

One hardly needs to observe that any exposition of the principles of federal government as exemplified in the Dominion of Canada, or any analysis of the constitutional charter on which this government is based must of necessity be preceded by a general review of the conditions which existed immediately previous to Confederation. It has been said that "Deadlock was the parent of Federation." From a political standpoint such a statement is mainly true as far as Ontario and Quebec are concerned. Briefly, the situation was this: The Union Act of 1840 marked the inception of responsible government in the provinces of Canada.¹ But "responsible government means party government and party government means the ascendancy, at least, of two distinct parties."² In the case of Upper and Lower Canada, however, which were by the Act of 1840 joined in legislative union there were four or five parties, each warring against the others. The result was, of course, that every government was necessarily a coalition government having all the weaknesses which attach to such a government. From these conditions too, sprang the dual systems. It was early laid down by prominent men that in order to ensure harmony no administration ought to remain in power unless it was supported by a majority from each section of the united provinces; neither should any action be taken affecting the interests of either of the provinces unless there was a clear majority in favor of this action from the province in question.³ The whole situation was unsatisfactory in the extreme. It has been pointed out that "there was no real life to the party controversies and the dreary struggle between the ins and outs never resulted in a real victory."⁴ No other proof is required of the sorry state of affairs than the simple fact that between the 29th of May, 1862, and the end of June, 1864, there were no less than five ministries in

*Constitution of
Canada. Bourinot
p. 28.*

*Federation, within
the Empire. Egerton
p. 35*

*Joseph LaFontaine &
Simon D. Dufferin
Laurier & T. L. P. 202-10*

Egerton-Drifp 37.

power, a situation which might well allow the assertion to be made that "the adoption of federation was a mere counsel of despair occasioned by the bankruptcy of party government." ¹ Bourinot tells us that "it was at this

union - third p 23.
critical juncture of affairs that the leaders of the Government and the Opposition in the session of 1864

third p.
came to a mutual understanding after the most mature consideration of the whole question." ² To the eternal credit of the leaders, Macdonald and Brown, a coalition government was formed on the basis of a federal union of all the British American provinces or of the two Canada

*in John A. Macdonald's
Federation Debate
pp. 26-7
in E. P. Taylor - third p 9.*
in case of the failure of a larger scheme. ³ It was a

happy circumstance that at this most critical time a Conference of the Maritime Provinces was called at Charlotte town to discuss questions of union. An invitation to the Canadian provinces to send delegates was readily accepted and at this Conference the cornerstone of Confederation laid.

There can be no question that matters in Upper and Lower Canada were ripe for a change in the system of government and that leaders in both these provinces were not undispensed to consider some sort of a union of all the provinces in British North America. The same, however, can hardly be said of the Maritime Provinces. It is true that statesmen in these provinces contemplated some kind of a union among themselves; but events showed clearly that it was with the greatest reluctance that the people of Nova Scotia, New Brunswick and Prince Edward Island were won over to the cause of Confederation in its entirety. And it was not unnatural that these provinces should at first refuse to believe that it was to their advantage to throw in their lot with an unknown interior and its political meelstrom. Identity of race, of interests,

of policy, the very things which must sooner or later have brought about a union among these provinces themselves tended to militate directly against a union with the provinces of Canada. It has been aptly said that "In this state the wonder is, not that ~~the~~ complete union was achieved but that even a federation was at length accomplished."

aton - 2nd p 20
Indeed subsequent history showed that the Quebec Resolutions favoring Confederation did not reflect the settled opinion of the Maritime Provinces.

However, the delegates who met at Charlottetown became impressed with, at least, the idea of union as such, and the result of the Conference was an adjournment to Quebec to consider the question in a wider and broader aspect than had at first been proposed. This latter Conference met in the old city of Quebec on the 10th of October, 1864, and after sitting eighteen days behind closed doors adopted the famous Quebec Resolutions, of which the B. N. A. Act is practically a complete embodiment. These Resolutions, seventy-two in number, were brought before the Canadian Parliament at the end of January 1865, where they were treated as the terms of a treaty between independent powers which could not be amended but must be accepted or rejected en bloc. They passed the House of Assembly by a majority of fifty-eight in a House of one hundred and twenty-four voting, and by a larger majority in the Legislative Council. In the Maritime Provinces, however, the Resolutions did not fare so well. An election in New Brunswick in 1864, ^{resulted} in a legislature unfavorable to the scheme of union and this election was immediately reflected in the other provinces. Prince

Edward Island openly repudiated its own delegates and Nova Scotia was emphatic in its opposition to the proposed scheme. Fortunately, another election in New Brunswick in 1865 brought into power a legislature which espoused the cause of federation. Suspicion and hesitation, to say nothing of open opposition, created a difficulty hard to overcome, but in the end, through the efforts to a great extent of Mr. Tilley and Dr. Tupper and the stipulation that Federation was to be followed by the building of an intercolonial railway, the Maritime Provinces became united with regard to the plan of union. In Canada pressure had been brought to bear on the government by Lord Monck so that prompt action followed the assents of the Maritime Provinces. Six delegates sailed for London on the 18th of November, 1866, and the plan of union was submitted to the Imperial Parliament on the 12th of February 1867. Here it met with the warm support of statesmen of all parties and passed without amendment in the course of a few weeks, the royal consent being given on the 29th of March 1867.

It must not be supposed ^{that} the idea of federation was a sudden happy inspiration on the part of the fathers of Confederation. Not only had the principle been advocated more or less for a considerable time previous to the Conference at Charlottetown, but, as a matter of fact, circumstances apart from the internal political conditions had been preparing the minds of statesmen for a co-operative movement on the part of the provinces in British North America. It is well known that the legislative union of the two Canadas which Lord Durham proposed was not the

union which he at first conceived. When he began his mission it was with the idea that the federal principle should be applied in this country. In his famous Report he writes: "On my arrival in Canada I was strongly inclined to the project of a Federal Union and it was with such a plan in view that I discussed a general measure for the government of the Colonies with the deputation from the Lower Province and with various leading individuals and public bodies in both the Canadas." His opinion with regard to this matter was changed by the conditions which he found to be existing and which he considered unfavorable to a federal union at that time. The idea, however, was never lost and was constantly referred to by leading men of both parties. As early as 1858 the Canadian government advocated a Federal union of British North America, and Mr. Galt, the Finance Minister, made the adoption of such a policy a condition precedent to his joining the ministry. The fact is events were gradually preparing the country as a whole for the application of a principle anticipated long before by men like Durham. The Civil War in the United States marked the dangers of isolation; the termination of the Reciprocity Treaty proved the necessity of increased facilities of trade between the provinces; and the breaking down of the machinery of government in the Canadas showed that the time was ripe for a new and larger scheme. Then, too, as has been said, "Beyond and above this there was be-

Wethers 2nd Ed p 226

sides in the background and for a time hardly consciously a nobler motive at work. The idea of a greater Canada had for years been in the minds of thinking men, together with the conviction that one day or other the East and West would be linked by the unifying force of a trans-continental railway." We see, therefore, that the centrifugal forces gradually yielded, though in the case of the Maritime Provinces, and particularly Nova Scotia, somewhat reluctantly, and that Confederation was the culmination of events which logically led up to it.

The system of government which evidently appealed to the delegates who met in the fall of 1864 and which the B. N. A. Act introduced into this country is clearly set forth in the first four Resolutions which were drawn up in the historic assembly at Quebec.

1. The best interests and present and future prosperity of British North America will be promoted by a federal union under the Crown of Great Britain, provided such union can be effected on principles just to the several provinces.

2. In the federation of the British North American Provinces, the system of Government best adapted under existing circumstances to protect the diversified interests in the several Provinces, and secure efficiency, harmony and permanency in the working of the union, would be a general Government, charged with matters of common interest to the whole country; and Local Governments for each of the Canadas, and for the Provinces of Nova Scotia, New Brunswick and Prince Edward Island charged with the control of local affairs in their respective sections; provision

made for the admission into the union, on equitable terms, of Newfoundland, the North West Territory, British Columbia and Vancouver.

3. In framing a constitution for the general Government, the Conference, with a view to the perpetuation of our connection with the mother country, and to the promotion of the best interests of the people of these Provinces, desire to follow the model of the British constitution so far as our circumstances will permit.

4. The Executive authority or government shall be vested in the Sovereign of the United Kingdom of Great Britain and Ireland and be administered according to the well-understood principles of the British constitution by the Sovereign personally, or by the representative of the Sovereign duly authorized."

Of the intention to model our constitution after that of the British constitution there is, as the Resolutions show, no question, but as to the actual execution of this intention, however, there has been some discredit cast. Professor Dicey, the great English constitutional authority, declared that the framers of the B. N. A. Act were guilty of "official mendacity"--later changed to "diplomatic inaccuracy"²--in intimating that the Canadian provinces were to be federally united "with a Constitution similar in principle to that of the United Kingdom." Most authorities, however, defend the framers of the Act. Referring to Prof. Dicey's statement an eminent Canadian writer says: "This view of the Canadian constitution is quite erroneous and wanting in a proper regard for the underlying principle in conformity to which the pre-Confederation provinces had been governed,--the principle of executive

*view of the Constitution
2nd Ed p 155
4th Ed 146*

responsibility to the people through parliament, which is the chief distinguishing feature of the British form of government the Empire over as contrasted with that of the United States. Because the union of the British North America provinces is federal, indicating, ex necessitate, some sort of division of the field of governmental action and an allotment of some part of that field to a central government, the conclusion is rashly reached that these matters of outward and superficial resemblance between the Canadian system and that of the neighboring Republic are sufficient to stamp them as essentially alike. A closer examination of the B. N. A. Act itself, coupled with some slight knowledge of the pre-existing provincial constitutions and their practical working, would have sufficed to show that in essentials, the constitution of Canada is not like the constitution of the United States, but is in very truth "similar in principle to that of the United Kingdom."¹ Woodrow Wilson, whose constitutional studies are so well known, supports this view. Referring to the Canadian system of government he declared it to be "a very faithful reproduction of the Government of the mother country."² "The efficient secret of the English Constitution", says Bagehot,³ "may be described as the close union, the nearly complete fusion of the executive and legislative powers." As a writer already quoted puts it: "The responsibility of the executive to the people through the elective branch of parliament is the essential principle of the British constitution."⁴ In Canada, as in the mother country, the legislative side of the Government is connected to the executive side by a cabinet chosen

Canadian Constitution
Clement p. 16.

The State - Boston 1890
see also His
Executive Government
p. 2nd p. 304. but see
in Essays on Government
Small p. 46 et seq.

English Constitution p. 10

Clement - Lib. p. 20

from the party having a majority in the House of Commons and continuing to hold their seats in the House. This cabinet, which is really a committee of the legislative body selected to be the executive body, remains in power just so long and no longer as it represents a majority in the House of Commons, and in this way is directly responsible to the people. The dependence of this nexus upon the will of the people marks the control which the people have over both the law-making and the law-executing power of the government; under our system not only are the legislative and executive parts of the state joined by the cabinet, but the cabinet through the house of Commons is subject directly to the will of the people in whom reside the ultimate power in government.

It appears to be fairly well established that in the fundamental principle of government the Canadian Constitution is similar to that of the mother land. In ~~this~~ ^{this} respects the Canadian Constitution resembles those of the other two federations within the British Empire. In Canada, Australia, and South Africa, the British precedent of responsible government is followed, though in South Africa it has not been attempted to employ this principle in the administration of the provinces. "Herein a wide gulf separates these Constitutions from that of the United States. In that Constitution the spheres of the executive, the legislative, and the judicial authorities are kept strictly separate. The American Constitution was framed on the model of the English Constitution as conceived by Montesquieu and sought to reproduce the English model freed from parasitic accretions which were ascribed to the poisoning influences of the Crown. But the distinction

between Parliamentary and non-Parliamentary is fundamental, and the absence in the United States of the connecting link of the cabinet, between the executive and the legislature, causes the American Constitution to run in a wholly different channel from the one followed by those Constitutions which accept the English system of government by

a parliamentary Cabinet." The essential difference between

our system and the American system is shown in the first

Article of the Constitution of the United States which

provides that "no person holding any office under the

United States shall be a member of either House during

his continuance in office." "The theory of our Government--

State and National"--said Judge Miller delivering judgment

of the Supreme Court in Savings and Loan Association vs.

Topeka,² "is opposed to the deposit of unlimited power

anywhere. The executive, the legislative, and the

branches of these Governments are all of limited and

defined powers." In the words of another American showing

the independence of the President as far as the legislative

branch of the Government is concerned, "The executive head

of the United States Government is completely independent

of the legislature as to his political policy. His council

or cabinet of advisers are his own agents responsible

politically to him only. The defeat of a proposition made

by him or by any one or all of them to the legislature by

a vote of censure passed by the legislature upon him or

them does not call for his resignation or their resign-

nations. Nothing of the sort is provided for or intended

in the remotest degree in the Constitution. The political

independence of the Executive over the Legislature is

complete." This separation of the two great branches of

government which is seen in the Constitution of the

gerton- 2nd p. 90
when considering
the Constitution of
the U.S. it must be
remembered that
at the time it was
drafted the
first system
of state
independence in the
at the time.

2nd p. 603

Legal Science and
Parliamentary Constitution
Lyon, Boston 1891
pp. 19-20

United States demonstrates the essential difference in the attitude of the American people and that of the people of Great Britain and her self governing colonies towards those who are chosen to make and execute laws for the peace, order, and good government of the country. From the time

*Goldwin Smith
points out one of
the works - which one
cannot recall - that
changes which
Smith in his great
interest sought to
improve further
of the real dangers
which were later
to be faced
in the
power of corporations.*

of Jefferson to the present the American people have been fearful of giving free rein to the governing bodies. This is seen not only in the cleavage between the legislature and the executive, but also in the limitations upon the power of the legislature which the Constitution itself

*For anything as
dangerous as
the 13th and 14th
Sec 18*

imposes. For example in Art. 1, Sec. 9 we find that 'no title of nobility shall be granted by the United States.' Again in Amendments to Art. 1, 'Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof, or abridging the press, or the rights of the people peacefully to assemble.' The people of the several states too, show an increasing tendency to make laws for themselves in their own way.

*American Commonwealth
By J. A. Cochrane
p 410*

They "take subjects which belong to ordinary legislation out of the category of statutes, place them in the constitution and then handle them as part of the fundamental instrument." For example, in 1880 Illinois provided by fundamental law of the state that that commons should be reserved forever to the people, meaning by commons, lands that were once granted in common in any town or community by competent authority. In 1870 the same State embodied in its constitution regulations as to warehouses for storing grain. It has

*Legislative Power
Canada - Report
p 461*

been well said that "distrust of legislatures is a pervading and growing characteristic of American institutions." The whole British system on the other hand is in striking contrast to this, and Canada no less than Great Britain

illustrates that "The principle of the separation of powers is the basis of the British system of government."

seems to be that good servants ought to be trusted, and so the Ministry of the day is trusted with seats in Parliament and supreme direction and influence therein so long, but so long only as it can command a majority, while to Parliament are entrusted unreservedly the most fundamental institutions of the realm as much as the most unimportant, the most sacred enactments of the statute book as much as the most insignificant." One of the most eminent of our Ontario judges² put the matter thus: "With us, the Legislature is supreme in all such matters. The Courts are not instituted by any Constitution--they were all instituted by the Legislature; all their powers came from the Legislature and the same hand which gave can take away. As was said in one case:--"If the Legislature has in fact said that the true boundary between two adjoining lots is to be determined by three farmers or by a land surveyor, it is my duty loyally to obey the order of the Legislature and stay my hand; the Legislature has the legal power--and that is all I may concern myself about to say that His Majesty's Court shall not determine the property rights of His Majesty's subjects in respect of the extent of their land." It will at once be observed that this is clearly allied to the principle we have already been examining as to the sacredness of private rights--but it goes further. The substance is that the dead and gone generation are, in the United States, saying to the present and living: 'Thus far shalt thou go and no further'--a prohibition to which I do not believe any British people would submit for one minute."

Gray - Lh.

Labell 19 before
Empire Club
Jan 14/10

To recapitulate for a moment, there are four outstanding facts with regard to our system of government the combination of which made us for a time unique in the history of nations. First, we have a written charter of government--an Imperial Act known as the British North America Act, 1867, which settled and defined the present constitution of Canada. This of itself was of course nothing new; it has been said that "the history of the Canadian Constitution is a history of constitutional instruments."

In this connection, however, it must not be forgotten that besides this written charter there are numerous conventions, rules, and usages adopted for the most from the Imperial Parliament which are as authoritative perhaps as the Act itself; for example the Act does not require the governor-general, or the lieutenant governors to open the legislature with English ceremony, or indeed to deliver the speech in person, but in accordance with the English practice these functionaries or their deputies, in case of illness, always come down to open Parliament with a speech.

Second, the system prescribed by the B. N. A. Act is a federal system. This system was borrowed from the United States of America, but our constitution differs from theirs in several important respects, i. e. the freedom of the legislative bodies generally, the non-separation of the legislative and executive functions, the vesting of the residuary power in the Parliament of the Dominion instead of in the Legislatures of the various provinces. Third, the fundamental principle of government is that of an executive responsible to Parliament and through it to the people. Herein lies the essential difference between the Canadian and American forms of government. Fourth, the ultimate source of executive authority is vested in the

*may therefore be
constitutionally affirmed
that of both the
governor and the
lieutenant governors
that they have the
right to open the
legislature with
English ceremony, and
to deliver the speech
in person, which
is in accordance with
the practice of the
Imperial Parliament.
The British North
America Act, 1867,
in its original form,
did not require the
governor-general to
open the legislature
with English ceremony,
but in accordance with
the practice of the
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Imperial Parliament.*

King; he is apex of executive power.

Turning now to the legal and constitutional agencies of government in the Dominion and the Provinces as prescribed by the Act and those unwritten conventions of the British conventions which have practically the force of law, they may be briefly defined in the following terms:--

As to the Dominion.

The ~~King~~, in whom is legally vested the executive authority; in whose name all commissions to office run; by whose authority Parliament is called together and dissolved; and in whose name bills are assented to or reserved. ~~He~~ is represented for all purposes of government by a governor-general appointed by ~~his~~ majesty in council and holding office during pleasure. He is responsible to the imperial government as an imperial officer. He has the right to pardon all offences, but exercises this and all executive powers under the advice and consent of a responsible ministry.

A ministry composed of thirteen or more members of the Privy Council, having seats in the two houses of Parliament; holding office only whilst in a majority of the popular branch; acting as a council of advice to the governor-general; responsible to Parliament for all legislation and administration.

A senate³ composed of seventy-eight members appointed by the Crown for life from the provinces and territories, though removable by the House itself for bankruptcy or crime; having co-ordinate powers of legislation with the House of Commons except in the case of money or tax bills which can neither initiate or amend; having no power to try impeachment; having the same privileges, immunities and powers as the English House of Commons when defined

*rules the land
none the
responsibility
government
the governor. He
vested in the
responsibility
for him alone. The
executive power
is vested in
the governor. Since
the 1867 Act the
power is only
exercised on the
advice of the
ministry.*

9, 10, 12, 13, 14, 15

*15 with Port Folio
the Minister of
the Privy Council*

*Canada we treat
a Senate more or
less of a joke. One
of the most visible
is the new
H.F. Gault
thing from Ottawa
spelling said
helps help
half of it.
the Senate
more, give it more
we would not the
people and the
chances and it
not state a
fact factor in our
institution*

This number will be increased
A
A House of Commons of ~~223~~ ²²³ members elected for five years on a very liberal Dominion franchise in electoral districts fixed by law in each province and in the territories; liable to be prorogued and dissolved at any time by the governor-general on the advice of his council; having alone the right to initiate money or tax bills; having the same privileges, immunities, and powers as the English House of Commons.
pp. 18, 19, 20-22

A Dominion judiciary, known as the Supreme Court, acting as a court of appeal for all the provincial courts; subject to have its decisions reversed on appeal to the judicial committee of the queen's privy council in England; irremovable except for cause on the address of the two Houses to the governor-general.²

*78, 104
150, 154
Vic the
independent Court
in the
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A civil service appointed by the governor-general on the advice of his council; irremovable except for cause; governed by statute providing in specified cases for examinations and promotions; certain important positions being still political appointments but not subject to removal in case of change of parties.³
*"Fisher's Govt."
Can. Parliament
pp. 118-20*

As to the Provinces.

A lieutenant-governor, appointed by the governor-general in council, practically for five years, removable by the same authority for cause, exercising all the powers and responsibilities of a head of the executive under the system of responsible or parliamentary government; having no power to reprieve or pardon criminals.⁴
355-62

An executive council in each province composed of certain heads of departments, varying from five to ten in number; called to office by the lieutenant-governor; hold their positions so long as they retain the confidence of the majority of the people's representatives, responsible for and directing legislation; conducting generally the

563-46
administration of public affairs in accordance with the law and conventions of the constitution.

A legislature composed of two houses, a legislative council and an assembly in Quebec, New Brunswick, Nova Scotia, and Prince Edward Island, and of only an assembly, or elected house in the other Provinces. The legislative councillors are appointed for life by the lieutenant-governor in council, removable for same reasons as senators, must have a property qualification except in Prince Edward Island where the upper house is elective; cannot initiate money or tax bills, but otherwise have all powers of legislation; cannot sit as court of impeachment. The legislative assemblies are elected for four years in all cases except in Quebec where the term is five; liable to be dissolved at any time by the lieutenant-governor acting under the advice of his council; elected on a franchise, manhood suffrage or of a very liberal character.²

569-90

A judiciary in each of the Provinces appointed by the governor-general in council; only removable on the address of the two houses of the Dominion Parliament.

A civil service appointed by the lieutenant-governor in council; nominees in the first instance of the political party in power, but once appointed irremovable except for sufficient reasons.

As might be supposed, the chief concern of the framers of the B. N. A. Act was in connection with the distribution of legislative powers between the Dominion and the different Provinces and it has been with regard to the interpretation of the Act so far as these powers are concerned that the courts have had most to do. It is well known that Sir John A. Macdonald himself was strongly in favor of legislative union, being an ardent believer in a powerful central authority. He gave way to the general opinion ^{on in favor}

of a federal union, but the lessons learned from the United States bore fruit in that the residuary power was left in the Dominion Parliament and not in the Legislatures of the several provinces. The scheme adopted was to give exclusive powers to the Dominion and to the Provinces over some subjects (secs. 91 and 92;) concurrent powers over Immigration and Agriculture (sec. 95) and special powers over Education (sec. 93.) Sections 91 and 92 are of course the most important sections in the Act and from the judicial decisions concerning these sections we can deduce a number of fundamental principles which are to be applied in concrete cases which may require an interpretation of these sections. The sections themselves are here appended:--

POWERS OF THE PARLIAMENT.

91. It shall be lawful for the Queen, by and with the advice and consent of the Senate and House of Commons, to make laws for the peace, order, and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the legislatures of the provinces; and for greater certainty, but not so as to restrict the generality of the foregoing terms of this section, it is hereby declared that (notwithstanding anything in this Act) the exclusive legislative authority of the parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated; that is to say:--

1. The public debt and property.
2. The regulation of trade and commerce.
3. The raising of money by any mode or system of taxation.
4. The borrowing of money on the public credit.
5. Postal service.

6. The census and statistics.
7. Militia, military and naval service, and defence.
8. The fixing of and providing for the salaries and allowances of civil and other officers of the government of Canada..
9. Beacons, buoys, lighthouses, and Sable Island.
10. Navigation and shipping.
11. Quarantine and the establishment and maintenance of marine hospitals.
12. Sea coast and inland fisheries.
13. Ferries between a province and any British or foreign country, or between two provinces.
14. Currency and coinage.
15. Banking, incorporation of banks, and the issue of paper money.
16. Savings banks.
17. Weights and measures.
18. Bills of exchange and promissory notes.
19. Interest.
20. Legal tender.
21. Bankruptcy and insolvency.
22. Patents of invention and discovery.
23. Copyrights.
24. Indians and lands reserved for the Indians.
25. Naturalization and aliens.
26. Marriage and divorce.
27. The criminal law, except the constitution of court of criminal jurisdiction, but including the procedure in criminal matters.
28. The establishment, maintenance, and management of penitentiaries.
29. Such classes of subjects as are expressly excepted in the enumeration of the classes of subjects by this Act assigned exclusively to the

legislatures of the provinces.

And any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the legislatures of the provinces.

EXCLUSIVE POWERS OF PROVINCIAL LEGISLATURES.

92. In each province the legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated, that is to say:—

1. The amendment from time to time, notwithstanding anything in this act, of the constitution of the province, except as regards the office of Lieutenant-governor.
2. Direct taxation within the province in order to the raising of a revenue for provincial purposes.
3. The borrowing of money on the sole credit of the province.
4. The establishment and tenure of provincial offices, and the appointment and payment of provincial officers.
5. The management and sale of the public lands belonging to the province and the timber and wood thereon.
6. The establishment, maintenance and management of public and reformatory prisons in and for the province.
7. The establishment, maintenance, and management of hospitals, asylums, charities, and eleemosynary institutions in and for the province, other than marine hospitals.

8. Municipal institutions in the province.
9. Shop, saloon, tavern, auctioneer, and other licenses in order to the raising of a revenue for provincial, local, or municipal purposes.
10. Local works and undertakings other than such as are of the following classes:--
 - a. Lines of steam or other ships, railways, canals, telegraphs, and other works and undertakings connecting the province with any other or others of the provinces, or extending beyond the limits of the province;
 - b. Lines of steamships between the province and any British or foreign country;
 - c. Such works as, although wholly situate within the province, are before or after their execution declared by the parliament of Canada to be for the general advantage of Canada, or for the advantage of two or more of the provinces.
11. The incorporation of companies with provincial objects.
12. The solemnization of marriage in the province.
13. Property and civil rights in the province.
14. The administration of justice in the province, including the constitution, maintenance and organization of provincial courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in those courts.
15. The imposition of punishment by fine, penalty, or imprisonment for enforcing any law of the province made in relation to any matter coming within any of the classes of subjects enumerated in this section.
16. Generally all matters of a merely local or private nature in the province.

There can be no doubt that the above sections were drawn up with the greatest care. The delegates who drafted the famous Resolutions included in their number lawyers noted for their acumen in constitutional matters and statesmen of profound knowledge in political science. With the constitution and the history of the American Republic to guide them they apprehended perfectly the scheme of government which they believed to be best fitted for this country and they made this scheme very clear; hence the particularity shown in the sections under discussion. Undoubtedly they intended these two sections to be as plain as a pike-staff. But ideas are not passed from generation to generation so readily, and the vast number of cases which have arisen in connection with these two sections show how difficult after all it is to understand the simplest English. For a long time there was a standing feud between the Provinces and the Dominion and many a legal battle has been fought between eminent counsel over the distribution of legislative powers. Judicial opinion has become pretty well fixed by this time, however, with regard to this distribution, and it is possible to lay down some fundamental propositions which have resulted from the litigation.

The distribution of legislative power is exhaustive.

There are of course matters of imperial concern over which neither the Dominion nor the Provinces have jurisdiction, but with respect to purely Canadian affairs, that is in the field of self-government allotted to Canada by the B. N. A. Act, "whatever is not thereby given to the provincial legislatures rests with the parliament" of Canada. The residuum of power is with the Dominion. In this respect it may be noted that an Act of the Dominion Parliament is not affected in respect of its validity by

the fact that it interferes prejudicially with the objects and operation of Provincial Acts provided that it is not in itself legislation upon or within one of the subjects assigned to the exclusive legislative jurisdiction of the Provincial Legislature.

22. 729 This is derived from the judgment of the Privy Council in Russell v. The Queen, where it is clearly enunciated and illustrated. The question there was, whether the Canada Temperance Act, 1878, was within the proper competency of the Dominion parliament to pass. At the place cited their lordships say:--"It appears that by statutes of the province of New Brunswick authority has been conferred upon the municipality of Fredericton to raise money for municipal purposes, by granting licenses of the nature of those described in No. 9 of section 92 (sc., of the British North America Act,) "and that licenses granted to taverns for the sale of intoxicating liquors were a profitable source of revenue to the municipality. It was contended by the appellant's counsel, and it was their main argument on this part of the case, that the Temperance Act interfered prejudicially with the traffic from which this revenue was derived, and thus invaded a subject assigned exclusively to the provincial legislature. But supposing the effect of the Act to be prejudicial to the revenue derived by the municipality from licenses, it does not follow that the Dominion parliament might not pass it by virtue of its general authority to make laws for the peace, order, and good government of Canada. Assuming that the matter of the Act does not fall within the class of subject described in No. 9 that sub-section can in no way interfere with the general authority of the Parliament to deal with that matter." And they point out that the Dominion legislation in question was not in itself legislation within the subject

of No. 9 of section 92 of the British North America Act, and that if, because of No. 9 of section 92, Parliament could never legislate with regard to any article or commodity which had or might be covered by such license as are therein referred to, it might be that laws necessary for the public good or public safety could not be enacted at all, as being thereby beyond the competency of Parliament, and yet not laws of the character specified in No. 9.

The fact is, that intra vires federal legislation will override inconsistent intra vires provincial legislation.

This was brought out very clearly in the Local Prohibition Case where it was held that the local prohibitions authorized by the Ontario Act 1890 are within the powers of the provincial legislatures but that they are imperative in any locality which adapts the provisions of the Dominion Act--The Scott Act. ⁹Quoting from Lord Watson:

"It has been frequently recognised by this Board and it may now be regarded as settled law that according to the scheme of the B. N. A. Act the enactments of the Parliament of Canada in so far as these are within its competency must override provincial legislation. But the Dominion Parliament has no authority conferred upon it by the Act to repeal directly any provincial statute whether it does or does not come within the limits of the jurisdiction prescribed by sec. 92. The repeal of a provincial Act by the Parliament of Canada can only be effectual by repugnancy between its provinces and the enactment of the Dominion; and if the existence of such repugnancy should become matter of dispute, the controversy cannot be settled by the action either of the Dominion or of the provincial legislatures, but must be submitted to the judicial tribunals of the country."

The Dominion may trench upon the Provincial field when it legislates upon the subjects enumerated in Sec. 91.

xR. The right of the Dominion legislature to invade the Provincial field has given rise to a lot of discussion and litigation. In *McArthur vs. The Northern Pacific Junction Railway Co. et al.* the question came up whether the Dominion Parliament could pass a law limiting the time for bringing actions against Railway Companies for any injury caused by reason of the railway. In appeal against the judgment of Street J. which was affirmed, it is interesting to compare the different positions taken by our Ontario judges. Burton and MacLennan J. J. A. apposed the Dominion invasion. Burton J. A. said in part:

"When we refer to sec. 91 we find this particular contract excepted, the exclusive right to legislate upon it being given to the Dominion. The Parliament of the Dominion therefore has the most complete and absolute power to deal with description of contract to the exclusion of the Province. Adopting the same test when dealing with the question of procedure, the only exception that we find is in those provisions which enable the Dominion to establish courts of its own, as for instance, bankruptcy and insolvency and maritime courts. With these exceptions the power to deal with procedure including the power to limit the time for bringing action is vested exclusively in the Local Legislatures and the view is strongly confirmed when we refer to sec. 94 which empowers the Dominion Parliament to make provision for uniformity of any laws relative to property and civil rights and to the procedure of the courts only on the consent of the Provinces. When therefore we find a Parliament whose powers do not extend to deal with property and civil right.

in the instances specifically enumerated it is difficult to suggest a reason for the validity of the exercise of the power in the present case."

Contrasting this with the judgment of Osler J. A.:

"It seems to me impossible to say that a clause of the nature of that we are now considering is not for the above and other reasons which might be suggested, well within the competence of Parliament to pass in order to legislate generally and effectually on a subject within its exclusive powers even though it may to some extent trench upon the subject of property and civil rights. The argument which strikes at the validity of this clause attacks also the power of parliament to pass the compensation clause and others relating to the compulsory acquisition of land by railway companies and pushed to its logical conclusion. I am not sure that as to any corporation within the legislative domain of Parliament it would not leave to Parliament merely the power to create a naked corporation which must acquire--if it can--most of its useful powers and protective enactments from a local legislature."

*See also Duffey
to AC 404.*
As early as 1880 it was held that the Dominion Parliament could interfere with property and civil rights which by 13 of Sec. 92 is under the exclusive jurisdiction of the Provinces when legislating on matters of Bankruptcy and Insolvency which by 21 of Sec. 91 is under the exclusive jurisdiction of the Dominion. To quote from the judgment of the Privy Council:

"It ~~was~~ contended for the appellant that the provisions of the Insolvency Act interfered with property and civil rights and was therefore ultra vires. This objection was very faintly urged but it was strongly contended that the Parliament of Canada could not take

away the right of appeal to the Queen from final judgment of the Court of Queen's Bench which it was said was part of the procedure in civil matters exclusively assigned to the Legislature of the Province. The answer to these objections is obvious. It would be impossible to advance a step in the construction of a scheme for the administration of insolvent estates without interfering with or modifying some of the ordinary rights of property and other civil rights, nor without providing some mode of special procedure for the vesting, realization and distribution of the estate, and the settlement of the liabilities of the insolvent. Procedure must necessarily form an essential part of any law dealing with insolvency. It is therefore to be presumed, indeed, it is a necessary implication that the Imperial statute in assigning to the Dominion Parliament the subjects of bankruptcy and insolvency, intended to confer on it legislative power to interfere with property, civil rights and procedure within the Provinces so far as a general law relating to those subjects might affect them."

77-2231
Perhaps the leading case illustrating this principle is *Tenant vs. The Union Bank*, where it was held by the Privy Council that 15 of Sec. 91 gives to the Dominion Parliament power to legislate over every transaction within the legitimate business of a banker, notwithstanding that the exercise of such power interferes with property and civil rights in the province and confers on a banker privileges which the provincial law does not recognize. Lord Watson, perhaps the greatest exponent of our constitution, delivered the judgment:

"Statutory regulations with respect to the form and legal effect, in Ontario, of warehouse receipts and other negotiable documents which pass the property of goods without delivery, unquestionably relate to property and civil

rights in that province and the objection taken by the appellant to the provision of the Bank Act would be unanswerable if it could be shown that by the Act of 1867 the Parliament of Canada is absolutely debarred from trenching to any extent upon the matters assigned to the provincial legislature by sec. 92. But sec. 91 expressly declares that "notwithstanding anything in this Act" the exclusive legislative authority of the Parliament of Canada shall extend to all matters coming within the enumerated classes; which plainly indicates that the legislation of that Parliament, so long as it strictly relates to these matters, is to be of paramount authority. To refuse effect to the declaration would render nugatory some of the legislative powers specially assigned to the Canadian Parliament. For example, among the enumerated classes of subjects in sec. 91 are Patents of Inventions, Discoveries and Copyrights. It would be practically impossible for the Dominion Parliament to legislate upon either of these subjects without affecting the property and civil rights of individuals in the provinces."

"The law being so far settled by precedent, it only remains for consideration whether warehouse receipts, taken in security by a bank in the course of the business of banking are matters coming within the class of subjects described in 15. of sec. 91 as 'Banking, Incorporation of Banks and the Issue of Paper Money.' If they are, the provisions made by the Bank Act with respect to such receipts are intra vires. Upon that point their Lordships do not entertain any doubt. The legislative authority conferred by these words is not confined to the mere constitution of corporate bodies with the privilege of carrying on the business of bankers. It extends to the issue of paper currency, which necessarily means the creation of a

species of personal property carrying with it rights and privileges which the law of the province does not, and cannot, attach to it. It also comprehends 'banking', an expression which is wide enough to embrace every transaction coming within the legitimate business of a banker."

"The powers of the Dominion Parliament depend on sec. 91 and the power to legislate conferred by that clause may be fully exercised although with the effect of modifying civil rights in the province."

It cannot be stated too clearly, however, that the trenching power is limited. The legislation through which the Dominion desires to trench should be under the enumerated subjects of Sec. 91 and the trenching must be incidental to the due exercise of the power conferred directly by Sec. 91. Where the Dominion legislation is not confined to the enumerated subjects but operates under the general authority of the "peace, order, and good government" clause, it should be strictly confined to such matters as are of natural importance and must not trench upon the enumerated subjects in Sec. 92, but may in a sense encroach upon 16 of Sec. 92 and to the extent of such encroachment it is of paramount authority. Strong J. is reported to have said in the course of the arguments before the Supreme Court in the matter of the Dominion Liquor License Act 1883-4, "It has been ^{said} that, all that is not expressly given to the Provinces is exclusively reserved to the Dominion. Now there are no words in the Act to that effect. The enumerated powers (in Sec. 91) are exclusively given to the Dominion, but there is nothing to say that anything beyond the enumerated powers is exclusively given to the Dominion." In the Local Prohibition case the Privy Council were emphatic on this point.

"But to those matters which are not specified among

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the enumerated subjects of legislation the exception from sec. 92 which is enacted by the concluding words of sec. 91 has no application and in legislating with regard to such matters, the Dominion Parliament has no authority to encroach upon any class of subjects which is exclusively assigned to Provincial legislatures by Sec. 92. These enactments appear to their Lordships to indicate that the exercise of legislative power by the Parliament of Canada in regard to all matters not enumerated in Sec. 91 ought to be strictly confined to such matters as are unquestionably of Canadian interest and importance and ought not to trench upon provincial legislation with respect to any of the clauses of subjects enumerated in Sec. 92. To attach any other construction to the general power which in supplement of its enumerated powers is conferred upon the Parliament of Canada by Sec. 91 would in their Lordships' opinion not only be contrary to the intendment of the Act, but would practically destroy the autonomy of the provinces. It is were once conceded that the Parliament of Canada has authority to make laws applicable to the whole Dominion in relation to matters which in each province are substantially of local or private interest upon the assumption that these matters also concern the peace, order and good government of the Dominion, there is hardly a subject enumerated in Sec. 92 upon which it may not legislate to the exclusion of the provincial legislature."

"Their Lordships do not doubt that some matters in their origin local and provincial may attain such dimensions as to affect the body politic of the Dominion and to justify the Canadian Parliament in passing laws for their regulation and abolition in the interests of the Dominion. But great caution must be observed in distinguishing between that which is local and provincial and

therefore within the jurisdiction of the provincial legislatures and that which has ceased to be merely local and provincial and has become matter of national concern in such sense as to bring it within the jurisdiction of the Parliament of Canada. An Act restricting the right to carry weapons of offence, or their sale to young persons within the province would be within the authority of the provincial legislature. But traffic in arms, or the possession of them under such circumstances as to raise a suspicion that they were to be used for seditious purposes or against a foreign state, are matters which their Lordships conceive might be competently dealt with by the Parliament of Canada."

Provincial Legislatures within the ambit of their jurisdiction are supreme.

*1857. A.C.H.
this was one of
the first great
cases*
This principle was first enunciated in Parsons Case and has had far-reaching effects. Nothing could be of greater importance than the fact that within her own field of legislation as defined by the Act the authority of a Province is paramount. The cases which have established this principle are most interesting and show the growth of opinion in favor of the supremacy of the Provinces.

*in direction by
S.C.R. 185.*
In one of the earliest cases it was laid down by Gwynne J. that "no matter is exclusively assigned to the local legislatures unless it be within one of the subjects expressly enumerated in sec. 92 and at the same time does not involve any interference with any of the subjects enumerated in section 91." It will be seen that to give effect to the underlined clause would limit the power of the Province to an extent unthinkable at this date.

A. Clement says with regard to the formula contained in this clause, "Had it been finally adopted the Provinces would have become large municipalities merely and the

Union would be legislative rather than federal. Fortunately this formula was rejected by the Privy Council."

In Parsons Case,² a Dominion Act having required insurance companies to obtain licenses from the Minister of Finance as a condition to their carrying on the business of insurance in the Dominion, it was held that neither the Act nor the fact of the company having obtained such a license could withdraw the company from the operation of a Provincial Act passed to secure uniform conditions in the policies of fire insurance. The Privy Council took direct issue with the dicta of Gwynne J. :

"Notwithstanding this endeavor to give pre-eminence to the Dominion Parliament in cases of a conflict of powers it is obvious that in some cases where this apparent conflict exists the Legislature could not have intended that the powers exclusively assigned to the Provincial Legislature should be absorbed by the Dominion Parliament. Take as one instance the subject of 'marriage and divorce' contained in the enumeration of subjects in Sec. 91. It is evident that solemnization of marriage would come within this general description; yet 'solemnization' of marriage in the Province' is enumerated among the classes of subjects in Sec. 92 and no one can doubt, notwithstanding the general language of Sec. 91 that this subject is still within the exclusive authority of the Legislature of the Province." "In these cases it is the duty of the Courts, however difficult it may be, to ascertain in what degree and to what extent, authority to deal with matters falling within these classes of subjects exists in each Legislature and to define in the particular case before them the limits of their respective powers. It could not have been the intention that a conflict should exist; and in order to prevent such a result, the lang

uage of the two sections must be read together, and that of one interpreted, and where necessary modified by the other. In this way it may in most cases be found possible to arrive at a reasonable and practical construction of the languages of the sections so as to reconcile the respective powers they contain and give effect to all of them. In performing this difficult duty, it will be a wise course for those on whom it is thrown, to decide each case which arises as best they can, without entering more largely upon an interpretation of the statute than is necessary for the decision of the particular question at hand."

1784 AC 575
In Lamb's Case, decided in 1887, it was held that a Quebec Act imposing a direct tax on banks by virtue of 2 of Sec. 92 was intra vires although Banking is under the exclusive jurisdiction of the Dominion. The words of Lord Hobhouse in this case are most illuminating:--

"Then it is suggested that the legislature may lay on taxes so heavy as to crush a bank out of existence and so nullify the power of parliament to erect banks. But their Lordships cannot conceive that when the Imperial Parliament conferred wide powers of local self-government on great countries such as Quebec it intended to limit them on the speculation that they would be used in an injurious manner."

1780 AC 200
The judgment in the Fisheries Case² is instructive in this connection for it not only marks the powers of the Province but at the same time indicates the limit of this power. Lord Herschel delivering judgment says:

"The earlier part of this section 91 read in connection with the words beginning 'and for greater certainty' appears to amount to a legislative declaration that any legislation falling strictly within any of the classes

pecially enumerated in sec. 91 is not within the legislative competence of the Provincial Legislatures under sec. 92. In any view the enactment is express that laws in relation to matters falling within any of the classes enumerated in sec. 91 are within the 'exclusive' legislative authority of the Dominion Parliament. Whenever therefore a matter is within one of these specified classes, legislation in relation to it by a Provincial Legislature is in their Lordships' opinion incompetent. It has been suggested, and this view has been adopted by some of the judges of the Supreme Court, that although any Dominion legislation dealing with the subject would override provincial legislation, the latter is nevertheless valid, unless and until the Dominion Parliament so legislates. Their Lordships think that such a view does not give their due effect to the terms of sec. 91 and in particular to the word 'exclusively.' It would authorize, for example, the enactment of a bankruptcy law or a copyright law in any of the provinces unless and until the Dominion Parliament passed enactments dealing with those subjects. Their Lordships do not think this is consistent with the language and manifest intention of the British North America Act. --- "It is true that this Board held in the case of Attorney-General of Canada v. Attorney-General of Ontario that a law passed by a Provincial Legislature which affected the assignments and property of insolvent persons was valid as falling within the heading 'Property and Civil Rights,' although it was of such a nature that it would be a suitable ancillary provision to a bankruptcy law. But the ground of this decision was that the law in question did not fall within the class 'Bankruptcy and Insolvency' in the sense in which those words were used in sec. 91. For these reasons their Lordships feel constrained to hold that

the enactment of fishery regulations and restrictions is within the exclusive competence of the Dominion Legislature, and is not within the legislative powers of Provincial Legislatures. But whilst in their Lordships' opinion all restrictions or limitations by which public rights of fishing are sought to be limited or controlled can be the subject of Dominion legislation only, it does not follow that the legislation of Provincial legislatures is incompetent merely because it may have relation to fisheries. For example, provisions prescribing the mode in which a private fishery is to be conveyed or otherwise disposed of, and the rights of succession in respect of it would be properly treated as falling under the heading Property and Civil Rights within sec. 92 and not as in the class 'Fisheries' within the meaning of sec. 91. So too the terms and conditions upon which the fisheries which are the property of the province may be granted, leased, or otherwise disposed of, and the rights which consistently with any general regulations respecting fisheries enacted by the Dominion Parliament may be conferred therein, appear proper subjects for provincial legislation, either under class 5 of sec. 92, 'The Management and Sale of Public Lands' or under the class 'Property and Civil Rights.' Such legislation deals directly with property, its disposal, and the rights to be enjoyed in respect of it, and was not in their Lordships' opinion intended to be within the scope of the class 'Fisheries' as that word is used in sec. 92."

It cannot be made too plain, however, that the Provincial Legislatures have no powers excepting the enumerated powers which are given to them by the B. N. A. Act, and they cannot by any corresponding legislation in any degree enlarge the scope of those powers. The one thing the Provinces cannot do is to extend their legislative operations outside the limits prescribed by Sec. 92.

The relation between the Crown and the Provinces is the same as that which subsists between the Crown and the Dominion in respect of the powers which are vested in them respectively.

It was at first thought that the lieutenant-governors did not represent the Crown in the Provinces to the same extent that the governor-general represented the Crown in the Dominion and years ago the matter was subject to considerable public discussion. As a matter of fact it was of tremendous importance whether or not the Lieutenant-Governor of a Province becomes entitled *virtute officii* and without express statutory enactment to exercise all prerogatives incident to executive authority in matters in which the Provincial Legislatures have jurisdiction and whether he has in fact delegated to him the administration of the royal prerogatives as far as they are capable of being exercised in relation to the government of the Province as fully as the Governor-General has the administration of them in relation to the government of the Dominion. The question came up squarely before the Canadian Courts in The Pardonng Power Case when it was held that lieutenant-governors had power to pardon for offenses against Provincial Acts. The late Hon. Edward Blake in the course of his argument before Boyd C. expressed himself in these words:

"Are you then going to take a logical, satisfactory, plain principle of interpretation of the constitution,

having regard to the two Sovereignties, the two sets of powers existing, and hold that where you find Sovereign powers given, you find them bestowed on the Sovereign authority in a spirit of complete and exhaustive efficiency? If so, you will probably determine that as to Provincial Acts having reference to acts which affect only the peace of the Province, the power of pardon in such matters is within the Province as well; that under the B. N. A. Act there is an express or implied vesting in the Province of those executive powers which are essential to complete the Legislative powers and that there is indisputable power in some instances and I say in all instances ^{within} ~~can~~ the domain of Provincial legislation of effect ⁱⁿ ~~A~~ Royal Prerogative."

Boyd.
The fundamental principles involved were brought out by the learned Chancellor in his judgment:

"Now it is a well settled principle of public law, that after a colony has received legislative institutions, the Crown--subject to the special provisions of any Act. of Parliament--stands in the same relation to that colony as it does to the United Kingdom. Effective colonial legislation as to pardon may be attributed to the fact that the Crown is a constituent of the local law-making body; but it is contended such is not the case as to Ontario. Though as compared with the Dominion, the mechanism may be different, and no direct or immediately representative co-ordination of Queen and people may exist in the Provincial Assembly, yet sovereign power must substantially operate and be manifested in Ontario legislation in order to the efficient exercise of territorial government under the sanction of the Imperial Act. The power to pass laws implies necessarily the power to execute or to suspend the execution of those laws, else the concession of self government in domestic affairs is a delusion. Sovereign

power is a unity, and though distributed in different channels and under different names it must be politically and organically identical throughout the Empire. Every act of government involves some output of prerogative power."

See also Bank of New Brunswick v. Attorney General 12 A.C. 414.

In 1892 the question came before the Privy Council and has been settled for all time. In this case it was held that the Province of New Brunswick on the failure of a bank was entitled to payments in full over other depositors and other simple contract creditors, its claim being for a Crown debt to which the prerogative attaches. The following is the judgment, delivered by Lord Watson, in part:

"Their Lordships do not think it necessary to examine in minute detail the provisions of the Act of 1867 which nowhere profess to curtail in any respect the rights and privileges of the Crown, or to disturb the relations then subsisting between the Sovereign and the Provinces. The object of the Act was neither to weld the Provinces into one nor to subordinate Provincial Governments to a central authority, but to create a federal government in which they should all be represented, entrusted with the exclusive administration of affairs in which they had a common interest, each Province retaining its independence and autonomy. That object was accomplished by distributing between the Dominion and the Provinces all powers, executive and legislative, and all public property and revenues which had previously belonged to the Provinces, so that the Dominion Government should be vested with such of these powers, property, and revenues as were necessary for the due performance of its constitutional functions, and that the remainder should be retained by the Provinces for the purposes of provincial government. But in so far

as regards those matters which by sect. 92, are specially reserved for provincial legislation, the legislation of each Province continues to be free from the control of the Dominion and as supreme as it was before the passing of the Act. In *Hodge v. The Queen* Lord Fitzgerald, delivering the opinion of this Board, said: "When the British North America Act enacted that there should be a legislature for Ontario, and that its Legislative Assembly should have exclusive authority to make laws for the Province and for Provincial purposes in relation to the matters enumerated in sect. 92, it conferred powers not in any sense to be exercised by delegation from or as agents of the Imperial Parliament, but authority as plenary and as ample within the limits prescribed by sec. 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow. Within these limits of subject and area, the Local Legislature is supreme, and has the same authority as the Imperial Parliament or the Parliament of the Dominion." The Act places the constitution of all Provinces within the Dominion on the same level; and what is true with respect to the Legislature of Ontario has equal application to the Legislature of New Brunswick. ---

--- It is clear therefore that the Provincial Legislature of New Brunswick does not occupy the subordinate position which was ascribed to it in the argument of the appellants. It derives no authority from the Government of Canada, and its status is in no way analagous to that of a municipal institution, which is an authority constituted for purposes of local administration. It possesses powers, not of administration merely, but of legislation in the strictest sense of that word; and within the limits assigned by sect. 92 of the Act of 1867, these powers are exclusive and

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supreme. It would require very express language, such as is not to be found in the Act of 1867 to warrant the inference that the Imperial Legislature meant to vest in the Provinces of Canada the right of exercising supreme legislative powers in which the British Sovereign was to have no share. — — — — —

— In asking their Lordships to draw that inference from the terms of the statute, the appellants mainly, if not wholly, relied upon the fact that, whereas the Governor-General of Canada is directly appointed by the Queen, the Lieutenant-Governor of a Province is appointed not by Her Majesty, but by a Governor-General who has also the power of dismissal. If the Act had not committed to the Governor-General the power of appointing and removing Lieutenant-Governors, there would have been no room for the argument, which if pushed to its logical conclusion, would prove that the Governor-General and not the Queen, whose Viceroy he is, became a sovereign authority of the Province whenever the Act of 1867 came into operation. But the argument ignores the fact that by sect. 58 the appointment of a provincial governor is made by the Governor-General in Council by instrument under the Great Seal of Canada or in other words by the executive government of the Dominion which is by sect. 9 expressly declared to continue and be vested in the Queen. There is no constitutional anomaly in an executive officer of the crown receiving his appointment at the hands of a governing body who have no powers and no functions except as representatives of the crown. The act of the Governor-General and his Council in making the appointment is within the meaning of the statute, the act of the Crown; and a Lieutenant-Governor when appointed is as much a representative of Her Majesty for all

purposes of Provincial government as the Governor-General himself is for all purposes of Dominion government.

The courts have laid down a cardinal rule which if applied cannot fail to clarify the situation when it is necessary to decide as to the competency of a particular Act.

The real pith and substance of the Act is the vital consideration.

Supra
Quoting again from the Local Prohibition case, the true nature and character of the ^{legislation} in the particular instance under discussion must always be determined in order to ascertain the class of subjects to which it really belongs.

*Hyden's Case
42 A.C. 570*
An Act of the Legislature of B. C. which prohibited Chinamen from working in mines was declared ultra vires because the real purpose was to strike at Chinamen as such, who being aliens come under 25 of Sec. 91. Quoting from the judgment of the Privy Council:

"Their Lordships see no reason to doubt that, by virtue of sec. 91, sub-section 25, the legislature of the Dominion is invested with exclusive authority in all matters which directly concern the rights, privileges and disabilities of the class of Chinamen who are resident in the provinces of Canada. They are also of opinion that the whole pith and substance of the enactments of sec. 4 of the Coal Mines Regulation Act in so far as objected to by the appellant company, consists in establishing a statutory prohibition which affects aliens or naturalized subjects, and therefore trench upon the exclusive authority of the Parliament of Canada. The learned judges who delivered opinions in the full Court noticed the fact that the Dominion legislature had passed a Naturalization Act, No. 113 of the Revised Statutes of Canada, 1886, by which

a partial control was exercised over the rights of aliens. Walkem J. appears to regard that fact as favorable to the right of the provincial parliament to legislate for the exclusion of aliens being Chinamen from underground coal mines. The abstinence of the Dominion Parliament from legislating to the full limit of its powers, could not have the effect of transferring to any provincial legislature the legislative power which had been assigned to the Dominion by sec. 91 of the act of 1867."

In one case it was endeavored to show that an Act of the Ontario Legislature which provided penalties for the violation of its provisions was really an infringement of the exclusive power which the Dominion has over criminal law by 29 of Sec. 92. Street J. in his dissenting judgment which was followed by the Court of Appeal reversing the decision of the Queen's Bench Division illustrates the method of inquiry to be followed:

"I do not say that this is the only test to be applied, but it clears the ground of the initial difficulty and leaves it open to us to consider the real character of the legislation which is attacked, that legislation being within the letter of the powers of the Legislature under the constitutional Act. Is it an Act constituting a new crime for the purpose of punishing that crime in the interest of public morality? Or is it an Act for the regulation of the dealings and rights of cheese makers and their patrons, with punishment imposed for the protection of the former? If it is to be found to come under the former head, I think it is bad as dealing with criminal law; if under the latter I think it is good as an exercise of the rights conferred on the Province by Sec. 92 of the B. N. A. Act. An examination of the Act satisfies me that the latter

is its true object, intention and character."

It must be kept in mind too that an Act may have two aspects and that "subjects which in one aspect and for one purpose fall within sec. 92 may in another aspect and for another purpose fall within section 91."

A word should be said as to what Egerton calls the "curious power given to the Dominion Executive to disallow Provincial Acts." It is now admitted beyond dispute that the power of confirming or disallowing Provincial Acts has been fixed by law absolutely and exclusively in the Governor General in council. "The power of the Governor General in council to disallow a Provincial Act is as absolute as the power of the Crown to disallow a Dominion Act and is in every case to be the result of the exercise of a sound discretion and for which exercise of discretion the Executive Council for the time being is in either case to be responsible as for other acts of executive administration. In the first few years after Confederation it became necessary to settle the course to be pursued in consequence of the large responsibilities devolved upon the general government. In 1868 the Minister of Justice laid down certain principles of procedure which have been pretty generally followed since then. On the receipt of the acts passed in any province they are immediately referred to the Minister of Justice. He thereupon reports those acts which he considers free from objection of any kind and if his report is approved by the Governor General in council, such approval is forthwith communicated to the Provincial governments. He also makes separate reports on those acts which he considers:

1. as being altogether illegal and unconstitutional.
2. as being illegal and unconstitutional in part.

3. as, in cases of concurrent jurisdiction, clashing with the legislation of the general parliament.

*See Report of
John A. Macdonald
Can. Sec. P.
No 735 pp 6-7.*

4. as affecting the interests of the Dominion general.^A

The acts may be disallowed within two years and must be disallowed in their entirety. It has been argued that this power of disallowance practically invaded the field allotted to the Courts but, as the learned Chancellor of Ontario first pointed out, ^{there} is a difference between the plane of political and legislative expediency. When the Dominion disallows a Provincial act it moves simply in the plane of political expediency and does not interfere in the least with the plane within which the Courts operate. The tendency has been to adopt the same principle with regard to Provincial acts that the Imperial Parliament adopts toward Dominion acts. The Dominion will not interfere with the acts unless they are clearly repugnant to matters of national concern.

In conclusion it should be pointed out that Dominion legislation must not be repugnant to Imperial legislation affecting the Empire generally, but in such a case the Act would only be void to the extent of the repugnancy. An eminent Canadian jurist has recently laid down the thesis that Canada is "independent fiscally, legislatively, executive, and judicially." The fact remains, however, that the king ^{is} the supreme executive authority of the Empire and has a right to control all legislation enacted in the name of the ruler.² The B. N. A. Act is an Imperial Act and it is by virtue of this Act that both the Dominion Parliament and the Provincial Legislatures exercise their powers. The simple truth is this: the legislative powers of both the Dominion Parliament and the Provincial Legislatures are supreme and their authority paramount when confined to the jurisdiction allotted to them, not otherwise.

*J. S. Ewart in
London Papers 1901
p. 5.*

*See Gollie's
Elementary Govt
of the Colonies
p. 5.*

1 May 1912.

Joseph Wearing '10.