THE ARGUMENT FOR THE APPLICATION OF THE ROYAL PROCLAMATION OF 1763 TO BRITISH COLUMBIA: ITS FORCE AND EFFECT

By

PATRICIA MARGARET HUTCHINGS

LL.B. University of Victoria, 1983

A THESIS SUBMITTED IN PARTIAL FULFILLMENT OF

THE REQUIREMENT FOR THE DEGREE OF

MASTER IN LAWS

in

THE FACULTY OF GRADUATE STUDIES

FACULTY OF LAW, UNIVERSITY OF BRITISH COLUMBIA

We accept this thesis as conforming

to the required standard

THE UNIVERSITY OF BRITISH COLUMBIA

October 1987

© Patricia Margaret Hutchings, 1987
In presenting this thesis in partial fulfilment of the requirements for an advanced
degree at the University of British Columbia, I agree that the Library shall make it
freely available for reference and study. I further agree that permission for extensive
copying of this thesis for scholarly purposes may be granted by the head of my
department or by his or her representatives. It is understood that copying or
publication of this thesis for financial gain shall not be allowed without my written
permission.

Department of  LAW

The University of British Columbia
1956 Main Mall
Vancouver, Canada
V6T 1Y3

Date  9/10/87
ABSTRACT

The purpose of this work is to construct the argument for the continuing application of the Royal Proclamation of 1763 to British Columbia and to examine its legal force and effect in relation to pre-Confederation colonial legislation. This has important implications as to the continued existence of aboriginal title in British Columbia.

In Canada the existence of a sui generis, aboriginal legal interest ("aboriginal title") is no longer in doubt. (1) Scattered judicial statements have not fully addressed the sui generis nature of the interest but have focused solely on its 'common law' source (2) and have held it, like other common law rights, to be subject to legislative abrogation. (3) That is not to say extinguishment will be lightly implied. (4) Aboriginal rights are now recognized and confirmed in the Constitution Act. (5) To the extent that the aboriginal right is declared and confirmed in the Royal Proclamation of 1763 (6) a different argument can be

The Royal Proclamation is a Prerogative instrument. The "Indian provisions" come towards the end of the Proclamation and address a series of diverse issues. Confusion exists as to the geographic scope of the provisions concerning Indian lands and particularly regarding their application to British Columbia. It is here argued that it is misleading to focus solely on the geographic scope as explained in the document itself. The Royal Proclamation of 1763, as a law of constitutional significance and manifestly universal application, it is argued, applied to British Columbia, if not as of its enactment in 1763, then either upon the assertion of British Sovereignty over that area or by virtue of the Colonial Laws Validity Act, 1865.

Further it is argued that the Proclamation enjoyed the force and effect of an Imperial statute in the colonies to which it applied. The Indian rights therein declared or confirmed thus became statutory rights. This has important implications regarding the susceptibility of the articulated rights to colonial legislative derogation.

In order to understand fully the import of the Royal Proclamation in the colonies it is necessary to understand British constitutional rules governing the nature and exercise of the Sovereign's prerogative legislative and executive powers in newly acquired territories and the rules governing the Imperial laws to which the colonies are subject. Whether or not the Royal

Proclamation extends to after acquired colonies depends in part upon the category of Prerogative to which the Proclamation belongs. Basically "minor" prerogatives operate in those territories in which the British common law operates and are freely alterable by the colonial legislative bodies. "Major" Prerogatives, however, exist in all British territories whether or not the British common law is in force and operate to bind and limit colonial legislatures.

The argument is made that the Indian land provisions of the Royal Proclamation of 1763 should be classified as major Prerogative legislation on the grounds that:

(1) they are constitutional in nature having to do principally with limitations on the powers of Governors to acquire unsurrendered tribal lands, or

(2) as legislation governing the procedure to be adopted for Crown alienation of Indian lands they fall within the King's peculiar authority.

Further that as major Prerogative legislation the Indian Land provisions enjoyed the force and effect of an Imperial statute with the necessary intendment for the colonies within the meaning of the Colonial Laws Validity Act, 1865. Further that by virtue of such Act the provisions of the Royal Proclamation of 1763 (at least up until the passing of the Statute of Westminster, 1931) operated to void colonial legislation (or for that matter Dominion or Provincial legislation) repugnant to any of its provisions to the extent of any such repugnancy.
# TABLE OF CONTENTS

**ABSTRACT**

i

**TABLE OF CONTENTS**

v

**ACKNOWLEDGEMENT**

viii

**INTRODUCTION**

1

**PART I: THE ROYAL PROCLAMATION OF 1763**

10

1. Introduction 10
2. Construction of the Royal Proclamation of 1763 19
3. Geographic Scope of the Royal Proclamation of 1763 23
   (i) Introduction 23
   (ii) Indian Provisions of the Royal Proclamation - Part IV 26
   (iii) The Indian Beneficiaries of Part IV 30
   (iv) Geographic Reach of Part IV of the Proclamation 33
4. Prospective Application of the Royal Proclamation of 1764 48
   (i) Introduction 48
   (ii) Construction of the Territorial Effect of the Royal Proclamation's Indian Provisions in Light of Their Legislative Purpose 49
   (iii) Basic Rules of Statutory Construction re Temporal Application 56
   (iv) Prospective Application of Constitutional Documents 62
   (v) Extension of Territorial Limits of British Jurisdiction 66
   (vi) Creation of New Colonies and Plantations 72
5. Statutory Effect of the Royal Proclamation of 1763 82
   (i) Introduction 82
   (ii) Statutory Effect of the Indian Provisions of The Royal Proclamation of 1763 89
# PART II: THE ROYAL PREROGATIVE AS IT RELATES TO COLONIES

1. The Royal Prerogative
   (i) Introduction
   (ii) Historical Roots of the Royal Prerogative

2. Territorial Acquisition
   (i) Introduction
   (ii) The Prerogative Legislative Power as It Relates to Settlements
   (iii) The Prerogative Legislative Powers as It Relates to Conquered and Ceded Colonies
   (iv) The King's Constituent Legislative Power in Relation to British Dominions

3. The Laws to Which Colonies Are Subject

4. The Imperial Law in Force Proprio Vigore in British Territories

5. Classification of the Royal Prerogative
   (i) Introduction
   (ii) Major Prerogative Powers

# PART III: THE ROYAL PROCLAMATION OF 1763 AS MAJOR PREROGATIVE LEGISLATION

1. The Indian Land Provisions of the Royal Proclamation of 7th October 1763 as Major Prerogative Legislation Referable to the British Crown's Constituent Power in Dependent British Territories

2. The Indian Land Provisions of the Royal Proclamation of 7th October 1763 as Major Prerogative Legislation Referable to the British Crown's Power in Relation to Land in Dependent British Territories
   (i) General
   (ii) Crown Rights in Relation to Land as a Major Prerogative

3. Amendment of Prerogative Legislation by Local Laws
   (i) Introduction
PART IV: THE COLONIAL LAWS VALIDITY ACT, 1865

1. The Historic Setting
   (i) Introduction
   (ii) Background to the Enactment of the Colonial Laws Validity Act
   (iii) Colonial Legislative Powers Prior to 1865 - The Doctrine of Repugnancy

2. Substantive Provisions of the Colonial Laws Validity Act, 1865
   (i) Introduction
   (ii) Section 2
   (iii) Section 4
   (iv) Section 5
   (v) Concluding Remarks

CONCLUSION

BIBLIOGRAPHY

APPENDIX I: THE ROYAL PROCLAMATION OF 7 OCTOBER 1763

APPENDIX II: THE COLONIAL LAWS VALIDITY ACT, 1865
ACKNOWLEDGEMENTS

I wish to express my appreciation to my thesis supervisor, Professor M. Jackson for his encouragement and assistance in this undertaking.

I wish to thank Professor Murray Greenwood for valuable discussions, particularly with reference to the Colonial Laws Validity Act, 1865.

I would like to thank the Department of Justice who provided funding through a Duff-Rinfret Scholarship.

In particular I would like to thank Sheila Talbot for her patience in typing and editing this manuscript.
INTRODUCTION

In the past western conceptions of the Native people's inferior legal status have denied the existence of aboriginal title. Such treaties as were concluded with the Indians were explained on grounds of moral duty or political expedience rather than upon the recognition of a subsisting legal interest.

A change was evidenced in 1973 when the federal government, which had previously denied the existence of the aboriginal claim, indicated a willingness to negotiate claims based on aboriginal title, a response due in part to the Calder decision. Such negotiations were to be premised upon extinguishment of the aboriginal claim in return for bare compensation. The most recent federal policy statement (December, 1986) issued in response to the "Collican" Report, indicates a willingness on the part of the federal government to reject the notion of the necessity of extinguishment as a pre-condition to negotiation. Recent changes in policy have allowed for self government powers to be included in the settlement process. These policy developments are reflected in the content of four modern treaties -- the 1975 James Bay Agreement, the 1984 Cree-Naskapi Act, the 1984 Western Arctic (Innuialuit) Claims Settlement and the 1986 Sechelt Indian Band Self Government Act.

-----------------

A legal basis for the resolution of outstanding claims is now found in the Constitution Act 1982.(9) The aboriginal people are secured a commitment to a just resolution of their claims in the recognition given to their existing treaty and aboriginal rights by virtue of section 35. The constitutional conference established under section 37 of the Constitution Act, 1982 and the additional conferences added by the 1983 amendments were intended to provide a forum for reaching some agreement on the content of such claims. The clearly expressed constitutional right of aboriginal people to participate in this process reflects their vital input into the solution. These conferences have failed to make any significant contribution to a constitutional definition of aboriginal rights.

It seems clear that ultimately the terms of accommodation will be set through negotiation between the governments of Canada and its aboriginal peoples. However, although such is a rising factor on the political agenda, the federal government and most provincial and territorial governments (notably British Columbia) continue to deny the existence of a validly subsisting aboriginal title. In British Columbia it is further argued that land legislation of the Colony of British Columbia, prior to Confederation, served to extinguish such title. Thus in British Columbia the Courts presently seem to offer the only means of ensuring the negotiation envisioned by ss. 35 and 37 take place.

Indian rights were first addressed in the Royal Proclamation of 1763,(10) promulgated by George III of Great Britain in regard to British North America, which arguably reserved to the Indians all land in their possession which 'not having been ceded to or purchased by [the British Crown] are reserved to them as their hunting grounds'. As pointed out by Lysak, a finding that the Royal Proclamation applies to the province of British Columbia, coupled with the fact that the greater part of British Columbia has never been formally surrendered through treaties made with the Indians, would suggest a broader ambit of federal authority in relation to 'lands reserved for the Indians' than is generally conceded.(11)

Legal responsibility for aboriginal peoples is assigned to the federal government under section 91(24) of the Constitution Act, 1867.(12) This section gives the federal Parliament jurisdiction over two different subject matters: Indians and Lands reserved for Indians. It can be argued that in granting the Parliament of Canada the power to legislate with respect to Indians the United Kingdom Parliament intended and assumed it would respect Indian title. That accordingly it would honour existing obligations with the Indians and continue the British


(12) Constitution Act, 1867 (U.K.), 30 & 31 Vict., c. 3.
policy, expressed in the Royal Proclamation of 1763, of protecting Indian lands from private encroachment and of their purchase only in the name of the Crown and according to the formal procedure for such purchases therein enunciated. Although it is clear that s. 91(24) alone creates no legally enforceable duty in the federal government as regards Indians, by the Royal Proclamation of 1763 (and the various Indian Acts) a fiduciary duty is placed upon the federal government in regard to the aboriginal peoples and their lands. (13) Recently the Supreme Court of Canada applied the constitutional doctrine of legislation by reference in a way that permits the Parliament of Canada to abandon its responsibility for the aboriginal peoples to the provinces. (14) The court ignored completely the important historical evidence that federal responsibility for Indians is touched by a special charge to protect the aboriginal peoples and their culture, a charge that traces from the beginning of British rule in North America. The Courts have yet to rule on whether federal responsibility for 'lands reserved for Indians' (s. 91(24)) can be likewise abandoned to the provinces. In the St. Catharines (15) case Lord Watson (Privy Council) pointed out that the latter words were not synonymous with 'Indian reserves' but were to be more broadly construed. He held that "the words used ----------------


(15) St. Catherine's Milling and Lumber Co. v. R. (1888), 14 A.C. 46 (P.C.); 10 O.R. 196 (Ont. Ch. Div.).
are according to their natural meaning sufficient to include all lands reserved, upon any terms or conditions, for Indian occupation..."

The Royal Proclamation of 1763 may have an even greater significance if it is held applicable to British Columbia. An argument can be made that as a Prerogative instrument under the Great Seal, to the extent that it is intra vires and a valid exercise of the Crown's prerogative power, it enjoyed the force and effect of an Imperial Statute applying proprio vigore to all British Colonies throughout North America. That as such it operated to void inconsistent colonial legislation, a rule contained in part in the Colonial Laws Validity Act, 1865,(16) and therefore served to invalidate the land legislation relied on by the Province of British Columbia as extinguishing aboriginal title prior to Confederation. It thus becomes important to explore the application of the Royal Proclamation of 1763 to British Columbia and the status and scope of the Indian rights articulated therein.

The Royal Proclamation of 1763 announced a series of policies in respect of British territories in North America. In part it provided for the organization and government of Britain's newly acquired territories arising out of French cessions under the Treaty of Paris (signed on 19th February 1763). More importantly the Proclamation formally enunciated Imperial policy in relation to those lands in British North America in aboriginal

(16) Colonial Laws Validity Act, 1865, 28 & 29 Vict., c. 63. See Appendix II.
possession. In relation to its 'Indian policy', the Proclamation is declarative of principles already well established in the common law. It merely gave statutory expression to the common law concept of aboriginal title, which derives from the fact that the Indians were in occupation and use of the lands prior to the settlement or conquest of North America by European States. The Indians were recognized from earliest times as possessing a degree of sovereignty which necessitated their consent as a pre-condition to the valid acquisition of land in their possession. Such reflected contemporary principles of international law which found in all peoples with a sufficiently developed political organization a degree of sovereignty such that constituted a bar to the free acquisition of their territory by more highly civilized people.

Indian rights to land in their possession were always recognized by the British Crown. The invariable procedure adopted by the British Crown in its early relations with the Indian Nations had, prior to 1763, already hardened into substantive rules of common law which articulated a sui generis Indian interest. Such has now been confirmed by the Supreme Court of Canada in the Guerin decision. Because of the principal of discovery, which gave to the European discoverer the exclusive right to purchase vis a vis other European nations, such Indian title was subject to the sole restriction as to its alienability to all save the Crown. Such restriction did not extend to a denial of the right of the aboriginal possessor to sell: rather, purchase was premised upon Indian consent. This notion of
"title" is clearly reflected in the contracts between the Crown and the Indian Nations in the sixteenth and seventeenth centuries. Such then must inform the debate on the nature and scope of the Indian rights articulated in the Royal Proclamation of 1763.

In the opening recital to the Indian provisions, the Proclamation states that the Indians should not be molested or disturbed in the possession of such parts of the King's territories "as, not having been ceded to, or purchased by us, are reserved" to the Indians as their hunting grounds. The Proclamation then recognizes as 'Indian Country' land outside colonial borders and in this area Indian title is unequivocally affirmed and white settlement, at least for the present (presumably until further consensual arrangements) prohibited. Further the Proclamation recognizes Indian title to all unceded lands in aboriginal possession within the bounds of the colonies and lays down detailed procedures for its purchase. The territorial integrity of 'Indian' lands was protected by restrictions on grants, settlements and purchases. It is to be noted that the 'Indian Country' is not brought within any colonial jurisdiction.

The Royal Proclamation of 1763 recognizes then, Indian title in all those areas of British North America in which the Indians retain possession of their traditional lands. Where settlement is to be allowed it provides for the consensual acquisition of those lands by the Crown. Arguably the Proclamation, in leaving the 'Indian Country' out of the jurisdiction of the settled
colonies, also recognizes a degree of Indian tribal sovereignty. In so doing the Proclamation is declarative of a pre-existing legal right in the aboriginal people.

Confusion exists as to the geographic scope to be attributed to the Proclamation and more specifically its Indian provisions. The major problem of interpretation is the meaning to be attributed to the phrasing of the opening recital to the Indian provisions, to the effect that Indians living under British protection should not be disturbed "in the Possession of Such Parts of Our Dominions and Territories as, not having been ceded to, or purchased by us, are reserved to them, or any of them, as their Hunting Grounds,...". It might be suggested that British Columbia is excluded from the Proclamations provisions because that area was terra incognita, or not otherwise firmly under British sovereignty, as of 7 October 1763 when the Proclamation was issued.

This argument cannot be resolved through an examination of the text alone. Clearly on its terms the Proclamation is uncertain and ambiguous as to its geographic reach. It is open to argue that the 'Indian Country' stretched indefinitely westwards, an argument supported by the absence of express terms in the Proclamation suggesting otherwise, despite the fact that a western boundary had been proposed in the documentation leading to the issuance of the Royal Proclamation. Or alternatively that parts of British Columbia were brought within the Hudson Bay's territory, as this was described in the mid 18th century, or within the territory covered by the New England Charter of 1620.
A much more compelling argument, however, can be mounted. Whether or not the Royal Proclamation of 1763 originally applied to British Columbia, it nonetheless subsequently applied with the assertion of British sovereignty over that area. This rests on the fact that the Proclamation of 1763 was a law of manifestly universal application broad enough to protect the just rights and claims of those Indians who came under British sovereignty at any time during the Proclamation's life. Such is supported by the Colonial Laws Validity Act, 1865 which gives statutory extension to those Imperial Acts in which a necessary intendment can be inferred. By virtue of section 2 of the Act, this implied intendment applies also to those Imperial Orders having the force and effect of Imperial Statutes in the colonies.

Certainly since 1763 the provisions of the Proclamation governing Indian land purchases have been widely applied, as reflected in the treaty making process. Between 1680 and 1923, over 480 treaties, grants and surrenders were made upon terms and conditions compatible with the Proclamations provisions. The Royal Proclamation of 1763 continues today as part of Canada's constitution. As an instrument having the force of an Imperial Statute and recognized in the Constitution Act, 1982 as a document of constitutional importance, it should be applied liberally in favour of those Indians throughout Canada who retain possession of their traditional lands.
PART I: THE ROYAL PROCLAMATION OF 1763

1. Introduction

The Royal Proclamation of 1763(17) was promulgated by George III of Great Britain in relation to British territories in North America in general, and in particular to those recently acquired from France under the Treaty of Paris of 10 February 1763.

By Article IV of this treaty, the King of France ceded to Britain, Canada, with all its dependencies, as well as .... island, and all other islands in the St. Lawrence Gulf, and in general everything that depended on the said countries, lands, islands, by treaty or otherwise, which the King of France had until then over the said islands, countries, etc., and their inhabitants so that the King of France thus ceded and made over to the British King, and to the Crown of Great Britain, and that in the most ample manner and form, without restriction, and without any liberty to depart from the cession and guaranty under any pretence, or to disturb Great Britain in the possessions above mentioned. Under Article X, the Spanish King made a similar cession of Spanish Florida, with Port St. Augustin, and the Bay of Pentagonal, as well as all that Spain possessed on the Continent of North America, to the east or to the southeast of the Mississippi, and, in general, everything that depends on the said countries and lands, with the Sovereignty, property and possession, and all rights acquired by treaty or otherwise, which the Catholic King and Crown of Spain had till then. Although by

(17) Supra, footnote 10.
the treaty the King of France retained Louisiana to the West of the Mississippi, it had been ceded in secret to the Spanish King in 1762 and 1763. It then fell to the British Crown to formulate a coherent policy for the organization and government of its new possessions. This was effected in the Royal Proclamations of 1763 (the Proclamation). The Proclamation was not limited to the establishment of such governments but addressed a series of diverse and unconnected issues; each with its own preamble.

One of the main goals of the Proclamation was the establishment of a uniform, consolidated policy with regard to Indian occupied lands in its American possessions. While the Proclamation is a basic constitutional document establishing the government for the territories acquired from France following the Treaty of Paris, a most important part of the document is the announcement of new regulations in respect to Indians and their lands. One scholar thus noted; "The first thought of the framers was to allay the alarms of the Indians, and the articles, concerned with Indian relations, form the core of the document and of its policy".(18) The "Indian provisions" which came towards the end of the Proclamation give statutory force to Imperial policies, developed over a long period of time, of respect for the Indian claim to land in their possession and thus of the necessity for Indian consent to its alienation. Improved

relations with the Indians, essential to the peace and security of British North America, had been the subject of ongoing concern to the British government and the Proclamation was seized as a means to express formally Imperial intention in this regard, hastened perhaps by news of the Pontiac rebellion on the mid-western frontier. Indian complaints of fraudulent land grants, made by the various colonial governors without concern for the rights of the Indian occupiers, had been long voiced and the Imperial government had made various ad hoc attempts at its solution.

Slattery and Lester have dealt extensively with the historical setting of the Proclamation and the documentation preparatory to its enactment.(19) It is intended here to underline the fact that the Indian provisions of the Proclamation, though perhaps made more urgent by the news of Indian hostility on the mid-western frontier, were not conceived in haste. They declared what was indeed the law. The Imperial Government had long debated the establishment of an Indian policy which was uniform throughout the colonies and had as its major component respect for Indian lands.

-------------------

The first step in the consolidation of these policies was the calling of the Albany Congress in June, 1754, to establish the joint Management of Indian Affairs. (20) Unlawful land grants and purchases were major problems on the agenda of the Albany Conference of 1754 which although a failure in many respects (21) nevertheless formulated a procedure to govern future Indian land purchases. All future purchases from the Indians would be void unless executed in the name of the government within which the lands were situate, and unless in public council. This policy was put into effect through the issue of new instructions to the Governors. Throughout the eighteenth century a series of treaties had been concluded with the Indians, following such procedure, by which their land was ceded to the Crown. (22) Although these treaties went some way to allay Indian fears about encroachments upon their lands, the problem was not fully resolved and news of Indian hostility continued to reach the Imperial Government.

In 1761, as an immediate reaction to proposed land grants in the Colony of New York, the Board of Trade wrote a comprehensive report to the King, setting forth the basic policies which ought


(22) See for example the Treaty of Easton, Oct. 1758, at which Pennsylvania agreed to relinquish claims to part of the land it had purchased (fraudulently) at an earlier congress at Albany. Text in Indian Treaties, printed by Benjamin Franklyn, 1736-1762, with an introduction by Carl Van Doren (Philadelphia Historical Society of Pennsylvania).
to be pursued in all the American colonies as regards Indian lands. Noting that the main reason prompting the Indians to make war on the English was the "Cruelty and injustice with which they have been treated with respect to their hunting grounds, in violation of those solemn compacts by which they have yielded to us the Dominion, but not the Property of those Lands" the Board commented that:

... the granting of Lands hitherto unsettled and establishing Colonies upon the Frontiers before the claims of the Indians are ascertained appears to be a measure of the most dangerous tendency, and is more particularly so in the present case, as these Settlements now proposed to be made, especially those upon the Mohawk River are in that part of the Country of the Possession of which the Indians are most jealous having at different times expressed in the most strongest terms their Resolution to oppose all settlements thereon as a manifest violation of their Rights.(23)

Their Lordships went on to recommend that the King immediately issue orders "for putting a stop to all Settlements" upon land still in Indian possession.

This report was adopted by Order in Council on 3 December(24) and led to the issuing of Royal Instructions which refer to the King's determination to support and protect the Indians "in their just rights and possessions", forbidding the Governors of the various colonies from passing any grants of lands possessed by the Indians. Added to this injunction was an order that the Governors promulgate a proclamation in the King's

(23) Supra, footnote 19, Lester.

(24) Ibid.
name strictly enjoining and requiring all persons whatever, who may "inadvertently have seated themselves upon any lands so reserved or claimed by the Indians, without any lawful authority forthwith to remove therefrom". And further required all applications to purchase Indian lands to be first transmitted to the Crown for scrutiny and perusal. These instructions were to be made public throughout the colony and made known to the Indians, that the latter "may be apprized of Our determined Resolution to support them in their just Rights, and inviolably to observe our Engagements with them."(25)

The latter is clearly a forerunner of the Proclamation's strictures; any application to purchase lands from the Indians had to receive prior approval from the Crown, through the Lords of Trade, and be communicated to the Governor before such licence could issue. And more importantly, the Governors were not to make grants of any lands "possessed or occupied" by the Indians or "reserved to or claimed by them".(26) Several of the Governors issued proclamations in the terms ordered by the December instructions.(27) The same concern is evidenced in the various documents preparatory to the Proclamation. A letter from Lord Egremont, Secretary of State for the Southern Department, to the Board of Trade, 5 May 1763, asking for a report on various

------------------

(25) Ibid.
(26) Ibid.
questions relating to the policies to be adopted for the recently ceded territory in North America contained the following passage:

His Majesty's Justice & Moderation inclines Him to adopt the more eligible Method of conciliating the Minds of the Indians by the Mildness of His Government, by protecting their Persons & Property & securing to them all the Possessions, Rights and Priviledges [sic] they have hitherto enjoyed, and are entitled to, most cautiously guarding against any Invasion or Occupation of their Hunting Lands, the Possession of which is to be acquired by fair Purchase only; and it has been thought so highly expedient to give them the earliest and most convincing Proofs of His Majesty's Gracious and Friendly Intentions on this Head, that I have already received and transmitted the King's Commands to this Purpose to the Governors of Virginia, the Two Carolinas and Georgia, and to the Agent of Indian Affairs in the Southern Department, as your Lordships will see fully in the inclosed Copy of my Circular Letter to them on this Subject.

This shows Imperial recognition of the Indian claim and evidences the King's power to command the observance of such policy. Thus although news in Britain of the Pontiac rebellion on the mid-western frontier(28) may have prompted the British Crown to take immediate action in this regard, acting under the Prerogative, it is clear that the resulting Royal Proclamation of 1763, in the Indian provisions, reflected a longer history of Imperial consideration of the problem.

The reasons adopted by the Board of Trade for its decision to issue a Proclamation rather than some other Prerogative

---------------------------

(28) Keith, The First British Empire, supra, footnote 21 at p. 334 et seq; and see Slattery, p. 201 where he states that news of the rebellion reached in England in the latter part of July. (May 1763)
instrument are not made clear. (29) The Board wanted to make an authoritative public statement that would serve to bind all colonial governors to a uniform procedure when dealing with land burdened by Indian title. Slattery suggests a Proclamation was an obvious and appropriate choice, it being an official expression of the Sovereign will in matters falling within the Crown's peculiar authority. (30) As an instrument under the Great Seal it carried the legal authority of a Commission -- that is, it had in the colonies to which it related the force and effect of an Imperial Statute, a fact subsequently judicially confirmed. (31) To be valid, a Proclamation must pass the Great Seal and fulfil requirements regarding its publication. It seems clear that the Royal proclamation of 1763 satisfies the formal requirements attending its issue and publication. (32)

The final amended draft of the Proclamation was read and approved by the King in Council on 5 October, and Halifax was ordered to prepare a draft for the King's signature. (33) It was immediately approved and signed on 7 October 1763. Copies were printed and ordered to be sent to the Governors of the Kings' several colonies and plantations in America and to the agents of Indian Affairs. As to the legality of its contents,

(29) Supra, footnote 19, Slattery p. 200 et seq.
(30) Ibid. p. 200.
(32) Supra, footnote 19, Slattery, p. 287.
Attorney-General Yorke when asked to review it by the Board of Trade commented that the Proclamation "contains nothing contrary to law." (34)

(34) Yorke to the Board of Trade, 3 Oct. 1763. P.R.O. Co. O. 323/16, p. 337.
2. **Construction of the Royal Proclamation of 1763**

The question to be asked is: to what peoples and to what territories does the Royal Proclamation of 1763 apply? The answer may be found in part by focusing on the words used in light of events leading up to its enactment and freezing its geographic scope and Indian beneficiaries as of this date. However, it is misleading to focus solely on the geographic scope as explained in the document itself. The Proclamation, as will be seen, is broadly enough worded to allow for altered circumstances whether as to peoples or territories covered. And as a document which is of continuing constitutional significance and which relates to Indians it should be interpreted so as to give the most beneficial effect its words will permit. The following analysis of the scope of the Indian provisions as expressed in the document itself, is undertaken merely to show that even on its face the geographic extent is not clearly expressed so as to exclude its application to lands in the west and northwest of modern day Canada.

To the extent that the Royal Proclamation of 1763 is *intra vires* and a valid exercise of the prerogative legislative power, its effect and operation are to be determined according to the well established rules of construction applicable to legal instruments. In all cases the object is to determine the legislative intention as expressed by the words used in the document. However it seldom happens that the framers have in
their contemplation all the cases that are likely to arise. Moreover, from the imperfection of language it is impossible to know for certain the legislative intention without some inquiry as to the circumstances of the enactment and the mischief it was aimed to correct. (35)

The Royal Proclamation of 1763 is a composite document falling into several distinct parts with distinct purposes, each prefaced with its own preamble or recital introducing provisions, of varying scope. It is clear that the various parts, covering diverse and unconnected issues, are not all to be restricted to the territories ceded to Britain from France in 1763. In its Indian provisions, the Proclamation gives statutory expression to Imperial recognition of aboriginal title to lands in British North America in Indian possession, and further prescribes the procedure whereby such lands might be acquired by the Crown. (36) The problem that arises is whether such provisions are to be read narrowly and confined to the peoples and territories contemplated in 1763 or are to be construed more broadly so as to allow for altered circumstances as British colonization of North America spread west. To answer this question initially, one must look to the document and to the legislative intent there expressed, bearing in mind that words of a wide and general meaning in a remedial statute should be given a broad construction so as to benefit the greatest numbers of peoples. Such is mandatory where ________________


(36) See Appendix I.
the statute to be construed relates to Indians. As most recently expressed by the S.C.C.:

It is legal lore that, to be valid, exemptions to tax laws should be clearly expressed. It seems to me, however, that treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indian. If the statute contains language which can reasonably be construed to confer tax exemption, that construction, in my view, is to be favoured over a more technical construction which might be available to deny exemption. In Jones v. Meehan, (1891), 175 U.S. 1, it was held that Indian treaties 'must ... be construed, not according to the technical meaning of their words ... but in the sense in which they would naturally be understood by the Indians? (37)

It is to be noted that the narrow technical construction was open to the Court on the words of the statute to be there construed. It is suggested that the words of the Royal Proclamation of 1763 admit of a wide geographic interpretation and evidence seeking to narrow such a construction is only to be found in the documentation leading up to its enactment. The Proclamation continues as a significant document in our Constitution. (38) Its words, as stated above, are to be liberally construed with doubtful expressions resolved in favour of the Indians. (39)

-----------------------


(39) Supra, footnote 37.
For the foregoing reasons, the territorial extent of the Indian provisions (Part IV) of the Proclamation (Part IV) should be given a broad construction so as to benefit those peoples whose right it was designed to protect.
3. **Geographic Scope of the Royal Proclamation of 1763**

(i) **Introduction**

It is not intended here to analyze all the substantive provisions of the Proclamation, but several provisions are relevant when seeking to interpret Part IV, the so-called Indian provisions.

**Part I** of the Proclamation relates to the territories acquired by Britain from France under the then recently signed Treaty of Paris. Its opening recital states:

> Whereas We have taken into Our Royal Consideration the extensive and valuable Acquisitions in America, secured to Our Crown by the late Definitive Treaty of Peace, concluded at Paris the Tenth Day of February last; and being desirous, that all Our loving Subjects, as well of Our Kingdoms as of Our Colonies in America . . . .

It then provides for the establishment of the governments of these areas:

> To erect within the Countries and Islands ceded and confirmed to Us by the said Treaty, Four distinct and separate Governments, stiled and called by the Names of Quebec, East Florida, West Florida, and Grenada, . . .

Portions of the newly ceded territories are thus brought within four new colonies whose boundaries are then described. Other areas are to be annexed to existing colonies and the remaining areas, by far the largest part, are left in an unorganized state.(40)

-------------------

(40) *Supra*, footnote 19, Slattery, p. 205 *et seq.*
Part II of the Proclamation begins with the recital

And whereas it will contribute to the speedy setting Our said new Governments...

and proceeds to establish the constitutions of the "said colonies", clearly referring solely to the new colonies established within the recently acquired territories (Treaty of Paris).

Power is given to the Governors of the said colonies to call general assemblies in "such Manner and Form as is used and directed in those Colonies and Provinces in America, which are under Our Immediate Government." The governors were then given law-making powers with the restriction that such should be "as near as may be agreeable to the Laws of England". Further that such powers, in addition, were to be exercised "under such Regulations and Restrictions as are used in other Colonies". These provisions are interesting in their attention to the need for conformity between the governor's powers in the newly created colonies with those of the governor's of the established colonies. It evidences an intention on the part of the British Crown that all British dominions in North America were to be administered in a consistent manner.

Power was then given to the Governors of the "said new Colonies" to settle lands upon the inhabitants thereof limiting such grants to "such Lands, Tenements, and Hereditaments, as are now, or hereafter shall be in Our Power to dispose of..."
It is unclear as to what factual situation the underlined words were referable. They could apply equally to lands coming within the jurisdiction of the "said" territories described through future boundary alterations or to lands which, although already within the territorial limits of the new governments were not presently in the British power to grant as being unceded and unpurchased from the Indians. What is interesting to note is the expressed intent of future application.

The Proclamation goes on to state that such grants be upon "such Terms, and under such moderate Quit Rents, Services, and Acknowledgments as have been appointed and settled in Our other Colonies ... This again evidences the framers intention that colonial administration was to be consistent throughout British North America. And this was to be the case not only as of 1763 but also as to "such lands" as are "hereafter" within British power to dispose of. Even though these statements were clearly referable to lands within the existing or future territorial jurisdictions of the new colonies, they show an intention that future lands were to be granted in the same way.

Part III of the proclamation differs from the preceding parts in subject matter and scope. It begins

And whereas We are desirous upon all Occasions to testify Our Royal Sense and Approbation of the Conduct and Bravery of the Officers and Soldiers of Our Armies, and to reward the same, We do hereby command and impower Our Governors of Our Said Three New Colonies, and all other Our Governors of Our Several Provinces on the Continent of North America....
Part III clearly refers both to the Governors of the "said" new colonies and to the Governors of other British provinces on the continent of North America. The words are clear and unambiguous and cannot be construed so as to limit the operation of Part III to the territories ceded by France. The wording is comprehensive and prima facie would include all British colonies in North America including Rupert's Land.

This part goes on to provide for free land grants to military men who served in the war in America, specifically to those "as have been or shall be disbanded in America, and are actually residing there...". Clearly this part covers those qualifying officers who at any time hereafter might be disbanded in America. The same quantities of land, upon the same conditions are then given to Navy Officers of like rank having served in the late war.

Part III is important to an interpretation of Part IV in that it clearly applies to a wider geographic area than the preceding parts, suggesting that each Part must be read in light of the recital of that Part and not to the recital at the opening of the Proclamation. The fourth and final part of the Proclamation deals with a variety of matters relating to Indians.

(ii) Indian Provisions of the Royal Proclamation - Part IV

The Indian provisions came towards the end of the Proclamation (Part IV) and contain a series of distinct clauses with varying geographic reach.
The general scheme of the Indian provisions of the Royal Proclamation reflect both Imperial policy to regulate Western colonial expansion and to recognize aboriginal rights over lands in Indian possession which had not been ceded to or purchased by the Crown. To this end it creates an interior Indian reserve with uncertain western boundaries into which no settlement was to be allowed for an unspecified period. A rough boundary was drawn indicating that the frontier of expansion for the old colonies along the Atlantic seaboard was to be, temporarily at least, the Allegheny mountains. The several clauses relating to these raise two distinct problems of construction. The first lies in just what lands are included in the created reserve and the second to what extent lands in Indian possession in North America either within colonial boundaries or outside thereof are reserved. The Proclamation makes it clear that neither land in the interior reserve nor land still in Indian possession was to be acquired from the Indians except through the Crown and with Indian consent.

To determine the character and extent of the regulation of Indian title, the restrictions upon white encroachment on these lands and the procedures to be adopted for its purchase by the Crown, it is necessary to focus on the individual enacting provisions of Part IV and their scope as therein expressed. In so doing it should be noted that no greater limitations on Indian title should be imposed than is rendered necessary by the nature of the provision, its subject matter and the words used.(41)
Part IV begins with the recital:

And whereas it is just and reasonable, and essential to Our Interest and the Security of Our Colonies, that the several Nations or Tribes of Indians, with whom we are connected, and who live under Our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to, or purchased by Us, are reserved to them, or any of them as their Hunting Grounds;

This part then goes on to give a series of clauses relating to Indians. The question to be initially asked is to what territory and to what peoples did the framers intend the various provisions of Part IV to apply. Arguably such a question cannot be answered in a comprehensive fashion unless the relationship of the British and the Indians of North America and the historical context in which the Proclamation developed are clearly understood. Certainly in the Indian provisions the Proclamation lays down very little that is new in principle or implementation. The main elements of Part IV can be found in earlier precedents and in long settled Imperial Indian policy. The Proclamation merely entrenched the recognition of Indian title and the requirement of Indian consent to its abridgement, such being "just and reasonable" and "essential to the (British) interest and security of (British) Colonies".

That even hostile tribes were to be entitled to the Crown's protection is clear from the enacting clauses of the Proclamation, the purposes of which, as stated in the preamble,

is that the Indians not be "molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds.

Preambles, or opening recitals, especially in the earlier Acts, have been regarded as of great importance as guides to construction. They were used to set out the facts or state of the law for which it was proposed to legislate by the statute.(42) According to normal rules of construction where the words of the enacting sections are unclear the words of the preamble recital prima facie give the scope of the sections that follow.(43) The words of the preamble in Part IV are wide and generally recognize prima facie that lands in Indian possession throughout British North America, which have not been ceded to or purchased by the Crown, are reserved for Indian use. And it is to be noted here that there is nothing in the opening preamble nor in the enacting provisions of Part IV that suggest such "reservation" is referable solely to lands reserved by reason of antecedent transaction such as by treaty or other course of dealing.

The words of the recital are however not entirely free of uncertainty. The major problem lies in what meaning is to be ascribed to the phrasing of the opening recital. The people to

(42) Salkeld v. Johnson (1848), 2 Ex. 256, at 283 per Pollock C.B.

(43) Crowder v. Stewart (1880), 16 Ch. D. 368, 50 L.J. Ch. 136; 29 W.R. 331.
whom part IV is applicable are stated to be "the several Nations or Tribes of Indians, with whom We are connected, and who live under our Protection". The geographic extent is given in the words: "Such Parts of Our Dominions or Territories..."

The ordinary and literal significance of such expressions would have Part IV, apply to all Indians in possession of lands anywhere in British North America. Any restrictions or limitations must then be found in the enacting provisions or in the circumstances judicially cognisable under which the various provisions were inserted. In looking to the provisions of Part IV no greater restriction should be imposed than is rendered necessary by the nature and subject matter of the provision.(44) The presumption is that in the absence of express words, the extent of a statute and the limits of the application are prima facie the same.

(iii) **The Indian Beneficiaries of part IV**

We turn first to the persons to whom Part IV applies. Such is to be gathered from the language and purview of Part IV, which recites that the provisions are directed at "the several Nations or Tribes of Indians, with whom we are connected, and who live under our Protection". Where, an Act uses, as here words referring to general categories or sets of things, rather than to particular objects, the categories designated will normally encompass things not specifically contemplated by the maker who

---

cannot imagine all possibilities or anticipate every eventuality -- no legislature has a mind except that which is expressed. Here the enacting provisions which follow the recital to Part IV shed no light on the category of Indians to whom it applies, referring merely to the "said" Indians. We need therefore to ask what is meant by the term "Indians" and by the phrase "with whom we are connected and who live under Our Protection". (45)

As to the term Indians, the Supreme Court of Canada in Reference re Term "Indians", (46) held that "Indians" as used in s. 91(24) of the British North America Act 1867, encompassed Eskimos. Significantly, the principal opinion considered and rejected the contention that the phrase, "the several Nations or Tribes of Indians, ..." as used in the Royal Proclamation of 1763, did not cover Eskimos. (47)

As to the phrase restricting the category of Indians to those "with whom we are connected and who live under Our Protection", an initial interpretive problem to be addressed is whether, if the linked phrases are not synonymous, either or both criteria are required, i.e. did the framers of Part IV intend to reach both those Indians with whom the British Crown was factually connected and those Indians inhabiting territory over which the British Crown asserted sovereignty and who thus fell

-------------

(45) See generally Slattery supra, footnote 19, ch. 14, p. 231 et seq.

(46) [1939] S.C.R. 104, sub nom "Re Eskimos"

(47) Supra, footnote 19, Slattery, p. 232 and footnote 7 at that page.
within British protection; or did the framers intend the Proclamation's provisions to reach only those Indians satisfying both criteria? Grammatically either interpretation is correct. The manner of expression, nevertheless, suggests an intention to protect all Indians who in fact possess parts of British dominions in North America irrespective of their factual ties with British authorities. (48) Slattery addresses the peculiar consequences of extending Part IV to only those Indians meeting both criteria. (49)

Slattery asserts moreover that the travaux preparatoires to the Royal Proclamation do not support the view that the problems relating to North American Indians were perceived by the Crown as confined to one or more particular area or group of indigenous peoples. Rather they suggest that the "mischief" was considered to be generalized, and common to all Indians living under British protection. Basically, the confidential ministerial correspondence indicates that the Indian provisions were designed to conciliate and protect the Indians and their property. (50) Slattery notes that as early as 1765 and 1766 the term "connection" was dropped and the Proclamations Indian provisions interpreted as relevant to all Indians living under His Majesty's protection. (51) Slattery concludes that the category of Indians

(48) Ibid., p. 234.
(49) Ibid., p. 234-5.
(50) Ibid., p. 240.
(51) Ibid., p. 243.
recited in the preamble encompasses all indigenous groups occupying territories claimed by the British Crown as of October 1763.(52) Such is consistent with the extent of the 'mischief' perceived by the Crown in North America and is supported by contemporaneous exposition.

(iv) Geographic Reach of Part IV of the Proclamation

The recital to Part IV gives the geographic reach in wide general terms; "Such Parts of Our Dominions and Territories as, not having been ceded to, or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds;..."

Prima facie such words recognize Indian title to land in Indian possession throughout British North America. The wide, general words of the recital are, however, limited to varying extent in the enacting clauses, although not always in words entirely free of uncertainty. The confusion over the geographic reach of the various provisions is readily apparent in the divergence of judicial opinion on the matters.

Norris J.A. of the British Columbia Court of Appeal in R. v. White and Bob held that the terms of the Proclamation extended to Vancouver Island.(53) His judgment was accepted without reasons in the Supreme Court of Canada. Hall J. in Calder v. Attorney-General for British Columbia(54) was willing to extend

(52) Ibid., p. 243.
its protection to the Naas Valley. Judson J. in the same case was, however, unwilling to extend its application to B.C. In R. v. Discon and Baker,(55) discussed by Hall J. in Calder,(56) Schulz Co. Ct. J. rejected the application of the Royal Proclamation to British Columbia. Johnson J.A. in R. v. Sikyea(57) and Hall J. in R. v. Sigearak,(58) rejected the contention accepted by the lower courts that the Proclamation applied to the lands of the Hudson's Bay Company although he seems later to have changed his mind, see Narvey).(59) Hall's judgment should probably be read as referring only to the extent of the Indian Territory, from which Rupert's Land was clearly excluded rather than as referring to the provisions as a whole. The Proclamation's land purchases were not at issue. In R. v. Syliboym(60) the court rejected the argument that the Proclamation established aboriginal rights in Nova Scotia, though Patterson, Acting Co. Ct. J. recognized that it might so apply in

(56) Ibid., at pp. 206-208.
(60) 50 C.C.C. 389, at 393; [1929] 1 D.L.R. 307.
(61) (1975), 13 N.S.R. (2d) 460 at 478 (N.S.S.C. App.) however it was held to be applicable to Nova Scotia. And see R. v.
Quebec. (61) In R. v. Isaac and in Warman v. Francis (62) the court held that the terms of the Proclamation did apply to New Brunswick. There has yet to be an authoritative judicial statement by the Supreme Court of Canada on the geographic scope of the Proclamation's Indian provisions.

It seems clear that the various clauses of Part IV do not have the same geographic intention. The inquiry here as to geographic application will be limited to the clause which gives the widest recognition to Indian title (clause 2). This clause expresses the general prohibition against granting lands in Indian possession which have not been made the subject of cession or purchase. The clause is directed at all colonial governors or commanders-in-chief in British North America. The clause states:

We do therefore, with the Advice of Our Privy Council, declare it to be Our Royal Will and Pleasure, that (i) no Governor or Commander in Chief in any of Our Colonies of Quebec, East Florida, or West Florida, do presume, upon any Pretence whatever, to grant Warrants of Survey, or pass any Patents for Lands beyond the Bounds of their respective Governments, as described in their Commissions; as also, (ii) that no Governor or Commander in Chief in any of Our other Colonies or Plantations in America, do presume, for the present, and until Our further Pleasure be known, to grant Warrants of Survey, or (iii) pass Patents for any Lands beyond the Heads or Sources of any of the Rivers which fall into the Atlantick Ocean from the West and North-West, or upon any Lands whatever, which, not having been ceded to, or purchased by Us as aforesaid, are reserved to the said Indians, or any of them. (63)

(63) See Appendix I.
Before proceeding with the inquiry as to geographic reach, a point of minor relevance is the interpretation to be put on the phrase "for the present and until our further pleasure be known". It seems to cast a "temporary" light on the effect of clause 2. Such is readily explainable. The Imperial government recognized that the move to westward expansion could not be stopped for all times -- that at some future time land within the restricted areas might be needed for settlement. However it seems clear, given the mischief aimed at, where such land was needed it would have to be premised upon cession and purchase with Indian consent. The phrase itself is consistent with such an interpretation and should be so interpreted. To suggest that it implied, rather, a temporary recognition of Indian title would be to construe the document to the detriment of the Indians a course no longer open to the courts unless such is clearly expressed to be the intention.(64) Moreover, to interpret this ambiguous expression in favour of the Indians is to give it the interpretation most consistent with the intent expressed in the recital, it being just and reasonable and consistent with the Imperial policy of recognizing land in Indian possession.(65)

This clause is rife with textual ambiguity. Clearly the governors of Quebec, East Florida and West Florida are prohibited from granting lands beyond the boundaries of their respective

(64) Nowejigick, supra, footnote 37.
(65) c.f. St. Catherine's Milling and Lumber Co. v. R. (1888), 14 A.C. 46 (P.C.); (1887), 13 S.C.R. 577 (Can. S.C.); (1886), 13 O.A.R. 148 (Ont. C.A.); (1885), 10 O.R. 196 (Ont. Ch. Div.).
commissions. This stipulation is followed by a semicolon. The clause then proceeds to prohibit "for the present..." "the Governor or Commander-in-Chief in any of Our other Colonies or Plantations in America" from granting lands west of a described watershed (Allegheny Mountains) or "Upon any Lands Whatever, which not having been ceded to or purchased by Us as aforesaid are reserved to the Said Indians, or any of them."

The underlined portion of the clause refers to lands previously mentioned ("as aforesaid") and can only refer to the words in the recital - that is - "such Parts of our Dominions and Territories as, not having been ceded to, or purchased by Us, are reserved to them...". Thus "for the present" the governors of British territories throughout North America are prohibited from granting lands in Indian possession.

However a problem lies in determining whether this general prohibition, given in the underlined phrase of clause 2, (iii) is referable solely to the immediately preceding phrase (ii) or is also referable to phase (i) (supra, p. 40) so as to apply restrictions west of the Appalachian divide to both the New and Old Colonies.

Grammatically both interpretations are open but the latter interpretation has much to commend it -- it is consistent with the mischief as explained in the preamble to protect Indian title in all of British North America and it is the interpretation, open on the words, that most benefit the Indian beneficiaries of Part IV. It is also the interpretation which makes the most sense. The Royal Proclamation clearly laid down the boundaries
of the new provinces - why then enjoin the governors merely from granting land outside such boundaries, an act ultra vires the governor's powers on constitutional principles? Slattery presents evidence showing that contemporary officials in Quebec believed that clause 2 prevented them from granting lands, within their boundaries, still in Indian possession.\(^{66}\)

An argument can be made that it is only the Governors of the old colonies and plantations that are enjoined from granting lands within their boundaries in Indian possession or indeed upon any lands "whatever" in Indian possession where such have not been ceded to or purchased by the Crown. On this narrow interpretation the clause then protects lands in Indian possession, outside of the boundaries of the newly established colonies, which is subject to an Indian title.

Of major importance then is the meaning to be given to the expression in clause 2(ii) "Our Colonies or Plantations in America" since in such areas Indian title is recognized to the extent of prohibiting land grants. Blackstone treats the words "plantations" and "colonies" as synonymous.\(^{67}\) Holt defines "colony" or "plantation" to mean "any land, territory, island or possession beyond the sea, belonging to, or under the dominion of Great Britain".\(^{68}\) On such a definition Rupert's Land, Nova Scotia, Newfoundland and the Coast of Labrador would all be ________________

\(^{66}\) See Slattery \textit{supra}, footnote 19, p. 246.


included, as well of course as the American colonies. Again the
construction adopted should be that which offers the greatest
protection to Indian held lands (Nowejigick). Accordingly, the
better interpretation is that any unceded and unpurchased lands
whatever are immune from being granted away by the governing
authority of British possessions (other than Quebec, East Florida
and West Florida where by virtue of (i) above the restriction is
limited to land grants beyond their boundaries if a narrow
interpretation of clause 2 is adopted).

I do not propose to fully explore British territorial Claims
in North America in 1763 but a brief review of such shows that
the geographic extent of British dominions was uncertain as of
1763. Such supports a liberal interpretation of the
Proclamation's application as of 1763 to meet the expressed aim
of the Royal Proclamation, that being to recognize and protect
'Indian title' throughout North America. Further, such
uncertainty as to intended geographic scope is offered as support
for a prospective application of the Royal Proclamation, whereby
the inquiry as to actual geographic scope in 1763 becomes an
exercise in futility. Even the boundaries of New France or
Canada, at its cession to Great Britain in 1763, were undefined
on the north and west, and the boundaries given by the Quebec
Act, 1774 were not necessarily those of Canada in 1763.

In 1763 Britain could point to wide claims in North America
based on the wide wording of the early charters and particularly
that of the Virginia Charter of 1609 which describes the
territories to be colonized as either pertaining to the Crown or
not actually possessed by any Christian prince or people.(69) This charter and subsequent charters were different from their predecessors in designating specific boundaries for the territories to which they referred, and assuring exclusive rights for the English Crown within such boundaries.(70) They thus represent a Royal assertion vis-a-vis other Christian states, of exclusive rights of colonization, trade and territorial expansion within a designated area, rights which in turn are conferred upon the company.(71)

The Virginia Charter of 1609 would seem to confer rights to all lands situated upon a sector of the East Coast stretching 200 miles north and south of Cape Comfort "up into the Land throughout from Sea to Sea, West and North West".(72) On one common interpretation, while the southern boundary ran due west to the Pacific, the northern boundary extended in a north-westerly direction taking up a large part of Western Canada.(73)

The New England Charter of 1620 is expressed to cover territory between the 40th and 48th parallels "and in length by all the Breadth aforesaid throughout the Mainland, from Sea to Sea",(74) thus suggesting that Britain viewed its American

(69) Supra, footnote 19, Slattery p. 102 et seq.
(70) Ibid., p. 103.
(71) Ibid.
(72) Ibid., citing Thorpe, Charters, VII, 3795.
(73) Ibid.
dominions as stretching indefinitely westward to the Pacific Ocean.(75)

The principal English Charter of the 17th Century was that granted to the Hudson Bay Company in 1670, for Rupert's Land. This Charter gives its geographic scope in vague terms:

The sole Trade and Commerce of all those Seas Streights Bayes Rivers Lakes Creekes and Soundes in whatsoever Latitude they shall bee that lye within the entrance of the Streights commonly called Hudsons Streights together with all the Landes and Territoryes upon the Countryes Coastes and confynes of the Seas Bayes Lakes Rivers Creekes and Soundes aforesaid that are not already actually possessed by or granted to any of our Subjectes or possessed by the Subjectes of any other Christian Prince or State....(76) (My emphasis).

The text envisages not merely lands bordering directly upon the Sea, but all territories whose waters drain into the seas lying within the Hudson Strait except those lands already possessed or granted to British subjects; and 2) those possessed by the subject of other Christian Sovereigns.(77) The only other Christian state entertaining serious claims within the designated region was France and in 1763 all territories claimed by France in this area had been ceded to Britain. In reference to these "lands and territories" (mentioned in the Charter, above) Mr. Justice Monk, of Lower Canada said in Connolly v. Woolrich,(78)  

(74) Ibid., citing Thorpe Charters, III, 1829. 
(75) Ibid. 
(77) Supra, footnote 19, Slattery, p. 185.
"The western boundaries have never been clearly settled or defined by judicial decision or otherwise". In the British Columbia case of Sheppard v. Sheppard (79) Martin J., in holding that the limits of Rupert's land did not extend to what became British Columbia nevertheless included within such boundaries "the present Provinces of Manitoba, Alberta and Saskatchewan (and much more) granted to them by their Charter of 2nd May, 1670." Arguably such lands were not within British Sovereignty as of 1763.

The Hudson's Bay territory clearly can be brought within clause 2(ii) of the Royal Proclamation as a matter of legal construction. The territory granted to the Hudson's Bay Company is included in the expression "any of Our other Colonies or Plantations in America" by virtue of the words in the Company's Charter of 1670 "that the said lands be henceforth reckoned and reputed as one of Our Plantations or Colonies in America called 'Rupert's Land'". (80) Indian held lands within the boundaries of company land could not be granted away until some further Imperial edict in this regard (clause 2(ii)).

What areas, then did the Hudson's Bay Company text of 1670 encompass? This is a difficult question to answer with any degree of certainty. Slattery has reviewed various options and concludes that "considering the close association between the

(79) (1908), 13 B.C.R. 486 at 496.
Charte of 1670 and the earlier attempts at discovering a Northwest Passage, there would seem to be some basis, *prima facie* for adopting an interpretation that extends its geographic reach to the Arctic drainage basin, thus including lands further west."(81) In 1719 Britain officially presented to France a claim to all territories north of the 49th parallel west of Lake Mistassini. At this time Britain thus asserted exclusive rights to the whole of Western Canada north of the 49th parallel. British representatives were directed to claim all lands north of a line drawn from the coast of Labrador at 58 1/2 degrees north latitude running in a south westerly direction so as to bisect Lake Mitassini, and then indefinitely west along the 49 degree parallel.(82) At this time then the Company asserted rights to the whole of western Canada north of 49 degrees latitude. One scholar has noted that in 1763 there were two common versions of the southern limit of Rupert's Land west of Lake Superior.(83) One he says "had the boundary proceed indefinitely west along the 49 degree north latitude" and points to the contemporary maps of Bowan, Kitchen and others as evidencing this. On another contemporary map (Mitchell) the southern limit is drawn following the height of the land -- from the western end of Superior the undulating line on Mitchell's map drops from almost 51 degrees

(81) *Supra*, footnote 19, Slattery, p. 186.


north to about 49 degrees north when it leaves the map just north of the Lake of the Woods.

On either account the western boundary was unspecified. There were no competing claims in 1763 from other European nations that suggest one should be implied. Arguably then clause 2 of the Proclamation's Indian provisions operates to protect lands in Indian possession above 49 degrees north latitude indefinitely west. (84)

Various arguments have been raised to suggest that the Hudson's Bay territory did not fall within the scope of clause 2(ii) or (iii) (see p. 40 above). Firstly the clause prohibits land grants and as one scholar has pointed out, settlement had been prohibited by the Hudson's Bay since 1680. (85) However there was nothing to prevent the Hudson's Bay Company from altering this provision. By their Charter of 1670 the Hudson's Bay Company were allowed "to erect and build such castles, fortifications, forts, garrisons, colonies or plantations, towns or villages" as they should think fit within the territory granted to them. (86) In 1763, the territory granted to the


(85) Supra, footnote 83 at p. 22.

Hudson's Bay Company was unique among the various jurisdictions in British North America in that its only non-native inhabitants were Company servants whose contracts of service debarred them from private trade. The company's right to maintain this situation rested on the following words in their Charter from Charles II:

And further, of our more especial grace, we have condescended and granted, and by these presents, forms, our heirs and successors, do grant unto the said governor and company, and their successors, that we our heirs and successors will not grant liberty, licence or power to any person, or persons whatsoever, contrary to the tenor of these our letters patent, to trade, traffic or or inhabit!, unto or upon any of the territories, limits, or places afore specified, contrary to the true meaning of these present, without the consent of the said Governor and Company or the most part of them...

It would thus seem to be completely at the company's discretion whether settlement was to be allowed or prohibited.

Clause 2(ii) and (iii) of Part IV of the Proclamation are thus necessary and applicable to the Hudson's Bay Co. territory to prohibit the Company from giving land grants on lands in Indian possession which were unceded and unpurchased by the Crown. It is certainly then less of an anomaly that clause 2(i), which would prima facie have the sole purpose of preventing the new colonies, with defined boundaries, from issuing extra territorial land grants, a power denied them at law, was included.

In the "Plan for the future management of Indian Affairs"
issued by the Lords of Trade in 1764,(87) none of the tribes inhabiting the Hudson's Bay territory were listed in the Appendices. This omission is particularly striking when it is realized that two of the tribes involved -- the Assinboines and the Cree -- were well known and their hunting grounds were invariably indicated on contemporary maps (including Bowens) as being in Rupert's Land.(88) Professor Greenwood has argued that since the appendix listed all the Indian tribes save those in Rupert's Land, thought to be within British territories in North America, their omission may be taken as an exclusion of the Hudson's Bay Territory.

In answer Article 2 of the Plan provided for the division of "the British Dominion in North America" into two districts "to comprehend and include" the several tribes of Indians mentioned in the Appendix. It was thus not seen to be exhaustive of the tribes of Indians then in British territories -- it was not on its words limited to the mentioned tribes. And not only was the 1764 list itself not exhaustive, it already included tribes which had little, if any, contact with the British at the time of the Proclamation a year earlier.(89)

-----------------------------

(87) See Narvey supra, footnote 59, p. 139. footnote 51.

(88) Supra, footnote 83, at p. 25.

For the foregoing reason it seems that the better view is that the Hudson's Bay territory was comprehended by the general terms "colonies and plantations" even if excluded from the description of 'Indian Country'. Again the Indians of the Hudson's Bay territories should not, if at all possible the words of the proclamation, be denied its benefits solely on grounds of a narrow construction.

Narvey holds that as a matter of intention the Proclamation in the underlined phrase of clause 2 above recognized, confirmed and declared Indian title over all unceded and unpurchased land. "Whatever". That is:

... all lands in the possession of the Indians as their hunting grounds were intended to be ipso facto reserved to them .... until ceded to or purchased by competent authority.
4. **Prospective Application of the Royal Proclamation of 1763**

(i) **Introduction**

The argument is here made that even if the Indian land provisions of the Royal Proclamation of 1763 did not apply on their terms to Western Canada, such areas were nevertheless brought within their scope upon the assertion of British Sovereignty over this area. As a law of manifestly universal policy referable to a major Crown Prerogative it was "a law which followed the flag as England assumed jurisdiction over newly discovered or acquired lands or territories" applying *proprio vigore* to bind such territories regardless of their date of acquisition, a rule contained in part in the *Colonial Laws Validity Act, 1865*. Such a conclusion is not foreclosed by the wording of the text and is clearly consistent with its spirit as determined from an examination of the state of affairs which led to the passage of the statute and the evil it was designed to remedy. From this point of view the specific problems of legal interpretation as to its geographic scope as of 1763, assume a secondary place.

---

(90) See discussion *infra* p. 144 et seq.

(91) *Supra*, footnote 8, 34 D.L.R. (3d) 145 at p. 203 per Mr. Justice Hall.

(92) See generally Slattery *supra*, footnote 19, ch's. 11, 14.
It will elsewhere be argued that colonial legislatures were powerless to interfere with any of the provisions of the Royal Proclamation both because of the protection afforded such major Prerogative instruments by the Colonial Laws Validity Act, 1865,(93) and upon the further ground that interference with a major Prerogative would be repugnant "not merely to the law of England but to the authority of the Crown as an essential part of the countries constitution."(94)

Legislation under the prerogative powers of the Crown is, like statutes, original in character(95) and is to be construed in like manner. The Proclamation is on its face ambiguous as to its geographic reach and temporal application, many of its provisions being framed in general terms. Although it did not expressly address its application to future cases such does not preclude its application thereto. The Proclamation must be construed in a manner consistent with its spirit and the legislative intent as to cases not explicitly provided for, discovered, or presumed in light of its purpose or object according to the well-known rules of statutory construction.

(ii) Construction of the Territorial Effect of the Royal Proclamation's Indian Provisions in Light of Their Legislative Purpose

--------------------

(93) See discussion infra p. 211 et seq.


When seeking to construe legislation, a fundamental distinction to be made is that between intention as meaning and intention as goal. The latter may necessarily define the meaning of the words used, especially where general expressions, without reference to particular cases, are used. The construction placed upon such general words should then be that best designed to reach all cases within the mischief to be remedied.

Recognition of the importance of legislative purpose was first expressed in Heydons case, an Exchequer Court decision of 1584, where it was stated in Lord Coke's report that:

And it was resolved by them [the Barons of the Exchequer], that for the sure and true interpretation of the statutes in general (be they penal or beneficial, restrictive or enlarging of the common law,) four things are to be discerned and considered:

1st. What was the common law before the making of the Act. 2nd. What was the mischief and defect for which the common law did not provide. 3rd. What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth. And, 4th. The true reason of the remedy; and then the office of all the Judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and pro privato commodo, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, pro bono publico. (96)

The courts have since made forceful declarations advocating the primacy of legislative purpose as an interpretive tool. This was clearly expressed in Williams v. Box (97) by Idington J:

(96) (1584), 3 Co. Rep. 7a, 7b, 76 E.R. 637 at 638.
(97) (1910), 44 S.C.R. 1, 10 and see Hirsch v. Protestant Board
If we would interpret correctly the meaning of any statute or other writing we must understand what those forming it were about, and the purpose it was intended to execute.

The rules in Heydon's Case have been applied in the construction of constitutional provisions.(98)

The 'mischief rule' has since been codified in various Canadian Interpretation Acts. Section 11 of the federal Interpretation Act reads:

Every enactment shall be deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.(99)

This is derived from the original Canadian Interpretation Act of 1849: (100)

...and every such Act and every provision or enactment thereof, shall be deemed remedial, whether its immediate purport be to direct the

of School Commissioner of Montreal, [1926] S.C.R. 246 at 266 where Mr. Justice Anglin cited with approval the words of Lord Blackburn in Bradlaugh v. Clarke (1883), 8 A.C. 354 at 372:

All statutes are to be construed by the Courts so as to give effect to the intention which is expressed by the words used in the statute. But that is not to be discovered by considering these words in the abstract, but by inquiring what is the intention expressed by those words used in a statute with reference to the subject matter and for the object with which that statute was made; it being a question to be determined by the Court, and a very important one, what was the object for which it appears that the statute was made.

doing of anything which the legislature may
dee m to be for the public good or to prevent or
punish the doing of anything which it may deem
c ontary to the public good, and shall
accordingly receive such fair, large and
liberal construction and interpretation as will
best ensure the attainment of the object of the Act
and of such provision or enactment,
according to their true intent, meaning and
spirit...

Thus the evil or abuse that was to be remedied must be
identified, so that interpretation or construction may follow the
"intent, meaning and spirit" of the enactment. It would appear
that Parliament, by codifying the Mischief Rule, sought to remedy
an overly strict and literal interpretation of statutes. Of
course codification of the mischief rule does not absolve the
interpreter of the obligation to comply with the written
expression of the text whose words may circumscribe the full
application of the rule. (101) However where the instrument to be
construed is one of public concern the words used should be
liberally interpreted to best attain the legislative
purpose. (102) Where,, as here the instrument relates to Indians
and protection of their land rights, the necessity for such a

(98) Federated Saw Mill Employes v. James Moore and Son (1908), 8
C.L.R. 465, at 486.

(99) Federal Interpretation Act, s. 11.

(100) 12 Vict., c. 10, s. 5.

(101) See Wellesley Hospital v. Lawson, [1978] 1 S.C.R. 893 at
904 where the Court states: "There is nothing in this
provision that would tend to displace the rule that the
intention of the legislature is to be gathered from the
words used."

(102) See Mackenzie v. Mackenzie (1951), 5 De G. & Sm. 338; 21,
L.J. Ch. 385; 64 E.R. 1143 concerning various Annuity Acts
and Shipping Acts.
liberal construction, in favour of the Indians, is even stronger.(103)

Before mounting an argument for a prospective application of the Indian provision of the Proclamation then it is necessary to address the mischief sought to be remedied thereby. The preamble to Part IV of the Proclamation states:

And whereas it is just and reasonable, and essential to Our Interest and Security of Our Colonies, that the several Nations or Tribes of Indians, with whom we are connected, and who live under Our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories, as not having been ceded to, or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds;

As noted, preambles, especially in earlier Acts, have been generally regarded as of great importance as guides to construction, being a recital of the facts operative on the mind of the framers at the time of enactment and therefore of the legislative intent of the enacting provisions.(104) Where the intent is expressed in very general terms, such as these, they are particularly vulnerable to their legal environment and may be limited by the particular enacting provisions. The actual language of the Indian provisions will be dealt with in more detail later: suffice it to say here that they lay out a general scheme for the protection of Indian interests compatible with the


broad purpose recited in the preamble. The latter describes the Indian beneficiaries of Part IV as "The several Nations or Tribes of Indians, with whom We are connected, and who live under Our Protection", and the lands affected as "Such Parts of Our Dominions and Territories, as not having been ceded to, or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds." It thus recognized 'Indian title' to land in Indian possession throughout British North America and in the ensuing provisions aimed at a uniform procedure for Crown purchase of such lands with Indian consent. As one scholar notes:

> It may be remembered that the measures in Part IV are for the most part hardly novel. They represent a consolidation of principles and practices already prevailing in many old colonies. The intention was to bring the various British holdings in North America, both new and old, under a uniform regime regarding Indian lands, and to infuse the whole with policies conceived in a global manner, rather than piecemeal and haphazardly. There is no indication that Indian lands acquired after October 1763 were meant to be treated differently from those acquired previously.(105)

Given then that one of the chief purposes of the Proclamation was to establish a uniform Indian policy, is it reasonable that the intention of the Crown in this regard should be considered as fixed as of 1763 and to have no relevance or application to situations arising subsequent to this date? There is no express language in the Proclamation that suggests such a

----------------------

limited temporal application. Moreover, to impute such limited intention to the Crown is to deny both the history of the legislation and the dynamics of change in the late 18th century in British North America. In fact, colonial policy and events subsequent to 1763 evidence a reliance on the principles laid down in the Proclamation. The Plan of 1764 and the numerous treaties, grants and surrenders were made with the Indians on terms and conditions compatible with the Proclamations provisions. The 1847 Commission on Indian Affairs in Canada concluded in relation to the Crown's position vis a vis lands possessed by the Indians that:

Although the Crown claims the territorial state and eminent dominion in Canada, as in other of the older colonies, it has ever since its possession of the province, conceded to the Indians the right to occupancy upon their old hunting grounds, and their claim to compensation for its surrender, reserving to itself the exclusive privilege of treating with them for the surrender or purchase of any portion of the land. This is distinctly laid down in the Proclamation of 1763, and the principle has since been generally acknowledged and rarely infringed upon by the government. (106)

It is clear that the Proclamations strictures as to aboriginal title in general were thought to apply to Indian land policy in the Province of British Columbia. The federal government exercised its power of disallowment of provincial laws in relation to the B.C. Land act of 1874 on the basis that it did not adequately recognize the aboriginal rights of the native

-------------------

peoples of British Columbia as expressed in the Proclamation.

The Minister of Justice stated in his opinion that:

There is no shadow of a doubt, that from the earliest times England has always felt it imperative to meet the Indians in Council, and to obtain surrenders of tracts of Canada as from time to time were required for the purposes of settlement.

The Minister went on to recite the provisions of the Royal Proclamation and concluded:

The undersigned feels that he cannot do otherwise than advise that Act in question is objectionable, as tending to deal with lands which are assured to be the absolute property of the Province, an assumption which completely ignores, as applicable to the Indians of British Columbia, the honour and good faith which the Crown has, in all other cases since its sovereignty in North America, dealt with their various Indian tribes.

Clearly, as of 1874, insofar as the federal Minister of Justice was concerned, aboriginal title had not been extinguished in British Columbia. The ongoing constitutional significance of the Proclamation is evidenced by its inclusion in the 1982 Constitution Act.

The purpose, then, of the Indian provisions of the Proclamation was clearly to protect Indian land from unlawful white encroachment and to govern strictly the procedure to be adopted when such was alienated to the Crown. Such purpose must inform the inquiry into the construction of the Proclamation and more particularly its prospective application.

(iii) Basic Rules of Statutory Construction re Temporal Application
The rule universally adopted as the construction of wills, statutes and indeed all written instruments, is that the grammatical and ordinary sense of the word, at the time of their enactment,(107) is to be adhered to unless such leads to some absurdity, repugnance or inconsistency with the rest of the instrument.(108) But merely because the meaning of legislation at the time of its enactment must be respected, in no way suggests that the statute's effect is confined to material or social facts or events then existing. It is necessary to distinguish the meaning of a term from the things that may be included in its ambit.

It is a rule of statutory construction that a statute is to be considered as always speaking and applicable to circumstances as they arise (this rule is not inconsistent with the rule that an Act must be construed the day after it was passed). This rule is statutorily recognized in various interpretation Acts: "the law is ever commanding", and "whatever be the tense of the verb or verbs contained in a provision, such provision shall be deemed to be in force at all times and under all circumstances to which it may apply."(109) The use of the present tense in legislative


drafting is explained primarily by technical reasons -- it provides no basis for conclusions about the temporal operation of the law. The fact that a law is written in the present does not imply that it should receive a retroactive effect or be considered declaratory. (110) And it should not be presumed that the effect of the legislation is exhausted after its initial application, normally a statute applies as frequently as circumstances require. There is no presumption that a statute applies only to persons or property existing at the time of its enactment. It may govern new situations if its spirit so requires and its wording does not explicitly indicate the contrary. (111) Not only can a statute apply to situations which do not exist when it was enacted, it can also govern phenomena which were virtually unimaginable at the time. Thus, if justified by its aim and compatible with its purpose, a statute will apply to any future situations that fall within the ambit of its words. (112)

In addition, there is a presumption that where a statute is beneficial and remedial it should be liberally construed, and doubtful expressions interpreted in the largest sense which the words will properly bear. Thus a public enactment employing

--------------------


general words is usually understood to apply to all entities falling within its scope at any time during its life, even to things which did not exist and could not have been anticipated at the time of enactment, unless a narrower temporal compass is expressly stated or necessarily implied.\(^{(113)}\)

The subject of extending statutes by inference to include cases not originally contemplated is one which has given rise to several decisions, the leading characteristic of which is, that the earlier statute deals with a genus within which a new species is brought by a subsequent act or circumstance.

The **Telegraph Act 1869** was passed before telephones were invented, but in *A.G. v. Edison Telephone Co.*\(^{(114)}\) it was held that the privileges the Act conferred on the Postmaster-General extended to messages sent by phone. Thus Steven J., said:

> Of course no one suspects that the legislature intended to refer specifically to telephones many years before they were invented, but it is highly probable that they would, and it seems to us that they actually did, use language embracing future discoveries as to the use of electricity for the purpose of conveying intelligence.

The same has been held to apply to social changes. Thus a Quebec bylaw, referring to the "family" was extended to cover "foster families".\(^{(115)}\) It has been held that expressions such as

\[^{113}\text{Maxwell Statutes 12th ed., 102, cited in Slattery supra, footnote 9, p. 336 and see Dawes v. Painter (1674), 89 E.R. 126.}\]

\[^{114}\text{(1860), 6 Q.B.D. 244.}\]

\[^{115}\text{Ville de St-Hubert v. Riberdy, [1977] Que. S.C. 409, cited in Cote supra, footnote 109, at p. 205.}\]
"practice of medicine" (116) and farming (117) should be interpreted in a manner consistent with social development and not by reference to the situation at the time of enactment. (118)

This same reasoning was applied in Associated Newspapers Ltd. v. City of London Corporation (119) in relation to taxes, a matter usually subject to a strict interpretation. The issue in question was whether the Act of 7 Geo. III, c. 37, s. 51, which provided that land reclaimed from part of the bed of the Thames should vest in the owners of adjoining grounds "free from all taxes and assessments whatsoever", referred only to taxes existing at the time of the Act or to taxes subsequently imposed. The English Court of Appeal had held the exemption did not extend to future rates and taxes, limiting its operation to taxes existing when the Act was passed, based largely on the settled construction of such words.

The House of Lords reversed this judgment, finding "the natural meaning" of "all taxes and assessments whatsoever" extended to include future as well as existing rates. In so doing the Court noted that the words appear in a public statute, that the phrase contains 'words of widest possible meaning' and

-------------------------

(116) Re Ontario Medical Act (1907), 13 O.L.R. 501, at 506-7 (Ont. C.A.) per Moss J. (See Cote p. 205).


importantly that the statute, like any other statute, could be repealed by subsequent Act. Lord Sumner, dissenting, gave the words a more limited construction holding that "it is more natural to read the words as only purporting to do that which the Legislature, when it uses them, is competent to do..."(120) and held that it is not competent to bind future legislation. He does, however, note that this consideration may be set aside where the exemption appears in an Act of fundamental, general public concern citing among other examples the exemption given in the Merchant Shipping Act, 1894, s. 731.(121) There are many other examples of Acts being extended to cover future situations falling naturally within its terms.

In Williams v. Paine(122) an Act of Congress to quiet titles in favour of persons in actual possession of lands in the district was applied prospectively to benefit persons coming into possession of lands subsequent to the passing of the Act.

So also, the operation of a law for regulating "all existing railroad corporations" in respect to requiring them to exercise certain care and to take certain precautions for the protection of the public, was held to extend and control railroads incorporated after as well as before its passage (unless exception had been made in their charters).(123) And a statutory

(120) Ibid. at 452, per Lord Sumner.
(121) Ibid.
(123) Indianapolis and St. L.R. Co. v. Blackram, 63 111, 117.
provision that an alien "who shall have resided within the state two years" shall be capable of holding and transmitting real estate the same as a citizen, was held to apply to future as well as to past residence.\(^{(124)}\) In so holding, the court focused on the obvious intention of the legislature even though a strict grammatical interpretation would have favoured a narrowed interpretation.

Further in New Jersey it was held that a statute authorizing cities "already divided into wards" to subdivide the wards when they reached a certain size, was not confined to cities which had been divided into wards before the passage of the statute.\(^{(125)}\)

(iv) **Prospective Application of Constitutional Documents**

The argument favouring prospective application of legislation is particularly relevant where the document to be construed is constitutional in nature. No one would suggest that a written constitution should be construed for all time as if the court were sitting the day after it was enacted. Lord Jowett stated this clearly in reference to the question of whether the British North America Act 1867\(^{(126)}\) empowered the Canadian legislature to abolish the right of appeal from Canadian courts to the Privy Council;

\-------------------


\(^{(125)}\) *Wood v. Atlantic City* 56 N.J. Law.

\(^{(126)}\) 30 & 31 Vict. c. 3 (Imp.).
It is, as their Lordships think, irrelevant that the question is one which might have seemed unreal at the date of the British North America Act. To such an organic statute the flexible interpretation must be given that changing circumstances require.\(^{(127)}\)

Lord Sankey commented to similar effect that "the B.N.A. Act planted in Canada a living tree capable of growth and expansion within its natural limits."\(^{(128)}\) Professor Hogg, speaking of the distribution of powers under the B.N.A. Act 1867, states: "it goes without saying that the framers of the B.N.A. Act could not foresee every kind of law which has subsequently been enacted; nor could they foresee social, economic and technological developments which have required novel forms of regulation, but ...

... it is well established that the general language used to describe the classes of subjects (or heads of power) is not to be frozen in the sense in which it would have been understood in 1867."\(^{(129)}\) He cites as examples the court's readiness to include interprovincial telephone systems under 92(10)(a) of the B.N.A. Act, although the telephone system was unknown in 1867;\(^{(130)}\) the phrase "criminal law" (s. 91(27)) "is not confined to what was


criminal by the law of England or of any province in 1867;(131) and "banking" (s. 91(15)) is not confined to "the extent and kind of business actually carried on by banks in Canada in 1867."(132) The Courts, moreover, were ready to apply a progressive interpretation even where to do so meant extending, or rather conferring a new, jurisdiction. Duff C.J., held in the Adoption Reference case (1983)(133) that jurisdiction was "not to be frozen at the limits in existence in 1867" where such increased jurisdiction could come normally within the terms of the Act.(134) The court's readiness to adopt the statute to changing circumstances is even more clearly illustrated in relation to the constitutional validity of administrative tribunals, clearly not in existence as of 1867, and arguably offending the s. 96 court's jurisdiction. The Privy Council in Labour Relations Board of Saskatchewan v. John East Iron Works framed the question broadly and applied a very liberal test: "were the functions of the board analogous to the functions of a superior, district or county court", implying that new kinds of jurisdiction, since 1867, need not be exercised by higher courts. They went on to find the board was validly constituted making possible the growth of provincially-appointed tribunals to exercise jurisdiction in


areas of enlarged provincial government responsibilities. The court examined not merely the jurisdiction alone but its context and setting and conformity to broad legislative purpose. It is included here to show that the courts, in the case of instruments of constitutional significance, are willing to construe them progressively. Their application to a new situation depends to a large extent upon whether such comes within a liberal interpretation of the terms used and whether such is consistent with the aims and purposes of the legislation.

The words of the B.N.A. Act have thus been given a progressive interpretation by the courts so as to continually adapt to new conditions and ideas. In so doing, the Courts, Professor Hogg notes, have generally rejected the legislative history of the B.N.A. Act as an aid to its construction(135) and although he sees little reason for its exclusion, concludes that as time goes by this is of little relevance as "the principles of progressive interpretation undermine the relevance of the material." The point is that the B.N.A. Act is a "constituent" or "organic" statute which has to provide the basis for the entire government of a nation over a long period of time and an inflexible interpretation rooted in the past would only serve to withhold necessary powers from the Parliament or legislature and defeat its purpose.(136)


(136) R. v. Big M Brug Mart Ltd., 1985 1 S.C.R. 295, [1985] 3 W.W.R. 481, 37 Alta. L.R. (2d) 97; Southam Inc. v. Dir. of
It is elsewhere argued that the Royal Proclamation of 1763 fulfilled a similar function in relation to the Indian peoples of Canada, as is evidenced by its mention in the Constitution Act, 1982. It was a "constituent" instrument expressed in general terms, well able to include and make provision for new (and even unforeseen) circumstances. Like the B.N.A. Act, 1867 it should not be foreclosed in its application by the limits of British sovereignty in existence in 1763. As already stated, the applicability of a statute to a new situation depends in large part upon whether it fits within the aims or purposes of the legislation and the terms used to express such.

Clearly, legislation can be expressed so as to exclude a prospective application. There appears to be nothing in the actual language of the enacting clauses of the Proclamation to defeat a prospective interpretation. A justification for giving an extended meaning to its words of public policy is that the law differently interpreted would fail to encompass a large proportion of Indians in possession of lands, and allow wholesale alienation to private subjects. Clearly the purpose of the Act was to prevent such and pave the way for a "just and equitable" determination of this right.

(v) **Extension of Territorial Limits of British Jurisdiction**

-------------

A legislature is presumed to enact for persons, property and events within the territorial boundaries of its jurisdiction. Prima facie an English statute affects only English subjects or foreigners within the allegiance of the English Crown(137) and in the absence of words to the contrary express or implied, it is to be construed as applying only to the United Kingdom. A statute applicable to Her Majesty's dominions is, if the context permits, to be construed to apply to all British Subjects(138) throughout such territory(139) unless such an application is circumscribed in the enacting provisions.

There are, however, great difficulties in practice associated with determining a statute's actual territorial effect. This is obvious when discussing the Proclamation's intended geographic reach as of 1763 - the boundaries to British jurisdiction being even at that time uncertain (see discussion above on geographic scope).

It is clear that it lies within the Crown's prerogative to make declarations of sovereignty from time to time over new areas. Such will normally conform to the international law current at the time but in any event, municipal courts are bound


(139) This is set out in the form of a presumption in the federal Interpretation Act, s. 9(1): "Every enactment applies to the whole of Canada, unless it is otherwise expressed therein".
to enforce such declarations.\footnote{140} The question then becomes whether Imperial legislation expressed to apply, in general terms to British dominions, applies only so as to bind those territories falling within such definition at the time of the enactment or whether it applies to bind those territories falling within such definition at any subsequent period.

In \textit{R. v. Kent Justices}\footnote{141} the courts had to determine the meaning of "territorial waters" in the \textit{Wireless Telegraphy Act, 1949} the expression not having been defined in the Act. The Court concluded, Salmon L.J., dissenting, that the words must mean territorial waters over which from time to time the Crown may declare sovereignty. Lord Parker reached this conclusion firstly on the basis that if it was intended that the expression "territorial waters" was to be confined to a precise limit, then known, it would have been perfectly easy to so provide and no such specific limitation was given in the Act. Secondly that the boundaries of territorial waters "must inevitably have been expected to change from time to time and may do so in the future",\footnote{142} thus implying it could not have been the intention of the legislature to fix a limit the application of the Act, even though Parliament in 1949 did not have in mind the particular future situation that did arise. Thirdly, the Court noted that the matter of the extension of sovereignty over the

\footnote{140} [1967] 1 All E.R. 560.
\footnote{141} Ibid.
\footnote{142} Ibid., per Lord Parker at p. 564.
open seas is a matter for the Crown from time to time to determine under the prerogative and that such could surely be done without the need for specific legislation. It would be anomalous to recognize this and yet leave such new areas unregulated. The better position is clearly that the Wireless Telegraphy Act, 1949 along with all Imperial legislation expressed in general terms would flow into such areas ipso facto upon the declaration of sovereignty. The Courts held, in spite of the forceful argument to the contrary, that because of the penal nature of the provision in question that it should be construed strictly because of the need for certainty on the law where criminal sanctions were to be imposed.

This holding was later approved in Post Office v. Estuary Radio, Ltd.; (143) the court there holding that where an Act of Parliament refers to the United Kingdom or the territorial waters adjacent thereto, those expressions are to be construed prima facie as including such areas of land or sea as from time to time are formally declared by the Crown to be subject to its Sovereignty and jurisdiction as part of the United Kingdom or its territorial waters, rather than the precise area of these at the moment when the Act received Royal assent. Lord Diplock, noted that it lay within the prerogative power of the Crown to extend its sovereignty and jurisdiction to areas of land or sea over which it had not previously claimed or exercised sovereignty or jurisdiction,(144) and the area to which an Act of Parliament

(143) [1967] 3 All E.R. 663.
applies *prima facie* varies accordingly.

There is nothing to distinguish these cases from the case where the Crown, under the prerogative, annexes new territory to territory over which it presently asserts jurisdiction. Thus where territory is annexed to existing British dominions *prima facie* Imperial laws expressed in general terms, to apply to Her Majesty's dominions will extent *proprio vigore* to the new territories. Such is consistent with the opinions of various law officers in this regard cited by Slattery.(145)

Senegal was annexed to British possessions in Africa subsequent to the *Imperial Act of 1750 for Extending the African Trade.*(146) Section 1 of the Act provided that all British subjects might lawfully trade "to and from any Port or Place in Africa, between the Port of Sallee in South Barbary, and the Cape of Good Hope ... without any restraint whatsoever, save as herein expressed". Senegal was within the expressed limits though annexed subsequent to this enactment. It was implicit in the opinion of the law officers as to the Crown's powers in Senegal that the Act applied there to govern trade relations.(147)

Of similar effect is an opinion given in 1839 on the effect of the proposed annexation of New Zealand to Australia.(148) The


(145) *Supra,* footnote 19, Slattery at p. 342 et seq.

(146) 23 Geo. II, c. 31, s. 1 (Imperial) 1750.

(147) *Supra,* footnote 19, Slattery, p. 342-3 citing (footnote 51) *J.B.T.* 1759-63, 324 and notes that the opinion was revived and reapplied by Yorke, as Attorney General in 1763.

1828 Imperial Act(149) establishing the Legislative Council of Australia in section 20 refers to the necessity of furnishing laws for the "said Colonies of New South Wales and Van Dieman's Land, and the Dependencies thereof", and provides for the establishment of a Council in "New South Wales and Van Dieman's Land respectively". The Attorney and Solicitor-General Campbell and Rolfe stated in their opinion that the word "Dependencies", "must receive an extended construction so as to include future as well as then existing dependencies" so that the legislative authority in question would extend to New Zealand if annexed to New South Wales.

It seems the same holds true where a protectorate is annexed to British territory. Where an Imperial Act was expressed to apply to the whole or part of Her Majesty's dominions but did not extend to any protectorate unless applied specifically by Order in Council under a statutory power, an Order in Council making such an extension is unnecessary if the protectorate is annexed - the Act then applying to the territory of its own force. An example of this is to be found in "the omission of references to certain territories (Cyprus, Kenya Colony, Gilbert and Ellice Islands) from the revised schedule substituted by S.R. & O. 1922 No. 1418 for that contained in the Order in Council dated 18th October 1909, S.R. & O. 1909, No. 1230, extending the Evidence (Colonial Statutes) Act, 1907(150) to those territories, which

(149) 9 Geo. IV, c. 83.

(150) 7 Edw. 7, c. 16.
were protectorates at the date of the Original Order.(151)

(vi) **Creation of New Colonies and Plantations**

It would seem that the same reasoning should apply to govern the situation where Imperial legislation is expressed to apply, in general terms, to "Colonies and Plantations", i.e. that such legislation binds *proprio vigore* those colonies and plantations coming to existence subsequent to the passage of the legislation to the extent that the legislation is applicable to the new situation and not specifically excluded on its terms. At least one writer offers a definition of 'colony' or 'plantation' which includes in the definition of such any land, territory island or possession beyond the sea "now belonging to, or under the dominion of the Crown of Great Britain or which may hereafter become permanently so".(152)

Whether a statute expressed in general terms is deemed to extend of its own force to later acquired territories coming within the description must be informed, in large part, by the general purpose and policy of the legislation in question -- whether it was passed to curb a specific evil of purely local character or whether it was aimed at a general evil of major Imperial concern for which uniform treatment was required under Imperial supervision. Clarke, writing in 1834 confirms this

(151) See Hals. (3d) Vol. 5 - Commonwealth and Dependencies at p. 703.

view:

All statutes which are manifestly of universal policy, and intended to affect all our transmarine possessions, at whatever period they shall be acquired, such for example, as navigation acts, or the acts for abolishing the slave trade and slavery ... will upon the conquest or cession, ipso facto, and independently of posterior legislation, be binding upon a conquered or ceded colony.(153)

Statutes of universal application would apply ipso facto in settled colonies.(154) Lord Mansfield in Campbell v. Hall cited as an example of such 'universal' statutes the Acts of Trade but the same reasoning would apply to extend all Imperial laws expressed in the same general terms and embodying uniform Parliamentary policy in regard to the treatment of basic problems common throughout the 'colonies and plantations'. The main ingredient being that the problem must be such as to demand Imperial supervision.

In Regina v. Middleton(155) the Imperial Chinese Passenger Act(156) was held to be in force in the colony of Victoria even though no particular colony, but that of Hong Kong, was expressly referred to in the Act. Section 1 of the Act defined the word 'colony' as including all Her Majesty's possessions abroad which are not within the government of the East India Company. There was no reference in express terms to any particular colony or

(154) See discussion, infra, p. 133 et seq.
(155) Regina v. Middleton (1868), 8 Comwlth. 771.
(156) 18 & 18 Vic., cap. civ.
port outside the colony of Hong Kong. Section 13 enacted that offences and misdemeanours were to be tried as provided by "The Merchant Shipping Act", 1854, Pat 10, s. 518 (17 & 18 Vic., cap. civ) and Part 10 thereof is extended by s. 517 of the same Act to "all British dominions not specifically excepted".

In finding that the Chinese Passenger Act was in force in Victoria Stawell C.J. held that "The Imperial Parliament passed the Act, as relating to matters which required the exercise of the supreme legislative power over the whole British dominions."(157) And that "no doubt, legislation of the British Parliament is not to apply to this colony, unless by express words, or by necessary intendment in this case, it applies by necessary intendment."(158)

There is scant judicial authority upon the question of the application of Imperial Acts, expressed in general terms to apply to the North American colonies, to colonies erected subsequent to the enactment. The Merchant Shipping Act, 1786, was held to be applicable to Ontario.(159) The Imperial Act 5 Geo. 2, c. 7 (1732) (an Act for the more early recovery of debts in His Majesty's Plantations and Colonies in America) was held to be in force in Nova Scotia.(160) It is debatable whether the whole of Nova Scotia was in 1732 a colony of Britain and most if not

(157) Supra, footnote 155 at p. 185.

(158) Ibid., at p. 186.

(159) Torrance v. Smith (1854), 3 C.P. 411.

all of Upper Canada was a French colony until the cession to Britain in 1763. Since the Act is expressed in general terms to apply to the Plantations and Colonies in America it seems likely it was given a prospective application, binding all colonies coming at any time within its ambit though such is not made clear in the decisions.

The question of the extension to Quebec of Imperial Acts to colonies erected later was the subject of various law officers' opinions, particularly with reference to the application of the various Imperial Acts relating to trade and navigation.

The issue was raised in relation to the conquered island of Dominica. Goods (sugars) were seized for an alleged violation of the Act for Preventing Frauds (7 & 8 William III, c. 22) and 6 the Molasses Act, Geo. II, c. 13, in that certain sugars were landed in Dominica without a warrant signed by a collector to the effect that the required duty had been paid. The case came on appeal before the King in Council in 1766. (162) Charles Yorke, who appeared for the respondent, asserted that from the moment of conquest the island was "subject to these and other laws from the Navigation Act which have words of futurity." (163) This position was accepted by Lord President Worthington who stated in a relation to the extension of the Acts of Trade that because the legislature by a "proper description" and "talk of a future

(161) Supra, footnote 19, Slattery, p. 247 et seq.


(163) Ibid.
possession" expressed an intention to bind future acquisitions
the said laws "take place as soon as the Crown has an actual
indisputable Title."(164) The emphasis upon possession was
necessary to bring the cases within the words of the Navigation
Act(165) which defined the colonies as "Lands, Islands,
Plantations or Territories" to His Majesty belonging or in his
possession" (and similar phraseology in the Act for Preventing
Frauds, (7 & 8 William III, c. 22).

The same reasoning was used to extend various Imperial acts
of trade without express words of extension to future possessions
presumably on the basis that such Acts of manifestly universal
application necessarily had an implicit extension.

Thus a law officer's opinion stated that the Acts of Tonnage
& Poundage of 1660, and subsequent acts relating to the various
scales of duties for imports from Britain, and foreign
plantations, should apply to Guadeloupe, conquered from the
French in 1759:

I am of opinion, that Guadaloupe is to be
considered as a plantation, or territory
belonging to the King, by conquest; and I am
also of opinion that, provided the requisites
of the act of navigation, and the subsequent
laws relative to the same subject matter are
complied with, the produce ought to be charged
with the same duties, as if imported from
plantations originally British. The act of
navigation relies not only to the plantations
and territories belonging to, or in the
possession of, the Crown, at that time, but, to
future acquisition; and the later acts, which
relax, or vary, in some respects, the

_______________

(164) Ibid., at p. 498.

(165) 12 Chas. 11, c. 4 (1660).
provisions of it, are equally extensive....(166)

Slattery notes that the particular act in question contained nothing which explicitly extended its application to after-acquired colonies, it simply employed general phrases such as "the English plantations" in its book of rates.(167)

A further opinion on the extension of Acts of parliament to the colonies, when they are mentioned, generally, as dominions of the Crown is given by the Attorney and Solicitor-Generals, De Grey, and Willes, in 1767 in relation to the extension of the Act of 12 Anne stat. 2, c. 18 for Preserving Ships Stranded upon Coasts of This Kingdom or Any Other of Her Majesty's Dominions.(168) They opined that "as the title of the act of 12th of Ann. Stat. 2, ch. 18 expressly imports to be an act for preserving ships and goods forced on shore, or stranded upon the coasts of this Kingdom, or any other of Her Majesty's dominions, and the enacting part has words extending to Her Majesty's dominions in general, the said Act extends to, and is in force in, Her Majesty's colonies and plantations in America, notwithstanding the special promulgation of the law; and some other provisions in it are applicable only to this Kingdom. (My emphasis).(169)

-----------


(167) Supra, footnote 19, Slattery, p. 347.

Thus the opinion does not differentiate between colonies acquired prior to the enactment and those established subsequent to it. Nor does the opinion give any indication that the extension relied in any part upon whether or not English law formed the basic law of the colonies. (170) And very importantly the opinion clearly suggests that because some provisions of an Imperial Act do not extend on their terms to all the colonies, it does not follow that other provisions of the same Act must meet the same fate. If any of the provisions are expressed in general terms, sufficient to bring all the colonies within their ambit, these provisions will extend and be in force in all colonize at whatever time they are acquired.

Slattery notes that Francis Maseres, the Attorney-General of Quebec, interpreted the above opinion to mean that the Act of 12th Ann (supra, p. 85) extended to Quebec, even though as he noted, the Act was made before the conquest of Quebec "and [was] not extended by express words to the future dominions of the Crown..." (171) He further notes that Maseres, in relation to the extension of Imperial Acts passed prior to the conquest of Quebec, to Quebec remarks that they:

"Extend to your Majesty's future American dominions, as well as those which belonged to the Crown of Great Britain at the times of"

----------

(169) Supra, footnote 19, Slattery, p. 201.

(170) See discussion infra, p. 128 et seq.

(171) Supra, footnote 19, Slattery p. 347-8, citing the draft of an intended report of the Governor and Council of Quebec to the King concerning the state of the laws and the Administration of Justice in that province, Feb. 1769; C.D. I, 327 at 336.
passing them, either by express words for that purpose, or by some general words that have been deemed by your Majesty's ministers and law-officers, by just construction in law, to comprehend them..."(172)

The issue arose in relation to the extension of various Imperial religious Acts. A question was asked whether the Statute of 27 Mo. Eliz. C-2 against Romish priests, stated to apply "in any part of this realm, or any other of her Majesty's dominions" applied to dominions later acquired. Attorney-General Northey was of the opinion it would so bind them:

I am of the opinion this law extends to the plantations they being dominions belonging to the realm of England, and extends to all priests, foreigners, as well as natives.(173)

A similar opinion was given in relation to the Statute of 11 Mo. William III for Preventing the Future Growth of Popery.(174)

Opinions of this time(175) treated the American plantations as 'conquests' and therefore English law as such had no application unless 'received' by Imperial or local statute, however certain

(172) Supra, footnote 19, Slattery p. 348.

(173) 1 Chalmers, Opinions, p. 2-5.

(174) Ibid.

(175) See for example Blackstone, Commentaries, 1st ed., I, at p. 105:

Our American plantations are principally of this latter sort [conquered or ceded territories] being obtained in the last century either by right of conquest and driving out the natives .... or by treaties. And therefore the common law of England, as such, has no allowance or authority there ....
statutes expressed (or necessarily implied) to bind the colonies would do so proprio vigore. Since the opinions above make no distinction as to the time of acquisition of the various American plantations it seems implicit in the opinion that such Imperial statutes bind proprio vigore all territories coming within their general terms at any time during the life of the enactment.

Where the Imperial legislation is in express terms made applicable to the colonies generally and it is directed an an evil common throughout such territories, the better view is to impute to the legislator an intention that future colonies (even if not foreseen at the time of enactment) be likewise bound, especially since the legislation is at any time subject to repeal by specific enactment.

This principle has been accepted in a different context in relation to the application of Dominion Statutes, passed before the admission of a 'province' into the Dominion, to the provinces. In Fitzgerald v. McKinley (176) it was held that the Interpretation Act (31 Vic. ch. 1) applied to statutes of the Dominion relating to Prince Edward Island, whether such statutes were passed before or after the admission of the Island into the Dominion.

There is no reason why the same principles that apply statutes progressively to cover new situations should not hold true when considering instruments under the Royal Prerogative that have the force of such statutes in the colonies to which

(176) Fitzgerald v. McKinlay (1873), Cass. Dig. 2nd ed. 107 (Can.).
they relate (a rule contained in part in the Colonial Laws
Validity Act, 1865).

Thus it would seem that the Indian provisions of the Royal
Proclamation of 1763 should be construed to operate in a
prospective manner and operate so as to protect land in Indian
possession throughout British North America at any time during
its life.
5. **Statutory Effect of the Royal Proclamation of 1763**

(i) **Introduction**

The controversy that exists as to the geographic scope of the Proclamation and the cases determinative of this question for particular areas are not *per se* relevant to a discussion on the force and effect of the Proclamation's provisions. The latter is a separate question.

The first and most famous case to canvass the effect of the Royal Proclamation of 1763 was *Campbell v. Hall*. (177) The specific question there raised was the vires of Imperial Letters Patent of 20 July 1764 imposing an export duty on the island of Grenada, subsequent to the promise of an assembly in the Proclamation of 1763. Although the case did not specifically address the statutory force of the 1763 Proclamation, it was implicit in the judgment that it had such force. Thus Lord Mansfield, after noting that "The first and material instrument is the proclamation of the 7th October 1763"...(178) comments that "The next Act is of the 26th 1764, which, the constitution having been established by the proclamation [The Royal Proclamation of 1763] invites further, such as shall be disposed to come and purchase, to live under the constitution...."(179)

(177) *Campbell v. Hall* (1774), Lofft 655, 1 Cowp. 204, 98 E.R. 1045; 20 St. Tr. 239 (K.B.).

(178) Ibid., Lofft p. 746.

(179) Ibid., p. 747.
Lord Mansfield's reference to it as an Act is consistent with 18th century understanding of the force of major Prerogative legislation.

It was widely believed that the Royal Proclamation of 1763 had the effect of legislatively introducing English laws in the new colonies of Quebec, the two Floridas and Grenada. After announcing new constitutions for these colonies the King promised, until assemblies were summoned, that all persons inhabiting in or resorting to the new colonies could confide in the King's royal protection for the enjoyment of the benefit of the laws of England, and, accordingly, the Governors of the four new colonies had been empowered to erect and constitute courts of judicature and public justice for the hearing and determining of all causes, both criminal and civil, according to law and equity, and as near as may be agreeable to the laws of England, with liberty to all persons aggrieved, in civil cases, to appeal to the Privy Council. (180)

This issue was first raised in relation to the conquered colony of Grenada. In Attorney-General v. Stewart et al. (1817) Sir William Grant, Master of the Rolls, in dealing with the question whether the King had legislated by means of the Royal Proclamation of 1763 so as to introduce English laws into Grenada, commented first that: "The case of Campbell v. Hall (1 ---


(181) Attorney General v. Stewart et al. (1817), 2 Mer. 143 at 157-58.
Cowp. 204) determined nothing as to the effect of the proclamation in introducing the laws of England into the Island of Grenada..." However he went on to say: "How the law of England became the law of the Island of Grenada is not distinctly stated. Grenada was a conquered colony, in which French laws prevailed at the time of the Conquest. The King might undoubtedly abrogate these, and substitute the laws of England in their place. And it seems to be supposed that this was done by the proclamation of 1763..."(182) That English law was introduced is uncontroverted, he thus concludes: "in whatsoever way the English law may have been introduced into Grenada, there can be no doubt that it was received and acknowledged law of the island. For though there is no Act of Assembly, expressly recognized or adopting it, there are Acts which plainly imply that it was considered as having been recognized and adopted. And in the courts of judicature, it was the English and not the French law that was administered in civil as well as criminal cases."(183) One may ask what then, other than the Royal Proclamation of 1763, introduced English law, given that in the absence of such introduction, Grenada being a conquered colony, French law would have prevailed.

The question of whether the Royal Proclamation of 1763 legislatively introduced English law was raised again in relation to Quebec. Though Quebec was a ceded territory, and French law

(183) Ibid.
would prevail there in the absence of legislation to the contrary, subsequent to the proclamation of 1763 English laws were administered by the Quebec Courts.

In the leading case of Stuart v. Bowman (184) it was held by the trial court that the English Civil Laws had not been introduced into Canada by the Royal Proclamation of 1763. Mr. Justice Vanfelson, for the Court, holding as regards the Proclamation: "I thought, at the time of the argument, that the English law had been introduced by that Proclamation, but upon further consideration I now believe that was an erroneous opinion. The terms of the Proclamation are by no means sufficiently distinct and formal to be considered as introducing the body of the English law". (185) Mr. Justice Smith, dissenting, noted that it had been held that the Proclamation was a mere declaration of intent that His Majesty's subjects in the then Province of Quebec should be maintained in the enjoyment of the laws of England. In response to this argument he comments that "this has been contradicted by the establishment of Courts of Justice, which are ordered to administer justice and equity, as nearly as may be, in conformity with the laws of England" (186) and continues:

"If the Crown had the right to make such a declaration as that contained in the proclamation, and its intention to introduce the English law, was thereby made distinctly

(185) Ibid., at p. 443-444.
(186) Ibid., at p. 394.
manifest, we have nothing to do but to carry that intention into effect." These matters were considered during the debates of the Quebec Act of 1774. The latter Act enacted in section 4 that like provisions of the Royal Proclamation of 1763 so far as related to the civil government and administration of justice, is revoked, annulled and made void.

And importantly notes:

Could this Act have formally abrogated that which had never subsisted? Was not the intention of the Crown, and the acquiescence of the Parliament up to this period made manifest by this Act? It did not declare it to have been null, but annulled it from and after a certain date. The mere effect of our becoming subjects of the Sovereign of Great Britain, renders us Subject also to the proclamation, issued by his Privy Council, up to the time that Parliament saw fit to interfere, and this Act, by its terms, maintained what had been done by virtue of that proclamation, only annulling it for the future. By the eighth section the right to hold property by Canadian subjects under the old tenure is conceded, "as if the said proclamation, & c., had not been made," & c., further ordering, that for the decision of matters in dispute, relative to property and civil rights, recourse shall be had to the laws of Canada. The Imperial Parliament plainly held, then, that it required a distinct enactment on their part to re-convey to the Canadians their rights to the administration of the French system of laws, which they must consequently have held to have been formerly taken away by the capitulation and proclamation.(187)

The words of the **Quebec Act, 1774**(188) evidence an intention to abrogate certain of Proclamation's provisions and the majority judgment does not deal satisfactorily with this point. Moreover in holding that English laws were not introduced into Quebec by ____________


(188) *Quebec Act, 1774*, 14 Geo. III, c. 83 (U.K.).
the Proclamation the court relies to a large extent on the
vagueness of the language purporting to do so, a problem not
encountered on the wording in the Indian provisions where the
ambiguity and uncertainty is only as to geographic scope.

On appeal to the Court of Queen's Bench the trial decision
was upheld.(189) Alywin J., however, holding the Quebec Act, 1774
had the effect of according the Proclamation legislative
authority:

This section in thus revoking the Proclamation,
the governors Commission and particularly the
Ordinances relative to the administration of
justice, and all commissions to judges,
prospectively and from a day to arrive, viz, 1
May 1775, impliedly and necessarily contains a
recognition by the Parliament of Great Britain
of the authority of these Ordinances and
Commissions and gives them a Legislative
Sanction.(190)

The point at issue in the case was the introduction of the
civil law into Quebec and the case is not authority insofar as
the introduction of the criminal law is concerned. In fact
English criminal law was widely believed to have been introduced
by the Royal Proclamation of 1763. Although Stuart v. Bowman was
accepted in Wilcox Wilcox(191) the uncertainty and confusion
remained. In Q. v. Coote(192) (1873) the court suggested that
the Royal Proclamation of 1763 was responsible for the

(189) (1853), 3 L.C.R. 309 (Q.B.) at p. 348 per Rolland J.; and
p. 399 per Modelet J.

(190) Ibid., per Aylwin J., at p. 388.

(191) Wilcox v. Wilcox (1858), 8 L.C.R. 34 (Q.B.) per Lafontaine

introduction of English law into Lower Canada. The uncertainty as to the Royal Proclamation's effect in relation to the introduction of English law (193) into Quebec was only cleared up by passage of the Quebec Act, 1774. Professor Hogg comments:

The Royal Proclamation of 1763 (at least by implication) and an ordinance of the first English Governor, imposed English law in the newly-acquired colony, thereby excluding the pre-existing French civil law ... if English law had not been expressly imposed, the general rule of the common law with respect to a colony acquired by conquest (as opposed to settlement) was that the pre-existing law of the conquered people would continue in force, except in matters involving the relationship between the conquered people and their new sovereign (Campbell v. Hall (1774) 1 Cowp. 204, 98 E.R. 1045). (194)

And as to the effect of the Quebec Act of 1774 comments:

The Quebec Act of 1774 (Quebec Act, 1774 (Imp.), R.S.C. 1970, Appendix II, No. 2) replaced the Proclamation of 1763 as the Constitution of Quebec. The Quebec Act restored the pre-conquest law as the private law of the colony. (195) (My emphasis)

thus reiterating the dissenting opinion of Mr. Justice Smith in Stuart v. Bowman. (196) And it is an uncontroverted fact that English laws were being administered by the Quebec courts of superior jurisdiction subsequent to the Royal Proclamation of 1763. The change was effected by an Imperial Act of Parliament (Quebec Act, 1774).


(195) Ibid.

(196) Supra, footnote 184.
This is consistent with the judgment of Mr. Justice Hall (Spence and Laskin JJ., concurring) in Calder v. A.G.B.C. (197) who in commenting on the statutory force of the Royal Proclamation says:

That it was regarded as being the law of England is clear from the fact that when it was deemed advisable to amend it the amendment was effected by an Act of Parliament, namely the Quebec Act of 1774...

(ii) Statutory Effect of the Indian Provisions of The Royal Proclamation of 1763

It is clear that the Indian Provisions of the Royal Proclamation were seen in a different light, even in Quebec. The Quebec Council declined on several occasions in the late 1760s to accede to land grants re lands claimed by the Indians. (198) The reason for this being that:

The lands so prayed to be assigned are, or are claimed to be the property of the Indians, and as such by His Majesty's express command as set forth in his proclamation of 1763, not within their power to grant. (199) (My emphasis)

It is implicit in this Report that the Indian Provisions of the Proclamation of 1763 are of statutory effect (at least insofar as areas clearly covered by the Proclamation are concerned). A similar opinion was delivered by the Board of Trade in 1767. (200)

(198) Supra, footnote 19, Slattery, p. 309.
(199) Ibid. citing Minutes of the Quebec Council, 27 December 1766; P.A.C. RA 1, E1, Vol. 3, p. 293.
(200) Ibid., p. 310-11 commenting on a Board of Trade report on the authenticity of a land cession made by the Mohawk
There is no reason why the Orders therein, directed in clear and distinct language at British Subjects (not to purchase land or settle in the Indian reserve and to remove themselves from settlement upon any unsurrendered lands) should not be held to be of binding statutory force on British subjects.\(201\) Such has been the effect of judicial opinion on this subject.

The Indian provisions of the Proclamation were raised directly in Johnson v. McIntosh \(1823\).\(202\) Chief Justice Marshall referring to the effect of the Royal Proclamation of 1763 throughout the American continent, stated:

\begin{quote}
The authority of this proclamation, so far as it respected this continent, has never been denied, and the titles it gave to lands have always been sustained in our courts.\(203\)
\end{quote}

Chief Justice Marshall held that the Proclamation operated so as to invalidate certain land conveyances made to private persons by the Indians, such being inconsistent with its provisions.

In Halloway v. Doe D. Buck the Kentucky Court of Appeal came to a similar holding in respect to a tract of land sold by the Cherokee Indians to a private company. Chief Justice Boyle holding:

\begin{quote}
The Indian deed certainly conveyed no interest... All purchases by individuals from the Indians, were expressly forbidden by the Royal Proclamation of 1763, which remained in
\end{quote}

\begin{quote}
Indians to Sir William Johnson, Superintendent of Indian Affairs for the North. Recited in Order in Council of 26 August 1767; APC, IV, 750.
\end{quote}

\(201\) See discussion above, p. 88 and sequence.

\(202\) 8 Wheaton 543 (U.S.S.C.).

\(203\) Ibid., at p. 597.
force until the revolution, by which the then American colonies became independent states....(204)

In the later case of United States v. Mitchell (1835)(205) after commenting that the Indian right of occupancy was "as sacred as the fee of the whites" Marshall, C.J., comments that such an understanding was adopted "in the proclamation of October 1763 .... as the law which should govern the enjoyment and transmission of Indian and vacant lands."(206)

In Canada the Proclamation's Indian provisions were directly raised in the St. Catherines Milling and Lumber case.(207) This case involved a dispute between the Province of Ontario and the Government of Canada as to ownership of certain lands ceded by the Salteaux Tribe in an 1873 treaty with the Dominion. The Indian land in question was clearly within the geographic purview of the Proclamation. The Privy Council clearly ascribed Indian land title to the provisions of the Proclamation:

Whilst there has been no change since the year 1763 in the character of the interest which its inhabitants had in the lands surrendered by the treaty. Their possession, such as it was, can only be ascribed to the general provisions made by the Royal Proclamation in favour of all Indian tribes then living under the Sovereignty

(204) (1823), 4 Littell 293; 14 Kentucky R. 293 at 294 cited in Slattery at p. 311.

(205) 34 U.S. 711, at pp. 745-6.

(206) Ibid, and see Montgomery v. Ives (1849), 13 Smedes & M. 161 (Miss. H.C.) at pp. 174-5.

(207) St. Catherines Milling and Lumber Co. v. R. (1899), 14 App. Cas. 46 (P.C.); (1887), 13 S.C.R. 577 (Can. S.C.); (1886), 13 O.A.R. 148 (Ont. C.A.); (1885) 10 O.R. 196 (Ont. Ch. Div.).
and protection of the British Crown. (208) (My emphasis)

The Privy Council held the legal interest of the Indians to be "personal and usufructuary", and to be "dependent upon the goodwill of the Sovereign". The meaning to be ascribed to these statements has since been qualified by the Guerin decision. (209) For our purposes it is sufficient to note that the Privy Council held that the Indian provisions of the Royal Proclamation of 1763 did give rise to a legally enforceable interest. Such is consistent with the views of Mr. Justice Strong dissenting in the Supreme Court of Canada, in the St. Catherine's case. (210) Mr. Justice Strong reviewed the American case law as reflecting the consistent policy of the British government "as consisting in the recognition by the Crown of an usufructuary title in the Indians to all unsurrendered lands" (211) and concluded:

Therefore, when we consider that with reference to Canada the uniform practice has always been to recognize the Indian title as one which could only be dealt with by surrender to the Crown, I maintain that if there had been an entire absence of any written legislative act ordaining this rule as an express positive law [i.e., The Royal Proclamation of 1763] we ought, just as the United States courts have done, to hold that it nevertheless existed as a rule of unwritten common law, which the courts were bound to enforce as such.... (212) (My

(208) Ibid. 14 App. Cas. at p. 54.


(211) Ibid., p. 608.

(212) Ibid., p. 613.
Mr. Justice Strong thus would accord the Indian provisions of the Proclamation statutory force. And this was taken to have been decided by this case in two later cases. In *R. v. Lady McMaster* (213) the Exchequer Court of Canada held that a long term lease, (with right of renewal) over lands within the Indian reserve set up by the Proclamation the 1763, was invalid because it was in contravention of the Proclamation's provisions. Mr. Justice Maclean stated:

> The proclamation of 1763, as has been held, has the force of a statute, and so far therein as the rights of the Indians are concerned, it has never been repealed.(214) (My emphasis)

presumably referring to the decision in *St. Catherines* case as authority for this proposition as this was the only case to which he had referred at this point. And the Supreme Court of Canada in the later case of *Easterbrook v. R* (215) also held the Indian provisions of the Proclamation to have force of statute. It again concerned a lease, the contents of which need not detain us. In holding the lease void the Court stated that:

> ...the lease was ineffective and void at law, by reason of the absence of any authority in the part of the grantors to make it, and for non-compliance with the peremptory requirements of the proclamation (of 1763), which have the force of statute..(216) (My emphasis)

(213) [1926] Ex. C.R. 68.
(214) Ibid., at p. 72.
(216) Ibid., at pp. 217-8.
And as Robertson J. said in *Regina v. Kruger and Manuel* (217) its statutory force was that of an Imperial statute:

Assuming (without expressing any opinion) that the Proclamation has the force of Statute, it cannot be said to be an Act of Parliament of Canada: there was no Parliament of Canada before 1867 and by no stretch of the imagination can a proclamation made by the Sovereign in 1763 be said to be an Act of a legislative body which was not created until more than 100 years later. (218)

Not only have judicial statements accorded the Proclamations Indian provision the force of statute, some have gone further and suggested it to be an entrenched charter of Indian rights. Thus Mr. Justice Sissons, of the Territorial Court of the Northwest Territories in *Regina v. Koonungnak* (219) stated:

> This proclamation has been spoken of as the "Charter of Indian Rights". Like so many great charters in English history it does not create rights but rather affirms old rights... (220)

And Mr. Justice Norris in *R v. White and Bob* (221) stated in relation to the extinguishment of aboriginal rights that:

> ...it would have required specific legislation to extinguish the aboriginal rights and it is doubtful whether colonial legislation, even of a specific kind, would extinguish these rights in view of the fact that such rights had been confirmed by the Royal Proclamation of 1973. (222)

(217) [1975] 5 W.W.R. 167 B.C.C.A.


Clearly for Mr. Justice Norris the statutory effect of the proclamation was equal to that of an Imperial Statute since it is only the latter that is protected from Colonial override. (223) The judgment of Mr. Justice Norris was confirmed by the Supreme Court of Canada without reasons. (224) In Calder v. A.G.B.C. Mr. Justice Hall, for himself and two other judges in commenting on the guarantee of Indian rights contained in the Proclamation of 1763 said:

This proclamation was an Executive Order having the force and effect of an Act of Parliament and was described by Gwynne J., in St. Catherine's Milling case at p. 652 as the "Indian Bill of Rights": see also Campbell v. Hall. Its force as a statute is analogous to the status of Magna Carta which has always been considered to be law throughout the Empire. (225)

Although Judson J. (Martland and Ritchie JJ. concurring) in the same case held that the Royal Proclamation of 1763 could not apply to British Columbia he implicitly accepted its statutory force. After commenting on the judgment of the Privy Council in the St. Catherine's case, Judson J. stated:

There can be no doubt that the Privy Council found the Proclamation of 1763 was the origin of the Indian title -- "Their possession, such as it was, can only be ascribed to the .... royal proclamation in favour of all Indian


(223) See discussion infra on the Colonial Laws Validity Act, 1865.


tribes then living under the Sovereignty and protection of the British Crown..."(226)

Judson J. commented that the Proclamation was not, however, the sole source of Indian title and accepted a common law title based on original occupation and use. In finding the latter was extinguished by the pre-confederation land legislation of British Columbia Judson J. cannot be taken as saying such legislation would be operative to extinguish Indian rights expressed in the Proclamation. The point did not arise to be determined given his finding on the geographic scope of the Proclamation.

Lord Denning in R. v. Secretary of State for Foreign and Commonwealth Affairs,(227) stated of the Proclamation that it "was equivalent to an entrenched provision in the Constitution of the colonies in North America" and that it continued to be constitutionally binding on the dominion and provincial legislatures even after Confederation.

Recent decisions have made it clear that aboriginal title is a common law right, not dependent upon the Royal Proclamation the Indian Act, or any other legislative recognition.(228) But such in no way negates the fact that the common law right is given statutory effect by such legislation. As Mr. Justice Norris concluded the proclamation of 1763 was "declaratory and confirmatory of aboriginal rights."(229) And where an Act of

(226) Ibid., at p. 152 D.L.R.
(227) [1982] 2 All E.R. 118 (C.A.), at pp. 124, 125.
Parliament, according to its construction, has embraced and confirmed a right which previously existed at common law or by custom or prescription, such right becomes thenceforth a statutory right and the lower right is merged in and extinguished to the extent it is declared in the statute.(230)

The Royal Proclamation of 1763 is noted (together with the Quebec Act 1774) in the Appendix to the 1970 revised statutes of Canada.(231) Throughout the years since the Proclamation all legislation in the form of the various Indian Acts operative throughout Canada continued the letter and spirit of the Proclamation's provisions.(232) The continuing constitutional significance of the Proclamation is evidenced by its inclusion in the Constitution Act, 1982.(233)

Section 25 of the Constitution Act, 1982 states:

25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including:

(a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and

(229) Supra, footnote 221 at p. 636 of D.L.R.


(b) any rights or freedoms that now exist by way of land claim agreements or may be so acquired.

This section, clearly inserted to protect the special rights of the aboriginal peoples of Canada from the application of the Charter, recognizes that the Royal Proclamation of 1763 statutorily recognized certain aboriginal rights. These rights are recognized and confirmed by s. 35 of the Constitution Act, 1982 which states:

35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are thereby recognized and affirmed.

(2) In this Act, "aboriginal peoples of Canada" includes Indian, Inuit and Metis peoples of Canada.

(3) For greater certainty, in subsection (1), "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired (Const. Act, 1982, as amended March 1983).

Lord Denning said of section 35:

It seems to me that the Canada Bill itself does all that can be done to protect the rights and freedoms of the aboriginal peoples of Canada. It entrenches them as part of the Constitution, so that they cannot be diminished or reduced except by the prescribed procedure and by the prescribed majorities. In addition, it provides for a conference at the highest level to be held so as to settle exactly what their rights are....

There is nothing, so far as I can see, to warrant any distrust by the Indians of the government of Canada.... They will be able to say that their rights and freedoms have been guaranteed to them by the Crown - originally by the Crown in respect of the United Kingdom -- now by the Crown in respect of Canada -- but, in any case, by the Crown. No parliament should do anything to lessen the worth of these guarantees. They should be honoured by the Crown in respect of Canada "so long as the sun
rises and the river flows". That promise must never be broken. (234)

Presumably Lord Denning in talking of the guarantee for Indian rights originally given by the Crown in respect of the United Kingdom is talking of the guarantee contained in the Royal Proclamation of 1763.

It seems clear the Royal Proclamation of 1763 has, in Canada, been treated as having the force and effect of an Imperial statute relating to the colonies. It will elsewhere be argued that such major Prerogative legislative was explicitly recognized as having such force in the Colonial Laws Validity Act, 1865 and that having such force it operated so as to void repugnant colonial laws to the extent of any such repugnancy. (235)

In order to fully understand the import of the Royal Proclamation of 1763 it is necessary to understand the historical roots of the Sovereign's Prerogative powers and British constitutional rules governing the nature and exercise of this power in newly acquired territories.

---


(235) See discussion infra p. 211 et seq.
PART II: THE ROYAL PREROGATIVE AS IT RELATES TO THE COLONIES

1. The Royal Prerogative

(i) Introduction

Prerogative Orders are not delegated legislation. They are the exercise by the Sovereign (albeit with advice) of Her residual powers to legislate without the authority of Parliament and consequently they are original legislation. (236) The statutory effect of such Prerogative legislation is recognized by Bennion (237) who, in reference to the uniqueness of Acts of Parliament states, "Apart from Acts, and instruments made under the Royal Prerogative, no instrument made by Parliament separately, or by any other organ of state, has the quality of law proprio vigore (by its own force). If an instrument so made does have legislative effect, it is as delegated legislation operating by virtue of an Act". Thus the maxim that only Parliament can legislate by Statute does not deny the original character and authority of Prerogative legislation where such lies within Crown competence and complies the necessary formal requirements attendant on such legislation. Moreover, the presence of any ancient document vouched as a statute on the Parliament Roll, or its absence therefore, is not conclusive for or against its legislative validity. (238) Inasmuch as prerogative


(237) Francis Bennion, Statutory Interpretation (KF 425 B465).

orders, commands or prohibitions have been always acquiesced in as unquestionably authentic and a valid exercise of the Crown's discretion, this universal reception establishes and confirms their authority. (239) Such has been explicitly recognized in relation to the Royal Proclamation of 1763 by the Supreme Court of the United States. (240) In Canada the Proclamation has been held to have the force and effect of a Statute. (241)

Notwithstanding this it has, from time to time, been asserted that the Royal Proclamation of 1763, and more particularly its 'Indian provisions', does not have the force and effect of a British Act of Parliament extending to the colonies. It is thus necessary to understand something of the historical roots of the Royal Prerogative and its exercise and legal effect where Prerogative Instruments are promulgated and expressed to apply to the British colonies.

(239) Supra, footnote 95, Craies, p. 52 citing Hawkins, preface to Statutes (1735).

(240) See discussion, infra p. 88 et seq.

(ii) **Historical Roots of the Royal Prerogative**

The sovereign in Britain possessed various executive and legislative powers derived directly or indirectly from the prerogative, general Acts of Parliament and Special Acts of Parliament which conferred upon the Crown extraordinary rights and powers.

The Royal prerogative has been variously described. It meant to Blackstone the special preeminence of the King;\(^{242}\) to Dicey, the residue of the discretionary or arbitrary power legally left at any time in the hands of the Crown;\(^{243}\) to Lord Haldane it meant the common law as distinct from the statutory powers of the Crown.\(^{244}\) Whatever its precise meaning might be the Royal Prerogative can be defined as all those powers and privileges conferred upon the Crown without express legislative authority.

The Royal prerogative is of ancient origin. 'Prerogative' signifies something required or demanded before, or in preference to all others.\(^{245}\) Though the earliest statutory expression of the prerogative Royal is found in the Statute of M Ed. 2 st. 1 de prerogative regis, it is generally accepted that this statute was

---

\(^{242}\) 1 Bla. Comm. 239.


\(^{244}\) Ibid.

merely declarative of the common law. Historically the Royal Prerogative was the foundation of the legislative power exercised by the British sovereign. In 1539, Henry VIII under the Statute of Proclamations received the power to issue proclamations of a legislative nature. Such proclamations as might be issued were, however, not to effect or change property rights, common law principles or provisions of statutory law. Until the revolution of 1688 this legislative power was shared between the King and Parliament. Following the revolution, Parliament laid claim to the power of making laws, the power of administering and executing those laws being left to the King. Such legislative powers that remained to the King in Britain were not of a deliberative kind — he no longer had the power to propound laws but merely the prerogative right of rejection of suggested laws. This was the general rule, however, the Crown did retain the right in certain cases to enact regulations without prior delegation being written into a statute. And this power where it existed was not a delegated power but an original legislative power being a residue of the legislative power formerly held by the King and which he lost to Parliament. This independent regulation making power, historically enjoyed by the King, fell into disuse as Parliament with a virtual monopoly on legislative power began increasingly to delegate legislative

(246) Ibid., citing 2 Inst. 496, 263, 10 Co. 64. Bendl 117.
(247) 1539, 31 Hen. VIII, c. 8, repeated 1547, 1 Edw. IV, c. 12, s. 4.
(248) Supra, footnote 245, at p. 3.
power to the Crown or various administrative bodies.

Of more interest are the more extensive prerogative powers enjoyed by the Crown arising out of its role as Supreme Executive Magistrate under the British Constitution. Chitty states

As supreme magistrate, the King possesses, subject to the law of the land, exclusive, deliberate, and more decided, more extensive, and more discretionary rights and powers. (249)

And goes on to list among such principal prerogatives the prerogative with respect to foreign states and affairs; the prerogatives with respect to justice and the administration of laws and that relating to the superintendency and care of commerce in certain cases. Such prerogatives gave the British Crown extensive discretionary powers, many of which had relevance to the Crown's powers in British territories. The prerogative with respect to foreign states and affairs embraced a general power over external affairs (and hence acquisition of new territory) and an exclusive power to declare war and peace and make treaties (and consequently to acquire territory by virtue of conquest and cession). The prerogatives enjoyed by the Crown as the fountain of justice included the pardoning of offenders, the issue of the writ of habeas corpus, the prerogative of mercy and the issuing of proclamations. (250)

It is appropriate here to briefly explain the Crown's prerogative to issue proclamations. Proclamations were made by the Sovereign alone and became law on the affixing of the Great

(249) Supra, footnote 245, p. 3.
(250) Ibid., p. 6.
Seal, under the authority of a warrant bearing the King's signature. They were approved in draft by Order-in-Council. (251) The prerogative respecting proclamations enabled the King as executive Magistrate to command and enforce the performance by his subjects of existing laws and to make or alter regulations over which His Majesty had a special jurisdiction. (252) It did not entitle him to break through those fundamental principles on which the legislative power of government is founded, by commanding the observance of matters not sanctioned by Parliament. It merely enabled the Crown to proclaim the manner, time and circumstances of putting those laws into execution. (253) Such restrictions were clearly stated in the Proclamations Case. (254)

However, the restrictions placed on the exercise of the prerogative in Britain do not necessarily apply to limit the Crown's powers in British territories. Whether or not a particular prerogative extends to a British territory depends upon (1) whether the legal systems which forms the basic law in the territory concerned is or is not English law and (2) the category of prerogative to which it belongs.

-------------------

(252) 1 Bla. Comm. 270; 5 Bac. A6, 549, title: Prerogative
(253) Supra, footnote 245, pp. 2-5.
Turning first to the question of the law in force in British colonies, this cannot be fully understood without an understanding of the ways in which territories first come under British Sovereignty and the consequential effect the various modes of acquisition have on the basic law of the territories concerned.
2. **Territorial Acquisition**

(i) **Introduction**

Where the Crown obtains both the power of government and territorial title over the territory concerned, it properly becomes part of Her Majesty's dominions and the Crown is then sovereign in the same full sense as in the United Kingdom. (255) Territorial title belongs to the sovereign as head of state and the Crown's authority in relation to such territory is a pure matter of constitutional law.

Territories may be acquired by any one of the following means or by a combination of them: conquest, cession, annexation and settlement. The power to acquire territories is vested in the sovereign by virtue of the Royal prerogative over external affairs and in particular the making of war and treaties of peace. Conquest is exclusively embraced in the prerogative to make war and peace, as also is cession arising out of hostilities. Cession of other kinds rests on the exercise of the prerogative to make treaties. Settlements are referable to the general power over external affairs. (256)

Under the doctrine of Parliamentary Supremacy newly acquired dominions are subordinate to and dependent upon the Imperial Crown and Parliament of Great Britain. The latter has full

---


(256) *Supra*, footnote 251, Roberts-Wray, p. 116.
authority to make laws to bind the colonies quite independent of their mode of acquisition. The mode of acquisition, however, has important constitutional consequences insofar as the nature and exercise of the King's prerogative legislative powers in the new territories are concerned. In particular the legislative powers of the Crown in a settled colony are different from those in one gained by cession or conquest. It would seem that in conquered and ceded colonies the King enjoys a virtually unlimited power to make laws, at least until the promise of a legislature. In settled colonies the colonists have rights of their own at common law which are reflected in a restriction on the legislative powers of the Crown.\(^{(257)}\) It is in this regard that the distinction as to the mode of acquisition has important consequences.

(ii) The Prerogative Legislative Power as It Relates to Settlements

We are here concerned with the acquisition of territory by the Crown in consequence of the fact of settlement by British subjects in a place where there is not a civilized government and legal system. If a colonizing project is undertaken with the prior authority of the Crown, the settlers take possession on behalf of the Crown, and the territory becomes ipso facto a part of the sovereign's dominions.\(^{(258)}\) If the settlement is a private venture, without prior Crown authorization, some formal Crown Act

\(^{(257)}\) Ibid., p. 111.

\(^{(258)}\) Ibid., p. 99.
is required before territorial title in the Crown is recognized.

Some confusion stems from the fact that "settlement" was initially only referable to uninhabited countries. Thus Blackstone, writing in 1765, stated that colonies in distant countries are of two sorts: those where the lands are claimed by right of occupancy only "by finding them desert and uncultivated and peopling them from the mother country" and those which, when already cultivated, have either been gained by conquest or ceded by treaty. (259) The question is whether such "desert and uncultivated" lands are to be taken to include lands peopled by aboriginals with their own system of law and government.

**Blankard v. Galdy** (260) (1693) was the first case to attribute legal consequences to the distinction between occupation (settlement) and conquest. There Holt distinguished between an "uninhabited country newly found out by English subjects" and a conquered country and held that in the former "all the laws in force in England are in force there", in the latter "the laws of England did not take place until declared by the conqueror or his successors." (261) This accords with a statement of Vattel (262)

-------------------


(261) *Ibid*.

When a nation takes possession of a distant country and settles a colony there, that country, though separated from the principal establishment or Mother country, naturally becomes a part of the state, equally with its ancient possessions...

These rules were restated in a Privy Council Memorandum in 1722(263)

...that if there be a new and uninhabited country found out by English subjects, as the law is the birthright of every subject, so wherever they go they carry their laws with them; and therefore such new formed country is to be governed by the laws of England, then in being when they first settled..

These early cases draw the distinction between uninhabited areas that are settled by British subjects and conquered countries and as Slattery suggests, are silent as to the situation where the land settled was already inhabited.(264)

If the territory was occupied by "primitive peoples" with "barbarian laws" the settlers were similarly deemed to take English law with them. However, if the territory was already inhabited by "civilized peoples" the settlers were considered immigrants in a country whose laws applied to them, subject to any agreements to the contrary. This was the case on the Indian subcontinent. As to the distinction in general between colonies by settlement and colonies by conquest or cession, the following observations were made in the case of Freeman v. Fairlie(265)

-----------------------

(263) (1722), 2 Peer Wms. 75 (P.C.).
(264) Supra, footnote 19, Slattery p. 27 et seq.
(265) (1828), 1 Moo. Ind. App. 305 at 324, 18 E.R. 117 (Ch.).
I apprehend the true general distinction to be in effect between countries in which there are not, and countries in which there are, at the time of their acquisition, any existing civil institutions and laws; it being in the first of those cases matter of necessity that the British settlers should use their native laws, as having no others to resort to; whereas in the other case there is an established lex loci which it might be highly inconvenient all at once to abrogate, and therefore it remains till changed by the deliberative wisdom of the new legislative power. In the former case also there are not, but in the latter case there are, new subjects to be governed, ignorant of the English laws, and unprepared perhaps in civil and political character to receive them. The reason why the rules are laid down in books of authority with reference to the distinction between new-discovered countries on the one hand, and ceded or conquered countries on the other, may be found, I conceive, in the fact that this distinction had always, or almost always, practically corresponded with that between the absence and the existence of a lex loci, by which the British settlers might, without inconvenience, for a time be granted; for the powers from whom we rested colonies by conquest, or had obtained them by treaties of cession, had ordinarily, if not always, been civilized and Christian states, whose institutions therefore were not wholly dissimilar to our own.

Lord Kingsdown in Advocate-General of Bengal v. Rannee Surnomoye Dossee (266) pointed out in relation to English settlements in India, that if "the settlement had been made in a Christian country of Europe, the settlers would have become subject to the laws of the country in which they settled", the laws of England or the Crown of England having no authority in such places (267). However where Christianity does not prevail and the local laws

(266) (1863), 2 Moo. P.C. (N.S.) 22.

(267) Ibid. at p. 800 of E.R.
and usages are so at variance with such principles he notes that through the indulgence and weakness of the Potentates of those countries, English settlers have been allowed "to retain the use of their own laws".(268)

In describing the character of English settlement in India the Court stated;

It was a settlement made by a few foreigners for the purpose of trade in a very populous and highly civilized country, under the government of a powerful Mahamoden rule, with whose sovereignty the English Crown never attempted nor pretended to interfere for some centuries afterwards.(269)

And although the settlers in India retained their own laws within the "factories" they established it was only because the local sovereign allowed it. And;

the permission to use their own laws by European settlers does not extend those laws to Natives within the same limits, who remain to all intents and purposes subjects of their own Sovereign, and to whom European laws and usages are as little suited as the laws of the Mohometans and Hindoos are suited to Europeans. These principles are too clear to require any authority to support them."(270)

The "India" cases are distinguishable in that "settlement" there was not, initially at least, a vehicle for acquisition of territory -- the English Crown initially never attempted to gain sovereignty in India. And given the number and sophistication of its Indian inhabitants, any attempt at British sovereignty would  

(268) Ibid.
(269) Ibid.
(270) Ibid.
have had to be by conquest. It is not therefore surprising that
the use of English law, extended to the settlers, did not extend
English law to the Natives. The Court went on to find that the
case is different where the English establish themselves in an
"uninhabited or barbarous country." In such a case "they carry
with them not only the laws, but the sovereignty of their own
state; and those who live amongst them and become members of
their community become also partakers of, and subject to the same
laws." (271)

In summary the King had no ordinary legislative prerogative
in "settled" colonies. And in fact Roberts-Wray (272) notes that
the purpose and effect of the various British Settlements Acts
was to alter this common law rule (that, in a colony acquired by
settlement, the Crown can set up a constitution but cannot enact
legislation of other kinds).

(iii) **The Prerogative Legislative Power as It Relates to
Conquered and Ceded Colonies**

It is established beyond question that, as these territories
are acquired by virtue of the Prerogative to make war, peace and
treaties, so the sovereign has full power under the prerogative
to make laws either in the constituent field or otherwise. As we
have seen broad sovereign legislative powers in relation to
conquered/ceded colonies was expounded as early as 1693 by Lord

(271) Ibid.

(272) *Supra*, footnote 251, p. 166.
Holt in Blankard v. Galdy (273) and in a Privy Council memorandum, circa 1722. (274) The latter is presumed to have been issued to adopt the rules laid down in Blankard v. Galdy so as to make these rules applicable to places beyond the jurisdiction of the ordinary courts. In the latter case it was held that in a settlement "all the laws in force in England are in force there", settlers carrying with them the common law of England. Whereas in a conquered country "the laws of England did not take place until declared by the conqueror or his successors." This was affirmed by Lord Mansfield in Campbell v. Hall, (275) mainly on the authority of Calvins case, (276) only rejecting the proposition put forward in Calvins case as to the exception regarding infidels. It is useful to properly understand the ruling in Campbell v. Hall.

The case related to the island of Grenada, taken by the British armies in open war from the French king and surrendered upon capitulation. Letters Patent, dated March 26, 1764, commissioned General Melville as Governor of Grenada. He was given power to set up a legislature as specified in a previous proclamation under the Great Seal, dated October 7, 1763 (the Royal Proclamation). By that Proclamation of the King had empowered and directed the Government of Grenada by Letters

(273) Supra, footnote 260.

(274) Supra, footnote 263.

(275) Campbell v. Hall (1774), Lofft 655, 98 E.R. 848; 1 Cowp. 204, 98 E.R. 1045; 20 St. Tr. 239 (K.B.).

Patent under the Great Seal to summon general assemblies of the representatives of the people of Grenada so soon as the circumstances of the colony would allow, and with their consent to make laws for the public peace, welfare, and good government of the colony and its inhabitants. There had been a second proclamation of March 26, 1764, containing a recital of a survey of the islands and their division into allotments, as an invitation to purchasers to come in and take up properties on terms specified in the proclamation. After these instruments had been published Letters Patent were issued July 20, 1764 purporting to impose by virtue of the Royal Prerogative a duty of 4 1/2 percent on all sugars exported from the Island. The question was whether the King had precluded himself from the exercise of a legislative authority over Grenada by the promise of an assembly in the earlier proclamation.

Lord Mansfield laid out six principles governing conquests:

1st, a country conquered by the British arms becomes a dominion of the King in right of his Crown, and therefore necessarily subject to the legislative power of the Parliament of Great Britain.

2nd, the conquered inhabitants once received into the conquerors' protection become subjects; and are universally to be considered in that light, not as enemies or aliens.

3rdly, articles of capitulation upon which the conquest is surrendered, and treaties of peace by which it is ceded, are sacred and inviolable, according to their true intent.

4thly, the law and legislation of every dominion equally affects all persons and property within the limits thereof, and is the true rule for the decision of all questions which arise there: whoever purchases, sues or lives there, puts himself under the laws of the
place, and in the situation of its inhabitants. An Englishman in Minorca or the Isle of Man, or the plantations, has no distinct right from the natives while he continues there.

5thly, laws of a conquered country continue until they are altered by the conqueror. The justice and antiquity of this maxim is uncontroversible; and the absurd exception as to pagans, in Calvin's Case, shows the universality of the maxim. The exception could not exist before the Christian era, and in all probability arose from the mad enthusiasm of the Croisades. In the present case the capitulation expressly provides and agrees, that they shall continue to be governed by their present laws, until His Majesty's pleasure be further known.

6thly, if the King has power (and when I say the King, I mean in this case to be understood "without the concurrence of Parliament") to make new laws for a conquered country, this being a power subordinate to his own authority, as a part of the supreme legislature in Parliament, he can make none which are contrary to fundamental principles; none excepting from the laws of trade or authority of Parliament, or privileges exclusive of his other subjects."(277)

The King's initial exclusive legislative power over conquered colonies enables him to "entirely change or new-model the whole, or part of its laws and political form of government" and allows him to govern it by regulations framed by himself.(278) The King may preclude himself from the further concurrent exercise of his legislative prerogative by the grant of representative institutions without any reservation to himself of this important prerogative.(279) However, by such grant the

(277) (1774), Lofft 655, 98 E.R. 848; 1 Cowp. 204, 98 E.R. 1045 (K.B.) at pp. 741-742 Lofft.

(278) Supra, footnote 245, at p. 29.
authority of the sovereign instrument [usually Letters Patent or Order-in-Council] wherein such grant is given is clearly not in question.

In *Sammut v. Strickland* (280) the Court, considering *Campbell v. Hall*, stated that the true proposition to be taken from this case was that "as a general rule, such a grant without the reservation of a power of concurrent legislation precludes the exercise of the prerogative while the institutions continue to exist." (281) and "Nor is it in doubt that a power of revoking the grant must be reserved or it will not exist".

The same proposition was accepted as "settled" law in Canada in 1820 on the basis of these authorities and that of *Campbell v. Hall*. (282) Subsequent confirmation is to be found in other decided cases and works on constitutional law. (283)

In point of fact the general broad principle that the Crown possesses full legislative authority in ceded/conquered countries was substantially qualified by the Privy Council in *Campbell v. Hall* -- the limitation being that if the Crown grants to a


(280) [1938], A.C. 678 (P.C.).


(283) Cited in Roberts-Wray *supra*, footnote 251 at p. 157. *Lyons v. East India Co.* (1836) 1 Mod. P.C. 175
*Phillips v. Eyre* (1870), L.R. 6 Q.B. 1
*Sammut v. Strickland* (1938), A.C. 678, at 701
*Abeyeskera v. Jayahlake* (1932), A.C. 260
*Chitty, prerogatives of the Crown*, p. 29
*Hood Phillips*, p. 723.
conquered Colony a representative legislative body, without reserving to itself a power to legislate, that power is no longer exercisable.

Summary

The Crown is *prima facie* entitled to legislate for possessions acquired by conquest or cession, but is not so entitled in the case of settlements the line of distinction being based on the circumstance that English settlers wherever they went carried with them the principles of English law, and that English common law necessarily applied insofar as such laws were applicable to the conditions of the new colony. The Crown clearly had no prerogative right to legislate in such a case. Where, however, the territory was acquired by cession or conquest, more particularly where there was an existing system of law, it has always been considered that there was an absolute power in the Crown so far as was consistent with the terms of cession, to alter the existing system of law, though until such interference the laws remained as they were before the territory was acquired by the Crown.(284)

Further, where the Crown by an exercise of prerogative has conferred representative institutions on the inhabitants of a territory which has been acquired by the Crown (without reserving a power of revoking the grant) this act precludes a concurrent right in the Crown to legislate for that territory. (My

---------------

emphasis).

(iv) The King's Constituent Legislative Power in Relation to British Dominions

What we have so far been concerned with is the King's power to make ordinary laws for British territories, such, as we have seen, being in large part referable to the various modes of acquisition of the territories concerned. But insofar as the Crown's legislative powers are exercisable in British dominions, a major distinction which must be made is that between the Crown's constituent power (the power to establish, amend or revoke constitutions) and the Crown's power to make ordinary laws.(285)

In all colonies, whether acquired by settlement, conquest or the establishment of local governments and the courts fell to the Crown by virtue of the Prerogative and the actual setting up of colonial constitutions was left to Royal control. In all colonies, the right of appointing governors and delegating powers to him and other officers for the execution of the law, of erecting courts of justice for its administration, and of summoning representative assemblies among its inhabitants for the purpose of interior legislation, belonged by virtue of its general prerogative to the Crown.(286)

------------------------

(285) Supra, footnote 251, p. 143 et seq.
(286) 1 Chalmers 183, 184; 2 Chalmers 169, 170, 241.
It appears that when the constitutions had actually been set up, the Prerogative instruments responsible took on the force of British statutes. The constitutional provisions in these instruments could not be amended by colonial legislatures, a rule affirmed in part in the Colonial Laws Validity Act, 1865.

It is clear from what has already been said of the Crown's extensive prerogative rights in relation to conquered or ceded colonies, that the Crown has full power to make laws in the constituent field or otherwise for such colonies.(287) In a settled colony the settlers appear to have some sort of inherent right to expect the Crown to grant them the means to legislate for themselves. Thus in Phillips v. Eyre(288) it was stated:

There is even great reason for holding sacred the prerogative of the Crown to constitute a local legislature in the case of a settled colony, where the inhabitants are entitled to be governed by English law, than in that of a conquered colony, where it is only by the grace of the Crown that the privilege of self-government is allowed.

Even though the prerogative embraces no general legislative authority over settlements the existence of a constituent power has always been acknowledged.(289) Once a grant of a local legislature is made, it cannot be revoked by the Crown unless a power of revocation is reserved. Where the Crown grants such a legislature, without reserving to itself a power of legislation, the Crown loses its ordinary

(287) Supra, footnote 251, p. 157, footnote 65.
(288) Phillips v. Eyre (1870), L.R. 6 Q.B. 1, at pp. 18-19.
(289) Supra, footnote 251, p. 151.
legislative power. (290) But as stated above there is a distinct
difference between the constituent power of the Crown and its
ordinary legislative power in relation to British colonies. (291)
As already noted one clear difference lies in the fact that the
latter is exercisable only in conquered and ceded colonies
whereas the former can be invoked in relation to all British
colonies regardless of their mode of acquisition. (292) Moreover,
the King enjoyed certain other "major" Prerogatives in relation
to all British lands and territories. Such Prerogatives applied
proprino vigore as an incident of British sovereignty. The Royal
Proclamation of 1763, it is argued is such a major Prerogative
instrument, being referable to the Crown's Constituent
Prerogative. The Prerogative instruments by which the
sovereign's will was expressed, as to matters within its
particular authority, applied of their own force in the
territories to which they related, independently of whether or
not the basic law of such territory was English law. A result
occasioned by the effect of British sovereignty and recognized in
the Colonial Laws Validity Act, 1865.

-------------------

(290) Supra, footnote 251, p. 157, (and see Campbell v. Hall,
       supra, footnote 275).

(291) ibid., p. 158.

(292) Campbell v. Hall, supra, footnote 275. (This is discussed
       more fully infra).
3. The Laws to Which Colonies Are Subject

The differences in the modes of acquisition of British colonies, as we have seen, gives rise to corresponding differences in the basic law to which a colony becomes subject upon its foundation.

In the case of a territory 'settled' by British subjects, the law of England, then in being, is immediately in force insofar as it is applicable to the infant colony,(293) the settlers being deemed at common law to have brought English law there on the foundation of the colony. As a general rule the English law so introduced is taken to be the law which existed in England at the time the colony was settled, save for any which is plainly unsuitable to the conditions of the colony,(294) and subject to later amendment passed in or by the colony. And "what shall be admitted and what rejected, at what forces and under what restrictions, must, in case of dispute, be decided in the first instance by their own provincial judicature, subject to the decision and control of the King-in-Council;..."(295) it may be that "as the population, wealths and commerce of the colony increase, many rules and principles of English law, which were unsuitable to its infancy, will gradually be attracted to it."(296) In most settled colonies there has intruded a statute, 

(293) 2 P. Wms 75; Blankard v. Gaidy 2 Salk 411; 1 Bla. Com. 107.
(294) Ibid. and see 1 Chalmers Opinions, 195.
(295) 1 Bla. Com. 107.
(296) Cooper v. Stuart (1889), 14 A.C. 286 (P.C.).
sometimes local and sometimes Imperial, conferring the reception of English law, and defining exactly the date at which English law has been received. Where English law is the basic law of the colony it is the English common law and all statutes in affirmation of the common law antecedent to the settlement of the colony, or to the date set for the reception of English law, that is in force in the colony, subject to any local Act to the contrary. No statutes made in England subsequent to such date are in force unless the colonies are particularly mentioned or such extension can be necessarily implied (Colonial Laws Validity Act, 1865).

Basically, in a conquered or ceded territory its former laws are retained until changed by the King. Municipal courts will assume the *lex loci* remains in force until specifically changed, with the notable exception as to constitutional laws (and particularly barbaric laws). Where the King exercises his prerogative right to legislate, he is not bound to legislate in conformity with the law of England.(297) But the King's power being subordinate to the authority of Parliament he "cannot make any changes contrary to fundamental principles, none excepting from the laws of trade or authority of Parliament, or privileges exclusive of his other subjects."(298) Where in giving a new Constitution to the conquered or ceded colony, the King provides for the calling of a representative assembly it has been decided

(297) Wytham v. Dutton, 3 Mod. 160; Shaw P.C. 24; 2 P. Wms 75; Campbell v. Hall Cwp. 204.

(298) Ibid., Campbell v. Hall (1774), Lofft 665 at pp. 741-742.
that the Crown cannot afterwards exercise with respect to such colony its former right of legislation (299) unless there is a reservation of such right. Clark states that the legislative changes made by the Crown may be either partial, whereby particular institutions are engrafted on the forms of government of the places, or general whereby an entirely new code supersedes the former law. (300) "Where the change is partial only, it is said that the former customs of the country will still be in force as to all matters not otherwise provided for". (301) However when by Royal Commission a new legal constitution is granted establishing a legislature and courts of justice and it is directed that the law administered shall be in all things as 'nearly agreeable as possible to the law of England', then the law of England is the rule as to all cases not specifically provided for. (302) Few conquered/ceded colonies have been able to resist all infusions of English law. (303)

-------------

(299) Ibid.


(301) Ibid. citing Blankard v. Galdy, 4 Mod. 222.

(302) Clark, supra, footnote 300, p. 7.

(303) For a discussion of the manner and date by which English law was received in the various parts of Canada, see Clement, ch. 14; Jackett in Lang (ed., Contemporary Problems of Public Law in Canada, 3; Laskin, The British Tradition in Canadian Law (1969), 3-10; Cote (1977), 15 Alta. L.R. 29.
As already noted, the English law that is received as the basic law of the colonies is subject to its applicability to the conditions of that colony. In this respect it is interesting to note the basis of judicial statements determining which English statutes are to be admitted and which rejected. The courts, in considering this question, have looked to the extent to which the statute appears to be founded upon plain considerations of policy, (304) and have tended to reject the application, of English Statutes which were formed for reasons solely affecting the land and society of England and not for reasons applying to a new colony. (305) In Sammut v. Strickland (306) it was said that the settlers carried with them the "principles of English law". In A.G. v. Stewart (307) the court in determining whether the Statute of Mortmain be in force in the island of Grenada held that such was in large part dependent upon whether it was "a law of local policy adapted solely to the country in which it was made, or a general regulation of property equally applicable to any country: in which property was to be governed by the rules of English law." In rejecting its application the Court found that the Mortmain Act, "grew out of local circumstances and was meant to have merely a local operation".

------------------

(304) Cooper v. Stuart supra, footnote 296.

(305) Rex v. McKinney, [1889] 14 A.C. 77 (P.C.), where the court rejected the application of the Mortmain Act as introduced by the settlers into British Honduras.


(307) A.G. v. Stewart (1817), 2 ed. 143, 35 E.R. 895 (Ch.).
This then outlines the basic principles governing the laws in force in British dominions. It is important to understand that the differing modes of acquisition are important _solely_ in determining the "ordinary" law of such territories. And the repeal or amendment of such law is, as is discussed later, a matter within the power of any local legislature, even that of a colony that is not self-governing.
4. **Imperial Law in Force Proprio Vigore in British Territories**

The distinction as to mode of acquisition has considerable bearing on the basic law in force in the colonies. English law may be "received" as the basic law of the colonies through the vehicles of settlement or reception statutes or Orders (Imperial or local).

However, there is a marked difference between the English law so received and that which applied to all colonies, **proprio vigore**, or of its own force, regardless of their mode of acquisition. The latter is most clearly evidenced by those Imperial Acts which take effect in the colonies because they were intended by the British Parliament to be in force in the colony at a time when it was part of the Empire and so subject to the Imperial Parliament. Whatever the mode of acquisition, it is clear that the Imperial Parliament has always had full legislative power over British colonies (at least up until the passing of the **Statute of Westminster, 1931**).(308) The **American Colonies Act, 1766**, declaring the legislative competence of the British Parliament over the American colonies, was considered, until its repeal by S.L.R. Act in 1964, to be still in force, if and so far as it applied to Canada and the West Indies.(309) Thus Statutes passed by the Imperial Parliament and intended by that Parliament to be in force in any colony are thereby in force **proprio vigore** in such colonies independent of their mode of acquisition.

---

(308) **Statute of Westminster 1931**, (Imp.) 22 Geo. 5, c. 4.

(309) **Supra**, footnote 95 Craies p. 493.
acquisition. This has important constitutional implications, as though a colony may repeal all or part of the "ordinary" or "basic" law there in force it cannot overrule Imperial Acts or Orders in force *proprio vigore* unless it is self governing. And the powers granted by the Statute of Westminster, 1931, concern only Acts in force *proprio vigore*.(310) The Colonial Laws Validity Act, 1865(311) was passed to protect Imperial law in force *proprio vigore* in the colonies and to remove doubts as to colonial legislative competence in regard to English law received as the basic law of the colonies (see discussion below). By the Statute of Westminster, 1931 the self-governing colonies were given the power to modify, alter or repeal Imperial law in force *proprio vigore*.

To restate the general rule regarding the basic law in force in a colony: In settlements the common law and all Acts of Parliament passed before their acquisition are in force so far as is applicable to local circumstances. In conquered or ceded territories Acts of Parliament passed before their acquisition have no general force, unless adopted or incorporated by Royal or Parliamentary authority, or by acts of their own legislatures, either by way of specific enactment or as part of the general law of the mother country into their subsequent code.(312) But this


(311) Colonial Laws Validity Act, 1865. See Appendix II.

general rule is open to a very important exception, that of Imperial Law in force proprio vigore. Clearly, such includes those Imperial statutes passed with the expressed intention of binding the colonies. Tarring suggests it further extends to include those statutes which are manifestly of universal policy and intended to affect all our transmarine possessions, at whatever period they shall be acquired, such for example, as Navigations Acts, or the Acts for abolishing the slave trade and slavery. For such statutes will, upon conquest or cession, ipso facto and independently of posterior legislation, be binding upon not only a settlements but also a conquered or ceded colony.(313) Imperial Acts passed since the acquisition of a colony or at least subsequent to the establishment of its legal constitution by Royal Commission or Act of Parliament, do not extend to it, unless they appear to have been passed with the intention of being so extended.(314) This intention may be express, relating to a colony by name or by a general designation (such as 'our plantations and colonies), or by reasonable construction, as in the case of the Navigation Acts, Acts of Revenue and Trade and Acts relating to shipping, all of which are in general obligatory on the colonies although not in terms extended to them.

-------------------

(313) See 14 Geo. 3, c. 83, s. 18 as to Canada, cited in Tarring, supra, footnote 312, p. 15.
(314) 1 Chal. op. 197-220, 2 P. Wms. 75; 1 Bla. Comm. 108 and see Colonial Laws Validity Act, 1865. Appendix II.
In addition to Imperial statutes being in force *proprio vigore*, an argument can be made that major Imperial Prerogative legislation relating to the colonies would likewise be in force *proprio vigore*. Such a proposition has its basis in the fact that upon the assertion of British Sovereignty the public law of England (that governing the rights of subjects vis a vis the Crown) is necessarily introduced as the public law of the colonies. It is easy to see that in settled colonies the public law which governs is that of England. In addition it seems that British Sovereignty necessarily introduces English public law (or certain aspects of it) into conquered or ceded colonies.

It has been held that the conqueror cannot retain unimpaired the constitutional law of the previous sovereign, for constitutional law is the essence of the power of the new sovereign over the territory and its inhabitants.\(^{315}\) Thus laws contrary to fundamental principles of the British Constitution cease at the moment of conquest/cession.\(^{316}\)

This doctrine was discussed at considerable length by Lord Stowell in *Ruding* v. *Smith*\(^{317}\) He pointed out that even with respect to the ancient inhabitants no small portion of the ancient law is unavoidably superceded by the revolution of government that has taken place. The allegiance of subjects and


\(^{316}\) c.f. Lord Ellenborough, 30 St. Tr. Col. 742.

all the law that relates to it -- the administration of the law in the sovereign, and appellate jurisdictions, and all the laws connected with the exercise of the sovereign authority -- must undergo alterations adapted to the change;(318)

Though the laws are to remain, it is surely a sufficient application of such terms as 'that they shall remain in force' if they continue to govern (as far as they do continue) the transactions of the ancient settlers with each other, and with the new owners. To allow that they shall intrude into all separate transactions of the British conquerors is to give them a validity which they would otherwise want in all cases whatever."(319)

Although the general law of the previous sovereign remains, the Crown's position vis-a-vis the courts and government is a different thing.(320) One scholar has noted that the conquest of Canada in 1763 had the effect of substituting the public laws of England for that of France.(321) This general principle was approved by Kellock J. of the Supreme Court of Canada in Chaput v. Romain.(322) in relation to Quebec who stated;

-----------------------------


Questions which concern the relation of the subject to the administration of justice in its broadest sense are subject to the control of the Courts, and are, therefore governed by the law of England and not by that of France.

Kellock J. relied on a statement of Ramsey J. in Corporation du Compte d'Arthabaska v. Patoine(323) to the effect that

I have quoted English law on this subject, for it, I think, determines the point. Municipal institutions, such as those we have, are derived from the English law, and our courts have the general prerogatives of English courts. These last are derived from the authority of the Sovereign, and as the administration of justice is one of the greater rights of the Crown it is governed by the public law of the empire.(324) (My emphasis)

Cote notes that though these cases are from the Province of Quebec the same principle has been expressly recognized in South Africa,(325) and is reflected in several decisions of the Privy Council.(326)

In Abbott v. Fraser the question arose as to whether a French Edict (1743) in force in Quebec remained in force after the cession of that territory to Great Britain in 1763. The

---

(323) Ibid. citing Corporation du Compte d'Arthabaska v. Patoine (1886), 4 Dorion Que. Q.B. 364 at 370 for this proposition.

(324) Ibid.


Privy Council stated "it is open to considerable doubt, whether the first nine articles of the edict, which all relate to the foundation of corporations, retained the force of law after this cession; first because the forms and regulations they prescribed then became out of place; and secondly, for the substantial reason that the articles, which had for their object to put fetters on the King's own power, could not, it may fairly be contended, be of force to control the sovereign will of the English Crown, whose prerogative it would be, after the cession, to establish corporations...." (327)

In effect the Privy Council upheld, on this point, the judgment from the Court of Queen's Bench for Lower Canada and it is interesting to note the words of the Queen's Bench on this question. After finding that the declaration of 1743 "manifestly falls within the class of public administrative laws, and not of the civil or municipal law of the colonies" and that "its administrative character and functions are manifestly the enforcement of the public policy of the Kingdom, and the removal of the alleged public mischief, which touched the State only..." (My emphasis - c.f. Royal Proclamation of 1763) goes on to state that "as such public administrative law it belonged to the State exclusively, and necessarily followed its fortunes....". (328)

After citing examples of its administrative nature, the court finds "the Act of 1743 to be a public administrative Act, which

(327) Ibid., Abbott v. Fraser at p. 120.

(328) Ibid., pp. 105-106.
existed within the dominion only to which it belonged, and could not contract or govern the prerogative rights or powers of the new sovereign of the colony, and did not require to be abrogated or repealed by express legislative authority".\(^{(329)}\) The latter because on the cession of the colony to Great Britain in 1763 it was no longer subject to the administrative public law of France but became "subject to the administrative public law of Great Britain."\(^{(330)}\)

Cote notes that this principle was recognized in \textit{Re Adam} which held that although the old law of the conquered colony sets the rights and duties of an alien, vis-a-vis the Crown his rights and duties must be set by the Law of England,\(^{(331)}\) presumably on the grounds that British sovereignty necessarily imported public elements of British law into the new colony. This accords with a statement in \textit{Sammut v. Strickland} where the Court held that the extent of the prerogative must be determined by the English common law in Malta even though Malta was a conquered colony and therefore the English common law did not as such hold there.\(^{(332)}\) Walton, cited in Cote,\(^{(333)}\) canvasses which

\(^{(329)}\) \textit{Ibid.} \\
\(^{(330)}\) \textit{Ibid.}, pp. 106-107. \\
\(^{(331)}\) \textit{Re Adam} (1837), 1 Moo. P.C. 460 at 470; 12 E.R. 889 at 893 (P.C.) cited in Cote, \textit{supra}, footnote 310, p. 43. \\

part of the old constitutional law must be taken to have been
superseded on conquest. He suggests that English law replaces
the former law as to the duties of citizens, the powers and
duties of public authorities, public policy as to contracts [sed
quaerere], prerogative rights of the Crown, control over
corporations [sed quaerere], public lands, public contracts,
suits against the Crown, the prerogative writs, administration of
justice, liability of public officials and administrative law.
As to prerogative rights, Cote cautions that "one must not think
that all the rights of the Crown fall under this rubric of
constitutional law. It has been suggested, for instance, that
the Crown's title to the bed of navigable rivers is governed by
the local law, and that the British sovereign merely takes over
such rights from the former ruler."(334) Citing the case of
Dixson v. Snetsinger(335) (wherein the court held that the Crown
of Great Britain having acquired by cession the rights and
prerogatives which had previously belonged to the French King,
and that under the French law the Crown was invested with the
title to the bed of the river for public purpose, the court held
that Crown of Great Britain gained a similar title. The decision
relied in large part however on the Imperial Statute, 14 Geo. 3,

(333) Supra, footnote 310, p. 43 citing Walton, The Scope and
Interpretation of the Civil Code of Lower Canada (1907),
especially at 38, 30, 31, 32-33, 34, 37, 38, 40, 42, 43,
47; and 33 Can. L.T. at 287-90.

(334) Supra, footnote 310, p. 43 citing In re Provincial
Fisheries (1896), 26 S.C.R. 444 at 529, per Strong C.J.C.;
this point was not mentioned on appeal, [1898] A.C. 700
(P.C.).

(335) 23 U.C.C.P. 235.
83 wherein it was enacted "that in all matters of controversy relative to property and civil rights, resort shall be had to the laws of Canada, as the rule for the decision of the same". (336) The court did not focus squarely on what aspects of French law would automatically be abrogated upon the assertion of British Sovereignty.

From the above it is clear that certain prerogative rights of the Crown form part of the British public/constitutional law immediately in force in the colonies (and equally clear that not all the Prerogatives of the Crown will be in force).

We return then to Imperial Law in force proprio vigore. It seems clear that major Prerogative instruments expressed to apply to a particular colony or to colonies in general, (and especially where such instruments are passed under the Great Seal such as Letters Patent and Proclamations) are in force proprio vigore in the territories to which they apply. They do not depend upon "reception" of English law, it being only "major" Prerogatives that are in force ipso facto in colonies subject to British dominion as part of the constitutional framework of these colonies.

Cote cites as familiar examples of Imperial statutes in force proprio vigore "the Constitutional Acts creating the Canadian and Australian federations" which do not depend on any form of reception of English law - in fact he argues they have "never formed any part of the law of England", having been passed

(336) Ibid. cited In re Provincial Fisheries, supra footnote 334 at p. 530.
particularly for those dominions. He notes too that "the British North America Acts are in force in the Province of Quebec though it has not introduced the greater part of English law at all." (c.f. Quebec Act).

It would be anomalous, to say the least, if colonial constitutions were to be given in sovereign instruments instead of Imperial Acts, that the former should be treated differently. However not all Prerogative instruments enjoy such force.

It is useful to address the distinction to be made between "minor" and "major" prerogatives of the Crown.
5. **Classification of the Royal Prerogatives**

(i) **Introduction**

Basically, prerogatives fall to be classified upon whether the right fundamentally sustains the existence and authority of the Crown or is merely incidental to it."(337) Chitty makes the distinction between minor prerogatives, which are merely local to England and "those fundamental rights and principles on which the King's authority rests and which are necessary to maintain it.(338) Roberts-Wray adopts the convenient term of major Prerogative for this latter class.(339)

More importantly Chitty attached colonial significance to this distinction. The minor prerogative powers enjoyed by the King in England do not prima facie extend to British dominions unless received there as part of the common law.(340) They would run, therefore, in "settled" colonies or in colonies where the British common law runs as the result of a reception statute, whether of Imperial or Colonial origin. In such territories, the minor prerogatives are prima facie as extensive as in Britain.(341) The minor prerogatives are not prima facie

---

(338) Supra, footnote 245, pp. 25-6; 32-33.
(339) Supra, footnote 251, p. 557.
(340) Ibid., p. 558.
extensible to British territories which, though dependent on the British Crown, have a distinct local jurisprudence. Chitty suggests that where the law of such territories is silent as to the operation of the prerogatives that the prerogatives as established by the English law prevail, subject to exceptions which the difference between the constitution of that territory, and that of the mother country, may necessarily create. (342)

In addition to such minor prerogatives the King enjoys certain major Prerogative powers which fundamentally sustain the existence of the Crown, or form the pillars on which it is supported. (343) These prevail in every part of the territories subject to the British Crown, by whatever peculiar or internal laws they may be governed. (344) The King enjoyed major Prerogative powers in British dependent territories by virtue of the special role of the Crown in relation to foreign states or affairs. As stated above, in Sammut v. Strickland (345) it was held that a major Prerogative operates as "a pure question of English common law in a country such as Malta where the common law is not in force. (346) Major Prerogatives would extend even to

---

(342) Supra, footnote 245, p. 26 and see Liquidators of Maritime Bank of Canada v. Rec. Gen. of New Brunswick L.R. (1892), A.C. 437, where it was held that where not expressly created by local law or statute it is as extensive in the colonies as in Great Britain.

(343) Ibid., Chitty, p. 25.

(344) Ibid.


(346) Ibid., at p. 697.
other territories in which the Crown had jurisdiction, such as protectorates, subject to the law if any of that jurisdiction. Roberts-Wray suggests that it follows that major Prerogatives form part of the constitutional foundation of the country and that, without express grant, the legislatures of a dependent territory cannot alter or abolish them.(347)

(ii) **Major Prerogative Powers**

It is difficult to identify all the subjects falling within the Crown's peculiar jurisdiction that are appropriate for inclusion in the expression "major Prerogatives". Chitty describes these only in general terms as "those fundamental rights and principles on which the King's authority rests and which are necessary to maintain it."(348) He goes on to give as the source of such power: "The King is head of the church; is possessed of a share of legislation; and is generalissimo throughout all his dominions....".(349) He states that the King's minor prerogatives are freely alterable by local assemblies - implicitly then major Prerogatives are not. What then are the major Prerogatives which the legislatures of dependent territories are incompetent to modify and which are exercisable throughout the British dominion? Roberts-Wray goes some way in identifying some subject matters falling within the definition of major Prerogatives but is careful to note that the list is not

---

(347) **Supra**, footnote 251, at p. 561.

(348) **Supra**, footnote 245, at p. 25.

(349) **Ibid.**
exhaustive. (350) As already noted (351) in all colonies the King enjoyed the power to make laws of a constitutional nature — to bring into being, in such colonies, a general power to make laws. The prerogative instruments by which this was accomplished clearly fell to be classified as major Prerogative legislation. The extent of the constituent Prerogative is addressed more fully below.

The prerogative power to grant leave to appeal to the Privy Council may also be a major Prerogative right. It was held in British Coal v. R. (352) that if this Prerogative is to be limited by a Dominion or Colonial Act, it must be the Act of a Dominion or Colonial Legislature which has been endowed with the requisite powers by an Imperial Act giving the power either by express terms or by necessary intendment. This is not surprising as clearly prerogative powers were in all cases subordinate to the powers of the Imperial Parliament. (353)

Roberts-Wray further identifies the Prerogative of Mercy as a major Prerogative; "it could without difficulty be argued that an attempt to interfere with the exercise of Her Majesty (in England) of her right to mitigate the sentences of her courts would conflict with the Sovereign's authority as the fountain of justice, and that this is a major Prerogative". (354) Similarly

(350) Supra, footnote 251, at p. 379.
(351) See discussion above p. 125 et. seq.
(353) Supra, footnote 251, at p. 377.
the power of an English Court to issue the writ of **Habeas Corpus**, a "high prerogative writ" is a manifestation of a major Prerogative and so forms part of the basic law of a territory within British jurisdiction, whether or not received as part of British common law.(355) Roberts-Wray suggests that this in no way limits the powers of such dependent legislatures from enacting laws regarding the issue of writs by their own courts, merely that such legislatures were incompetent to alter the Crown's power to issue such writs.(356)

The criterion upon which a particular prerogative is classified as "major" is not readily discernable from the above examples. Clearly the major Prerogative rights of the Crown (e.g. to make laws - constitutions, or grant privileges - special leave, mercy) are so fundamental to the political character of the Sovereign such that they are *necessarily* extended to all newly acquired territories as a result of British Sovereignty. They form part of the basic law and constitutional framework of such territories and limit the legislative competence of the local assemblies. It is argued that the Indian land provisions of the Royal Proclamation of 1763 is major Prerogative legislation on either of two grounds: that they are constitutional in nature having to do principally with limitations on the powers of Governors to acquire unsurrendered


tribal lands or that as legislation governing the procedure to be adopted for Crown alienation of Indian lands they fall within the King's peculiar authority.
PART III THE ROYAL PROCLAMATION OF 1763 AS MAJOR PREROGATIVE LEGISLATION

The Indian Land Provisions of the Royal Proclamation of 7th October 1763 as Major Prerogative Legislation Referable to the British Crown's Constituent Power in Dependent British Territories

The Indian land provisions of the Royal Proclamation of 1763 purport to limit the powers of all Governors in North America to acquire unsurrendered tribal lands, except in accordance with the procedure therein enunciated. In this respect they can been seen as part of the constitution thereby given to the newly ceded territories, dictating the conditions upon which the governors were to exercise their authority over Indian lands. It is argued the effect of these provisions in relation to all colonies in British North America was to make such procedure a part of the constitution. As argued below, the Crown, by virtue of its constituent prerogative, could effect such minor constitutional changes in relation to all colonies whether or not such an amending power was reserved and whether or not a local legislature was constituted. In fact it was common for the Crown to issue instructions to Governors even where a general legislative power in relation to the particular colony, was lost. The Crown clearly enjoyed the right to make such laws for two or more territories; it was not, as colonial legislatures were, limited in territorial extent.

The means chosen to communicate, to the Governors of British North America, the royal pleasure in relation to the purchase by the Crown of Indian lands was a Royal proclamation, an official public announcement, under the Great Seal. (Remember that the
restrictions upon the use of Proclamations in Britain, as laid down in the Proclamation Case, do not necessarily apply to the colonies where the Crown's prerogative powers are more extensive). The Indian land provisions therein "enacted" did not effect any major constitutional amendment to any of the colonial constitutions but rather entrenched, in a written document, existing unwritten constitutional restraints. From the beginning, British colonial governors in North America had been given clear instructions to respect native land rights and to acquire territory only through cession and purchase. (357) The Indian provisions of the Proclamation confirmed the long held British colonial policy and practice of respect for Indian possession and declared the accepted common law position re Indian land rights. (358) The Indian provisions of the Royal Proclamation of 1763 merely instructed (reminded) governors to recognize certain procedures for Crown purchases of Indian title. That this was within the Crown's power gains support from the fact that a draft of the Proclamation prepared by the Lords of Trade and passed to Attorney-General, Charles Yorke, for legal comment was passed, with the words, "it contains nothing contrary


to law". (359)

It has been noted that it is the prerogative right of Her Majesty (in the United Kingdom) to make laws of a constitutional nature for a dependent territory. The King could establish constitutions for all British territories and where expressly retained had a power to amend or revoke the same. (360) The constituent power could be invoked in relation to all colonies whether acquired by settlement, conquest or cession. (361) It therefore must be referable a major Prerogative as prima facie minor prerogatives could only be exercised in those parts of the British dominions where the common law ran. The constitutions set up by Prerogative instruments in British dominions were not freely alterable by non-representative local legislatures, a rule contained in part in the Colonial Laws Validity Act, 1865. (362) Representative legislatures, by the same Act, were given the power to make laws respecting their Constitution, Powers and Procedure. (363) In R. v. McCawley it was held that:

There is nothing sacrosanct or magical in the word "constitution"; the expression itself not indicating how far, or when, or by whom, or in what manner the rules composing it may be

(359) York to the Board of Trade, 3 October, 1763, Pro. Co.O. 323/16, p. 337.
(360) Supra, footnote 245, p. 28 and see discussion above p. 125 et seg.p.
(361) Jephson v Riera (1835), III Knapp. 130.
(363) Ibid., Colonial Laws Validity Act, 1865, s. 5.
altered". (364)

The legislature must however be endowed with an amending power and must conform to any "manner and form" requirements. In R. v. McCawley the legislature in question was expressly given such power. (365) The case is not authority for the proposition that a constitutional amendment will be impled in the absence of antagonistic legislation with an expressed affirmative character. Repeal by implication is not favoured by the courts, (366) the presumption being that if Parliament intended to effect a repeal it would do so in express language. (367)

The Prerogative instruments establishing constitutions had the force of Imperial statutes and gave a legal basis to the institutions set up under them. Although the decision in Campbell v. Hall (368) (limiting the Crown's legislative authority where a local assembly has been promised) has been taken to extend to limit both the constituent and ordinary legislative power of the Crown, it seems there is little authority to support such a conclusion and good reason for holding otherwise. In this respect it is interesting to look at the decision of the judicial committee in Sammut v.

(364) R. v. McCawley, [1918] 26 C.C.R. 9, at 52 per Isaacs & Rich JJ.


(366) Bac. Abr., statute (D).


(368) Supra, footnote 275.
Strickland (369) and in particular at their consideration of Lord Mansfield's dicta in Campbell v. Hall. It was suggested by counsel in Sammut v. Strickland that as a general proposition, whenever responsible government is conceded by the Crown to a colony or possession, the Royal Prerogative to legislate by Letters Patent or Orders in Council comes to an end and is irrevocably lost or surrendered by the Crown, unless a special reservation is made in the grant. (370) In response the Court stated: "It may be stated at once that there is no authority for this view...." (371) The Court noted that the case relied on for the erroneous view was Campbell v. Hall. (discussed above)

In the latter case, Lord Mansfield, in delivering judgment, said that upon full consideration the Court was of the opinion that before the issue of the Letters Patent of July 20, 1764 (the taxing proclamation) the King had precluded himself from the exercise of a legislative authority over the island of Grenada by the grant of an assembly. He then proceeded to consider the terms of the two proclamations at issue, and after this examination stated

We therefore think, that by the two proclamations and the commission to Governor Melville, the King had immediately and irrecoverably granted to all who were or should become inhabitants, or who had, or should acquire property in the island of Grenada, or more generally to all whom it might concern, that the subordinate legislation over the

(369) [1938] A.C. 678.
(370) Ibid., p. 702.
(371) Ibid.
island should be exercised by an assembly with the consent of the governor and council in like manner as the other islands belonging to the King. (372) (My emphasis)

Of this statement the court in Sammut noted:

It is plain that this authority is dealing with a case where the Crown, after having granted representative institutions to the colony, was purporting to exercise by Royal Prerogative a concurrent right of legislation, though no such right had been reserved. (373) (My emphasis)

The Court in Sammut v. Strickland goes on to examine the legislative grant at issue in that case and concludes that:

The right [sovereign] to legislate in relation to local matters was doubtless suspended while the Letters Patent were in force, for the reason indicated by Lord Mansfield in the passage already quoted -- namely, that so to legislate would be "contrary to and a violation of" the instrument granting the powers; but there is nothing in it to preclude the exercise of the Royal Prerogative as soon as the Letters Patent in that respect cease to be in force. (374)

Clearly the court in Campbell v. Hall was concerned with the Crown's power to legislate for local matters [tax] while the Letters Patent constituting a local assembly were in effect. The court was at pains to make clear that what was at issue was a concurrent legislative power in the Crown where such a power had not been reserved, and on this point held that where an assembly has been granted the subordinate legislation over the territory is lost to the Crown. As Roberts-Wray points out the reference

(372) Ibid. p. 703 citing 1 Cowp. 213.

(373) Ibid., p. 703.

(374) Ibid., pp. 706-707.
to "subordinate" legislation seems clearly to have been a reference to ordinary laws and not those of a constituent nature.\(^{(375)}\) The constituent power of the Crown was not at issue in the case of \textit{Campbell v. Hall} and no decision was made regarding it.

Roberts-Wray examines some authority that implies an opinion to the contrary, i.e. that a Crown grant of a representative legislative body precludes both the exercise, by the Crown, of a general legislative power and the constituent power.\(^{(376)}\) He concludes:

\begin{quote}
It seems that there is a strong case for maintaining that \textit{Campbell v. Hall} and subsequent cases mean only that, unless there is an express reservation (a) the Crown does not possess a concurrent power to make ordinary laws so long as legislative institutions continue in the colony; (b) the grant of legislative institutions cannot be revoked unless the power of revocation is reserved; and (c) amendment of the Constitution not amounting to a revocation of the grant, remains within the prerogative rights of the Crown.\(^{(377)}\) (My emphasis)
\end{quote}

And he notes that the last proposition has the support of Chitty where the constitutional instrument is Royal instructions but not where it is Letters Patent or founded on local law.\(^{(378)}\)

\begin{flushleft}
\((375) \text{Supra, footnote 251, at p. 157.}\)
\((376) \text{Ibid., pp. 159-162 and the cases cited therein.}\)
\((377) \text{Ibid., p. 162.}\)
\((378) \text{Ibid.}\)
\end{flushleft}
notes that it may be that Crown's power of amendment is only referable to constitutional instruments made by the Crown. (379)

That the Crown, upon the grant of a legislature, is not emptied of all constituent power and specifically of the power to make constitutional amendments to the constitution, not amounting to a revocation of the grant, gains further support from Section 5 of the Colonial Laws Validity Act, 1865. (380) The Colonial Laws Validity Act was passed to 'remove doubts' as to colonial legislative competence. Section 5 provided that, "every Representative Legislature" shall have, and be deemed at all times to have had, "full Power to make Laws respecting the Constitution, Powers, and Procedure of such Legislature;..." Roberts-Wray notes that if the doubt as to the competence of colonial legislatures in this regard was well founded and if we accept that the Crown through a grant of a representative legislature loses its 'constituent' power then in whom apart from Parliament was the power to amend such a constitution vested or thought to be vested? (381) If we accept such a power lies with the Crown, section 5 of the Colonial Laws Validity Act, 1865 does no more than give a concurrent right to colonial "representative" assemblies. In fact section 5 has been held to enable representative assemblies to change no more than its own constitution, powers and procedure (382) and such of necessity

(379) Ibid.
(380) Ibid., p. 159.
(381) Ibid.
implies a power in the Crown to amend in other respects (such as the representative character of the legislature) the colonial constitution whether reserved or not. (383) Moreover, section 5 of the Colonial Laws Validity Act, 1865 confers or confirms amending powers in a "representative legislature" and is silent as to the powers of a "non-representative" legislature. The latter legislature clearly might enjoy amending powers where such is expressly authorized by Imperial Act or Order. However, in the more common situation such power would, it is argued, reside in the Sovereign by virtue of the constituent prerogative. (See discussion on Section 5, Colonial Laws Validity Act, 1865, below.

Roberts-Wray further notes that "in fact, for colonies where the general legislative authority has been lost, Letters Patent are made, amended and revoked dealing with the office of Governor, some of his powers, the Executive Council and, in certain respects, the Legislature." (384) Further that, "it is most unlikely that power to make provisions of this sort has always been expressly reserved, but it has never been called into question." (385) He cites various Letters patent for Bermuda and for the Bahamas and for Barbados which regulate their constitutions to a significant extent, and various Letters Patent in regard to British Honduras, Antigua and the Virgin Islands that deal with the Office of Governor, his powers and the

(383) Ibid.
(384) Supra, footnote 251, pp. 145-6.
(385) Ibid.
In some instances Acts of Parliament were used to effect constitutional changes. Most of these "were clearly necessary because they involved the complete abrogation of legislatures and the vesting of wide powers in the Crown".

It is not suggested, and clearly, is not the case, that the Crown's power to amend constitutional provisions extended to a revocation of the grant or to amendments that in substance effected this. But it seems clear that minor constitutional details such as the extent of the authority of the governor and the conditions on which he was to exercise his authority could be varied by the Crown. This was true whether or not such a power was reserved to the Crown. It is argued that the Indian provisions of the Royal Proclamation of 1763 are constitutional in nature having to do principally with the exercise of the Governor's powers. In order to fully understand the Crown's power to issue such instructions it is necessary to look at the nature of the office of the Governor and the powers he exercises.

------------------

(386) Supra, footnote 251, at pp. 145-6.

(387) Roberts-Wray p. 163 citing as an example The Jamaica Act, 1866 (29 & 30 v. c. 12) and c.f. The Malta (Letters Patent) Acts which gave Crown a power to amend, discussed in Roberts-Wray p. 163.

(388) Campbell v. Hall (1774), supra, footnote 275.

The authority of the Queen in the colonies is represented by a Governor. He is appointed by Her Majesty's Commission, which confers upon him his powers and with his instructions defines generally his duties. (390) It cannot be assumed that he possesses general sovereign power. The prerogative was the King's to bestow and he could grant it with or withhold it in such degree as he thought fit. (391) Delegation of the prerogative does not mean that it has been assigned, it is exercisable by a Governor in the name and on behalf of Her Majesty and she is not by such delegation emptied of her own power. (392) It has been held that a Governor of a colony has not, by virtue of his appointment, the whole sovereignty of the territory delegated to him. He is not a viceroy, his authority being limited to that conferred upon him by the Crown or by the Acts of Parliament or other laws. (393) His authority is derived from his Commission, and limited to the powers thereby expressly or impliedly entrusted to him. (394)

The instruments most commonly used to convey the Constitutional Orders of the Crown were Commissions and Instructions but in the early days of the British Empire other instruments such as Orders-in-Council and Proclamations seem to have been used more or less discriminately along with the former

(390) Tarring, supra, footnote 312, p. 33.
(391) Ibid.
(392) Supra, footnote 251, at p. 341.
(393) Commercial Cable Co. v. Governor of Newfoundland, [1916] 2 A.C. , at p. 616.
instruments for such purposes.\footnote{395}

A Commission is a public document, issued as Letters Patent, by which offices, particularly those of the Governor-General and Governor, are created and by which various powers are delegated to the holders of such offices.\footnote{396} Letters Patent are made by the Sovereign alone and become law on the affixing of the Great Seal, under the authority of a warrant bearing the Queen's signature. They are usually approved in draft by Order-in-Council and constitute a direct expression of the Sovereign's will.\footnote{397} At one time the prerogative Constituent power was always exercised by means of Letters Patent (or some other instruments made by the Sovereign alone) conveying instructions to the Governor to establish a legislature.\footnote{398} They seem to have the force and effect of British Statute and it has been held that a Governor's acts exceeding limits prescribed in his Commission are void. An opinion of Edward Northey, the Attorney General of England, \footnote{1713}, stated that land grants made by Governors of New York beyond the authority given in their Commissions would be void.\footnote{399} A similar opinion was given in


\footnote{396} Supra, footnote 251, at p. 143.

\footnote{397} Ibid., p. 144.

relation to land grants made by a Governor of New Hampshire, a
select Committee holding "if the Governor grants in direct
violation of his Commission, the grant is void."(400) And such is
implicit in section 4 of the Colonial Laws Validity Act, 1865,
wherein it is suggested that it is beyond the competence of
colonial governors to disregard even procedural instructions
contained in the 'major' constituent instrument. The latter is
described as "the Letters Patent or Instrument authorizing such
Governor to concur in passing or to assent to Laws for the Peace,
Order, and good Government of such Colony." (s. 4). Section 4
was aimed at saving colonial legislation passed without adherance
to the procedural formalities expressed in various Royal
instructions regarding such laws, but arguably (see discussion
infra) did nothing to detract from the force of such instructions
where they contained a direct order.

It is interesting to look at the various statements that
have been made regarding the force and effect of Royal
instructions. A Governor has no powers to legislate other than
those given in his Commission,(401) and he might be directed to
exercise such powers in accordance with Royal Instructions. Sir
Arthur Berridale Keith,(402) quoting Musgrave v. Pulido(403)

(399) Ibid., p. 306 citing Smith, Appeals to Privy Council, 607,
note 434, citing PRO W.O. 1/404/13.

(401) 5 Hals., 3rd ed., p. 558, para. 1209; Commercial Cable Co.
v. Government of Newfoundland, 29 D.L.R. 7 at p. 11, [1916]
2 A.C. 610; Musgrave v. Pulido (1879), 5 App. Cas. 102.

(402) Sir A. Berridale Keith, Responsible Government in the
There can be no doubt of the doctrine of the Privy Council; a Governor has no special privilege like that of the Crown; he must show in any court that he has authority by law to do an act, and what is more important for our purpose, he must show not merely that the Crown might do the act, but that he personally had authority to do the act. And a Governor was directed to perform his powers in accordance with Royal instructions regarding such.

Formal Instructions were usually issued under the Royal Signet and Sign Manual, addressed to the Governor or Governor General and usually were confidential, "Only such parts being disclosed publicly as were thought useful or essential for particular ends." (404) Their legal effect was controversial. The force and legal effect of such instructions was the subject of various legal opinions. Slattery (405) cites a legal opinion rendered in 1765 by John Kempe, Attorney-General of New York, in relation to the disregard by the Governor of Royal Instructions relating to land grants, not contained in the Commission, to the effect that the acts may nevertheless be binding:

The Crown has thought fit by its instructions to its governments here to direct them not to Grant Lands, before they were purchased from the Indians, but this is not a Restriction contained in his Commission by which he has Power to Grant, but exists in the private Instructions, and tho' if a Governor should act contrary to his instructions it would justly expose him to the King's Displeasure, yet perhaps his Acts might be nevertheless binding,

(403) Supra footnote 394.

(404) Supra, footnote 19, p. 305, citing Labaree, Royal Government, 6 seq., and Swinfen, "Royal Instructions" 22-3, 34-6.

(405) Ibid. p. 306.
and a Grant contrary to the Instructions good, if the Governor pursued the Powers in his Commission.... But of this I speak doubtfully, rather inclining to think there is a Clause in the Commission would make it void.(406)

On this opinion land grants made in excess of powers conferred in a Governor's Commission are void but the position as to instructions is less clear.

Royal instructions to a Governor might be merely administrative but they were frequently legislative. Clearly instructions may be held to be discretionary and not mandatory in their effect in the same way as other legislation, but Roberts-Wray suggests that such is part of and not an exception to the general principle that that Royal Instructions are law.(407) As canvassed above, where such instructions were used to convey the Royal pleasure under the Prerogative for the setting up of a local legislature, they clearly had legal effect.(408) It was also common for the Sovereign to convey constitutional details to supplement the major constituent instrument (Letters Patent, Act of Parliament, Order-in-Council) through Royal Instructions. It was in fact common for a Governor to be directed in the constituent instrument to perform specified functions and generally powers vested in him, in accordance with Her Majesty's Instructions.(409) Of the force of such

(406) Ibid., p. 306, footnote 11.
(407) Supra, footnote 251, at p. 147.
(408) Ibid., pp. 146-7.
(409) Ibid.
instruction, Roberts-Wray says "it would be absurd to suggest that the constitutional details set out in the instructions did not have full legislative operation...". (410) Such was recognized in dicta of the judicial committee in Cameron v. Kyte (411) to the effect that if a Governor had, by virtue of his appointment, the whole sovereignty of the colony delegated to him as Viceroy, his acts would be valid even though not in conformity with his instructions. This, as Roberts-Wray argues, implicitly suggests that where a Governor is not by his Commission made viceroy it is not open to him to disregard Royal Instructions regarding the exercise of his power. (412)

Section 4 of the Colonial Laws Validity Act, 1865, it is true, provided a statutory exemption to this rule in providing that colonial legislation contravening Royal Instructions was to be ultra vires only if such instructions were contained in (not merely mentioned by) the principal constitutional instrument whether Letter Patent, Order in Council or otherwise - such instrument being defined as that authorizing the Legislature to enact "Laws for Peace, Order, and good Government of such Colony". (This point is more fully discussed under Colonial Laws Validity Act, infra.)

------------------

(410) Supra, footnote 251, pp. 147-8.
(411) (1835), 3 Knapp 332.
(412) Supra, footnote 251, pp. 147-8.
It is important here to understand that whatever the effect of section 4 be, it would not operate to save colonial legislation in contravention of instructions contained in Acts of Parliament, Orders or Regulations under Acts of Parliament, or Orders having the force and effect of Acts of Parliament. Any such instructions would be binding on colonial legislatures by virtue of section 2 of the *Colonial Laws Validity Act, 1865* (see discussion infra under this heading).

In most cases the governor then was bound by Royal Instructions, other than those of merely procedural effect (this exemption being given in s. 4 of the *Colonial Laws Validity Act, s. 4*). In addition to standing instructions, special instructions could be given, either by the King-in-Council, or by a secretary of state or by the Board of Trade. And the instructions did not depend for their weight on the mode of communication; they were all valid to bind the Governor as regards his duty to the King.

In territories where the sovereign continued to exercise control over the constitutional details in matters of constitutional machinery and legislative procedure, the sovereign's pleasure was expressed through Orders-in-Council, Royal Instructions, and less frequently Proclamations.(413) The Crown, as argued above, retained the power to regulate such

(413) *Supra*, footnote 19, at p. 304 and footnote (3) where he cites as an example of a Royal proclamation containing directions as to the manner in which the governor should exercise his authority that issued in respect to Trinidad on 19 June 1813, partial texts of which are given in Clark, *Colonial Law*, 307-8, and Howard, *Colonial Laws*, I, 531-2.
constitutional details even in those colonies with elected legislatures where the Crown enjoyed little or no prerogative power to enact ordinary legislation (414) and where the Crown reserved no power to revoke the constitution. Further the Crown retained such power in the British colonies at least up until the enactment of the Statute of Westminster in 1931 [also see discussion below on the effect of s. 5 of the Colonial Laws Validity Act, 1865].

We are here interested in Proclamations. Royal Proclamations, as public acts under the Great Seal, are prerogative instruments of a high order and Slattery suggests are equal in authority to Governor's Commissions (415). They are susceptible of operating as colonial constitutions a fact evidenced by the Royal Proclamation of 1763 which establish the Constitution for Quebec (416). Slattery notes the basic Constitution of Trinidad was for many years a Royal Proclamation (417).

The Indian land provisions of the Royal Proclamation of 1763 purport to limit the powers of all Governors in North America to acquire unsurrendered tribal lands except in accordance with the procedure therein enunciated. In this respect they can been seen as part of the constitution thereby given to the newly ceded

(414) See discussion above p. 114 et seq.
(416) Ibid.
(417) Ibid.
territories, dictating the conditions upon which the governors were to exercise their authority over Indian lands and it is argued the effect of these provisions in relation to all colonies in British North America was to make such procedure a part of the constitution. As argued, the Crown, by virtue of its constituent prerogative, could effect such minor constitutional changes in relation to all colonies whether or not such an amending power was reserved and whether or not a legislature was constituted. In fact it was common for the Crown to issue instructions to Governors even where a general legislative power in relation to the particular colony, was lost.

Although directions to Governors did not depend for their weight on the mode of communication, the mode nevertheless had important consequences in relation to their force and to their susceptibility to colonial legislative "override".

The Indian land provisions of the Royal Proclamation were directed at the Governors of the various British North American possessions. As has already been noted, these instructions, reminding the Governors to recognize British policy in respect to Indian held lands, merely entrenched unwritten constitutional restraints on the Governor's powers, a course of action clearly open to the Sovereign.

The Royal Proclamation has been held to have the force and effect of an Imperial Statute in the colonies. The Indian land provisions, as argued above, are constitutional in nature having to do principally with limitations on the Governor's powers to purchase Indian lands and were thus a valid exercise of a major
Prerogative legislative power. The provisions served to bind the Governors in all British Colonies and plantations in America at any time during the Proclamation's life.
2. The Indian Land Provisions of the Royal Proclamation of 7th October 1763 as Major Prerogative Legislation Referable to the British Crown's Power in Relation to Land in Dependent British Territories

(i) General

It is here argued that the ultimate title to unsurrendered tribal lands was vested in the King by virtue of the Executive prerogative. This allowed the King to enact various legislative measures aimed at a uniform regime for the regulation and control of purchases from the Indians, commensurate with Imperial policy in this regard. The resulting Royal Proclamation of 1763 operated, as major Prerogative legislation, to bind colonial governors to the extent it directed the procedure to be followed for Crown alienations of such land, and bound subjects to the extent it ordered them not to purchase or settle in the newly created Indian reserve and to remove themselves from illegal settlements on unsurrendered tribal lands there or indeed throughout British North America.

As an incident of British Sovereignty the title to the territory passes to the British Crown. However, the acquisition of British Sovereignty by whatever means, also seems to import Crown rights in relation to the land itself. Slattery has undertaken an extensive review of the effect of British Sovereignty on pre-existing land rights and the principles involved. (418) I intend here to merely present a brief review of the main principles governing the Crown's title to land in newly acquired British territories.

------------------------

(418) Supra, footnote 19, ch. 2.
The circumstances in which a territory came under British sovereignty may affect land rights, although the distinction as to mode of acquisition is not always apparent in court judgments. Of more importance to Crown rights in this regard, is the state of the territory acquired; namely whether the land was uninhabited or was inhabited and subject to existing private or tribal rights at the time of acquisition.

Basically, in an uninhabited country acquired by settlement the Crown obtains full title to the soil and unrestricted powers of disposal. Incoming settlers can make good against the Sovereign only such rights to the land as derive from the Crown itself.\(^{(419)}\) The position is different where the territory acquired is already subject to existing rights of private ownership. In such a case the Crown gains immediate title to all land that has no owner, and an underlying title to those lands subject to private rights or tribal rights.\(^{(420)}\)

In the case of a conquest or cession the Crown possesses the initial right to extinguish or modify private rights through an Act of State (and such is not reviewable by municipal courts).\(^{(421)}\) This was made clear by Lord Mansfield in *Campbell* \(^{\text{(419)}}\) *Ibid.* p. 45, citing as an example *Falklands Island Company v. R.* (1864) 2 Moo. P.C. (N.S.) 266 (P.C.) at 272. And see; *Williams v. Attorney General for New South Wales* (1913), 16 C.L.R. 404, *Wi Parata v. Bishop of Wellington* (1877), 3 N.Z. Jurist 72.


v. Hall where he said that no man ever disputed that on conquest, if the King refused a capitulation and exterminated the population, all the land belonged to him; and that if he received under his protection and granted them their property he had power to fix such conditions as he thought fit.\(^{(422)}\) In the case of a conquest or cession the Crown, as we have seen, possesses the prerogative right to legislate for the territory concerned, at least until an assembly is summoned. Slattery cites authority for the proposition that the prerogative power of the Crown to legislate for a newly conquered or ceded territory is however constrained by any articles of capitulation or treaty under which the country was obtained.\(^{(423)}\)

The status of private rights and native rights in British territories is thus, in large part, dependent upon the initial actions of the Crown incident to acquisition. However, it is a "guiding principle" under British law that the Crown is assumed to intend, "that the rights of property of the inhabitants are to be fully respected".\(^{(424)}\) In the absence of adverse acts of state, performed as an incident of acquisition or of prerogative legislation affecting such rights, private rights are presumed to continue unimpaired and tribal rights to continue until extinguished with native consent or in accordance with

\(^{(422)}\) (1774), 1 Cowp. 204.

\(^{(423)}\) Supra, footnote 19, p. 49, footnote 18.

statute. (425) The rights in question must, however, be sufficiently precise so as to be susceptible of recognition and enforcement. (426) However, there is no necessity that they be stated in terms or concepts known to English land law, or that they be, in their own terms, freely transferrable or susceptible of individual ownership. Property rights of a communal or non-transferrable character being equally capable of recognition. (427) The same does not hold true of rights of a contractual character held as against the former sovereign or government. These are not enforceable against the Crown in municipal courts unless confirmed by Crown acts or legislation (428)

Where colonies are acquired by cession it has been held that a treaty of cession is an Act of State and as such not reviewable by municipal courts which will not enforce treaty rights unless they are given effect by statute. (429) In Vajesingji Joravarsingji v. Secretary of State for India (1924) (430) the Privy Council held that:

---------------------

(426) Supra, footnote 19, p. 49 and footnote 20.
(427) Ibid., pp. 49-50, footnote 21.
(428) Ibid., p. 50.
if in a treaty of cession it is stipulated that certain inhabitants should enjoy certain rights, that does not give a title to those inhabitants to enforce these stipulations in the municipal courts. The right to enforce remains only with the high contracting parties.(431)

And in Hoani Te Harhen Tukino v. Aotea District Maori Land Board (1941), a similar conclusion was reached regarding Maori land rights under the Treaty of Waitangi (1840) by which the Crown guaranteed the inhabitants of the territories full, exclusive and undisturbed possession of their lands. The Privy Council held that "it is well settled that any rights purporting to be conferred by such a treaty of cession cannot be enforced in the courts, except in so far as they have been incorporated in municipal law."(432)

However, this rule does not bar a court from recognizing pre-existing land rights where there has been no Crown conduct that necessarily negates such rights. This is consistent with the view of land ownership taken in the St. Catherine's Case(433) Lord Watson explained, in relation to the B.N.A. Act, 1867(434) that whenever public lands and its incidents is described as the "property of" or as "belonging to" the Dominion or a Province, these expressions merely import that the right to its beneficial

(431) Vajesingji Joravsingji v. Secretary of State for India (1924) L.R. 51 I.A. 357 (P.C.).


(434) 30 & 31 Vict., c. 3 (Imp.).
use, or its proceeds, has been appropriated to the Dominion or Province, as the case may be, the land itself being vested in the Crown (in that case by force of the Treaty of Paris). (435) If the Dominion or Province illegally alienated land subject to private rights or Indian title, these rights being capable of being vindicated in competition with the beneficial interest claimed by the Crown, a cause of action would accrue to the injured party, unless the intention be such as to make such disposition an extinguishment of that right. (436) It is argued that given Indian land rights were confirmed in the Royal Proclamation of 1763, an instrument held to have the force of an Imperial statute, that extinguishment of Indian title was not competent to the Dominion, Provincial or Colonial legislatures prior to 1931 (and the Statute of Westminster, 1931) except in accordance with the procedure laid down in the Proclamation.

There have been various judicial statements regarding native title. The New Zealand case of R v. Symonds (437) is authority for the proposition that, though the Crown was the exclusive source of title, it did not itself acquire title and that the title of the natives could not be extinguished without their consent. In Nireaha Tamaki v. Baker (438) the Judicial Committee

---------------------

(435) Ibid., at p. 56 (P.C.).
emphasized that native title could not be extinguished (at last in times of peace) otherwise than by the free consent of the native occupiers or in strict compliance with the provisions of a statute. In other cases minimal recognition has been accorded native title. In Canada aboriginal title has been recognized as a sui generis legal interest, which is not dependent upon legislative recognition and which is maintainable at the suit of the Indians against the Crown.

It seems clear British sovereignty imports Crown rights in the land. Upon acquisition the radical or ultimate title vests immediately in the Crown and the Crown has the right to dispose of land not subject to private or tribal rights and a power to abrogate or modify the latter as an incident of acquisition. In the absence of Crown conduct impinging on or extinguishing such rights they are however presumed to continue unimpaired. It remains to determine on what principles the accepted rights of the Crown in relation to land, the subject of British Sovereignty are premised and what powers of disposition thereby attach to the Crown.

(439) Supra, footnote 251, pp. 634-5.
(440) See Guerin supra, footnote 1 at p. 378.
(ii) **Crown Rights in Relation to Land as a Major Prerogative**

Salmond suggests that the principles of English feudal law (by which all England was not merely the territory but also the property of the Crown) were necessarily imported into colonial possessions along with the reception of English law (441) presumably either because such was brought by settlers or introduced by statute. The rule however governing the importation of English law limits the English law 'received' to that applicable to local circumstances and it is doubtful whether feudal principles would meet this test. This also fails to explain the uncontroverted Crown rights in lands acquired by cession or conquest (see discussion above) and where the basic law in force is not that of England. Salmond further suggests that where English common law is introduced into a colonial protectorate, all the land therein vests in the Crown, in accordance with feudal principles, even though the protectorate does not for that reason become a British territory. (442) As Roberts-Wray argues, there are major problems with such a view: "Even if feudal principles are imported into colonies as part of the common law, ownership of land (dominium) thereunder would surely flow from the ownership of the territory (imperium) and since in the case of a protectorate the latter is not vested in the Crown there is no basis for applying the fiction of Crown ownership". (443) However it would seem that by legislation the

---


(442) Ibid.
Crown may have similar rights in a Protectorate. (444)

Since Crown rights in relation to land in the colonies does not seem to depend solely upon the mode of their acquisition and its consequent effect on the basic law there in force, the rights must apply by virtue of Sovereignty -- either if feudalism is itself a major Prerogative or if the common law rights flowing from it are a major Prerogative. Judicial authorities have not clearly distinguished between the latter two. In _R. v. Clarke_ (445) the court asserted that the King by prerogative is ultimate owner of all colonial land, and absolute owner of ungranted land. (446) The cumulative effect of the judgments in the High Court of Australia in _Williams v. Attorney-General for New South Wales_ (447) is that on the acquisition of a Colony, feudal principles became applicable; the land belonged to the Crown in the right of Sovereignty and settlers acquired no title "until the Crown chose to 'grant' it." (448)

Whether New Zealand is regarded as a settlement or as a cession, the laws of New South Wales, a settled colony, were immediately applicable there, and later English law was confirmed __________________

(443) _Supra_, footnote 251, pp. 626-7.


(446) Ibid. at p. 79 c.f. Roberts-Wray who on this point comments that "it is doubtful whether it satisfies the test". Roberts-Wray, p. 627.


(448) _Supra_, footnote 251, p. 631.
to have been in force from the New Zealand Parliament. Thus the cases asserting feudal origins for Crown lands do not necessarily suggest this flows from a Major Prerogative — such is also consistent with the reception of feudal principles as part of the common law of England. And the cases that are premised upon New Zealand being considered a settlement must be read in light of this. In R. v. Symonds (449) it was held that a person acquiring land from a native obtained a good title as against the native but not as against the Crown as the Crown had an exclusive right to grant titles and extinguish native titles. (450) The Court accepted that the Crown was the source of title but expressed doubt as to whether a full proprietary title vested in the Crown. Martin C.J. explained that though this may have originated in feudal law, its objects were a uniform land system and the prevention of the formation of new colonies by settlers. (451) In re the Ninety Mile Beach the court accepted the proposition that upon the assertion of British Sovereignty over New Zealand the Queen was immediately vested with a fully proprietary title to the whole of New Zealand. (452) In Tamihana Korokai v. Solicitor General (453) Mr. Justice Cooper, applying feudal principles said


(450) Supra, footnote 251, p. 631.

(451) Supra footnote 449, at p. 395.


(453) Tamihana Korokai v. Solicitor General (1912), 32 N.Z.L.R.
that while technically the legal estate was in His Majesty, customary land could not be said to vest in him by virtue of the Prerogative unless ceded to or otherwise acquired by him. But such was premised on a definition in the Land Act defining Crown land as all native land ceded to, or otherwise acquired by Her Majesty or vested in her by right of her Prerogative. (454) And the New Zealand decisions reflect the uncertainty as to whether New Zealand is to be regarded as a cession or a settlement and the effect of the Treaty of Waitang.

It seems clear that whether by applying feudal principles or otherwise, in any colony the ultimate title to the land vests in the Crown by virtue of the Prerogative and the Crown has the right to dispose of land that has no owner. It seems further that the Crown has extensive discretionary powers in relation to land the subject of native title. The question as to whether Crown rights of disposition extended to extinguishment of native title by exercise of the Prerogative was left open in Nireaha Tamaka v. Baker. (455)

It remains to say something of the power of the colonial governors and local legislatures in relation to land. It is a recognized principal that real estate, or land, is exclusively subject to the laws of the government within whose territory the land is situated -- it is subject to the lex situs (456) But this

321 at 352-353.

(454) Land Act, (1892), No. 37, cited in Roberts-Wray supra, footnote 251, p. 634.

rule does not, however, apply as between the United Kingdom and the rest of the Queen's dominions, inasmuch as the British Parliament was until 1931 constitutionally competent to legislate for the whole. (457) It has here been argued that the Crown was constitutionally competent to legislate in regards to land in Indian possession throughout British dominions and that such Prerogative legislation was equal in force to an Imperial statute. It is also argued that it was incompetent to Colonial legislatures to pass legislation at variance with any Crown legislation in that sphere.

This does not mean that the Governors or local legislatures were incompetent to enact laws relating to land in the colony. Such a power was normally given in the legislative grant. But, as has already been noted, the delegation of a Prerogative power does not mean it has been assigned. It is exercisable by a Colonial Governor in the name, and on behalf of Her Majesty and she is not thereby emptied of her own power. (458) The powers of the Governor are various; (459) he is granted by letters patent constituting his office the executive authority of the Crown so far as is necessary for the government of the territory, to be exercised according to the laws in force and to the instructions

--------

(456) British South Africa Co. v. Companlia de Mocambique, [1893] A.C. 602; Deschamps v. Miller, [1908] 1 Ch. 856.


(458) Supra, footnote 251, at p. 341.

(459) See discussion above p. 150 et seq.
of the Crown. (460) In addition to his voice in legislative matters the Governor is normally empowered to make grants of land in accordance with any law or instructions. (461) It is clear that the Crown (and, of course, the Imperial Parliament) may in general prescribe limits to the exercise of such a power.

Cockburn A.-G. stated in argument before the Privy Council in R. v. Clarke (462) that;

A Governor of a Colony is not invested with all the prerogative of the Crown. The power of granting land is part of the prerogative of the Crown. The Governor's power is limited by his Commission, and the Royal Instructions. (My emphasis).

The "instructions" could be merely private directions (legislative or administrative) addressed to a particular Governor or could be directed to all colonial governors on matters of important Imperial concern. The necessity and the value of Imperial supervision is obvious in regard to the fundamental issue of land ownership (and the welfare of Natives). If the Governors or local legislatures were to be relieved of Imperial control, it would be impossible to expect the adoption of sufficiently generous measures in regard to native interests. (463) And it was a fundamental principle of British Constitutional Law that British sovereignty did not mean the

-------------------


(461) Ibid, 481.

(462) (1851) 7 Moo. P.C. 77 (P.C.) at p. 83.

(463) Keith, supra footnote 460 at p. 215.
confiscation of native land interests.

From an early time, colonial expansion took account of the various aboriginal interests and there was no doubt as to the obligation of colonial governments to respect those rights. From the beginning, British colonial governors in North America had clear instructions, often expressed in the Letters Patents themselves, to respect native land rights and to acquire territory only by purchase in the name of the Crown. (464) In R. v. Symonds, (465) Mr. Justice Chapman recognized that such a policy had been long accepted in relation to the American colonies:

The practice of extinguishing Native titles is certainly more than two centuries old. It has long been adopted by the Government in our American colonies, and by that of the United States ... whatever may be the opinion of jurists as to the strength or weakness of Native title ... it cannot be too solemnly asserted that it is to be respected, and that it cannot be extinguished (at least in times of peace) otherwise by the free consent of Native Occupiers.

This obligation on colonial governments, imposed by the Crown acting under its Prerogative, was expressed in various Prerogative instruments. Although it may be possible to argue that where such instructions were directed in private

---


communications to colonial Governors they did not serve to invalidate inconsistent colonial acts (based on s. 4 Colonial Laws Validity Act, 1865) it is not the case where the King 'enacted' measures of a legislative character in an instrument under the Great Seal, as was done in the Royal Proclamation of 1763, for matters within his control. The Crown's right to prescribe the policy to be adopted by all Governors in North America in relation to the procedure to be adopted in the colonies for Crown purchase of Indian title and to restrict the power of Governors to grant land subject to such title was a Major Prerogative of the King.

It is true the Commission usually contemplated that the Governor should act, not merely under the prerogative powers, executive legislative and judicial, conferred by it, but also according to such reasonable laws and statutes as might be enacted by the legislature. Although where an assembly is summoned in a colony whatever powers the Crown enjoyed to enact ordinary legislation for the colony ceases, Crown rights in regard to land are otherwise unaffected by the calling of the assembly.(466) Colonial assemblies were supreme in their sphere of activity and could modify by local legislation the prerogative insofar as it concerned local authority. However, they could not enact legislation inconsistent with Imperial statutes extending to the colony or with Major Prerogative Orders so extending. Any doubts in this regard were removed by s. 2 of The Colonial Laws

(466) Supra, footnote 19, p. 288, citing comments in O'Connell & Rioden, Opinions 329.
The distinction between the Crown's legislative powers in a colony, over people, and its powers over land was implicitly recognized in *Campbell v. Hall*. Although it was held, by Lord Mansfield, that by the Royal Proclamation of 1763 the King, by promising an assembly to Grenada, lost its powers of ordinary legislation, he nevertheless treated as valid a later proclamation (March 1764) by the King which set forth terms for the disposal of land in the colony. Lord Mansfield thus implicitly recognized that the Crown's Prerogative regarding land in the colony was not limited by the calling of an assembly, although his power to enact ordinary legislation was so limited.

This fact was also recognized in *Johnson v. M'Intosh*, as noted by Slattery. Of this case Slattery says:

"[The] Proclamation of 1763 could not restrain private individuals from purchasing Indian lands in Virginia "because the King had not, within the limits of that colonial government, or any other, any power of prerogative legislation, which is confined to countries newly conquered....", and *Campbell v. Hall* was cited in support. Marshall C.J. rejected this contention, stating that in British constitutional law all vacant lands were vested in the Crown, and the exclusive power to grant them was admitted to reside there as a branch of the royal prerogative. This power, he affirms, was fully recognized in the American..."
colonies. "All the lands we hold were originally granted by the Crown; and the establishment of a regal government has never been considered as impairing the right to grant lands within the chartered limits of such colony". This held true not only of vacant lands, but also of lands occupied by the Indians, the ultimate title to which, subject to the Indians' right of occupancy, was held by the King, along with the power grant that title. "These grants" explains Marshall in an earlier passage, "have been understood by all to convey a title to the grantees, subject only to the Indian right of occupancy." So, he concludes, the lands covered by the Royal Proclamation of 1763 were lands which the King had the right to grant or to reserve for the Indians.

The Chief Justice goes on to hold that the Proclamation's validity may be justified on another basis. In British constitutional law, the Crown holds extensive prerogative powers to conduct relations with foreign nations. The peculiar situation of the Indians, considered in some respects as dependent groups and in other respects as distinct peoples, occupying a country claimed by Britain, yet too powerful not to be feared as formidable enemies, required that some means should be adopted for the presentation of peace, by quieting the Indians' apprehension for their lands. This was to be effected by restraining the encroachments of the Whites; and the power to do this was never, we believe, denied by the colonies to the Crown". The powers of granting or refusing to grant vacant lands, and of restricting encroachments on the Indian lands have always been admitted." The authority of this proclamation [the Royal Proclamation of 1763] so far as it respected this continent, has never been denied, and the titles it gave to lands have always been sustained in our courts."(471)

In Jackson v. Porter commenting on the effect of the Royal Proclamation in New York, the court held that "the authority of the King to regulate and control purchases from the Indians

(471) Supra, footnote 19, pp. 289-291.
within his colonies, was not questioned on the arguments and cannot be denied." (472) The Kentucky Court of Appeal adopted the same position in 1823 as regards lands originally claimed by the colony of Virginia, holding that, "all purchases by individuals from the Indians, were expressly forbidden by the Royal Proclamation of 1763....". (473) Slattery further points to Mitchell v. U.S. (474) and Montgomery v. Ives (475) as evidencing the binding effect of the Proclamation's land strictures in the ceded territories comprised within the two Floridas.

A similar view of the Royal Proclamation's validity was accepted in the judgment of Lord Denning in The Queen v. Secretary of State for Foreign and Commonwealth Affairs. (476) It is interesting to note what Lord Denning said in this regard, although it was clearly obiter in that case:

The colonies formed one realm with the United Kingdom, the whole being under the sovereignty of the Crown. The Crown had full powers to establish such executive, legislative and judicial arrangements as it thought fit. In exercising these powers, it was the obligation of the Crown (through its representatives on the spot) to take steps to ensure that the original inhabitants of the country were accorded their rights and privileges according to the customs coming down the centuries.


(473) Slattery 291.


except insofar as these conflicted with the peace and good order of the country or the proper settlement of it. This obligation is evidenced most strikingly in the case of Canada by the Royal Proclamation of 1763".

and

The Royal Proclamation of 1763 had great importance throughout Canada. It was regarded as of high constitutional importance. It was ranked by the Indian people as their Bill of Rights... (477)

To my mind the Royal Proclamation of 1763 was equivalent to an entrenched provision in the constitution of the colonies in North America. (478)

And he goes on to say:

I find myself in agreement with what was said a few years ago in the Supreme Court of Canada in Calder v. A.G. of British Columbia (1973), 34 D.L.R. (3d) 145 at 203, in a judgment in which Laskin J. concurred with Hall J. and said: "This Proclamation was an Executive Order having the force and effect of an Act of Parliament and was described by Gwynne J., as the "Indian Bill of Rights"... its force as a statute is analogous to the status of Magna Carta which has always been considered to be the law throughout the Empire. It was a law that followed the flag as England assumed jurisdiction over newly-discovered or acquired lands or territories... The proclamation must be regarded as a fundamental document upon which any just determination of original rights rest".

And

The 1763 proclamation governed the position of the Indian peoples for the next hundred years at least. It still governs their position throughout Canada, except in those cases when it has been supplemented or superseded by a

(477) Ibid., at p. 154.

(478) Ibid.
treaty with the Indians... (479) (My emphasis).

When dealing with the Constitution Act, 1867 and noting, that save for the reference in s. 91(24) as to Indian affairs, nothing was said about the title to property in the "lands reserved for the Indians".... Lord Denning continued, "I have no doubt that all concerned regarded the Royal Proclamation of 1763 as still of binding force. It was an unwritten provision which went without saying. It was binding on the legislatures of the Dominion and the provinces just as if there had been included in the statute a sentence "The aboriginal peoples of Canada shall continue to have all their rights and freedoms as recognized by the Royal Proclamation of 1763." (480) This Act was not amendable by Dominion or provincial legislatures.

The Royal Proclamation of 1763 has thus been held to be a valid exercise of the Crown's Prerogative with respect to land the subject of Indian title and, as an incident to this Major Prerogative, the right and duty of the Crown to take such measures as are necessary to secure to the natives their land rights. It is true that there was no Imperial Statute of this time embodying the procedures and principles set forth in the Royal Proclamation of 1763 but Parliament was not altogether silent on the issue. From an early time the preoccupation of Parliament was not whether aborigines had any rights; nor was there any doubt as to the Imperial obligation to respect these

(480) Ibid., p. 155.
rights. The controversial point was always the extent of these rights.

One of the earliest manifestations of Parliamentary concern for the plight of aboriginal peoples was an address of the House of Commons in 1834. This document is clear evidence of the awareness of Britain's moral and legal responsibilities to the Indians and of the Crown's Prerogative to direct governors in this regard. The House of Commons resolved unanimously:

That His Majesty's faithful Commons in Parliament assembled, are deeply impressed with the duty of acting upon the principles of justice and humanity in the intercourse and relations of this country with the native inhabitants of its colonial settlements, of affording them protection in the enjoyment of their civil rights, and of imparting to them that degree of civilization, and that religion, with which Providence has blessed this nation, and humbly prays that His Majesty will take such measures, and give such direction to the Governors and officers of His Majesty's colonies, settlements and plantations, as shall secure to the natives the due observance of justice and the protection of their rights, promote the spread of civilization among them, and lead them to the peaceful and voluntary reception of the Christian religion.(481) (My emphasis)

The Lord Chancellor remarks of this Address that, so far from being the expression of any new policy, it only embodied and recognized principles in which the British government had for a considerable time been disposed to act.

-----------------------

(481) Annexed to the Report of the Select Committee of the House of Commons on Aborigines. (British Settlements) 1837, H.C.P.P. vol. 7, at 3 et seq.
I have elsewhere dealt with judicial authority which accords the Royal Proclamation of 1763, the force of Imperial Statute. What I have attempted to show here was that the Indian land provisions were a valid exercise of a Major Crown Prerogative, that of effecting minor constitutional changes to the colonial constitutions (Constituent Prerogative) or that in relation to land and more particularly land the subject of native title. The Prerogative instrument chosen to effect such 'legislation' was a Royal Proclamation under the Great Seal. By virtue of it being major Prerogative legislation (which has been accorded the force of effect of Imperial Statute) it enjoys the 'protection' of the Colonial Laws Validity Act, 1865 given such Imperial law. It is argued that the rule extended to protect constitutional instructions expressed in Prerogative Instruments of a high order or Imperial Acts. The Crown had the power to establish constitutions for all British colonies and where expressly retained had full power to amend the same. Where offices of the Governor or Governor-General were constituted, in sovereign instruments, and given thereby limited powers, the Crown retained both the power to "instruct" such Governors as to how they were to exercise the power thus delegated to them, and the power to enforce, through such instructions, the public policy of the United Kingdom upon matters of substantial Imperial concern. The instructions had 'the force of law', subject to any statutory modification (such as that effected by s. 4 of the Colonial Laws Validity Act, 1864), and where expressed in a Major Prerogative instrument clearly operated to bind colonial governors and legislatures (c.f. s. 2 of the Colonial Laws Validity Act, 1865).
On this argument the Indian Land provisions of the Royal Proclamation of 1763 operated to bind all British colonies in North America in 1763. These provisions express a universal policy in relation to the procedure to govern all Crown purchases of Indian land and the power of all Governors to grant land in Indian possession. As such, it is suggested they operated to bind the Governors of all colonies in British North America at whatever period they be acquired and independently of posterior legislation expressly extending them, in much the same way as the Acts for abolishing the slave trade are applied: proprio vigore and independent of the mode of acquisition of the territory. In fact the authorities have held that land grants made by colonial authorities of unceded Indian lands contrary to the Proclamations provisions are invalid. (see discussion infra).
3. Amendment of Prerogative Legislation by Local Laws

(i) Introduction

A colonial legislature is that authority, other than the Imperial Parliament of Her Majesty in Council, competent to make laws for any colony. Colonial legislatures are non-sovereign bodies subject to Imperial legislative control. The legislation of a colonial legislature differs from that of the United Kingdom in that the Acts of the latter, as has already been pointed out, cannot be questioned as ultra vires or invalid by any court. The constitutions granted to British possessions, whether by proclamation, charter, order in council, or British statute, differ from that of the United Kingdom in being written, and in being not original but derivative and thus in a sense subordinate, and in being more or less rigid and restrictive of the legislative body which they create. In the case of such legislatures, the courts of the possession, and in the last resort the Judicial Committee of the Privy Council, may have to adjudicate not only on the meaning of a statute or ordinance, but also as to its validity by reference to the instruments creating the authority to legislate. As to the latter question, they have to discharge a function analogous to that discharged by an English court in dealing with subordinate legislation.

--------------

(482) Colonial Laws Validity Act, 1865 28 & 29 Vict. c. 63, s. 1, see Appendix I.

(483) Dicey, Constitution, 10th ed. pp. 702 et seq, 127 et seq.
Regarding the legislative competence of colonial legislatures, the tendency of the decisions of the Judicial Committee has been to extend and not to limit their authority, which is recognized as supreme within its sphere of activity.(484)

The grant of a legislative power to a dependent legislature is invariably expressed as that of making laws for the "peace, order and good government" of that territory. Although the power rests on an Imperial grant, either by the authority of the Crown expressed by charter, proclamation, or Order in Council, or by the authority of Parliament expressed in a British statute creating or authorizing the creation of a constitution,(485) it is not considered to be a delegated power.(486) The dependent legislature has within its sphere of competence, plenary authority and full discretion in the exercise of its powers subject only to those restrictions expressly imposed or necessarily implied by the terms of its constitution(487) and from those imposed by the Colonial Laws Validity, Act 1865(488) (the only express general provisions in the British Statute Book


(485) See Campbell v. Hall (1774), 1 Cowp. 204; Wade and Phillips, Constitutional Law, 8th ed., pp. 422 et seq.


(488) Supra, footnote 482. See Appendix II.
with reference to the validity of Colonial laws) and the Statute of Westminster, 1931.\(^{(489)}\) A local legislature probably enjoyed no power to make laws with extraterritorial effect.\(^{(490)}\) Nor could it alter its constitution unless a power was expressly given in the grant of legislative power, a restriction removed as to colonies with representative legislatures by s. 5 of the Colonial Laws Validity Act, 1865. "Accordingly the act of a local legislature lawfully constituted, whether in a settled or a conquered colony, has, as to matters within its competence and the limits of its jurisdiction, the force and operation of sovereign legislation, though subject to control by legislation of the United Kingdom Parliament, and ... of the Crown."\(^{(491)}\) (my emphasis).

Imperial control of colonial legislation is exercised directly through Imperial legislation (Parliamentary or Prerogative) expressed (or implied) to apply to the colonies, and by the issue of instructions to colonial governors regarding the giving of assent to bills. Legislation of the United Kingdom, it has been held, must not unnecessarily be held to extend to the colonies and thereby overrule, qualify or add to their own legislation on the same subject.\(^{(492)}\) Imperial control is

\(^{(489)}\) Statute of Westminster, 1931, 22 & 23 Geo. 5, c. 4.


\(^{(491)}\) Hals, 3d edn. p. 582.

\(^{(492)}\) New Zealand Loan and Mercantile Agency Co. v. Morrison,
exercised indirectly through the machinery of the Colonial Laws Validity Act, 1865. By the latter, a colonial law will be invalidated on grounds of repugnancy to any Act of Parliament, extending by express words or necessary intendment to the territory to which such law relates, or which is repugnant to any Order or regulation made under the powers of, or having the force of, such Act in the colony, to the extent of such repugnancy. (493) Since the passage of the Colonial Laws Validity Act, 1865, repugnancy to the common law of England is not of itself sufficient grounds for invalidation. The repugnancy doctrine and the effect of the Colonial Laws Validity Act, 1865 is dealt with more fully later. As stated above, the Crown further exercises control over colonial legislation through instructions to Governors, for example, instructions as to the giving of Royal assent, and through the power of Crown disallowance of colonial acts.

The Governor is usually given, in the legislative grant, a general discretion to assent, refuse assent or to reserve a Bill for Her Majesty's pleasure. And the Royal Instructions commonly require him to reserve any Bill falling under specified headings. (494)


(493) Supra, footnote 1, s. 2 & 3.

(494) For example the Royal Instructions to the Governor of Jamaica of 27th Oct. 1944 mandate such reservation of any Bills "the provisions of which appear to him to be inconsistent with obligations imposed upon us by Treaty" or "of an extraordinary nature and importance whereby Our Prerogative or the rights and property of Our subjects not residing in [the territory] or the trade or transport or
In all cases, whether or not expressly reserved, the Crown has the Prerogative power, at common law, to disallow Colonial laws.\(^{(495)}\) If this power is exercised, the law ceases to have operation from the date at which notification of such disallowance, is published in the colony. Absent such disallowance the colonial law usually comes into operation immediately upon receiving the Governor's assent, unless some other date is prescribed by the law itself, or unless it contains a suspension clause. In the latter case the Colonial law, although assented to by the Governor, does not come into operation or take effect in the colony until Her Majesty's pleasure (i.e. not to disallow them) has been signified, usually through the Secretary of State or when the constitution of a colony so prescribes, by Order-in-Council.\(^{(496)}\) This procedure is a recognized alternative to reservation and may be contemplated in the constitutional instrument\(^{(497)}\) or prescribed by the local law itself.\(^{(498)}\) The force of Royal instructions is dealt with elsewhere.\(^{(499)}\) By virtue of s. 4 of the Colonial Laws Validity Act, 1865, a colonial law passed with the concurrence of the communications of any part of Our dominions or any territory under Our protection may be prejudiced".

\(^{(495)}\) Clark, supra, footnote 300, p. 46; Todd, Colonies, p. 171; Hood Philips p. 735 (cited in Tarring?).

\(^{(496)}\) Supra footnote 312, p. 41.

\(^{(497)}\) E.G. the Malta Royal Instructions, 5th September 1947, art. 20.

\(^{(498)}\) As was done in B.C. Land Act of 1870.

\(^{(499)}\) See discussion below at p. 255 et seq.
Governor or assented to by him is not invalidated by reason only of inconsistency with Royal Instructions regarding such law unless such instructions are contained in the primary Constituent instrument for that territory.

It has been suggested that where a colonial law is ratified by the express sanction of Her Majesty it then has the same authority as that of an Imperial Statute. Such was the opinion given by Attorney-General Northey in answer to a question posed by the Board of Trade as to whether the Queen could, by proclamation, alter the rates of foreign coin in the plantations, specifically where the rate was set by a Colonial Act which had been confirmed by the Queen in Council.(500) Northey was of the opinion that the confirmation having been absolute, the rate established would continue until repeal by another act of the General Assembly, "the passing of an act there with the absolute confirmation of Her Majesty having the force of an Act of Parliament made in England"(501) (my emphasis). Smith notes a similar opinion of Solicitor General Raymond, to the effect that acts of colonial assemblies were "of the same effect there, as an Act of Parliament here".(502)

--------------


(502) Ibid., Smith, p. 570 citing 1712-1714, #457.
The question of the effect of confirmation by the King arose as a secondary question in a series of cases relating to colonial laws of intestacy. The Privy Council in *Winthrop v. Lechmere* (503) declared invalid the Connecticut Intestacy Law of 1699 which abolished primogeniture in intestate succession. No power to disallow rested with the Crown under the Charter but the Act was found to violate the Charter by its departure from the rule that legislation must be in accord with English law, interpreted to include common law. This judgment was enforced by Order in Council of 15 February 1728. Yet in the Massachusetts case of *Philips v. Savage* (504) in 1738 the Massachusetts Act of 1692 (which had inspired the Connecticut Act of 1699) was upheld. It was argued as a point of distinction in the later case that the colonial act there in question was expressly confirmed by the King in Council. Smith notes that 'from the recital in the report it appeared that the grounds for dismissal of the appeal included the 1695 confirmation of the questioned Act by the King in Council, recent confirmation of a 1731 additional act and constant usage in the colony under the Act.' Further "that the circumstance of such Crown confirmation has been assumed was the ratio decidendi of the affirming consilior order", (505) although "there was some contemporary opinion in the Colony to the effect


(505) *Supra*, footnote 500, p. 569.
that the Confirmation was of no operative consequence". (506) The latter view, that is, that confirmation would not of itself validate an invalid Act, Smith comments, accords with judicial statements that Crown approval of corporate bylaws did not render such bylaws of the same force as a statute such that their validity was removed from judicial review. (507) As regards the force of such bylaws Holt C.J., stated:

Every by-law is a law, and as obligatory to all persons bound by it, that is, within its jurisdiction, as any Act of Parliament, only with this difference, that a by-law is liable to have its validity brought in question but an Act of Parliament is not. (508)

No English court has ever declared an Act of Parliament null and void on judicial review. (509) That a colonial confirmed act was subject to judicial review is clear from the opinion of law officers, solicited by the Board of Trade, on the question of whether, subsequent to such a confirmation, it lay in the King's power to repeal them where later they were found to be repugnant to the Charter. (510) The Law Officers advised that the laws in question were probably not repugnant but added that if they were to be found repugnant "the only method of bringing that matter to

(506) Ibid.
(507) Supra, footnote 500, p. 569 citing Tailors of Ipswich, 11 Coke 53a and The Stationers in the City of London v. Salisbury (Comb. 221).
(508) City of London v. Wood 12 Mod. 669, 678.
(509) Supra, footnote 500, p. 571 and see exceptions cited there.
a determination would be by some judicial proceeding". (511) The Board of Trade finally allowed colonial control of intestacy distributions. Matthew Lamb, Board of Trade Council, commented in relation to a confirmed Pennsylvania Act on this question:

This and some other of the neighbouring provinces have particular laws relating to the distribution and division of intestate's estates which are different to the laws of England but as they have heretofore passed and been confirmed here I can make no objection thereto. (My emphasis). (512)

These cases and opinions were given in the early 18th century when uncertainty as to the limits of the repugnancy doctrine reigned. (513) All the cited cases concerned laws not inconsistent with Imperial law in force proprio vigore in the territories but with the received common and statute law of England. Arguably they grasped at Imperial confirmation of such laws as a means of upholding the impugned colonial laws. Even so, that the opinions did not go so far as to accord them the force of an Imperial Statute, is implicit in the suggestion that their validity was always open to judicial review. Smith notes that there is no evidence that it was raised at first instance in Philips v. Savage, (514) that the impugned confirmed act had the force of an act of the Parliament, and goes on to comment "it is furthermore extremely doubtful if Northey's doctrine [that it

(511) Add. MS, 36, 142/300-311.

(512) Supra, footnote 500, p. 577, citing CO 5/1273/V62.

(513) See discussion above, p. 212 et seq.

(514) Supra, footnote 504.
did] could be supported."(515) By the mid 19th century the doctrine of invalidity on grounds of repugnancy was narrowed and limited to that of repugnancy to Imperial Law in force \textit{proprio vigore} in the colonies.(516) No exception is made for those colonial acts receiving express confirmation in Britain, they remain for purposes of review, colonial acts and subject to the overriding authority of Imperial legislation directed at the colonies. There is no good reason for suggesting that confirmation in Britain should operate so as to give validity to a colonial enactment which is void by reason of repugnancy to an Imperial statute or order of the same effect applying to the colonies. Keith comments that the doctrine of confirmation "would not be accepted by courts at the present time as validating a measure \textit{per se} illegal".(517) The better view is that this is probably true for a much earlier date, and certainly true since the \textit{Colonial Laws Validity Act, 1865}. This accords with a 1737 opinion of the Crown law officers holding that an act of a colonial assembly, \textit{even if confirmed} by the Crown, could not create a monopoly on trade with the Indians inhabiting the colony, "as an absolute exclusive trade with the Indians would be destructive of that general right of trading which all His Majesty's subjects are entitled to, and therefore repugnant to the laws of Great Britain...."(518)

(515) \textit{Supra}, footnote 500, p. 571.


(518) Cited in Slattery \textit{supra}, footnote 19, p. 316 - Opinion of
An analogy exists in the argument that the assent of the Crown may operate so as to cure a defect in a colonial law due to lack of competence in the legislature. In *Webb v. Outtrim* (519) the Judicial Committee said

Every Act of the Victorian Council and Assembly requires the consent of the Crown, and when it is assented to become an Act of Parliament as much as any Imperial Act, though the elements by which it is authorized are different. If, indeed, it was repugnant to the provisions of any Act of Parliament extending to the colony, it might be inoperative to the extent of its repugnancy, (see the Colonial Laws Validity Act, 1865, supra) but with this exception, no authority exists by which its validity can be questioned or impeached.

Craies, in commenting on this statement says it must be read subject to the comment that the Commonwealth of Australia Constitution Act, 1900, is an Imperial Act extending to Victoria. In *Naden v. R.* (520) the Privy Council in relation to a section of the Criminal Code of Canada purporting to annul the Royal Prerogative to grant special leave, held the section invalid as being inconsistent with the Imperial Judicial Committee Acts and therefore invalid under section 2 of the Colonial Laws Validity Act, 1865. Viscount Cave stated, "It is true that the Code has received this royal assent, but that assent cannot give validity to an enactment which is void by Imperial statute." (521) In fact colonial acts having received Royal Assent have on many occasions

Ryder A.G. and Strange S.G. dated 28 July 1737; Forsyth, Opinion, 431.

(519) [1907] A.C. 81, at p. 88.
been subject to review by the judicial committee of the Privy Council. (522)

Before leaving this point it is to be noted that, in any event, the confirmation given is to the legislation on its face. Where such does not contain express words indicative of an intention to extinguish, wholesale, aboriginal property rights throughout a colony, the King cannot be taken to have confirmed this. It is a rule of statutory construction that a Statute should not be deemed to extinguish or take away a right of property without compensation unless it appears by express words or by plain implication that it was the intention of the legislature to do so."(523) Given that that Imperial confirmation does not alter the authority of colonial legislation, confirmed colonial laws are subject to the same limits as those which were not confirmed.

Insofar as Imperial statutes are concerned, the Imperial Parliament had full power to pass legislation binding on colonial legislatures, although the former is never presumed to legislate except for the United Kingdom, unless a contrary intention is to


be found in the Act. The Imperial legislation applicable to a colony falls into two categories; (i) those British and United Kingdom Statutes expressly, or by necessary implication extending to the colony, being applicable to a particular mentioned territory or extending to all such territories; and (ii) those English, British or United Kingdom statutes in force in a colony by reason of settlement or through statutory (Imperial or local) adoption. Those Imperial Statutes falling within Category (i) apply *proprio vigore* (see discussion above) to the territories to which they apply, and serve as an absolute limitation on colonial legislative competence and operate so as to void every subsequent colonial act which is repugnant to any such provisions, to the extent of the repugnancy ([Colonial Laws Validity Act], s. 2). However, by the Statute of Westminster, 1931, no Act of the United Kingdom passed after December 11, 1931 extends to Canada (including Newfoundland), Australia or New Zealand unless it is expressly declared in the Act that the particular dominion has requested and consented to the enactment thereof (s. 4). Those Imperial statutes falling within category (ii) above, being the law in force in the colony merely by reason of settlement or adoption do not enjoy the protection afforded by the Colonial Laws Validity Act, 1865, and thus can be freely modified or repealed by a colonial legislature within its sphere of legislative competence.

Insofar as Imperial Crown legislation is concerned the position is less clear. Two issues are raised; (i) the ability of a colonial legislature to affect, by legislation, the
Prerogative of the Crown and (ii) the ability of a colonial legislature to pass legislation at variance with legislation under the Prerogative.

To deal briefly with the first issue. The issue was raised in relation to the Prerogative to grant leave to appeal to the Privy Council. In 1888 the federal Parliament enacted an amendment to the Criminal Code which purported to abolish appeals to the Privy Council in criminal cases. In *Naden v. The Queen*, (524) the Privy Council held the statute to be invalid, primarily because it conflicted with two Imperial statutes. After the Statute of Westminster had conferred on the dominions the capacity to repeal or amend Imperial statutes, Canada re-enacted the 1888 statute and it was held in *British Coal Corp. v. R.* (525) to be valid. There is dicta in the *British Coal Corpn.* case to the effect that where a colonial legislature intends to limit the prerogative, not only must the colonial Act itself mention the prerogative by express terms or necessary intendment, but the colonial legislature must have been endowed with the requisite power, expressed or implied in an Imperial Act (or presumably the Crown constituent instrument where the legislative authority is by virtue of a Crown grant). This dicta cannot be taken as authority for colonial legislative competence in regard to all Crown prerogatives. The case there concerned the power to abolish the Prerogative power to grant leave to

---

appeal to the King in Council and the court found that s. 91 of the **B.N.A. Act, 1867** endowed the Dominion Parliament with the competence to do so. But it must be remembered that this decision came after the enactment of the **Statute of Westminster, 1931** which freed certain colonial legislatures, including Canada, from the restrictions, given in the **Colonial Laws Validity Act, 1865**, as to repugnancy. In **Attorney-General of Canada v. Cain and Gilhula** (526) it was stated that any power or prerogative of the Crown may be delegated or transferred "to the governor or the government of one of the colonies, either by a Royal Proclamation which has the force of a statute (citing **Campbell v. Hall** (1774), 1 Cowp. 204), or by a statute of the British Parliament, or by the statute of a local Parliament, to which the Crown has assented. If this delegation has taken place, the depository, or depositaries, of the executive and legislative powers and authority of the Crown, can exercise those powers and that authority to the extent delegated, as effectively as the Crown could itself have exercised them". (527) But as to each possession it is necessary to examine the relevant statutes, orders and instructions, to see whether the particular prerogative has been surrendered, delegated, or put within the legislative control of the local legislature. (528) The minor prerogatives of the Crown

(526) [1906] A.C. 542, at 546.

(527) The following cases were cited as establishing these propositions: **Re Adam** (1837), 1 Moo. P.C. 460, 472-476; **Donegani v. Donegani** (1835), 3 Knapp 63, 88; **Cameron v. Kyte** (1835), 3 Knapp 332, 343; **Jephson v. Riera** (1835), 3 Knapp 130; 3 St. Tr. (N.S.) 591.
are prima facie as extensive throughout British territories as in England (529) and the power of colonial legislatures to affect such minor prerogatives is found in the words, common in the legislative grants to colonial assemblies, to make laws for the "peace, order and good government of the territory." (530) The same does not hold true where the Prerogative is a major Prerogative operating throughout Her Majesty's dominions, independently of the extension of British common law, and which have the force and effect of Imperial Statutes. (531) Such major Prerogatives "are part of the constitutional foundation of the country" and, without express grant, the legislature of a dependent territory cannot alter or abolish them." (532) Although from the British Coal case it must be argued that this was changed by virtue of the Statute of Westminster as of 1931.

Turning to the second issue; the ability of colonial legislation to modify and rescind prerogative legislation. The ability of colonial laws to derogate from prerogative legislation depends, in large part, on the classification of the prerogative legislation in question. (See discussion above). There is no reason for suggesting that colonial laws could not alter or repeal prerogative legislative provisions making ordinary laws

(528) Supra, footnote 95 at pp. 502-3.


(530) See British Coal Corp. v. R., supra footnote 2.

(531) See discussion above p. 144 et seq.

(532) Supra, footnote 251, p. 379.
(minor prerogative legislation) they being of equal stature. But the better position appears to be that it was not competent to colonial legislatures to interfere with major Prerogative legislation, the only exception being statutory (s. 5 Colonial Laws Validity Act). There is little judicial authority on this point. The Judicial Committee stated in Chenard v. Arissol,(533) that the power to make laws for peace, order and good government does not authorize alteration by a colonial legislature of its constitution or powers. The decision of the judicial committee in Yeap Cheah Neo v. Ong Cheng Neo (1975)(534) that a local ordinance had not abrogated a provision made by Prerogative Letters Patent, seems to imply that it could have done so. The decision, however, did not turn on whether such a repeal had been effected, so this statement was unnecessary to the decision. Moreover Letters Patent of a constitutional nature (here setting up a particular court) were generally held to limit colonial legislative competence. Section 5 of the Colonial Laws Validity Act, 1865 removed this limitation, to a certain extent, in the case of a representative legislature, a provision hardly necessary if it was open by mere ordinance to alter the colonial constitution.

In summary, local legislatures had plenary law-making powers subject only to the limits imposed or necessarily implied in their constitutions, and to the limits expressed in the

(533) [1949] A.C. 127
(534) Yeap Cheah Neo v. Ong Cheng Neo (1875), L.R. 6 .C. 381.
repugnancy doctrine.

It is here argued that, insofar as British Columbia is concerned, the local Land legislation purporting to extinguish aboriginal title was ultra vires the terms of the constitution of the Colony of British Columbia which included the The Royal Proclamation of 1763 (as well as inconsistent with instructions issued to the Governor.) It is elsewhere argued that the Royal Proclamation of 1763 is as major Prerogative legislation, with the force and effect of an Imperial statute extending to the Colonies,(535) and that it should be held to apply to British Columbia.(536) Because of the protection afforded such Orders by the Colonial Laws Validity Act, 1865, colonial legislatures were powerless to enact legislation repugnant to its provisions. It is further argued that the Colonial Laws Validity Act, 1865 protects major Prerogative Legislation relating to the colonies from colonial derogation, and operates so as to void any repugnant local legislation to the extent of such repugnancy.

----------------------

(535) See discussion, above p. 144 et seq.

(536) See discussion, supra, p. 54 et seq.
PART IV: THE COLONIAL LAWS VALIDITY ACT, 1865

1. The Historic Setting

(i) Introduction

The Colonial Laws Validity Act, 1865, was passed to remove doubts as to the validity of colonial laws and remained at least up until the passing of the Statute of Westminster, 1931, as a check on colonial legislative competence.

It was never doubted that the Imperial Parliament possessed the ultimate and final law making power throughout the British Empire, and that local assemblies could not derogate from Imperial laws intended by the Imperial Parliament to have colonial significance. Doubt arose, rather, as to the interpretation and authority of colonial legislation that purported to contradict the ordinary law of England. In this respect the Colonial Laws Validity Act provided that it was only those Imperial "laws" expressly or "by necessary intendment" extending to the colonies that were to be considered sacrosanct in the colonies to which they applied. The Act operated to render colonial acts, repugnant to the provisions of such Imperial laws, void to the extent of repugnancy.

(537) 28 & 29 Vict. c. 63.
(538) The Statute of Westminster, 1931, 22 Geo. 5, c. 4.
(539) Supra, footnote 482, ss. 2 & 3. Appendix II.
(540) Ibid.
The Colonial Laws Validity Act gave statutory definition to those Imperial "laws" which were to operate as restrictions on the legislative competence of colonial legislatures. Clearly the Act operated to void colonial enactments repugnant to Imperial statutes with the necessary colonial intendment, and delegated legislation enacted under the authority of such statutes. The argument is made here that such "protection" was extended to Certain Imperial Orders and Regulations, enacted under the royal prerogative, and intended to have colonial reach. More specifically the argument will be made that any colonial enactment contrary to the provisions the Royal Proclamation of 1763 being such an 'Order' must by virtue of the Colonial Laws Validity Act, be held void to the extent of such repugnancy. [Such an argument lies in addition to an argument that the Royal Proclamation of 1763 applied proprio vigore to impose strict constitutional limitations on the power of colonial legislatures to derogate from its provisions.]

(ii) **Background to the Enactment the Colonial Laws Validity Act**

The immediate cause of the Act was a series of judgments rendered by Mr. Justice Boothby in the Supreme Court of South Australia in the early 1860s. These judgments impugned the validity of several South Australian statutes on various grounds, such as their repugnancy to the common law of England, their

---------------


(542) *Supra*, footnote 251, at p. 396 (hereafter noted as Roberts-Wray).
having been assented to by the Governor contrary to instructions or their having been constitutional amendments beyond the power of the colonial legislature. The immediate crises provoked by these decisions were handled by specific validating Acts of Parliament.(543) The problems which these judgments brought to light were the subject matter of three opinions of the Law Officers of the United Kingdom, who agreed with the views of Mr. Justice Boothby to a substantial extent, and showed no sympathy with an address from the Legislature of South Australia praying for his removal.(544)

On the question of repugnancy, the Law Officers reported that a colonial statute contravening a British Act applying of its own force was void to the extent of the conflict. Moreover, they were of the opinion that repugnancy also arose in case of conflict with fundamental principles of the common law. It was difficult to define fundamental as opposed to other principles but it was suggested, as examples, that repugnant colonial statutes would include those authorizing polygamy, abolishing Christianity or providing punishment without trial.(545) The Law Officers recommended an Imperial Act applicable to all colonies to clarify the restrictions upon colonial Imperial legislative authority.

--------------------

(543) 25 & 26 Vict. (1862), c. 11; 26 & 27 Vict. (1863), c. 84.


(545) Ibid.
The colonial office prepared the draft bill which Parliamentary Reports suggest went through all stages and was enacted as the Colonial Laws Validity Act, 1865, without any debate whatsoever. (546) Section 2 of the Act declared specific Imperial limitations to full colonial legislative competence (subject of course to any restrictions imposed in the grant of legislative authority). It thus preserved the right of the Imperial Parliament (and in certain respects the Crown) to legislate for a colony to which a local legislature was granted, and to make it impossible for the colonial legislature to enact anything repugnant to Imperial legislation so affected; but not otherwise to derogate from the general powers of colonial legislatures. (547)

The Colonial Laws Validity Act, 1865, did not impose any new restrictions on colonial legislation but, rather, made precise the rules regarding the relations of Imperial and colonial legislation.

The expressed purpose of the Colonial Laws Validity Act, 1865, was to remove doubts as to the authority and powers of colonial legislatures. The preamble to the Act reads:

Whereas doubts have been entertained respecting the validity of divers laws enacted or purporting to have been enacted by the legislatures of certain of her Majesty's colonies, and respecting the powers of such legislatures, and it is expedient that such doubts should be removed....

(546) Supra, footnote 251, p. 397.

Preambles, especially in the earlier Acts, have been used as an important guide to construction. "The Preamble", according to Pollock C.B.(548) "is undoubtedly part of the Act". It is a recital of the facts operative on the mind of the framers in proceeding to enact the law. The intention of the Colonial Laws Validity Act clearly was to remove doubt, and not to fundamentally change the existing law. This makes less surprising the total lack of debate preceding its enactment.(549) It further explains why, given that all the principle sections of the Act were retrospective in operation, there is no evidence that the Act in fact caused any chaos in the colonies.(550) Given that the law, then, suffered no fundamental change, the Act should be interpreted in light of the existing state of the law upon which Boothy's judgments had cast a shadow.

It is a sound rule of construction that a statute be construed in conformity with the common law except where the statute is plainly intended to alter the course of the common law.(551) Where an expression used is in general terms, the words are to receive such a construction as may be agreeable to the rules of common law in cases of that nature, as statutes are not to alter common law further or otherwise than the Act expressly

-------------------

(548) Salkeld v. Johnson (1848), 2 Ex. 256 at 83) and see also Davies v. Kennedy (1848), 2 Ex. 256, 283.
(549) Murray p. 47.
(550) Supra, footnote 251, p. 397.
(551) R. v. Morris (1867), L.R. 1 C.C.R. 90 at p. 95.
declares.\textsuperscript{(552)} It thus becomes necessary to look at the repugnancy doctrine at common law prior to the passing of the Colonial Laws Validity Act.

(iii) \textbf{Colonial Legislative Powers Prior to 1865 - The Doctrine of Repugnancy}

The rule, that a colonial law might be invalid by reason of repugnancy to the law of England, appears to have its origin in the practice of Parliament in making a grant of legislative power to stipulate that no laws should be repugnant to the "law of England".\textsuperscript{(553)} The rule was incorporated in varying forms, in many Royal charters, Commissions and other instruments which conveyed colonial legislative power with the proviso respecting agreement or non-repugnancy with the laws and statutes of England. These formula, in their origin, were intended as caveats against the undue exercise of by-law power, being first employed in patents of incorporation as a check upon the manner in which the by-law powers of domestic corporations were to be exercised. Such domestic corporations were subject, in all respects, to the common law and statutes of England.\textsuperscript{(554)} There is reason to believe that when they came to be applied to

\textsuperscript{(552)} Arthur v. Bokenham (1708), 11 Mod. 148 at 150.

\textsuperscript{(553)} For an early formulation of the doctrine of repugnancy, see the opinion of Yorke A.-G. and Talbot S.-G. of 1 August, 1730 on the powers of the Connecticut Assembly; Chalmers, Opinions, I, 353-A).

plantation charters, their intendment was to restrict the grant of legislative power to local government and to retain utter discretion to the Crown and Parliament of England. (555)

At an early stage uncertainty arose regarding what meaning was to be attributed to the phrase "Laws of England". Clearly it covered Imperial Acts of Parliament extending to a colony. One scholar notes that a prima facie presumption of repugnancy would also exist in the case of acts running counter to any established common law or equity doctrine that was living law in England. (556) This position is reflected in early 18th century opinions emanating from the colonies suggesting that colonial legislatures were incompetent to alter the Statute or common law of England and that they could not enact 'anything against Her Majesty's prerogative". (557)

(555) Ibid., 529.
(556) Ibid., 529.
(557) This is illustrated in an opinion (1732) of the Attorney-General [Rawlin] of Barbados, on the Act of Assembly creating paper money. Dealing with the Assembly's legislative powers it was said:

"...it cannot be granted there, that they are capable to enact, at their own will, and pleasure, what they think fit. For they cannot, by law, alter the common law of England, and the settled course of proceedings thereon, .... They cannot enact anything against Her Majesty's prerogative. ... and they cannot pretend to have an equal power with the Parliament of England."

Other early opinions are to the same effect. An Opinion of 1718 by Sol.-Gen. Thorison, treated as void a Carolina law imposing a heavy duty on British goods, on the ground that it effectively prohibited trade to British subjects, "which
During the eighteenth century, the doctrine of repugnancy, so far as it related to Imperial law, not given statutory expression, was limited to certain fundamental features of English law and generally to matters vital to Imperial interests. (558)

Parliament itself had made several attempts to grapple with the problem of measuring colonial legislation against the standard of laws of England. The first of such Acts was "An Act for Preventing Frauds and Regulating Abuses in the Plantation Trade, made applicable to Colonies in Asia, Africa and America. (559) By section 9 of the Act any plantation laws

"...which are in any ways repugnant to the before mentioned laws, or any of them, so far as they do relate to the said plantations, or any of them, or which are any ways repugnant to this present act, or to any other law hereafter to be made in this Kingdom, so far as such law shall relate to and mention the said plantations, are illegal, null and void, to all intents and purposes whatsoever". (my emphasis).

is by no means agreeable to the laws of Britain" 7 [5 April 1718, Chalmers Opinions 11, 292-3].

In 1737 the Crown law officers held that an act of a colonial assembly, even if confirmed by the Crown, could not create a monopoly on trade with the Indians inhabiting the colony, "as an absolute exclusive trade with the Indians would be destructive of that general right of trading which all His Majesty's subjects are entitled to, and therefore repugnant is the law of Great Britain... 8

[Opinion of Ryder A.-G. and Strange S.-G. dated 28 July 1737; Forsyth Opinions, 431].

(558) Supra, footnote 251, p. 316.

(559) 7 & 8 Wm. III (1969), c. 22.
Repugnancy thus applied in relation to certain existing or future Imperial 'laws' as distinct from existing or future "statutes". It can be inferred that repugnancy was intended to cover conflicts with the common law (as limited during the course of the 18th century to fundamental features thereof) and to Imperial law as well as to Parliamentary enactments. This interpretation accords with an opinion on colonial legislative competence.(560) However the context of s. 9 might indicate a more restricted interpretation, i.e. that "laws" in s. 9 should be interpreted as "Acts" since the "before mentioned laws" were three statutes of Charter II's time referred to in the previous section.

The exact meaning of these words of s. 9 was even at the time doubtful. In 1752 James Abercromby who had extensive colonial experience,(561) submitted a proposal to Lord Halifax in relation to the proper standard for repugnancy. The proposal was in the form of a draft of a lengthy Act of Parliament designed to strengthen the colonial administrative system of Great Britain. Commenting on the inadequacy of s. 9 of 7 & 8 Wm. III, c. 22 (supra) to remove doubts re the validity of colonial laws, he proposed a new section to deal with repugnancy.(562) Basically, he proposed that colonial law should be voidable on grounds of

(560) Supra, footnote 374.
(561) James Abercromby, served nearly 13 years as Attorney and Advocate-General of South Carolina and since 1749 as colonial agent for North Carolina, Smith 578.
(562) Supra, footnote 500, p. 578.
repugnancy to the common law of England; to the prerogative royal; to the rights and liberties of the Subject, or to Imperial statutes in affirmance or amendment of the common law. The latter he felt should bind colonial legislatures whether or not such statutes were expressed to apply to the colonies.\footnote{563} Whilst the solution may have been, even at this time, been stated too broadly, it can be seen as evidence of the doubt that still remained. The focus of the 'doubt', as evidenced from Parliamentary response to early colonial "repugnancy" cases, centered upon the problem of which Imperial statutes were to have colonial significance, all Imperial statutes or only those with the necessary colonial extension? This then, and not the effect of Prerogative legislation with colonial intention, was the focus of the problem to which Parliament turned its attention. It is therefore not surprising the later Acts were directed at the confusion regarding the effect of Imperial Statutes.

Section 9 of the 1969 Act\footnote{564} was repealed in 1825\footnote{565} and replaced in the same year.\footnote{566} The new Act was stated to apply only to colonies in "America" including Bermuda and those in the Caribbean. Section 49 of this Act stated repugnancy in terms of Acts of Parliament:

\begin{quote}
\end{quote}

\footnote{563}{\em Ibid.} 
\footnote{564}{\em Supra,} footnote 559. 
\footnote{565}{6 Geo. IV (1825), c. 105, s. 34.} 
\footnote{566}{6 Geo. IV. (1825), c. 114, s. 49.}
And be it further enacted, That all Laws, Bye Laws, Usages or Customs at this Time, or which hereafter shall be in practice, or endeavoured or pretended to be in force or practice, in any of the British Possessions in America, which are in any wise repugnant to this Act, or to any Act of Parliament made or hereafter to be made in the United Kingdom, so far as such Act shall relate to and mention the Possessions, are and shall be null and void to all Intents and Purposes Whatsoever.(567)

It has been suggested that this provision clearly contemplated only the "protection" of Imperial Statutes.(568) Certainly it deals only with repugnancy to Imperial statutes relating to and mentioning the said possessions. However, this can be explained in terms of the controversy it sought to end, that is which Imperial Acts were to be considered sacrosanct? It directed that only those English statutes, extending by express wording to the colonies, were such as would restrict colonial legislative competence. All other Imperial statutes were not to be accorded binding force in the colonies such as to limit colonial legislative authority.

Section 49 of 6 Geo. IV (1825), c. 114 was in turn replaced in 1833(569) and again in 1845(570) by identically worded Sections.

-----------------------------

(567) Ibid.
(568) Murray p. 33.
(569) 3 & 4 Wm. IV (1833), c. 59, s. 56 Act to Regulate the Trade of British Possessions.
(570) 8 & 9 Vict. (1845), c. 93, s. 63.
The section in the 1845 Act was repealed in a statute of 1853 consolidating the law relating to customs. (571) This new Act carried forward the repugnancy provision, (572) and was still in force at the time of the enactment of the Colonial Laws Validity Act, 1865.

It is important to recognize that none of the above considered Acts was worded in such a way as to limit the repugnancy doctrine to Imperial Acts with expressed colonial intendment. As we have seen, prior to the enactment of the Colonial Laws Validity Act, 1865, the 'repugnancy' doctrine also served to protect certain fundamental principles of English law. Thus the wording of the above considered Acts cannot be regarded as exhaustive of the categories of Imperial law which might void colonial laws on grounds of repugnancy. Moreover, this is clear from a consideration of various Imperial Acts passed for the colonies.

An Imperial Act (573) authorized the legislature of lower Canada (Quebec) to make laws repugnant "to the Law of England" relating to the disposition of real property, a subject neither dealt with in an Imperial Act extending to the colony nor, even then, considered as fundamental. Nevertheless the Act was passed with the expressed purpose of "removing doubts" as to its legal competence in that respect. Similarly the Colonies (Evidence) Act, (571) 16 & 17 Vict. (1853), c. 107.

(572) Ibid. s. 190 and Schedule A.
(573) 1 Wm. 4, c. 20.
Act, 1843(574) recited and removed "doubts" as to whether colonial laws were repugnant to the "Law of England" and therefore null and void, if they provided for the admissibility of evidence of uncivilized people. Evidentiary procedure surely could not be considered as a fundamental principle of English law nor was it covered by an Imperial Act with the necessary colonial intendment. It can be inferred from the wording of these Acts that 'doubts' were entertained as to what Imperial law, other than Imperial Acts, passed and stated to have colonial application, was to be considered binding on the colonies.

An early law officer's opinion suggests a liberal interpretation for the Imperial law to be accorded 'protected' status in the colonies. The opinion stated that a Hong Kong Ordinance was void merely because it punished as perjury an act not so punishable in England.(575) The Law Officers declined to draw a line between principles of English law which were fundamental and those which were not. They advised however that a law would be "repugnant" if it prohibited Christianity or permitted slavery, polygamy, punishment without trial or the "uncontrolled destruction of aborigines".(576) (emphasis added).

Before the passing of the Colonial Laws Validity Act, 1865, the repugnancy doctrine seems to have been limited more strictly, to the fundamental laws of England. It was in that form that the

(574) 6 & 7 Vict. (1843), c. 22.
(575) Supra, footnote 251, p. 401; Forsyth, Opinions p. 23.
(576) Ibid. 401.
law was stated by the Law Officer shortly before the Act was passed. (577) The Act limited repugnancy to certain defined Categories of Imperial Law: Imperial Acts extending to the colonies, orders and regulations made under the authority of such Acts and Orders and Regulations whilst not made under the authority of such Acts, nevertheless having in the colonies the force and effect of such Acts. (578) As stated above, it will be argued that the last mentioned category applied to protect 'major' Prerogative legislation which extended to the colonies proprio vigore and with which the local legislatures were not competent to interfere.

It is true that there was, at the time of the enactment of the Colonial Laws Validity Act, 1865, little discussion as to the relevancy of the repugnancy doctrine to prerogative legislation. The Act was not, however, altogether silent on this point. Orders-in-Council and Letters Patent, the two instruments most commonly used to express the "will" of the Sovereign in relation to the colonies were expressly mentioned in the Act. (579) Moreover it was never controverted that certain prerogative instruments had in the colonies to which they applied the force and effect of Imperial Acts, for example, the prerogative instruments granting the country's constitution. Further that such constitutional provisions were not freely amendable by the

(577) Ibid.
(578) Ss 2 and 3. Appendix II.
(579) Ss 1, 3 and 4. Appendix II.
local legislatures, a rule contained in part in the *Colonial Laws Validity Act*. Section 2 of the Act specifically recognizes the paramountcy of certain Orders and Regulations, which though without Parliamentary Sanction, nevertheless have the force and effect of such an Imperial Act.

Given the extent and legal effect of the Crown's prerogative in relation to the colonies, it will be argued that such Orders and Regulations, above mentioned, must necessarily be interpreted to be those prerogative Orders and Regulations which are of such major importance in the colonies to which they relate that the Imperial Parliament has deemed them sacrosanct and any colonial law purporting to derogate from their provisions must by virtue of the *Colonial Laws Validity Act*, be void to the extent of the repugnancy.

It is to be noted, before passing to a discussion of the Act itself, that the Act is not exhaustive of the limitations to colonial legislative autonomy.

The Act, in declared purpose and effect merely removes doubts as to the *vires* of colonial laws on grounds of repugnancy to the laws of England. The Act left untouched basic constitutional principles relating to the legislative authority of dependent British territories. Thus, for example, colonial legislatures could enact nothing outside the legislative limits prescribed by the instrument under which they were constituted, a


(581) *Supra*, footnote 482 Preamble and ss 2 and 3.
The clear implication of sections 4 and 5 of the Act is that a colonial legislature is subject to the authority by which it was created. Clearly colonial legislatures had no power to abolish or limit the constituent prerogative power. Also dependent colonial legislatures could not claim Parliamentary rights, privileges and immunities in the absence of an express grant. (This limitation was later modified). A further limitation on colonial legislative competence, important to understand, was that in respect of the Royal Prerogative. Roberts-Wray concludes, probably correctly, that colonial laws might also be ultra vires on grounds of encroachment, "not on the law of England but upon that part of the Royal Prerogative extending to the colony with which a local legislature is not competent to interfere." It is clear that Roberts-Wray is talking here of the "major Prerogatives" of the Crown.

(582) Ibid., 4 and 5.
(583) Supra, footnote 251, pp. 402-3.
(585) It is now clear that the common form of power to make laws for peace, order and good government authorizes the enactment of rights, privileges and immunities, whether general or in favour of particular persons or classes of persons. Chenard v. Arrisol, [1949] A.C. 127, quoting Ried v. R. (1885), 10 App. Cas. 675.
(586) Supra, footnote 251, p. 455.
It might be suggested that it is implicit in the above statement that "major Prerogatives" do not form part of the Law of England and are thus not brought within the framework of the Colonial Laws Validity Act. To answer this suggestion, although prerogative power, like Parliamentary power, is not part of the positive law of England, any positive expression of the Sovereign will, (provided it is both formally valid and within Crown competence) would be as much a part of the Law of England as an Imperial Statute. This is the case even where the major Prerogative legislation has no relevance to England, being enacted solely in relation to British Colonies. Clearly an Imperial Statute passed only in relation to the colonies, this as the Colonial Laws Validity Act, 1865, itself would fall within the definition of "Laws of England" as defined in s. 2 of the Act even though such Act was never the Law of England. Support for this proposition is found in another statement from Roberts-Wray. In talking of colonial interference with major Prerogative provisions he states that such "would be repugnant, not merely to the law of England, but (i.e. in addition) to the authority of the Crown as an essential part of the country's constitution". (587)

------------------

(587) Ibid., p. 381.
2. **Substantive Provisions of the Colonial Laws Validity Act, 1865**

(i) **Introduction**

The operative provision of the Act is found in section 3, which provides that a colonial law shall be void on the ground of repugnancy only where repugnancy exists in relation to the Law of England as such is defined in section 2 of the Act.

Section 3 reads:

> No Colonial Law shall be or be deemed to have been void or inoperative on the Ground of Repugnancy to the Law of England, unless the same shall be repugnant to the provisions of some such Act of Parliament, Order, or Regulation as aforesaid. (My emphasis).

Section 2 provides for the circumstances in which colonial laws will be voided for repugnancy: it thus defines "Law of England" for the purpose of section 3.

> Any Colonial Law which is or shall be in any respect repugnant to the Provisions of any Act of Parliament extending to the colony to which such law may relate, or repugnancy to any Order or Regulation made under Authority of such Act of Parliament, or having in the Colony the Force and Effect of such Act, shall be read subject to such Act, Order, or Regulation and shall, to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative. (My emphasis).

Section 1 provides that an Imperial statute is deemed to extend to the colony only if it is made applicable to the colony "by the express words or necessary intendment" of the statute. A colonial legislature could thus enact laws repugnant to the Common Law of England, local statutes of the United Kingdom or
even Imperial statutes which where in force in a colony by virtue of settlement or adoption. (588) The Colonial Laws Validity Act, 1865, by so defining the doctrine of repugnancy, was intended to extend rather than restrict colonial legislative powers.

The definition section of the Act includes the following definitions:

**Definitions**

1. The Term "Colony" shall in this Act include all of Her Majesty's Possessions abroad in which there shall exist a Legislature, as hereinafter defined, except the Channel Islands, the Isle of Man, and such Territories as may for the Time being be vested in Her Majesty under or by virtue of any Act of Parliament for the Government of India:

   The Terms "Legislature" and "Colonial Legislature" shall severally signify the Authority, other than the Imperial Parliament or Her Majesty in Council, competent to make Laws for any Colony:

   The Term "Representative Legislature" shall signify any Colonial Legislature which shall comprise a Legislative Body of which One Half are elected by Inhabitants of the Colony:

   The Term "Colonial Law" shall include Laws made for any Colony either by such Legislature as aforesaid or by Her Majesty in Council:

   An Act of Parliament, or any Provision thereof, shall, in constructing this Act, be said to extend to any Colony when it is made applicable to such Colony by the express Words or necessary Intendment of any Act of Parliament.

(588) Thus in Harris v. Davies (1885), 10 App. Cas. 279, it was held that the New South Wales legislature had power to repeal s. 6 of 21 Jac. 1, c. 16, as to costs in slander which had not been expressly enacted by the Imperial Parliament to be applicable to the colony.
The Term "Governor" shall mean the Officer lawfully administering the Government of any Colony:

The Term "Letters Patent" shall mean Letters Patent under the Great Seal of the United Kingdom of Great Britain and Ireland.

The inclusion of Imperial 'Orders-in-Council' in the definition 'Colonial Laws' has given rise to some confusion. This confusion results from the wording of s. 2 of the Act (supra). This section seeks to 'protect' certain "Orders" from colonial legislative derogation; namely those Orders made under the authority of an Act of Parliament and (more importantly for our purposes), in addition, Orders having the force and effect in the colonies of an Act of Parliament. It is clear that Orders-in-Council cannot, at the same time, be Orders coming within the definition of "Colonial Laws" (in s. 1) and Orders coming within the definition of 'Laws of England' (s. 3) as such are defined in section 2 of the Act. In other words, Orders-in-Council cannot, at the same time, be sacrosanct Imperial legislation (s. 2) and "colonial laws" (s. 1). Clearly then those Orders-in-Council included in the definition of "Colonial Laws" (s. 1) must be substantively different from those coming within the protected category of "Law of England" (s. 2). The former category of "Orders" must be limited so as to exclude the latter category of Order if the Act is to have internal coherence. As a general rule a word or phrase is to be considered as used throughout a statute in the same sense.(589)

(589) Re National Savings Bank Association (1866), 1 Ch. App.
It may happen, however, that the same word is used in different senses in the same section and, *a fortiori*, in different sections of the same statute. (590)

An argument has been made that the "Orders" referred to in s. 2 are only those passed *under* the authority of an Act of Parliament and having in the Colonies the force and effect of such an Act. (591) Apart from the inherent weakness of such an argument, relying as it does on a drafting error, such a reading does not of itself resolve the internal inconsistencies in the Act.

The cardinal rule for the construction of Acts of Parliament is that they should be construed according to the intention of Parliament as expressed in the Acts themselves. (592) Such intention must, where possible be deduced from the language used (593) in light of the facts operative on the mind of the framers which induced the legislation. The mischief the *Colonial Laws Validity Act* was intended to remedy is clearly stated in the title and preamble to the Act:

An Act to remove doubts as to the Validity of Colonial Laws

547, at p. 550.


(592) 4 Co. Inst. 330.

(593) *Copper v. Baldwin*, [1965] 2 Q.B. 53 at p. 61 per Lord Parker C.J.
Whereas doubts have been entertained respecting the validity of diverse laws enacted or purporting to have been enacted by the legislatures of certain of Her Majesty's Colonies, and respecting the powers of such legislatures, and it is expedient that such doubts should be removed:

The expressed purpose of the Act, then, was to remove doubts as to the validity of 'colonial laws' in the context of colonial legislatures. It is clear that the Act, on above words, was concerned with the powers and authority of Colonial legislatures and the vires of their laws. "Colony" is defined for the purpose of the Act as those of Her Majesty's possession in which there "shall exist a Legislature". (594) Thus we are dealing with a situation in which most, if not all, of the ordinary laws of the colony would be enacted by its legislature. Thus it is not surprising that the preamble explains that "doubts have been entertained respecting the validity of ... Laws enacted ... by the Legislatures" of the Colonies. And it is to these the intended remedy is to be applied and the 'doubt' removed.

As stated above, "Colonial Laws", however, included Laws made for the Colony by Her Majesty in Council (s. 1). I suggest that the "Orders" included in the definition of "Colonial Law" should be limited to those "Orders" having the force and effect, in the Colonies, of laws enacted by Colonial Legislatures. That is, "Colonial Laws" as defined in section 1 of the Act should be read down so as to include only those Orders-in-Council enacted for or applying to a particular Colony which have the same weight

(594) Supra, footnote 482, s. 1. Appendix II.
or authority in that colony as the laws enacted by the colonial legislature. Upon this reading the Orders-in-Council included in the definition of "Colonial Laws" would include 'minor' Prerogative legislation but exclude 'major' Prerogative legislation. (See discussion above on the characterization of 'minor' and 'major' Prerogatives).

This is not a surprising result. The distinction as to 'minor' and 'major' prerogative legislation was well established at common law. The principle which had for a long time been accepted and acted upon was that Prerogative Orders-in-Council making ordinary laws and Ordinances and other local statutes were of equal status, and both were equally amendable (presuming their vires) by the local legislatures. Within the scope of their authority, local legislatures had plenary powers and there is no reason why they could not alter prerogative instruments containing ordinary laws. The situation was different where the Order-in-Council fell within the classification of 'major' Prerogative legislation, this having the force and effect of Imperial Acts in the colonies to which it applied (for example, the prerogative instruments containing the country's constitution -- see discussion above.) It is to Major Prerogative Orders, then, that s. 2 of the Act is directed.

-------------------

(595) And it would apply equally to Letters Patent and Other Instruments.

(596) Supra, footnote 251, p. 375.
A clear limitation on Colonial legislative competence was that they could enact no laws with extra territorial reach. (597) An argument might be made that the Orders-in-Council included within the definition of "colonial laws" should be similarly limited. Orders-in-Council making ordinary laws for a colony would fall within such limitation.

It has been suggested that the inclusion of Major Prerogative legislation in section 2 would be inconsistent with s. 5 of the Colonial Laws Validity Act, 1865. Section 5 reads:

Colonial legislature may establish, &c courts of law. Representative legislature may later constitution

5. Every Colonial Legislature shall have, and been deemed at all Times to have had, full Power within its Jurisdiction to establish Courts of Judicature, and to abolish and reconstitute the same, and to alter the Constitution thereof, and to make Provision for the Administration of Justice therein; and every Representative Legislature shall, in respect of the Colony under its Jurisdiction have, and be deemed at all Times to have had, full Power to make Laws respecting the Constitution, Powers, and Procedure of such Legislature; provided that such Laws shall have been passed in such Manner and Form as may from Time to Time be required to any Act of Parliament, Letters Patent, Order in Council, or Colonial Law for the Time being in force in the said Colony.

According to section 1 of the Act, a "Representative Legislature" is defined as any colonial legislature of which one-half of the members were elected by inhabitants of the colony. Section 5, then, affords such legislatures the power to amend their

(597) Supra, footnote 591, p. 30.
constitutions, with certain limitations. (598) By virtue of section 2, Acts of Parliament or Orders or Regulations under such Act or having in the colony the force and effect of such Act, are given binding status. If these have an effect contrary to section 5, there is an apparent internal conflict in the Act. But this conflict is extant whatever interpretation is put on the words underlined. That is, even if the above underlined words of s. 2 were to be read as "Orders or Regulations under such Act and having in the colony the force and effect of such Act" the same internal conflict may arise. In either instance we have 'subordinate' legislation protected by s. 2, with the results that section 2 must be read subject to the proviso that representative legislatures have the powers stated in s. 5. This problem is discussed more fully later. What is important to understand here is that there is no argument that can be made using s. 5 which supports a particular reading of "Orders" in section 2 so as to exclude major Prerogative Orders.

An argument might be raised that the Crown had a very limited power to enact 'ordinary laws' for the colony so that inclusion of these orders in the definition of 'colonial laws' was hardly necessary. The power to enact 'ordinary laws' existed only in relation to conquered or ceded colonies prior to the promise of an assembly unless such power was reserved. (599)

(598) Provided such meet manner and form requirement as are expressed from time to time in various legislation. See discussion below p. 265 et seq.

(599) Campbell v. Hall (1774), Lofft 655, 98 E.R. 848; 1 Cowp. 204, 98 E.R. 1045; 20 St. Tr. 239 (K.B.).
Roberts-Wray states that it has not been common practice in recent years for ordinary laws which a territory is competent to make for itself to be made by Order in Council. He comments, however, that where made such orders have been amended by the local legislatures. (600)

In addition to ordinary laws enacted directly by the Crown for a colony because of the special relation of the Crown in relation to ceded or conquered territories, it must be remembered that in general, the Royal Prerogative was as extensive throughout Her Majesty's dominions as in Great Britain. (601) The 'minor' prerogatives would apply in those territories where the common law ran or English law was adopted as the basic law and would exist unless and until abrogated or amended by local legislatures. Thus it is not that surprising that 'Orders-in-Council' were included in the definition of 'colonial laws'. It merely recognized that the law received or adopted in a colony might include minor prerogative legislation and that such was to have the same weight as colonial laws and be open to amendment or repeal by the colonial legislature.

Another argument suggests that the definition of 'colonial laws', in s. 1 of the Act, is sufficiently broad to encompass both Royal enactments made under the prerogative as well as the much more common Orders-in-Council authorized by Statute. (602)

(600) Supra, footnote 251, p. 377, footnote 8.

(601) ibid. 378, and see p. 559.

(602) M.G. p. 27 citing "Hood Philips and Paul Jackson."
That in turn section 2 of the Act applies to protect only those Imperial Orders and Regulations made under statutory authority and having in addition the force and effect of an Imperial Act in the colonies.

However, if 'colonial law' as defined in s. 1 is to be read as encompassing laws made for a colony by Her Majesty in Council, whether statutory or prerogative, it is difficult to ascribe full meaning to the words of section 2 (see discussion infra). Moreover, such interpretation still requires a reading down of the "Orders" coming within the definition of "Colonial Law" so as to exclude those orders mentioned in section 2. This argument has the added problem that it involves a rewriting of the words of section 2 — namely a substitution of or for and.

The better view, it is argued, is that the 'Orders-in-Council' included within the definition of 'Colonial laws' (s. 1) are those giving ordinary laws which have the same weight and authority as 'Colonial laws' enacted by local legislatures. This interpretation makes sense in relation to the common law as then understood, and in relation to other sections of the Act. Taking, then, such to be the scope of the definition of 'Colonial law' we turn now to the categories of Imperial Law which serve to void a repugnant colonial law. These are given in section 2.

(ii) **Section 2**

Section 2, in substance, repeated the previous Acts (as respects colonies not in Oceania or Europe) and almost certainly
stated the common law.\(^{603}\) It seems to have been more in the nature of an incidental, though necessary, qualification on section 3. Section 2 reads:

**Colonial law when void for repugnancy**

2. Any Colonial Law which is or shall be in any respect repugnant to the Provisions of any Act of Parliament extending to the colony to which such law may relate, or repugnant to any Order or Regulation made under Authority of such Acts of Parliament, or having in the Colony the Force and Effect of such Act, shall be read subject to such Act, Order, or Regulation, and shall, to the Extent of such Repugnancy, but not otherwise, be and remain absolutely void and inoperative.

Section 1, as discussed above, explains, that, for the purpose of the Act, an enactment shall be said to extend to a Colony only if it is applied expressly or by "necessary intendment".

Three Categories of Imperial legislation are 'protected' by section 2:

Category 1. **Acts of Parliament of the United Kingdom extending to the Colonies.** These statutes were those passed by Parliament when it intended to bind the colonies generally, a group of colonies to which the one in question belonged or the particular colony alone. They applied to the colony of their own force, that is *proprio vigore*. This category clearly did not include statutes enacted for Great Britain, intended to have only local impact, which were *received* as law

\(^{603}\) *Supra*, footnote 251, p. 399.
in the colonies as a result of its status as a settled colony or by legislative initiative whether colonial or imperial. (604) By specifying that only those Imperial Acts with the necessary colonial intendment (whether stated specifically or as a result of necessary intendment) the Colonial Laws Validity Act cleared up the doubt that had existed as to this question.

Category 2. Orders or Regulations made under Authority of Such Acts of Parliament -- i.e. those Imperial Acts having the requisite Colonial extension. This employs the language of delegated legislation and would obviously include Orders-in-Council made under the authority of an Act of Parliament extending (as defined in s. 1) to the Colony. Thus those Orders-in-Council enacted under statutory authority (with the required reach) fall within the 'protected' class of Imperial Laws. They would render void repugnant Colonial Laws (which may also be contained in an Order-in-Council although not under statutory authority).

Category 3. Orders or Regulations having in the Colony the Force and Effect of Such Act [of Parliament].

------------------

These words envision the possibility of Orders or Regulations which, although not issued under the authority of Acts of Parliament, nevertheless in the Colonies are recognized as having the force and effect of an Imperial Act. I submit this category necessarily applies to protect non-delegated original Sovereign legislation that meets the classification of major Prerogative legislation, which, as we have seen, had in the Colonies the force and effect of Imperial Statutes.

An argument has been made which collapses categories 2 and 3 above into one category. That is, in addition to Imperial Acts (with the necessary intendment) section 2 "protects" Orders and Regulations enacted under such Acts and which in addition have the further qualification of having in the colonies the force and effect of the Act itself. Such interpretation has been implicitly accepted by both scholars and courts and thus needs to be fully addressed.

Firstly on a plain reading of the section three definite categories of Imperial Laws are given as a standard against which to apply the repugnancy doctrine. The conjunction between category 2 and 3 is or not and. Parliament was not therefore, on the words of the Act, limiting repugnancy to delegated legislation under Acts of Parliament but extending protection to

(605) Supra, footnote 591.
Orders which, although without statutory authority, had in the colonies the force and effect of such statute.

As already noted, Acts of Parliament must be construed according to the intention of the legislature as inferred from the actual language of the Act itself. Where the language used is clear and explicit the courts must give effect to it, whatever may be the consequences, as "the words of the statute speak the intention of the legislature". Moreover, where the grammatical construction is, as here, clear and manifest, that construction ought to prevail unless there is a strong and obvious reason to the contrary apparent from the declared purpose or intention of the same document, or if it would involve any absurdity, repugnancy, or inconsistency to give force to the plain meaning. The onus of showing that the words do not mean what they say lies heavily on the party who alleges it. He must, as Parke B., said in Becke v. Smith, advance something which "clearly shows the grammatical construction would be repugnant to the intention of the Act or lead to some manifest absurdity." (my emphasis). The court assumes the function of


(609) Warburton v. Loveland (1832), 2 D & Cl. (H.L.) 480 at 489 per Tindal C.J.

(610) Waugh v. Middleton (1853), 8 Ex. 352 at 356 per Pollock C.B.


(612) (1836), 2 M. & W. 191 at 195.
When the legislature enacts a particular phrase in a statute the presumption is that it is saying something which has not been said immediately before. The rule that a meaning should, if possible, be given to every word in the statute implies that, unless there is good reason to the contrary, the words add something

(613) See Attorney-General v. Sillem (1864), 2 H & C 431 at 515 per Pollock C.B.

(614) 53 & 54 Vict. c. 37, s. 12.

(615) S. 12 in this Act, applies only to Order-in-Council made in pursuance of Act, 1890, and its effect is to render void any such Order-in-Council repugnant to an Act of Parliament and Statutory Order or Regulation or are having in the colonies the force and effect of such.

12(1) If any Order in Council made in pursuance of this Act as respects any preigiai country is in any respect repugnant to the provisions of any Act of Parliament extending to Her Majesty's subjects is that country, or repugnant to any order or regulation made under the authority of any such Act of Parliament, or having in that country the force and effect of any such Act, it shall be read subject to that Act, order, or regulation, and shall be to the extent of such repugnancy, but not otherwise, be
which has not been said immediately before.(616)

In R. v. Berchet, it was said to be a known rule of interpretation of statutes, that a sense is to be made of the whole so that "no clause, sentence or word shall prove superfluous, void or insignificant, if by any other construction they may all be made useful and pertinent."(617)

Enough has been said to show the duty of the court is, if possible, to ascribe some meaning to all the words of section 2 of the Colonial Laws Validity Act. It is only where no meaning can be given to these words without making the Act insensible or defeating its manifest intention, that the court may deviate from this course.

It falls now to apply the above rules of construction to Section 2

2. Any Colonial Law which is or shall be in any respect repugnant to the provisions of any Act of Parliament extending to the colony to which such law may relate, or repugnant to any Order or Regulation made under authority of such Act of Parliament, OR HAVING IN THE COLONY THE FORCE AND EFFECT OF SUCH ACT, shall be read subject to the such Act, Order or Regulation, and shall, to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative. (My emphasis).

---------------------

void.


(617) (1690), 1 Show 106 per Sir B. Shower — this dictum was quoted by Court in R. v. Bishop of Oxford (1879), 4 Q.B.D. 245 at 261 as "a settled canon of construction".
To what category of Imperial law do the above underlined words apply? The words "such Act" refer back to "such Act of Parliament" mentioned immediately before, which in turn refer back to "any Act of Parliament extending to the colony to which such [Colonial] law may relate".

It has been suggested that the above underlined words referred to Orders and Regulations which were linked in some way to a specific Act of Parliament extending to the colony. (618) This is an unnecessarily limited interpretation of section 2 and one reached only by circumventing the plain legal and grammatical reading of the section itself. On a plain reading the underlined words refer to Orders and Regulations which have in the colony the force and effect of any Act of Parliament extending to the colony to which the colonial law may relate.

Since this clearly is not referable to Statutory Orders and Regulations, these having been previously mentioned (category 2), the underlined words can only be referable to those prerogative Orders and Regulations which although closely related to delegated legislation cannot be equated with it. It is equally clear that not all prerogative Orders and Regulations enjoy the "protection" offered by section 2, only those which have, in the colonies, the force and effect of an Imperial Act with the requisite colonial extension. This, it is submitted, is a statutory recognition of the force and effect of "major" Prerogative legislation in the colonies to which it applies.

This legislation was passed for the colonies at the time of the Crown's authority over them, with the intention that they should be bound. As noted above, minor prerogative orders and regulations containing ordinary laws would not meet the test of the required force and effect. The latter were on a par with colonial laws and I suggest would fall within the definition of "colonial law" in s. 1. Any "ordinary" Prerogative order that conflicted with a "major" Prerogative Order would thus be void to the extent of the inconsistency by virtue of s. 2 of the Act.

There is no reason, in principle, to suggest this was not what the Act envisioned, and there is much to support such an interpretation. It is the only interpretation that ascribes full meaning to the words of section 2, and thus merely echoes what was, in fact, the law was prior to the enactment of the Colonial Laws Validity Act, as regards Sovereign legislation. The power of colonial legislatures to pass laws at variance with major Prerogative legislation was always denied. It is no answer to say that because there was never any 'doubt' expressed regarding the force of Major Prerogative legislation there was thus no reason for including such major Prerogatives in the Act. Likewise there was never any doubt that Imperial Acts, expressed to apply in the colonies would be mandatory and serve to void repugnant colonial provisions. These were nevertheless included within the ambit of s. 2 of the Colonial Laws Validity Act.

The argument, canvassed above, that would collapse categories 2 and 3 of section 2 (that is Orders and Regulations passed under the authority of an Act of Parliament with the
necessary intendment AND having in the colonies the force and effect of an Imperial statute) proceeds from the fact that no prerogative Orders meet the description given in category 3 of being of the force and effect of an Imperial Act. An Imperial Act has the effect of repealing earlier Acts, inconsistent with its provisions, whereas an Order-in-Council is rendered null by such a conflict. This was laid down by Lord Chancellor Northington in a Privy Council appeal of 1766. In holding that the commercial code, known as the Navigation Acts, applied to the recently conquered/ceded island of Dominica, the Lord Chancellor stated that, "The King nor his officers could not say they would suspend the operation of that law." (619) In Campbell v. Hall (620) (1774) Lord Mansfield reiterated the same principles and further stated that the King when legislating acted in a role "subordinate to his own authority as a part of the Supreme Legislature in Parliament" and that as to laws he can make none which are, "contrary to fundamental principles; none excepting from the laws of trade or authority of Parliament." (621) Letters Patent or any other instrument made by the Sovereign which, without express statutory authority, altered or negated an Act of Parliament would be an exercise of the outlawed dispensing power and would be invalid whether made under the Prerogative or under an Act of

(619) M G. p. 28 -- Case discussed and quotation found in Henry Smith, Appeals to the Privy Council from the American Plantations (N.Y., 1950), 496-499.

(620) Campbell v. Hall 20 St. Th. 239.

(621) Ibid. at 323.
In essence then, it is contended that section 2 envisages only Orders and Regulations having the same force and effect of Imperial Acts, and more specifically only those Orders or Regulations having the capacity to repeal existing statutes. (623) In answer, section 2 does not stipulate that category 3 Orders and Regulations have the same force and effect as an Act of Parliament but merely that they should have the force and effect of such Acts in the colonies to which they relate. The section presumes the vires of the defined Orders and Regulations and the Act clearly must be read as 'protecting' that delegated or Prerogative legislation that is validly enacted. The 'protection' does not arise where the Orders and Regulations are in themselves void as attempting to limit, repeal or amend Acts of Parliament.

Moreover, this same argument, against category 3 applying to major Prerogative legislation, can also be mounted in relation to the "collapsed" category argued for by some. Even were section 2 to be read as "protecting" only those Orders and Regulations passed under the authority of the Act of Parliament and having in the Colony the force and effect of such Act, the same criticism applies. On this interpretation we have subordinate legislation which similarly may not amend provisions in its parent

------------------------

(622) Supra, footnote 251, p. 211.
(623) ibid., p. 211.
statute(624) or other statutes(625) and this even where given the force and effect of the Act itself. It was held in Belanger v. R. that even where a provision of the statute in question stated that, "All such regulations under this Act shall be taken and read as part of this Act" the Supreme Court of Canada held the regulations, so far as inconsistent with the Act, must give way.(626) Duff J., relied upon the general principle enunciated by Lord Herschell in Patent Agents Institute v. Lockwood(627) regarding subordinate legislation and its effect.

Thus even where regulations are specifically given the "force and effect" of the Act itself, this is still subject to a qualification that the regulation, even then, cannot amend a statutory provision. It must meet the same hurdle posed for Prerogative legislation and fails in the same respect.

A larger hurdle to the above argued "collapsed" category is that it rests upon an assumption of a statutory drafting error - that the disjunctive particle "OR" separating categories 2 and 3 of s. 2 should be read as the conjunctive "and".

The principles of statutory construction allow this only where the change is necessary to give the statute sense and effect, or to harmonize its different parts, or to carry out the


(627) [1894] A.C. 347 at 369 (H.L.).
evident intention of the legislature. (628)

This rule is based on the assumption that the legislature could not have intended to produce an absurd or unreasonable result and that this would follow from a literal construction of the words of the statute. (629)

Further it must be remembered that the words and and or are in so sense interchangeable terms -- their use in the structure of the language of a statute is chosen with due regard to grammatical propriety and therefore the courts are not at liberty to treat these words as interchangeable. On the contrary they should be taken in their strict, proper meaning. The substitution of one for the other is permissible only when the context or other provisions of the statute require it, or when that is necessary to avoid an absurd nor impossible consequence and to carry out the evident intention of the legislature. (630) Since meaning can be attributed to category 3 of section 2 which is neither absurd nor impossible, and doesn't defeat the intention of the legislature, the courts should give substance to it. The authority of 'major' Prerogative legislation was not in doubt at common law, it was always held to have the "force and effect" of an Imperial Act in the colony to which it applied.

---------------------

(629) Blacks, Interpretation of Statutes, p. 230.
(630) Ibid. at 231.
It is true that scholars commenting on the scope of section 2 have tended not to give effect to category 3 which is independent of category 2. Sir Kenneth Roberts-Wray admitted defeat in attempting to explain the words of category 3. Of this he said; "it is not easy to say what value is possessed by the last twelve words, i.e. what orders or regulations not made under the authority of an Act extending to a Colony, have the force and effect of such an Act." Roberts-Wray concluded that section 2 was designed to protect only Acts of Parliament and instruments made under such Acts. However, this must be read in light of the fact that Roberts-Wray suggests the Colonial Laws Validity Act was not applicable to Prerogative legislation. This he felt to be outside the scope of the Act. Commenting on "major" Prerogatives, Roberts-Wray states that they are "part of the constitutional foundation of the country and that, without express grant, the legislature of a defendant territory cannot alter or abolish them." Clearly Roberts-Wray recognized the authority of them "major" Prerogatives over colonial laws but felt such to be outside the scope of the Colonial Laws Validity Act. He nowhere addresses the possibility that they fall under category 3 of section 2 and his conclusions as to the effect of this section must be read in light of this fact.

-----------------------

(631) Supra, footnote 591, p. 22.
(632) Supra, footnote 251, pp. 210-11; 397-98.
(633) Ibid.
(634) Ibid.
The same collapsing of categories 2 and 3 of section 2 has occurred in judgments of the courts. In the first case to construe section 2, Phillips v. Eyre (1870),(635) a unanimous decision of the Court of Queen's Bench held that it was "clear that the repugnancy to English law which avoids a colonial Act means repugnancy to an Imperial statute or order made under such statute applicable to the colony."(636) These remarks are obiter insofar as the inclusion of major Prerogative legislation in section 2 is concerned, this question not being raised in that case.

Again in Ex Parte Marais(637) (1902) the Judicial Committee declared that the "obvious purpose" of section 2 of the Colonial Laws Validity Act was to prevent a colonial legislature from enacting "anything repugnant to an express law applied to that colony by the Imperial Legislature itself."(638) This was clearly one obvious effect of section 2 but arguably not exhaustive and, insofar as prerogative Orders were not in issue, the court cannot be considered to have determined that they were not included in section 2. Moreover, as Roberts-Wray comments(639) while the above quoted statement is no doubt a true statement of an effect of section 2 (subject to section 5, which confers a right to

(635) (1870), L.R. 6 Q.B. 1.
(636) Ibid. at 20-21 per Willis J.
(637) 1902 A.C. 109.
(638) Ibid. at 54.
(639) Supra, footnote 251, p. 399.
amend an Act of Parliament relating to the government of a colony) it was not necessary for the main purpose of the Act to reverse Mr. Justice Boothby's decisions which held colonial acts invalid on the ground of repugnancy to general law. This purpose was achieved by section 3 as qualified by section 2. (640)

In no instance was the possibility that section 2 might apply to 'protect' Major Prerogative legislation explored. It was not an issue that presented itself for resolution and the small number of cases dealing with the Colonial Laws Validity Act cannot be taken as closing a category which was not raised as an issue in any of the cases. Moreover, limiting the application of section 2 to Imperial Statutes and Statutory Orders and Regulations with the necessary intendment (s. 1) would require treating the last 12 words of section 2 as redundant. As has already been pointed out, this is not open to the courts where meaning can be given to the words consistent with the expressed intention of the Act.

It might be useful at this point to look at the cases that have dealt with the power of colonial legislation to limit the prerogative. British Coal Corporation v. The King (641) contained dicta to the effect that the prerogatives of the Crown could not be affected by colonial legislation without the authority of an }

(640) See also Union Steamship Co. of New Zealand Ltd. and Another (1925), 36 C.L.R. 130 at 141 per Knox J.

Woolworths (N.Z.) Ltd. v. Wynne (1952), N.Z.L.R. 496 at 508 per Haig J.

(641) 1935 A.C. 500.
Imperial Act. That, if the prerogative was to be limited "by a
Dominion or Colonial Act, it must be the Act of a Dominion of
Colonial Legislature which has been endowed with the requisite
powers by an Imperial Act giving the power either by express
terms or by necessary intendment".\footnote{Presumably if const. given in Letters Patent or other prior
instrument the requisite power could be founded there.}

The case concerned the
power of the Canadian Parliament to abolish the prerogative power
to give leave to appeal to the King in Council. It had
previously been held in \textit{Naden v. The King},\footnote{[1926] A.C. 482.} referred to in
the judgment, that a Canadian Act for that purpose was invalid on
the grounds that such an Act had extra territorial effect and was
repugnant to an Act of Parliament. The question of whether such
was invalid as affecting the Royal Prerogative was not decided.

Clearly the dictum in \textit{British Coal} must be limited. It is
patently untrue as regards all prerogatives of the Crown.\footnote{See for e.g. \textit{Maritime Bank of Canada v. Receiver-General

\textit{Chitty's two categories of Prerogatives},\footnote{See discussion above.}
"minor" and "major"
prerogatives. While the former may be modified or altered by
local legislatures,\footnote{\textit{Ibid.} at footnote 63.} the latter cannot, in the absence of an

\footnote{Presumably if const. given in Letters Patent or other prior
instrument the requisite power could be founded there.}

\footnote{[1926] A.C. 482.}

\footnote{See for e.g. \textit{Maritime Bank of Canada v. Receiver-General

\footnote{See discussion above.}

\footnote{\textit{Ibid.} at footnote 63.}
express grant, be altered or abolished by the legislature of a dependent territory.

It might well be that the prerogative right to grant a right of appeal to the Privy Council falls within the category of "major" Prerogatives and that the dictum in British Coal (supra) should be so limited.(647)

It is not surprising then that major Prerogative legislation should be included in the definition of 'Laws of England' for the purposes of the Colonial Laws Validity Act. [In addition colonial laws purporting to limit these prerogatives would be outside the limits of the legislative power granted.] Clearly such meaning can be fairly attributed to category 3 of section 2, consistent with the Act's expressed intention of stating which Imperial Laws were to be considered of binding authority in the colonies.

For the purposes of construction, the context of words which are to be construed includes not only the particular phrase or section in which they occur, but also other parts of the Statute.(648) The statute or order is to be construed as a whole so as, so far as is possible, to avoid any inconsistency or repugnancy as between that section and other parts of the statute.(649) The literal meaning of the words in a particular

------------------------

(647) Supra, footnote 251, pp. 379-380.

(648) Bywater v. Brandling (1828), 7 B. & C. 643 at 660.

section may in this way be extended or restricted by reference to other sections and to the general purview of the statute. Thus, for the purpose of construing the words of section 2, it is useful to look at other provisions of the Act.

(iii) **Section 4**

Section 4 deals with the *prima facie* validity of colonial acts that are inconsistent with Imperial procedural requirements referable to such acts. The section establishes the presumption of colonial legislative competence with regard to colonial statutes contravening Royal instructions, where such instructions are not contained in the instrument authorizing such legislature to enact laws for the "Peace, Order and Good Government" of the colony.

The issue arose especially as regards the validity of Acts assented to in defiance of instructions. The Act, in section 4, declared that assent was not vitiated by disobedience to instructions not actually embodied in the primary constituent instrument. Section 4 reads:

4. No Colonial Law, passed with Concurrence of or assented to by the Governor of any Colony, or to be hereinafter passed or assented to, shall be deemed to have been void or inoperative by reason only of any Instructions with reference to such Law or the Subject thereof which may have been given to such Governor by or on behalf of Her Majesty, by any Instrument other than the Letters Patent or Instrument authorizing such Governor to concur in passing or to assent to Laws for the Peace, Order and Good Government of such Colony,

(650) *Atkinson v. Fell* (1816), 5 M. & S. 240.
even though such Instructions may be referred to in such Letters Patent or last-mentioned Instrument.

This section was likely drafted in response to a judgment of Mr. Justice Boothby which had invalidated a colonial statute on grounds of it having been assented to by the Governor contrary to instructions. He was of the opinion that Royal Instructions had the force of Imperial Law and so operated as restrictions upon the legislative competence of the colonial legislature.

As Roberts-Wray points out, when in the early colonial days the Sovereign's Instructions to a Governor were used to convey the Royal pleasure under the prerogative, particularly for the setting up of a local legislature, they must have had legal effect otherwise the legislature would not have been lawfully constituted. (651) This must have been the case whether or not such instructions were contained in the Instrument authorizing the legislature to enact laws for the Peace, Order and Good Government of such colony. The British Law Officers took a different view, advising that Instructions were a matter between the Crown and the Governor, to whom they were directory only. (652) Clearly the Act did not reflect, completely, their view.

Section 4 provides that a colonial law is not to be voided by reason only of inconsistency with Royal Instructions, "with reference to such laws or the subject thereof", unless such

(651) Supra, footnote 251, p. 147.
(652) Ibid., p. 402-3; citing Law Officers Opinion of April 12, 1862.
Instructions are contained in (not merely mentioned by) the instrument authorizing the legislature to enact "Laws for the Peace, Order and Good Government of Such Colony". The inconsistency with which the section is concerned relates to procedural requirements in Royal Instructions which are directly referable to the "Colonial Law or Subject thereof". Most notably instructions regarding the giving of Royal assent and the reservation of Bills for Her Majesty's pleasure but also instructions as to the form of colonial bills. As Roberts-Wray points out, as a general rule the Governor is given a general discretion to assent to a Bill, to refuse his assent or to reserve the Bill for Imperial consideration; but is generally instructed to reserve Bills falling within given prescribed categories. If such a requirement is found in Instructions contained in the principal constituent Instrument (that authorizing the Governor to enact Laws for the Peace, Order and Good Government of the Colony) then colonial acts passed contrary to such instructions are deemed to be void or inoperative from their inception. However where the instructions are not to be found in the principal constituent instrument, then non-compliance will not of itself serve to void a colonial Bill.

It is interesting here to look at the Letters Patent and commission under which James Douglas, governor of British Columbia, acted. The act to provide for the Government of British Columbia received Royal assent on 2nd August 1858, a

(653) Ibid., Roberts-Wray, p. 402-3.
clause of which enabled the Crown to establish a government in
the colony. Subsequently on the basis of this authority, an
Order-in-Council, dated 2 September, 1858, conferred on the
'governor absolute power to legislate and provide for the
administration of justice by issuing proclamations having the
force of law and subject only to the approval of Parliament. The
Letters Patent under which Douglas acted authorized him in part
as follows:

... and whereas We have, in pursuance of the
said Act, by Our Order made by Us in Our Privy
Council, bearing date this 2d instant, ordered,
authorized, empowered, and commanded Our
Government of Our said Colony to make provision
for the administration of justice in Our said
Colony, and generally to make, ordain, and
establish all such laws, institutions, and
ordinances as may be necessary for the peace,
order, and good government of Our subjects and
others residing therein, wherein the said
Governor is to conform to and exercise the
discretions, powers, and authorities given and
granted to him by Our Commission, subject to
all such rules and regulations as shall be
prescribed in and by Our Instructions under Our
Signet and Sign Manual accompanying Our said
Commission, or by any future instructions, as
aforesaid;... (My emphasis)

and:

IV. And We do by these presents further give
and grant unto you, the said James Douglas,
full power and authority, by Proclamation or
Proclamations to be by you from time to time
for that purpose issued under the Public Seal
of Our said Colony, to make, ordain, and
establish all such laws, institutions, and
ordinances as may be necessary for the peace,
order, and good government of Our subjects and
others residing in Our said Colony and its
Dependencies: Provided that such laws,
institutions, and ordinances are not to be
repugnant, but, as near as may be, agreeable to

(654) 21 & 22 Vict. (1858), c. 99.
the Laws and Statutes of Our United Kingdom of Great Britain and Ireland: Provided also, that all such laws, institutions, and ordinances, of what nature or duration soever, be transmitted in the Public Seal of Our said Colony for Our approbation or disallowance, as in Our said Order provided: And We do by these presents require and enjoin you that in making all such laws, institutions, and ordinances you do strictly conform to and observe the rules, regulations, and restrictions which are or shall be in that respect prescribed to you by Our Instructions under Our Royal Sign Manual and Signet accompanying this Our Commission, or by any future Instructions, as aforesaid.

Attached to Douglas' commission and forming an integral part thereof were "Instructions" by which he was to govern the Colony.

Regarding those Instructions, the Letters Patent said:

VII. You are, as much as possible, to observe, in the passing of all laws, that each different matter be provided for by a different law, without intermixing in one and the same law such things as have no proper relation to each other; and you are more especially to take care that no clause or clauses be inserted in or annexed to any law which shall be foreign to what the title of such law imports, and that no perpetual clause be part of any temporary law, and that no law whatever be suspended, altered, continued, revived, or repealed by general words, but that the title and date of such law so suspended, altered, continued, revived, or repealed be particularly mentioned and expressed in the enacting part.

(My emphasis).

These are clearly procedural requirements directed at Governor Douglas who could not issue proclamations "repugnant to the law of England" (Clause IV, above) or in alteration or repeal of any law without such being particularly "mentioned and expressed in the enacting part" (Clause VII). As these 'instructions' were contained in the instrument authorizing him to establish "laws
... as may be necessary for the peace, order, and good government of Our Subjects and others residing in Our Colony..." (Clause IV) they would be binding on the Governor at common law because such 'constituent' instrument had the force of Imperial Statute in the colonies. The British Columbia Act, 1866 which affected a Union of the colonies altered the size of the Council of British Columbia but had no effect otherwise on the constitution of British Columbia. Clause IV of the Act read in part:

On the union taking effect, the Form of Government existing in Vancouver Island as a separate colony shall cease, and the Power and Authority of the Executive Government and of the legislature existing in British Columbia shall extend to and over Vancouver Island.

The Colonial Laws Validity Act, 1865 was passed to removed doubts about the legislative competence of the colonial body authorized to make laws. Section 4, which reiterated the binding nature of any instructions expressed on the face of the principal constituent instrument, merely declared and gave statutory effect to the common law in this respect. The instructions above mentioned would thus operate to invalidate any colonial legislation repugnant to or purporting to alter or modify the provisions of the Royal Proclamation of 1763 as the laws do not on their face mention that the provisions of the Royal Proclamation are suspended, altered or repealed. This proposition lies in addition to an argument based on s. 2 of the Colonial Laws Validity Act, 1865 based on repugnancy. Further instructions were sent from time to time by the Colonial Secretary in London, including one dated July 31, 1858 which read in part:
3. I have to enjoin upon you to consider the best and most humane means of dealing with the Native Indians. The feelings of this country would be strongly opposed to the adoption of any arbitrary or oppressive measures towards them. At this distance, and with the imperfect means of knowledge which I possess, I am reluctant to offer, as yet, any suggestion as to the prevention of affrays between the Indians and the immigrants. This question is of so local a character that it must be solved by your knowledge and experience, and I commit it to you, in the full persuasion that you will pay every regard to the interests of the Natives which an enlightened humanity can suggest. Let me not omit to observe, that it should be an invariable condition, in all bargains or treaties with the Natives for the cession of lands possessed by them, that subsistence should be supplied to them in some other shape, and above all, that it is the earnest desire of Her Majesty's Government that your early attention should be given to the best means of diffusing the blessing of the Christian Religion and Civilization among the Natives.

Although, on the words of s. 4 of the Colonial Laws Validity Act, 1865 (which is declarative in this respect of the common law), this would not operate to bind Douglas, they are indicative of the Imperial government's position regarding Indian lands in British Columbia, and can be used as an aid to the interpretation of instructions contained in the Commission. As Hall J. pointed out in the Calder decision (p. 217) they show Imperial recognition in the use of the word "cession", that the Indians possessed land rights and that such should be gained by purchase in a manner not "arbitrary or oppressive". These later instructions, specific to the Indian land question", thus offer more force to the argument that it was not open to Douglas, upon the words of his Commission, to enact or assent to legislation
inconsistent with the provisions of the Royal Proclamation of 1763.

Returning to the words of section, this section expressly recognizes that colonial acts inconsistent with Royal instructions might fall to be voided upon other grounds. Colonial acts in contravention of instructions found in an Act of Parliament or an Order or Regulation made under the authority of such Act or having in the Colony the force and effect of such Act would be void to the extent of the conflict by virtue of section 2 of the Act (Colonial Laws Validity Act, 1865 — see discussion above). In light of the argument advanced above that the last twelve words of section 2 are referable to Major Prerogative legislation, section 4 can be seen as mandating colonial compliance with only those instructions falling with the classification of Major Prerogative legislation.

Unquestionably the Letters Patent or other Instrument setting up the constitution would fall to be classified Major Prerogative legislation and any instructions contained on the face of such instrument would be binding on colonial governments. It is argued above that Instructions regarding constitutional arrangements would also be classified as Major Prerogative legislation and likewise be binding on colonial governments, a rule contained in part in section 5 of the Colonial Laws Validity Act, 1865. It is not important, therefore, that neither the relevant Imperial enactments,(655) nor the principal 

(655) Administration of Justice in Vancouver's Island Act, 12 & 13 Vict. (1849), c. 43; Government of British Columbia
constitutional instruments relating to Vancouver Island, Mainland British Columbia or United British Columbia contained instructions regarding Indian Land Policy. The Royal Proclamation directed to the Governors as Major Prerogative legislation, has the same binding effect. (This does not rule out the argument that since Royal Instructions to Douglas (31 July 1858) assumed that there would be "treaties with the Natives for the cession of lands possessed by them" that the land legislation of British Columbia was ultra vires the Governor as in breach of Instructions). Section 4 has relevance only so far as the necessity for compliance with Imperial procedural instructions regarding the colonial law are concerned. Moreover the necessity for non-repugnancy to the Indian provision of the Royal Proclamation is also found in section 2 of the Act. Section 4 merely deals with the necessity for compliance with any procedural requirements of Royal instructions, it does not sanction colonial acts repugnant to the laws of England as defined in section 2 of the Act.

Another interesting fact that sheds light on the meaning of the words in section 2 of the Act (An Order having the force of an Imperial Act in the colonies) can be taken from section 4. Section 4 presumes that the Letters Patent or other instrument authorizing the Governor to enact laws for the Peace, Order and Act, 21 & 22 Vict. (1866), c. 67; The British Columbia Government Act, (1870), 33 & 34 Vict. (1870), c. 66.

(656) Imperial Order in Council, dated 11 June 1863, R.S.B.C. 1979, Appendices, v. 7, Part B which provided the constitution for colonial British Columbia (including Vancouver's Island after union in 1866).
Good Government of the Colony, enjoy protection from colonial derogation. Section 4 expressly 'protects' royal instructions included in such instruments but does not expressly give the instruments themselves statutory protection. There seems no good reason for this other than that section 2 was seen as doing just that -- these instruments were in fact what was contemplated by the words "Orders and regulations having in the colony the force and effect of an Imperial Act." Although it could be argued that the authority of such instruments was never in doubt at common law, Mr. Justice Boothby had held otherwise and since his judgments were responsible to a large extent for the enactment of the Colonial Laws Validity Act, 1865, such was arguably a 'doubt' which the Act should have addressed. The doubt can be removed by interpreting section 2 as encompassing all major Prerogative legislation. Such an interpretation is in harmony with and makes the most sense of the words of section 4.

(iv) **Section 5**

Section 5 of the Colonial Laws Validity Act, 1865, dealt with two subject matters; the right of colonial legislatures to establish Courts and to abolish and reconstitute the same and the right of representative legislatures to amend their constitution:

5. Every Colonial Legislature shall have, and be deemed at Times to have had, full Power within the Jurisdiction to establish Courts of Judicature, and to abolish and reconstitute the same, and to alter the Constitution thereof, and to make Provision for the Administration of Justice therein; and every Representative Legislature shall, in respect to the Colony under its Jurisdiction have, and to deemed at all Times to have had, full Power to make Laws respecting the Constitution, Powers, and Procedure of such Legislature; provided that such laws shall have been passed in
such Manner and Form as may from Time to Time be required of any Act of Parliament, Letters Patent, Order in Council, or Colonial Law for the Time being in force of the said Colony.

As to the power in relation to Courts, "it was intended that colonial legislature should have power to constitute new courts and to put an end to existing courts, to determine whether specific Courts should continue to exist or should cease to exist, as well as to mold their form, prescribe their duties, and regulate their procedure..."(657) The section removed doubts which had arisen in South Australia about the competency of the legislature to enact laws in relation to court administration. These doubts should not have arisen as the competency of colonial legislatures in this regard was an accepted principle of the common law. The general authority to legislate (normally for the "Peace, Order and Good Government") including such a power, unless a restriction was to be found in the constituent instrument itself.(658)

However, the second part of section 5 arguably changed the law in respect to the ability of colonial legislatures to enact constitutional amendment. The section allowed a "representative" legislature(659) to make laws respecting the Constitution,


(658) Cf. the decision in Yeap Cheah Neo v. Ong Cheng Neo (1875), L.R. 6 P.C. 381 and comments by Sir Kenneth Roberts-Wray at p. 376.

(659) By section 1 of the Colonial Laws Validity Act, 1865 such is defined as one comprising a legislative body with half its members elected.
Powers, and Procedure of such legislature provided that such laws as are passed conform to any "manner and form" requirements in any Acts of Parliament, Sovereign constituent instruments or Colonial Laws which are in force.

The scope of section 5 was addressed at length in Taylor v. A.-G. Queensland.(660) Barton J., stated that, "the term [Constitution] is here used, to mean the composition, form or nature of the House(s) of legislature"(661) and Garan Duffy and Rich JJ., held to similar effect that the word "constitution" means, "nature", "composition", or "makeup", and that the section enables a representative legislature to alter its constitution as it pleases, to allot to the legislature such powers as it thinks fit, and to prescribe the method in which it shall conduct its proceedings.(662) Probably the power does not extend to authorize the elimination of the representative character of the legislature within the meaning of the Act,(663) nor is the word "legislature" in the context of the section intended to include the Crown.(664) Thus the powers of constitutional amendment are limited to determining the nature of the legislative body, what are to be its powers of the legislation and what its methods of procedure.

------------------

(660) Supra, footnote 659.
(661) Ibid., at p. 468.
(662) Ibid., at p. 477.
(663) Ibid., at p. 468.
(664) Ibid., at p. 473, per Isaacs J.
Importantly the case of *McCawley v. R.* (665) laid to rest the idea that a written constitution, with no express restriction on its amendment, has any greater force than any other law. (666)

Thus a colonial law, made by a representative legislature, effecting a constitutional change cannot be voided on the ground that it is in conflict with the constitution. As to the necessity for a prior repeal of the 'constitutional' law it was stated in the same case in the High Court by Isaacs and Rich JJ., (with whose judgment the Judicial Committee was "in almost complete agreement", that, "there is nothing sacrosanct or magical in the word 'constitution'"; the expression itself not indicating how far, or when, or by whom, or in what manner the rules composing it may be altered". (667) The Judicial Committee thus rejected the argument that notwithstanding the amending powers given by virtue of section 5, a law of a constitutional nature cannot be modified by implication but prevails over any other law which does not expressly amend it. This is subject to the proviso that the law may be limited by a "manner and form" requirement either in the Constitution itself or in an Imperial Act or Colonial Law. (668) That is not to say that an amendment will be given effect unless it clearly expresses this intention (669) or such must of necessity be implied.

---


(667) *Supra*, footnote 657, at p. 52 *et seq* of C.L.R.

(668) *Colonial Laws Validity Act*, 1865, s. 5. Appendix II.
Representative government was not established in British Columbia until 1870 when the Imperial Government passed the British Columbia Government Act, 1870, and an accompanying Order in Council, which replaced the existing legislative council with one based on elective principles, thereby inaugurating representative government in British Columbia. (670) It was not until the 5th January 1871 that the first representative legislature assembled and was "for the first time ... legally competent to amend its own constitution." (671) Thus, for purposes of the Colonial Laws Validity Act, 1865, the British Columbia legislature was at no time prior to 5th January 1871 competent to alter its constitution, which we have argued elsewhere was given in part by the Royal Proclamation of 1763.

Section 5 is given retrospective operation, the legislature being "deemed at all times to have had" this power. (672) Supra, footnote 251, p. 404. out, (673) a literal reading of this would mean that even a clear, express, statutory (or Sovereign) restriction on the authority of a legislature was repealed as from its enactment and this would involve a violent disregard of the maxim generalia specialibus non derogant. He suggests the

(669) Supra, footnote 657.

(670) British Columbia Government Act, 1870, 33 & 34 Vict. (1870), c. 66 and see generally Ward and McDonald (editors), British Columbia Historical Readings (Douglas & Mcintyre Ltd. Vancouver, 1981, at pp. 260 et seq. being an essay by James E. Hendrickson).

(671) Ibid., Ward and McDonald, at p. 270.

(672) Colonial Laws Validity Act, 1865, s. 5. Appendix II.

(673) Supra, footnote 251, p. 947.
better position is that section 5 merely confers the general right, subject to any express provision or clear implication to the contrary. Of course such retroactivity is referable only to the inception of the "representative" legislature.

As to the powers of non-representative legislatures to effect constitutional amendment, it was held in *Chenard v. Arrisol* that section 5, in conferring upon representative legislatures a power of constitutional alteration, does not imply that non-representative legislatures cannot exercise like constituent powers derived from some other source. The court went on to hold that the power to make laws for "peace, order and good government", does not authorize alteration by a colonial legislature of its constitution or powers. The power to do so must be found to be expressly provided in the words of the grant of a constitution or in an Imperial Act applicable to that territory. None of the constituent legislation applicable to British Columbia so provides.

It is important here to stress the fact that even were the legislature of British Columbia competent to effect constitutional amendment (express or by implication), the exercise of such powers must be consistent with any "manner and form requirements" relating to such legislation. Section 5 stipulates that the exercise of the legislative powers of amendment must be consistent with the "Manner and Form as may


from Time to Time be required by any Act of Parliament, Letters Patent, Order in Council, or Colonial Law for the Time being in force in the said Colony". (676) While a legislative body is not bound by self-imposed restraints as to the content, substance or policy of its enactments it is reasonably clear that a legislative body may be bound by self-imposed manner and form restraints on its enactments. (677) Manner and form requirements predate section 5 of the Colonial Laws Validity Act, 1865. Their inclusion in section 5 does not imply that these requirements were now to be limited to representative legislatures. The Act in section 5 merely gives statutory expression to the principle as regards a representative legislature because the section having afforded the latter wide powers of amendment it might be thought that manner and form limitations no longer applied. The proviso in section 5 removed any doubts that might arise in this respect. The usual rule, that later statutes (presuming their vires) expressly or impliedly repeal earlier ones, may not hold in the case of Manner and form requirements. Clearly the "manner and form" law could be directly repealed in the ordinary way but it could not be disregarded and in the absence of such repeal a

(676) Colonial Laws Validity Act, 1865, s. 5 c.f. Ellen St. Estates Ltd. v. Minister of Health, [1934] 1 K.B. 590 at 597 per Maugham L.J.: "The legislature cannot according to our constitution bind itself as to the form of subsequent legislation."

(677) A.-G. N.S.W. v. Trethowan, [1932] A.C. 526 (P.C. Aust.) (although it could be explained as vesting in section 5 of the Colonial Laws Validity Act, 1865 -- see P. Hogg, Constitutional Law of Canada, (Carswell; 1977) p. 201 et seq.)
later inconsistent statute would be not merely inoperative but invalid.\textsuperscript{678}

It was held in \textit{A.G. for N.S.W. v. Thethowan}\textsuperscript{679} that the manner and form requirement of section 5 is a condition which must be fulfilled before the legislature can validly exercise its power to make the kind of laws referred to in the section.\textsuperscript{680} In this respect their Lordships agreed with the words of Rich J., in the court below that "the proviso to section 5 relates to the entire process of turning a proposed law into a legislative enactment, and was intended to enjoin fulfilment of every condition and compliance with every requirement which existing legislation imposed upon the process of lawmaking."\textsuperscript{681} The Court further held that, "A Bill .... which received the Royal assent with anyout having been approved by the electors in accordance with manner and form requirement would not be a valid Act of the legislature. It would be \textit{ultra vires} section 5 of the Act of 1865".\textsuperscript{682}

It may be possible to argue that the procedure laid down in the Royal Prerogative of 1763 for crown purchase of Indian lands may itself operate as a "manner and form" limitation on future Crown acquisitions of Indian land. Certainly the strictures

\textsuperscript{678} ibid., Hogg, p. 437-8.
\textsuperscript{679} [1932] A.C. 526.
\textsuperscript{680} Ibid., at p. 539.
\textsuperscript{681} ibid., p. 541.
\textsuperscript{682} Ibid.
there laid down were reiterated in the various Indian Acts and were reflected in the numerous treaties made with the Indians since that date.

In relation to British Columbia the Letters Patent giving law making powers to Governor Douglas contained the restriction already above mentioned that:

VII. You are, as much as possible, to observe, in the passing of all laws, that each different matter be provided for by a different law, without intermixing in one and the same law such things as have no proper relation to each other; and you are more especially to take care that no clause or clauses be inserted in or annexed to any law which shall be foreign to what the title for such law imports, and that no perpetual clause be part of any temporary law, and that no law whatever be suspended, altered, continued, revived, repealed by general orders, but that the title and date of such law so suspended, altered, continued, revived, or repealed be particularly mentioned and expressed in the enacting part. (My emphasis).

It is suggested the whole of clause VII operates as a manner and form requirement on colonial laws. It may be objected that such are merely 'directory' procedural requirements, beach of which does not lead to invalidity.(683) The answer lies in the force and effect of the constituent Letters Patent at common law, given statutory effect by implication in section 4 of the Colonial Laws Validity Act, 1865. It has been argued above that binding nature of such 'manner and form' requirements predated the enactment of the latter Act. On this argument Governor

Douglas did not have the authority to assent to a Colonial Act purporting to alter any existing law which did not on its face express such intention even where such law did not have the force of Imperial Statute as argued for in the case of the Royal Proclamation of 1763.

Before leaving the discussion on section 5 it is useful to clarify a possible conflict between sections 2 and 5 of the Act. When the impugned colonial law is captured by section 5 then even though it be repugnant to a prior Imperial Act protected by section 2, according to all recognized rules of construction section 5 works an implied repeal of such prior enactment to the extent of any inconsistency. "But section 2 operates to this extent -- that if by any later British Act any provision is made repugnant to section 5, then the section must pro tanto give way to later legislation. If in those circumstances a colony legislates repugnantly to the later enactment, section 2 operates to void the colonial legislation so far as it is repugnant."(684)

A further point remains to be clarified. Where the Imperial legislation, relevant to section 2, was not an Imperial Act but an Order thereunder or an Order having the force and effect of such Act, a different result is met. There is no difficulty, where the Imperial Order (for purposes of s. 2) is prior in time to the enactment of section 5 of the Colonial Laws Validity Act, 1865, section 5 takes precedence and works an implied repeal of the Order. Where however the Imperial Order, relevant to a ----------------------

section 2 inquiry, was passed subsequent to the enactment of the Colonial Laws Validity Act, 1865, section 5 would still likely take precedence, differing then in result from the case in which the legislation wor in an Imperial Act. The reason being that while an Imperial Act has the effect of repealing earlier Acts inconsistent with its provisions, subordinate legislation under such an Act or indeed Prerogative legislation would be rendered null by such conflict. (685) The doctrine of implied repeal does not apply to conflicting provisions of the same statute. (686) Section 5 may thus be read as an exception to section 2 and has the effect of reducing its scope so far as constitutional amendments made by a representative legislature are concerned.

In summary on this point, British Columbia, not being a representative legislature, the power to make or alter constitutional laws must be found in the grant of legislative power as an Imperial Act or Order relating to B.C. Neither the Governor's Commissions for the relevant period nor the Imperial acts and Orders providing for the government of British Columbia contained a power to effect constitutional amendment. It follows that any laws made by the Governor or Council of British Columbia prior to 1971 insofar as they purported to extinguish aboriginal title contrary to the provisions of the Royal Proclamation of 1763 were ultra vires.

---------------------

(685) Supra, footnote 251, p. 404 et seq.
The B.N.A. Act, 1867 continued the supremacy of Imperial Acts and Orders extending to the Colony over colonial statutes where 'repugnancy' existed. Section 129 of the B.N.A. Act, 1867 continued in force pre-confederation laws that were in force in the uniting provinces, and it gave to the competent legislative body the power to repeal, abolish or alter such pre-confederation laws. Importantly section 129 excluded from Dominion or provincial competence the repeal, abolition or alteration of such laws "as are enacted by or exist under Acts of the Parliament of Great Britain or of the Parliament of the United Kingdom of Great Britain and Ireland", but was silent as to the effect of Imperial Orders of the same force and effect as Imperial statutes. The section has generally been held to preserve the restrictions defined in the Colonial Laws Validity Act, 1865, even though a literal reading of the section might suggest that even if as argued, certain Imperial Orders were included in s. 2 of the latter Act, the supremacy of such was not continued by s. 129 of the B.N.A. Act, 1867. In particular it cannot be presumed that the failure of the later Act to mention Imperial Orders impliedly worked a repeal of this provision in section 2 of the Colonial Laws Validity Act. Moreover the wording of s. 129 is suspect in another respect. Hogg comments that the words of section 129 are, on their face, sufficiently broad so as to deny Canadian power to amend or

---

(687) Constitution Act, 1867, supra, footnote 12.

repeal British statutes received by settlement or adoption, as well as those protected by the Colonial Laws Validity Act, and suggests such would not be the intention. Rather section 129's exclusion was intended to be no wider than the Colonial Laws Validity Act's definition of Imperial statutes and (Orders) extending to the colony. The restriction on repealing or amending pre-confederation Imperial legislation extending to the Colony was removed by the Statute of Westminster.(689)

By section 2(1) the Statute of Westminster, 1931 repealed the Colonial Laws Validity Act, 1865 in its application to the Dominions, defined in the Act (s. 1) to include the Dominion of Canada, including Newfoundland. By section 2(2) the Act granted to each Dominion the power to repeal or amend "any existing or future Acts of Parliament of the United Kingdom, or of any order, rule or regulation made under any such Act insofar as the same is part of the law of the Dominion". Section 2(2) also stated that no Dominion statute should be void on the ground of repugnancy "to the law of England", or to the provisions of any Imperial Statutes or Orders or regulations thereunder. The powers granted by section 2 extended to future as well as existing Imperial statutes. The provisions of section 2 were made applicable to the provincial legislatures by section 7(2) of the Act.

------------

Section 2 in both repealing the Colonial Laws Validity Act, 1865 and providing that "Dominion" laws should not be void on the ground of repugnancy to Imperial legislation, made clear the pre-1865 law on repugnancy was not to be revived by such repeal. It can also be argued that in providing that Dominion laws should not be void on the ground of repugnancy to the law of England or United Kingdom Acts it implicitly recognized that repugnancy as defined in the Colonial Laws Validity Act, 1865 included some Imperial laws not caught within the definition 'Imperial statutes or orders or regulations made under any such Act. That is, section 2 of the Statute of Westminster implicitly recognized the inclusion in the Colonial Laws Validity Act of Imperial Orders of Regulations which while not made under the authority of a United Kingdom statute nevertheless had the force of such in the colonies. Read in this way the wording of section 2 of the Statute of Westminster can be seen as support for the interpretation, here argued for, that Imperial Orders were included in the definition of Imperial Law given in section 2 of the Colonial Laws Validity Act for purposes of repugnancy.

It has been suggested that s. 7(1) of the Statute of Westminster, by providing that "nothing in this Act shall be deemed to apply to the repeal, amendment or alteration of the B.N.A. Act, 1867 to 1920", left section 129 of the B.N.A. Act intact. This argument was rejected by the majority in Nanaimo Community Hotel v. Board of Referees (1945, B.C.C.A.). (690) but

(690) Ibid., citing Nanaimo Community Hotel v. Board of Referees, [1945] 3 D.L.R. 225 (B.C.C.A.) -- the argument was accepted
the point may still be open to argue. However that may be decided, it is clear that at least up until the passage of the Statute of Westminster, 1931, section 2 of the Colonial Laws Validity Act operated so as to void any colonial, Dominion or provincial legislation repugnant to the provisions of Imperial legislation, as there defined, to the extent of any such repugnancy.

--------------

by O'Halloran J.A. dissenting at p. 240.
Conclusion

In Canada the existence of a common law aboriginal interest in land, existing independently of any legislative recognition, is no longer at issue. It stems from the simple fact that Indians were in occupation and possession of various parts of North America prior to the assertion of British sovereignty over those areas. It has been recently characterized as a *sui generis* legal interest, restricted as to alienation to parties other than the Crown and not created by the *Royal Proclamation of 1763*, the *Indian Act* or by any other executive order or legislative provision.

In the past the courts have confirmed to the Crown the uninhibited and exclusive right to modify and extinguish such title, and have held the equity of the extinguishment to be immune to judicial review. That is not to say extinguishment will be lightly implied. The common law requirement for the strict construction of statutes purporting to encroach on the property rights of subjects demands that the actual acts of extinguishment be plain and unambiguous in their intention, and in the absence of such clearly expressed intention, aboriginal rights must be presumed to continue. This presumption is given more force where the right in question (aboriginal title) arguably enjoys constitutional status, and where the legislative body responsible for its extinguishment has a fiduciary obligation to deal with the interest for the benefit of the Indians.
Aboriginal and treaty rights are now recognized and affirmed in the Constitution, Act, 1982. Such can be read as an intention, on the part of the Parliament of Canada, to protect the rights from judicial or legislative derogation. The value expressed through these constitutional provisions is consistent with a recognition of the fiduciary relationship between the federal government and the Indians. Although at one time it may have been possible to argue that section 35 had the effect of entrenching aboriginal rights so that any future modification called for a constitutional amendment, the courts have so far held the right, protected by s. 35 to be one subject to regulatory control. The ramifications of these decisions cannot be fully documented here.

The common law aboriginal right was statutorily confirmed in the Royal Proclamation of 1763 for those areas to which the Proclamation applies. It is not decided here whether the right as expressed in the Proclamation, is synonymous with that existing at common law, it may be that the latter is more extensive and remains as a source of aboriginal rights to the extent they are not declared in the Proclamation. Nor do I address the question of whether the proof necessary to found the right is the same in both instances. It is clear that prior to the enactment of the Constitution Act, 1982, the courts held that the common law right of aboriginal title was open to modification or abridgment by the competent legislative body.

However, it has been here argued that to the extent that aboriginal rights are recognized and confirmed in the Royal
Proclamation of 1763, a different argument lies. The Proclamation as a major Prerogative Order has been held to have the force and effect of an Imperial statute with the requisite colonial extension in those territories to which it applied. It is clear that, at least for these territories gained by Britain from France under the Treaty of Paris, 1763, the Proclamation is the sine qua non of aboriginal rights to the extent they are there declared. This in no way detracts from the common law incidents of title to the extent they are not so declared. It is submitted that the Proclamation applied prospectively to embrace all British North American colonies as such were from time to time defined, at any time during the Proclamation's life. On this argument the definition of its geographic compass as of 1763 assumes secondary importance. As an Imperial Order of manifestly universal application it formed a basic part of the constitutions of all British colonies erected subsequent to its enactment, and in law served as a constitutional limitation on the powers of colonial governors to derogate from its provisions.

This position was clarified and confirmed in the Colonial Laws Validity Act, 1865, which declared the primacy of Imperial statutes and certain Imperial orders having an expressed or implied colonial extension over colonial laws.

It is submitted that the Indian provisions of the Royal Proclamation of 1763 are caught by the terms of the Colonial Laws Validity Act, 1865 which applied to make these provisions of the Proclamation the law of British Columbia. By section 2 of this Act major Prerogative legislation with the requisite colonial
extension (express or implied) bound colonial legislatures and operated so as to void inconsistent colonial laws to the extent of any repugnancy. This limitation was removed for self-governing "dominions" with the enactment of the Statute of Westminster in 1931, but is relevant when discussing the legislation of the colony of British Columbia prior to 1931 and for that matter provincial or Dominion legislative initiatives prior to that date. The Proclamation being, then, the law of the Colony of British Columbia, the pre-confederation land legislation of that colony must be read so as to be consistent with the Indian interest as recognized in the Royal Proclamation of 1763.

It has been argued that the Royal Proclamation of 1763 recognizes and confirms a legal interest in the Indians to land in their possession throughout British dominions in North America and contemplates extinguishment only upon cession by the Indians and purchase by the Crown according to a prescribed procedure. This is not incompatible with a radical title in the Crown. On this argument insofar as the pre-confederation land legislation of British Columbia purports to extinguish aboriginal title in the province it is repugnant to the provisions of the Proclamation and void to the extent of such repugnancy by virtue of the Colonial Laws Validity Act, 1865 (section 2). To avoid a repugnancy, the British Columbia land legislation must be read as reaching only those lands within the colonial governor's powers to grant. Such would not reach any lands subject to the Indian right of possession where this right has not been lawfully
extinguished in compliance with the Proclamation's strictures regarding such land.
Bibliography


Cohen, F. "Original Indian Title" (1947), 32 Minnesota Law Rev. 28.


Cote, J.E., "The Introduction of English Law into Alberta" (1964), 3 Alta. L. Rev. 262.


Humphreys, R.A. "Lord Shelburne and the Proclamation of 1763" (1934), XLIX English Historical Review 241.


Narvey, Kenneth M. "The Royal Proclamation of 7 October 1763. The Common Law, and Native Rights to Land within the Territory Granted to the Hudson's Bay Company" (1973-74) *XXXVIII Saskatchewan Law Review* 123.


"Indian Hunting and Fishing Rights" (1973-74), 38 *Sask. L. Rev.* 45.


Ancestral Lands, Alien Laws: *Judicial Perspectives on Aboriginal Title* (Saskatoon: University of Saskatchewan Native Law Centre, 1983.


Stagg, J. *Anglo-Indian Relations in North America to 1763 and An Analysis of The Royal Proclamation of 7 October 1763*, published by Dept. of Indian Affairs and Northern Development, Govt. of Canada, 1981.
1763, October 7.
[Establishing New Governments in America.]

BY THE KING.

A PROCLAMATION

GEORGE R.

PART I

Whereas We have taken into Our Royal Consideration the extensive and valuable Acquisitions in America, secured to Our Crown by the late Definitive Treaty of Peace, concluded at Paris the Tenth Day of February last;\(^1\) and being desirous, that all Our loving Subjects, as well of Our Kingdoms as of Our Colonies in America, may avail themselves, with all convenient Speed, of the great Benefits and Advantages which must accrue therefrom to their Commerce, Manufactures, and Navigation; We have thought fit, with the Advice of Our Privy Council, to issue this Our Royal Proclamation,\(^2\) hereby to publish and declare to all Our loving Subjects, that We have, with the Advice of Our said Privy Council, granted Our Letters Patent under Our Great Seal of Great Britain, to erect within the Countries and Islands ceded and confirmed to Us by the said Treaty, Four distinct and separate Governments, stiled and called by the Names of Quebec, East Florida, West Florida, and Grenada, and limited and bounded as follows; viz.

1) First. The Government of Quebec, bounded on the Labrador Coast by the River St. John, and from thence by a Line drawn from the Head of that River through the Lake St. John to the South End of the Lake nigh Pissin,\(^3\) from whence the said Line crossing the River St. Lawrence and the Lake Champlain in Forty five Degrees of North Latitude, passes along the High Lands which divide the Rivers that empty themselves into the said River St. Lawrence, from those which fall into the Sea; and also along the North Coast of the Baye des Chaleurs, and the Coast of the Gulph of

\(^1\) Text of treaty can be consulted in Chalmers' *Collection of Treaties*, I. 467.
\(^2\) The events leading up to the issuing of this proclamation have been so thoroughly treated in C. W. Alvord's "Genesis of the Proclamation of 1763" in *Michigan Pioneer and Historical Collections*, vol. xxxvi, p. 20, and in C. E. Carter's *Great Britain and the Illinois Country* (Prize Essay of the Amer. Hist. Assoc., 1910) that any explanatory notes in this place seem unnecessary.
\(^3\) *Nipissin* in proclamation as printed in the *London Gazette*. 
St. Lawrence to Cape Rosieres, and from thence crossing the Mouth of the River St. Lawrence by the West End of the Island of Anticosti, terminates at the aforesaid River of St. John.

3) Secondly. The Government of East Florida, bounded to the Westward by the Gulph of Mexico, and the Apalachicola River; to the Northward, by a Line drawn from that Part of the said River where the Chatahouchee and Flint Rivers meet, to the Source of St. Mary's River, and by the Course of the said River to the Atlantick Ocean; and to the Eastward and Southward, by the Atlantick Ocean, and the Gulph of Florida, including all Islands within Six Leagues of the Sea Coast.

4) Thirdly. The Government of West Florida, bounded to the Southward by the Gulph of Mexico, including all Islands within Six Leagues of the Coast from the River Apalachicola to Lake Pentchartrain; to the Westward, by the said Lake, the Lake Mauripas, and the River Mississippi; to the Northward, by a Line drawn due East from that Part of the River Mississippi which lies in Thirty one Degrees North Latitude, to the River Apalachicola or Chatahouchee; and to the Eastward by the said River.

5) Fourthly. The Government of Grenada, comprehending the Island of that Name, together with the Grenadines, and the Islands of Dominico, St. Vincents, and Tobago.

6) And, to the End that the open and free Fishery of Our Subjects may be extended to and carried on upon the Coast of Labrador and the adjacent Islands, We have thought fit, with the Advice of Our said Privy Council, to put all that Coast, from the River St. John's to Hudson's Streights, together with the Islands of Anticosti and Madelaine, and all other smaller Islands lying upon the said Coast, under the Care and Inspection of Our Governor of Newfoundland.

7) We have also, with the Advice of Our Privy Council, thought fit to annex the Islands of St. John's, and Cape Breton or Isle Royale, with the lesser Islands adjacent there to, to Our Government of Nova Scotia.

8) We have also, with the Advice of Our Privy Council aforesaid, annexed to Our Province of Georgia all the Lands lying between the Rivers Attamaha and St. Mary's.

And whereas it will greatly contribute to the speedy settling of Our said new Governments, that Our loving Subjects should be informed of Our Paternal Care for the Security of the Liberties and Properties of those who are and shall become Inhabitants thereof; We have thought fit to publish and declare, by this Our Proclamation, that We have, in the Letters Patent under Our Great Seal of Great Britain, by which the said Governments are constituted, given express Power and Direction to Our Governors of Our said Colonies respectively, that so soon as the State and Circumstances of the said Colonies will admit thereof, they shall, with the Advice and Consent of the Members of Our Council, summon and call General Assemblies within the said Governments respectively, in such Manner and Form as is used and directed in those Colonies and Provinces in America, which are under Our immediate Government; and We have also given Power to the said Governors, with the Consent of Our
said Councils, and the Representatives of the People, so to be summoned as aforesaid, to make, constitute, and ordain Laws, Statutes, and Ordinances for the Publick Peace, Welfare, and Good Government of Our said Colonies, and of the People and Inhabitants thereof, as near as may be agreeable to the Laws of England, and under such Regulations and Restrictions as are used in other Colonies: And in the mean Time, and until such Assemblies can be called as aforesaid, all Persons inhabiting in, or resorting to Our said Colonies, may confide in Our Royal Protection for the Enjoyment of the Benefit of the Laws of Our Realm of England; for which Purpose, We have given Power under Our Great Seal to the Governors of Our said Colonies respectively, to erect and constitute, with the Advice of Our said Councils respectively, Courts of Judicature and Publick Justice, within Our said Colonies, for the hearing and determining all Causes, as well Criminal as Civil, according to Law and Equity, and as near as may be agreeable to the Laws of England, with Liberty to all Persons who may think themselves aggrieved by the Sentences of such Courts, in all Civil Cases, to appeal, under the usual Limitations and Restrictions, to Us in Our Privy Council.

2) We have also thought fit, with the Advice of Our Privy Council as aforesaid, to give unto the Governors and Councils of Our said Three New Colonies upon the Continent, full Power and Authority to settle and agree with the Inhabitants of Our said New Colonies, or with any other Persons who shall resort thereto, for such Lands, Tenements, and Hereditaments, as are now, or hereafter shall be in Our Power to dispose of, and them to grant to any such Person or Persons, upon such Terms, and under such moderate Quit-Rents, Services, and Acknowledgments as have been appointed and settled in Our other Colonies, and under such other Conditions as shall appear to Us to be necessary and expedient for the Advantage of the Grantees, and the Improvement and Settlement of our said Colonies.

And whereas We are desirous, upon all Occasions, to testify Our Royal Sense and Approbation of the Conduct and Bravery of the Officers and Soldiers of Our Armies, and to reward the same, We do hereby command and impower Our Governors of Our said Three New Colonies, and all other Our Governors of Our several Provinces on the Continent of North America, to grant, without Fee or Reward, to such Reduced Officers as have served in North America during the late War, and to such Private Soldiers as have been or shall be disbanded in America, and are actually residing there, and shall personally apply for the same, the following Quantities of Lands, subject at the Expiration of Ten Years to the same Quit-Rents as other Lands are subject to in the Province within which they are granted, as also subject to the same Conditions of Cultivation and Improvement; viz.

To every Person having the Rank of a Field Officer, Five thousand Acres. — To every Captain, Three thousand Acres. — To every Subaltern or Staff Officer, Two thousand Acres. — To every Non-Commission Officer, Two hundred Acres. — To every Private Man, Fifty Acres.
2) We do likewise authorize and require the Governors and Commanders in Chief of all Our said Colonies upon the Continent of North America, to grant the like Quantities of Land, and upon the same Conditions, to such Reduced Officers of Our Navy, of like Rank, as served on Board Our Ships of War in North America at the Times of the Reduction of Louisbourg and Quebec in the late War, and who shall personally apply to Our respective Governors for such Grants.

And whereas it is just and reasonable, and essential to Our Interest and the Security of Our Colonies, that the several Nations or Tribes of Indians, with whom We are connected, and who live under Our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to, or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds; We do therefore, with the Advice of Our Privy Council, declare it to be Our Royal Will and Pleasure, that no Governor or Commander in Chief in any of Our Colonies of Quebec, East Florida, or West Florida, do presume, upon any Pretence whatever, to grant Warrants of Survey, or pass any Patents for Lands beyond the Bounds of their respective Governments, as described in their Commissions; as also, that no Governor or Commander in Chief in any of Our other Colonies or Plantations in America, do presume, for the present, and until Our further Pleasure be known, to grant Warrants of Survey, or pass Patents for any Lands beyond the Heads or Sources of any of the Rivers which fall into the Atlantick Ocean from the West and North-West, or upon any Lands whatever, which, not having been ceded to, or purchased by Us as aforesaid, are reserved to the said Indians, or any of them.

2) And We do further declare it to be Our Royal Will and Pleasure, for the present as aforesaid, to reserve under Our Sovereignty, Protection, and Dominion, for the Use of the said Indians, all the Lands and Territories not included within the Limits of Our said Three New Governments, or within the Limits of the Territory granted to the Hudson's Bay Company, as also all the Lands and Territories lying to the Westward of the Sources of the Rivers which fall into the Sea from the West and North West, as aforesaid; and We do hereby strictly forbid, on Pain of Our Displeasure, all Our loving Subjects from making any Purchases or Settlements whatever, or taking Possession of any of the Lands above reserved, without Our especial Leave and Licence for that Purpose first obtained.

3) And We do further strictly enjoin and require all Persons whatever, who have either wilfully or inadvertently seated themselves upon any Lands within the Countries above described, or upon any other Lands, which, not having been ceded to, or purchased by Us, are still reserved to the said Indians as aforesaid, forthwith to remove themselves from such Settlements.
4a) And whereas great Frauds and Abuses have been committed in the purchasing Lands of the Indians, to the great Prejudice of Our Interests, and to the great Dissatisfaction of the said Indians; in order therefore to prevent such Irregularities for the future, and to the End that the Indians may be convinced of Our Justice, and determined Resolution to remove all reasonable Cause of Discontent, We do, with the Advice of Our Privy Council, strictly enjoin and require, that no private Person do presume to make any Purchase from the said Indians of any Lands reserved to the said Indians, within those Parts of Our Colonies where We have thought proper to allow Settlement; but that if, at any Time, any of the said Indians should be inclined to dispose of the said Lands, the same shall be purchased only for Us, in Our Name, at some publick Meeting or Assembly of the said Indians to be held for that Purpose by the Governor or Commander in Chief of Our Colonies respectively, within which they shall lie: and in case they shall lie within the Limits of any Proprietary Government, they shall be purchased only for the Use and in the Name of such Proprietaries, conformable to such Directions and Instructions as We or they shall think proper to give for that Purpose: And We do, by the Advice of Our Privy Council, declare and enjoin, that the Trade with the said Indians shall be free and open to all our Subjects whatever; provided that every Person, who may incline to trade with the said Indians, do take out a Licence for carrying on such Trade from the Governor or Commander in Chief of any of Our Colonies respectively, where such Person shall reside; and also give Security to observe such Regulations as We shall at any Time think fit, by Ourselves or by Our Commissaries to be appointed for this Purpose, to direct and appoint for the Benefit of the said Trade; And We do hereby authorize, enjoin, and require the Governors and Commanders in Chief of all Our Colonies respectively, as well Those under Our immediate Government as those under the Government and Direction of Proprietaries, to grant such Licences without Fee or Reward, taking especial Care to insert therein a Condition, that such Licence shall be void, and the Security forfeited, in Case the Person, to whom the same is granted, shall refuse or neglect to observe such Regulations as We shall think proper to prescribe as aforesaid.

4b) And We do further expressly enjoin and require all Officers whatever, as well Military as those employed in the Management and Direction of Indian Affairs within the Territories reserved as aforesaid for the Use of the said Indians, to seize and apprehend all Persons whatever, who, standing charged with Treasons, Misprisons of Treason, Murders, or other Felonies or Misdemeanors, shall fly from Justice, and take Refuge in the said Territory, and to send them under a proper Guard to the Colony where the Crime was committed of which they stand accused, in order to take their Tryal for the same.
Appendix II: The Colonial Laws Validity Act, 1865

(28 & 29 Vict. c 63)

An Act to remove Doubts as to the Validity of Colonial Laws.

Whereas Doubts have been entertained respecting the Validity of divers Laws enacted or purporting to have been enacted by the Legislatures of certain of Her Majesty's Colonies, and respecting the Powers of such Legislatures, and it is expedient that such Doubts should be removed:

Be it hereby enacted, etc.:—

Definitions

1. The Term "Colony" shall in this Act include all of Her Majesty's Possessions abroad in which there shall exist a Legislature, as hereinafter defined, except the Channel Islands, the Isle of Man, and such Territories as may for the Time being be vested in Her Majesty under or by virtue of any Act of Parliament for the Government of India:

The Terms "Legislature" and "Colonial Legislature" shall severally signify the Authority, other than the Imperial Parliament or Her Majesty in Council, competent to make Laws for any Colony:

The Term "Representative Legislature" shall signify any Colonial Legislature which shall comprise a Legislative Body of which One Half are elected by Inhabitants of the Colony:

The Term "Colonial Law" shall include Laws made for any Colony either by such Legislature as aforesaid or by Her Majesty in Council:

An Act of Parliament, or any Provision thereof, shall, in constructing this Act, be said to extend to any Colony when it is made applicable to such Colony by the express Words or necessary Intendment of any Act of Parliament.

The Term "Governor" shall mean the Officer lawfully administering the Government of any Colony:

The Term "Letters Patent" shall mean Letters Patent under the Great Seal of the United Kingdom of Great Britain and Ireland.

Colonial law when void for repugnancy
2. Any Colonial Law which is or shall be in any respect repugnant to the Provisions of any Act of Parliament extending to the Colony to which such Law may relate, or repugnant to any Order or Regulation made under Authority of such act of Parliament, or having in the Colony the Force and Effect of such Act, shall be read subject to such Act, Order, or Regulation, and shall, to the Extent of such Repugnancy, but not otherwise, be and remain absolutely void and inoperative.

**Colonial law when not void for repugnancy**

3. No Colonial Law shall be or be deemed to have been void or inoperative on the Ground of Repugnancy to the Law of England, unless the same shall be repugnant to the Provisions of some such Act of Parliament, Order, or Regulation as aforesaid.

**Colonial law not void for inconsistency with instructions**

4. No Colonial Law, passed with Concurrence of or assented to by the Governor of any Colony, or to be hereinafter so passed or assented to, shall be deemed to have been void or inoperative by reason only of any Instructions with reference to such law or the Subject thereof which may have been given to such Governor by or on behalf of Her Majesty, by any Instrument with reference to such Law or the Subject thereof which may have been given to such Governor by or on behalf of Her Majesty, by any Instrument other than the Letters Patent or Instrument authorizing such Governor to concur in passing or to assent to Laws for the Peace, Order, and good Government of such Colony, even though such Instructions may be referred to in such Letters Patent or last-mentioned Instrument.

**Colonial legislature may establish, &c. courts of law. Representative legislature may alter constitution**

5. Every Colonial Legislature shall have, and be deemed at all Times to have had, full Power within its Jurisdiction to establish Courts of Judicature, and to abolish and reconstitute the same, and to alter the Constitution thereof, and to make Provision for the Administration of Justice therein; and every Representative Legislature shall, in respect of the Colony under its Jurisdiction have, and be deemed at all Times to have had, full Power to make Laws respecting the Constitution, Powers, and Procedure of such Legislature; provided that such Laws shall have been passed in such Manner and Form as may from Time to Time be required by any Act of Parliament, Letters Patent, Order in Council, or Colonial Law for the Time being in force in the said Colony.

**Certified copies of laws to be evidence that they are properly passed. Proclamation to be evidence of assent and disallowance**

6. The Certificate of the Clerk or other proper Office of a Legislative Body in any Colony to the effect that the Document to
which it is attached is a true Copy of any Colonial Law assented to by the Governor of such Colony, or of any Bill reserved for the Signification of Her Majesty's Pleasure by the said Governor, shall be prima facie Evidence that the Document so certified is a true Copy of such Law or Bill, and, as the Case may be, that such Law has been duly and properly passed and assented to, or that such Bill has been duly and properly passed and presented to the Governor; and any Proclamation purporting to be published by Authority of the Governor in any Newspaper in the Colony to which such Law or Bill shall relate, and signifying Her Majesty's Disallowance of any such Colonial Law, or Her Majesty's Assent to any such reserved Bill as aforesaid, shall be prima facie Evidence of such Disallowance or Assent.

And whereas Doubts are entertained respecting the Validity of certain Acts enacted or reputed to be enacted by the Legislature of South Australia: Be it further enacted as follows:

Certain Acts of legislature of South Australia to be valid

7. All Laws or reputed Laws enacted or purporting to have been enacted by the said Legislature, or by persons or Bodies of Persons for the Time being as such Legislature, which have received the Assent of Her Majesty in Council, or which have received the Assent of the Governor of the said Colony in the Name and on behalf of Her Majesty, shall be and be deemed to have been valid and effectual from the Date of such Assent for all Purposes whatever; provided that nothing herein contained shall be deemed to give Effect to any Law or reputed Law which has been disallowed by Her Majesty, or has expired, or has been lawfully repealed, or to prevent the lawful Disallowance or Repeal of any Law.