Transfer of the English Common Law to the English Colonies

by Charles Joseph Hilkey

1907

Submitted to the Department of History of the University of Kansas in partial fulfillment of the requirements for the Degree of Master of Arts

Master Thesis

History

Hilkey, Charles J. 1907

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Of

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Lawrence, Kansas

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INTRODUCTION.

The law of England falls naturally into two divisions, the written and the unwritten. The latter, for the most part, comprises the great body of common law, and forms the basis for that of the English Colonies and of the United States. Common law may be defined, in general, as those maxims, principles, and forms of judicial proceeding which have no written law to prescribe or warrant them, but which, founded on the laws of nature and the dictates of reason, have, by usage and custom, become interwoven with the written laws, and by such incorporation form a part of the municipal codes of certain states or nations.[1] According to Blackstone,[2] the lex non scripta, or unwritten laws of England, includes not only general customs , or the common law properoy so-called; but also the particular customs of certain parts of the kingdom; and likewise those particular laws, that are by custom observed only in certain courts and jurisdictions.

While the Continental countries generally follow the carefully classified and codified system of the Roman civil law, the common law of England was a gradual growth[3] and its

1. Am. & Eng. Ency. of Law.
2. Cooley's Blackstone 1: 56-57
3. The New International Ency.

origin was as various and motley as that of the English language.[1] It is derived from the customs and precedents of Anglo-Saxons, of Normans, of the united England which followed the Norman rule, and includes also some principles and practices derived from the Roman law itself. Even at the time of the Norman conquest England had a definitely established, though crude legal system, and on that system much of the common law, though perhaps not the greater part, rests.[2]

Common law, then is based primarily on customs growing out of the united wisdom and experience of mankind. In time these customs became recognized as reasonable, consistent, and established, are sanctioned by the courts, and are interpreted and made binding by the decisions of the final courts of appeal. The manner in which this takes place may be illustrated by citing the recognition by courts of the already long-established principle of primogeniture; of the similar recognition of the fact that the validity of a deed depends on its being sealed and delivered; of the recognition of the principle that wills should be less strictly construed than deeds; of the sanctioning the already existing mercantile custom that three days of grace should be given in payment of notes and bills. In all these cases the law did not make the custom or principle, but

1. Reeves 1: 160.
2. The New Int. Encyc.

found it ready made, recognized its convenience and usefulness, and sanctioned it by judicial authority.[1]

Although great importance is attached to precedent in ascertaining the principles of the common law, yet the ablest jurists of the English bench, such as Lord Mansfield,[2] have recognized the fact that precident must be tempered by reason. In this way much has been done to make the administration of law in England pliable and efficient.[3] But the flexibility of the common law consists, not in a change of great and general truths, but in the application of old principles to new cases and in the modification of rules flowing from them; thus enabling it to be adapted to the ever-varying conditions and emergencies of human society. But while the rules of the common law and the result of the application of its principles will vary with the facts under which such application is made, the fundamental principles of the law remain immutable. Statutes, too, are to be interpreted with reference to those principles and any legislation intended to arrogate them must be strictly construed. And by the repeal of the abrogating enactment, the common law is restored to its former state.[4]

Such is the common law of England and it is our purpose to consider its transfer to the various English

1. The New Int. Ency.
2. Am. & Eng. Encyc. of Law.
3. Cooley's Blackstone 1: 64 note.
4. The New Inter. Encyc.
5. Am. & Eng. Encyc. of Law.

colonies. In this respect the common or unwritten law differs greatly from the written or code law. When a nation adopts a certain code the transfer is completed by that very act and it only remains for the courts to refer to the already classified law and render their decisions accordingly. But the common law of England by its very nature, not being found in any one book or digest, but having its principles discussed in the treatises of innumerable writers of text-books and commontaries, and in the records of the decisions of the courts,[1] can only be transferred to any community portion by portion.

The colonists who went out from the mother country carried with them such general laws as were applicable to settlers in the new territory. But in all cases the portion of the common law thus transferred was very small. In those new lands the life of the colonists was very simple, and they needed no elaborate system of written or unwritten law. But, as time went on, the settlements grew and the life of the settlers became less simple. Business complications arose and new questions continually presented themselves. For every injury it was natural to look to the home government for a remedy. But the transfer was not so simple as it appears. The new conditions in the colonies, conflicting commercial interests, and, at times, the apparent apathy of the home government made the process a long and tedious one.

1. The New Inter. Encyc.

It must not be presumed that the common law was transferred without change to the colonies. The late David Dudley Field, in an address as president of the American Bar Association, said: "The common law of England, at the time of our Revolution was divisible into two portions, one public, and the other private. The public portion, with its three great branches, trial by jury, habeas corpus, and representative assemblies, was worthy of all commendation. Its private portion, that which related to land and private obligations, was but little advanced beyond the region of semi-barbarism; most of the good which it had, and of that which it has since accumulated, was the contribution of the Romans".[2] But, at any rate the common law is looked upon by Englishmen as their natural heritage and this is the greatest factor in its being transferred to the colonies of the realm.[1]

In our discussion of this transfer it will often be impossible to separate the written from the unwritten law, since both were generally transferred together. But such a separation is not necessary as the two are so interwoven that one would mean but little without the other. It will be found, too, as we proceed, that this process took place, for the most part, in each colony separately and that the colonial constitutions must be considered, for without them there could be no law or order of any kind. But these elements will appear, as we investigate the history of each colony,

1. Todd 213-214.
2. Cooley's Blackstone 1:64 note.

beginning with Canada and Newfoundland, and then indicate the unifying influence of the general governments.

QUEBEC AND ONTARIO.

The Treaty of the 10th of February, 1763, between England, France and Spain, left England in possession of far more territory than at the beginning of the war. Among other things the treaty confirmed England's acquisition of Canada. At the time of its conquest, Canada contained about 65,000 inhabitants, mainly settled on the banks of the St. Lawrence and its tributaries. These were either French, or of mixed French and Indian blood. That the French population might be absorbed by an English element, the British government made an effort to turn the tide of emigration in the direction of Canada, and many of the soldiers who had served in the war were given grants of land.[1]

By the proclamation of George lll., issued in England on the 7th of October, 1763[2], but which did not reach Canada and go into effect until the 10th of August, 1764, provision was made for the temporary government of the new dependencies. The Canadians were promised the same sort of constitution as was enjoyed in the other colonies

1. Payne 147.
2. Bourinot Hist.40.

in America.[1] The province of Quebec was constituted and General Murry was appointed governor. His commission gave him authority with the advice and consent of the council to establish courts of justice to try cases both criminal and civil and to appoint judges and justices of the peace.[2] Power was also given him, with the advice and consent of the council and, as soon as the circumstances would permit, to call an assembly of the free-holders and planters, and until this was done the governor and council were invested with authority to make such rules and regulations as should be needed for the government of the province. But, since members of the proposed assembly were required to take in addition to the oaths of allegiance and supremacy a declaration against transubstantiation and the French population who were Catholics refused to take such tests, the assembly, although formally summoned, never met.[3] The government remained in the hands of the governor and council.

The council was composed of the lieutenant governor of Montreal and Three Rivers, the chief justice, and eight others chosen from the residents in the province. It had both legislative and executive power, but the Crown retained the right to disallow any law. No law could go into force, therefore, contrary to the wish of the English government.

1. Houston 68-69
2. Houston 75.
3. Munro 15.

As to what laws were actually in force in the province, there were various opinions. Some believed that English law in all its branches had been established through the conquest and the proclamation of the 7th of October, 1763. The French, on the other hand, maintained that the old laws of Canada still survived. But the opinion of many of the leading lawyers was between the two former views. The effect of the proclamation, they held, was to introduce the criminal law of England and to confirm the civil law of Canada[1].

This uncertainty might have been removed had the attention of the home government not been called to another question. The trouble which broke out in New England caused the plan for a new constitution to be suspended, and Quebec remained under military rule until 1774.

In 1774, on the eve of the American Revolution, the Anglo-Canadians petitioned that they might be given the promised constitution. The crown by order in council directed Attorney General Thurlow and Solicitor General Widderburn "to take into consideration several reports and papers relative to the laws and courts of judicature of Quebec and to the present defective mode of government in that province and to prepare a plan of civil and criminal law for the said province and to make their several reports thereon".[2]

1. Munro 16.
2. Munro 16.

With the knowledge gained from the reports made in obedience to this order, the problem for Parliamdnt was a simple one. The Anglo-Canadians were as great lovers of liberty as the Americans, but the French Canadians would prefer their own form of government. In the dispute with America it was policy to keep Canada on the side of England. The French system, therefore, it seemed, should be retained as far as possible.[1] In accordance with this policy, Lord North introduced into Parliament a measure known as the Quebec Act.[2] This Bill was bitterly opposed by a certain element in England, among which was Lord Chatham, and the Mayor and Council of London, but it passed notwithstanding the opposition.

The new constitution placed the legislative power in the hands of a council appointed by the crown, consisting of not more than 23 and not less than 17 persons. No ordinance could be passed unless a majority of the council was present, and every ordinance was to be transmitted within six months after its enactment, for His Majesty's approbation, and, if disapproved of, should be null and void from the time the disapprobation was proclaimed at Quebec.

The religion of the Frence population was rec-

1. Payne 147-148
2. 14 Geo. lll. C. 83

ognized by relieving Catholics from the necessity of taking the test oath and by confirming the accustomed dues and rights of the Catholic clergy.

With respect to controversies, relative to property and civil rights, resort was to be had to the laws of Canada for a decision, except where the laws of Canada should be varied by an ordinance passed by the governor and council. But any person might make a will which should be executed either according to the laws of Canada, or according to the forms prescribed by the laws of England.

The Act goes on to state that since the criminal law of England had been uniformily administered for more than nine years and the benefits resulting from its use had been sensibly felt by the inhabitants, the same should continue to be administered to the exclusion of every other rule of criminal law or mode of proceeding thereon, which prevailed in the province before the year one thousand seven hundred and sixty-four; subject nevertheless to such alterations and amendments as the governor and council should make.

The situation, then, in Quebec, with respect to the laws in force, is easily seen. The criminal law of England was established, the civil law of Canada was confirmed, while wills might be executed either by the laws of Canada or those of England: This was at any rate the purpose of the Quebec Act, but in practice there still re-

mained great confusion in regard to the laws actually in force, and at times the courts were very arbitrary in their decisions.

This Act was not received in the same spirit by the English and the French element in Canada. While there was no popular demonstration on the part of the French, yet the priests, cures, and seniors, the leaders of the people, regarded these concessions, as evidence of the liberal spirit in which the British government would rule the province. But the English, seeming to think that their rights as subjects of Great Britain had been invaded, were greatly dissatisfied.[1]

Two years later the American Revolution broke out, but a large number of the colonists remained loyal to the mother country. After the peace of 1783, many of the loyalists immigrated to Quebec and settled chiefly in the west, along the banks of the St. Lawrence and in the neighborhood of the lakes Ontario and Erie. The new British settlers, being dissatisfied with the state of affairs in the province, joined with the other Anglo-Canadians in demanding the repeal of the Quebec Act and the grant of a constitution resembling that to which they had been accustomed.[2]

At length in 1791, a bill was introduced by Pitt, dividing the province into Upper and Lower Canada,

1. Bourinot Hist. 47.
2. Munro 17.

the division line being so drawn as to give a great majority to the English element in Upper Canada and a great majority to the French element in Lower Canada. This measure was strongly opposed by Fox on the ground that the French and English should coalesce into one body in order that the different distinctions of the two elements might disappear. Many of the Canadians, too, were opposed to the principle of the bill, and their agent, Adam Lymburner, a merchant of Quebec, was heard at the bar of the House of Commons.[1] The measure was passed, however, and is known as the Constitution Act of 1791.[2]

According to the provisions of this Act, each province was to have a governor and executive council, appointed by the crown, also a law-making body consisting of a legislative council, appointed by the crown, and a representative assembly, elected by the people. The governor could give or withold the royal assent to bills, or could reserve them for consideration by the crown. The government, however, in both provinces was responsible only to the Colonial Office in London, and was independent of the assembly.

The clergy of the church of Rome was given the same privileges as granted by the Quebec Act, and the right of self taxation was bestowed upon both provinces.

1. Munro 17.
2. 31 Geo. lll. C. 31.

This Act also declared that since, by an ordinance passed in the province of Quebec, the governor and council were constituted a court of civil jurisdiction for hearing and determining appeals in certain cases, the governor and executive council of each province should be a court of civil jurisdiction with powers equal to those exercised by the governor and council of Quebec.

All laws in force at the commencement of this Act were to remain in force, except as repealed or varied by this Act, or by His Majesty and the legislative councils and assemblies exercising authority given by this act.

The effect of the Constitution Act of 1791 was to confirm the English criminal law which had been introduced by the Quebec Act of 1774. Through the assembly and council, however, the English civil code might also be introduced.

On the 24th of August, 1791 two orders were issued by the king in council. One of these divided Quebec into Upper and Lower Canada and defined the boundary line; the other enjoined the issue of a warrant authorizing the governor of Quebec to fix a day for the Constitution Act to go into effect.[1] Accordingly Lieutenant-Governor Clarke proclaimed that on the 26th of December, 1891, the division of the province should take effect, and on the 7th of May,

1. Houston 146, note 2.

1792, Lower Canada was divided into fifty electoral districts returning fifty members in all. Its legislature was called together by the proclamation of the 30th day of October and met at Quebec on the 17th of December. There were fifteen members in the legislative council.[1] In July of the same year, the government of Upper Canada was organized at Kingston and the legislature - an assembly of sixteen members and legislative council of seven, held its first meeting at Newark on the 17th of September. The legislatures of both provinces assembled with all the formalities observed on like occasions in England, and the rules and orders adopted were based, as far as practicable, upon those of the British Parliament.[2]

It is interesting to note here that it was the purpose of the Act of 1891 to assimilate the constitution of Canada to that of Great Britain, as nearly as the difference arising from the manners of the people, and from the situation of the province would admit, and Lieutenant-Governor Simcoe, in closing the first session of the legislature of Upper Canada, said that it was the desire of the Imperial Government to make the new constitutional system an image and transcript of the British Constitution.[3]

But some of the measures passed by this, the first

1. Bourinot C. 24.
2. Bourinot (C) 25.
3. Bourinot (C) 25

Parliament of Upper Canada, deserve a thorough consideration. We have already seen that the Act of 1791 confirmed the criminal code of English law in both provinces, but that it gave the local governments authority to introduce the English civil law, in case they should decide to take such a course. Accordingly the Parliament of Upper Canada at once took steps to complete the transfer of English law and its first act[1] was passed for this purpose.

By this statute, the provision of the Quebec Act of 1774, which stated that in all matters of controversy relative to property and civil rights resort should be had to the laws of Canada as the rule for the decision of the same, was abolished throughout the province. This provision, however, was not to affect existing rights to property or to affect any contract or security already made and executed according to the laws of Canada. But in the future all matters of controversy relative to property and civil rights were to be decided according to the laws of England, but the ordinances made by the governor and legislative council of Quebec previous to its division were to remain in force. All matters relative to testimony and legal proof were to be regulated by the rules of evidence established in England. But nothing in the statute was to interfere with any of the subsisting provisions respecting Ecclesiastical rights or dues within the province or

1. Houston 290.

with the forms of proceeding in civil action, or the jurisdiction of courts already established. Nor was anything in the measure to be so construed as to introduce any of the laws of England respecting the maintenance of the poor or respecting bankrupts.

Such were the provisions of the first act passed by the Parliament of Upper Canada. Important as this measure was, it was perhaps no more so than the second which introduced the trial by jury into the province. This act provided that after the first day of December 1792 every issue of fact, joined in any action real, personal, or mixed should be tried and determined by the unanimous verdict of twelve jurors duly sworn for the trial of such issue.[1] The jurors were to be summoned and taken conformably to the law and custom of England. Nothing in this act, however, was to prevent the jurors from bringing in a special verdict.

During the twenty years intervening between 1792 and 1812 both provinces of Canada were mostly occupied with questions of local importance, but a year or two before the close of this period there appeared indications of that irrepressible conflict in Lower Canada between the House elected by the people and the one nominated by the Crown, which conflict finally led to the suspension of the constitution of 1791.[2] As early as 1795 Lord

1. Houston 292.
2. Bourinot H. 95.

Dorchester had failed in his attempt to persuade the French element to consent to a modification of the old land laws. But the French were to become stronger and more obstinate still. Although fresh batches of English settlers were continually arriving, the French increased in numbers faster than the English immigrants and the Parliament became more and more democratic. The English minority, however, strove against the bad laws and narrow commercial policy of the French and the history of the province is, to a great extent the history of this conflict.[1]

The conclict between the two races was begun in earnest in 1806 by"Le Canadien", which was published in the interest of "Nos institutions, nostre longue, et nos lois". The hostility of the French was increased by the officials. Although a large number of the English settlers had little esteem for the aristocratic officials yet the French Canadians were led by official arrogance to believe that they were looked upon as an inferior race. Unfortunately just at this time Sir James Craig was intrusted with the administration of the government.[2] Craig was a military man and his appointment was, doubtless, due to the critical relations with the United States, but his military qualities were not needed and his lack of political experience rendered his administration a complete failure.

1. Payne 149.
2. Bourinot H. 96.

His policy was deppotic. The officers of the French militia were removed, the newspapers suppressed, and the leaders of the popular party imprisoned.[1] In fact the seed was being sown for the rebellion of 1837.[2]

In Upper Canada, happily, no racial differences existed. Here the questions which received attention were of local interest, such as the disposal of public lands. The second session of the first Parliament passed an act preventing the further introduction of slaves and limiting the term of contract for servitude.[3] By this time, to be sure, Upper Canada was in advance of the lower province.

In 1812 the war between the United States and England which had seemed at hand for some time broke out. It is estimated that at this time there were five hundred thousand people in the various provinces of British North America and that at least half of them were the French of the province of Lower Canada. But even the French, though they had been somewhat dissatisfied with British rule, remained loyal to England. They had resisted being Anglasized.[4] And it was perfectly natural that they should resist annexation to the United States which, probably, would have hastened the introduction of the very thing they didn't want. In Upper Canada the majority of inhabitants were loyalists or descendants of loyalists who were attached to

1. Payne 150.
2. Bourinot H. 96.
3. Bourinot H. 98.
4. Payne 151

the British government and hated everything that had to do with American Republicanism.[1] So we find the Canadian provinces loyally on the side of England until the close of the struggle in 1815.

The war did a great deal to unite the various factions and lift the people above the conditions of a colonial life and the struggle for purely material necessities. But after the peace of 1815, emigrants came to both provinces in much larger numbers and the habitants of Lower Canada who saw themselves being overwhelmed by the increasing English faction became more hostile than ever. They continually complained to the home government and disputed with the executive at every turn.[2] Nor were the French altogether in the wrong. The executive and the legislative councils composed entirely of Crown nominees, were not in sympathy with the greater part of the people. In the struggle, however, it often happened that the upper house had law on its side and several times rejected a supply bill because it asserted that the assembly had a right to control the Crown revenues and to vote the estimates of the salaries of the officials. Finally the machinery of the government became clogged by the obstinacy of the governor, councils and assembly. Their assembly went so far in 1836 that the majority declared its right to amend the constitution of the council as defined in the Imperial Statute of

1. Bourinot H. 111.
2. Payne 152.

1791. But as far as the financial dispute was concerned the British Parliament showed a conciliatory spirit and in 1831 passed an act[1] which made it lawful for the legislative councils and assemblies of both Upper and Lower Canada to appropriate the duties raised by imperial statutes for the administration of justice and support of the civil government.

Another source of complaint was the position of the judiciary. During the governorship of Sir James Craig, judges were disqualified from sitting in the assembly on the demand of that body, but they continued to hold office during the pleasure of the Crown and at its will to be called to the executive and legislative councils. The assembly believing that the judges were under the influence of the governor-general attacked some of them on very frivolous grounds and passed a bill making the judiciary independent but it had to be reserved because it was not in accordance with the conditions considered necessary by the Crown for the protection of the bench.[2]

During these controversies, Louis Joseph Papineau, a young man of zeal and ability, became leader of the French Canadian majority and was several times selected speaker of the assembly. But Papineau's policy gradually arrayed against him the more thoughtful of the British Liberals who rallied to the support of the government, and in every appeal to the people the British party dwindled away, while

1. 1 & 2. Will 4. c. 23
2. Bourinot H, 128-29.

no member of the French faction was ever again returned to the assembly, if he disagreed with the speaker. The grievances of Papineau's party were embodied in a manifesto addressed to the English government and known as the "Ninty-two Resolutions."[1] These resolutions, adopted in 1834, were rather verbose, but the main idea they contained was a demand for an elective council which would have, if granted, increased the power of the French.

The following year, three commissioners were sent over to investigate the conditions in Lower Canada. Lord Gosford was chosen chief commissioner and governor-general, but he failed either to conciliate the French Canadian majority or to obtain the confidence of the British party and the majority in the assembly who could now control the casual and territorial revenues was determined not to withdraw from its position, and the result was that no provision was made for the space of four years to pay the public service. The commissioners brought in a report against an elective legislative council, but in favor of a modified system of responsible government, not dependent on the vote of the assembly, and also the surrender of the casual and territorial revenues, on the condition that provision be made for the payment of the civil service and the administration of justice.[2]

1. Payne 153.
2. Bourinot H. 132.

In 1837 Lord John Russell carried, by a large majority, in the House of Commons, a series of resolutions, which positively refused the demand of an elective legislative council and other radical charges.[1] As soon as the action on the part of the home government became known in Lower Canada, Papineau and his party denounced in strong terms the British Government and there were great displays of popular frenzy. Open rebellion soon broke out, but Papineau, after remaining a short time on the scene of action, fled to the United States.

In Upper Canada, the financial disputes between the executive and the assembly never reached so great proportions as in the Lower province, nor did the conflict between the assembly and the legislative council ever become so serious, yet the leaders of the reform party were opposed to the constitution of the council and in 1835 a committee of grievances brought in a report in favor of an elective and responsible council. As soon as responsible government was suggested an official combination was formed, known in Canadian history as the "family compact", to oppose its concession in every way possible. Creed also was a powerful factor in political controversies. The Church of England claimed an exclusive right to the "clergy reserves", set aside by the constitution of 1791 for the support of a protestant clergy. On the other hand, Roman

1. Bourinot C. 30.
2.

Catholics and members of all protestant sects eventually demanded that the funds be applied to the use of all denominations or else that the reserves be secularized for educational or other public purposes. This feeling against the English church culminated in 1836 when Lieutenant-Governor Colborne established forty-four rectories. The political discontent reached a crisis in 1837, when William Lyon Mackenzie, who for a number of years had been leader of the reform party, became convinced that reform in government could not be obtained without resort to extreme measures. At various meetings of the reformers resolutions were adopted to the effect that it was their duty to resort to arms in defence of their rights and those of their countrymen. This party was now ready to revolt against the government and hearing of the success of the revolutionists in Lower Canada actually took ~~x~~ up arms.[1]

The rebellion, however, did not reach any large proportions in either province and was easily suppressed,[2] but the British government felt compelled to suspend the constitution of Lower Canada which was done by an Imperial Statute signed by the queen February 10, 1838.[3] This measure enacted that so much of the constitutional or other acts which related to the legislative council or legislative assembly should be of no force in Lower Canada until the first day of November 1840. The Crown, however, could appoint

1. Bourinot (H) 153.
2. Payne 153
3. 1 & 2 Vict. c. 9.

a special council, and with the advice and consent of this council, the governor could make laws and ordinances for the welfare of the province, but all such laws and ordinances had to be proposed first by the governor for adoption by the council, and were not to continue in force beyond the 1st of November 1842, nor could an act of the Imperial Parliament or of the legislature of Lower Canada be repealed or altered. This act was to take effect from the time of its proclamation by the governor and was not to invalidate any law or ordinance in force within the province, except in so far as it should be repugnant to this measure.

The proclamation of the act appeared in the Quebec Gazette on the 29th of March, and in obedience to its provisions, Sir John Colborne appointed a special council, which continued in office until the arrival of Lord Durham[1], who had been dispatched to Canada[2] to act as governor general and high commissioner "for the adjustment of certain important affairs, affecting the provinces of Upper and Lower Canada".

Immediately upon his arrival, Lord Durham dissolved the special council, mentioned above, and appointed a new executive council. At this time many of the insurgents were still in prison. He had an ordinance passed by his "Special Council" on the 28th of June 1838, which

1. Bourinot (C) 30.
2. Bryce 392.

declared that Wolfred Nelson and seven others, then in prison, should be banished to the Bermudas and detained there, and that Papineau, Cartier, and fourteen others, then fugitives from justice, should not be permitted to return without the special permission of the governor.

The clause which provided for the detention of prisoners in the Bermudas was made the ground for an attack upon the ordinance, as beyond the power of the governor and special council. This view was advanced by Lord Brougham and endorsed by Attorney-General Campbell.[1] So strong was the feeling in England upon this question that Lord Melbourne, then premier, was forced to repeal the ordinance and consent to a bill[2] indemnifying all who had acted under its provisions.

This Parliamentary rebuke so incensed Lord Durham that he immediately placed his resignation in the hands of the government. Soon afterwards he returned to England and Sir John Colborne became administrator and subsequently governor-general.[3]

The report upon the Canadas which Durham had made was presented to the British government on the 31st of January 1839 and attracted no little attention in England where at last the rebellion had opened the eyes of statesmen to the absolute necessity of furnishing an effective remedy

1. Houston 148note 30
2. 1 & 2 Vict. C. 112.
3. Bourinot (H) 138.

for difficulties which had never before been thoroughly understood.[1]

In this report Lord Durham, after giving a vivid account of the condition of the Canadas, recommended what in his judgment would be a remedy. Among the evils mentioned was the struggle between the English and French in Lower Canada. "I expected to find", said he, "a contest between a government and a people; I found two nations warring in the bosom of a single state; I found a struggle, not of prin ciples, but of races."[2] In different provinces there were collisions between the executive and the legislative assemblies, and between the legislative councils and legislative assemblies. He attributed the lack of disturbance in the Maratime colonies to the recent departure in them from the ordinary course of the colonial system and to a nearer approach to sound constitutional practice.[3] In order to remove these evils, no change in the principles of government was needed, but an observance of the principles of the British constitution and introduction into those colonies of the wise provisions, by which alone the working of a representative system could in any country be rendered harmonious and efficient. Representative government had been irrevocably established and the desired harmony might be secured by administering the government on those principles which had been found perfectly efficacious in Great

1. Bourinot (H) 156
2. Bourinot (C) 27 Note 1.
3. Bourinot (C) 29

Britain. The means occasionally proposed in the colonies themselves would not attain the desired end in the best way. An elective executive council would not only be inconsistent with monarchical government, but would deprive the community of one of the great advantages of an hereditary monarchy.

Popular control could be combined with every advantage of vesting the immediate choice of advisers in the Crown, were the colonial governor instructed to secure the cooperation of the assembly in his policy, by intrusting its administration to such men as could command a majority. This change could be effected by a single dispatch, or if any legal enactment were necessary, it would only be one requiring the official acts of the governor countersigned by some public functionary.

The great mass of discontent in Upper Canada might be dispelled by an assurance that the government of the colony would be carried on according to the views of the majority in the assembly. But for the well-being of the colonies and the security of the mother country, it is necessary that such a change be rendered permanent. The public attention at home has been distracted by the various and sometimes contrary complaints of the provinces. Each urged its demands at different times, in somewhat different forms, and each individual complaint was too petty to attract the due attention of the Empire. But should these colonies speak with one voice, were it felt that every error of our

colonial policy would cause a common suffering and a common discontent throughout the whole wide extent of British America, these complaints would never be provoked; because no authority would venture to run counter to the wishes of such a community, except on points absolutely involving the few imperial interests which it would be necessary to remove from the jurisdiction of the colonial legislation.[1]

The two radical changes, then, urged in the report, were a legislative union of the two Canadas and the concession of responsible government. As a result of these suggestions, a royal message, recommending a union of the Canadas, was presented to the Imperial Parliamant on the 3rd of May 1839.[2] In June of the same year a bill was introduced by Lord John Russell to unite the two provinces, but in order that the measure might be considered in Canada, it was allowed to lie over until the next session.

During this delay an act[3] was signed on the 17th of August, amending the act of 1838 which provided for the temporary government of the Lower province. By its provisions the special council was to consist of not less than twenty members and no business could be transacted unless eleven were present. It repealed the provision in the suspension act preventing the making of permanent laws; but all permanent laws were to be laid before Parliament thirty days previous to their confirmation. The pro-

1. Extract from Lord Durham's Report. Houston 293-298
2. Bourinot (C) 33
3. 2 & 3 Vict. C. 53

vision prohibiting the alteration of acts of Parliament was also repealed, but no law was to be made affecting the temporal or spiritual rights of ecclesiastics or the law of tenure.

In the autumn of 1839, after the arrival of Mr. Poulett Thompson, who had been appointed governor-general the special council of Lower Canada and the legislature of Upper Canada passed addresses in favor of the union. Accordingly in the session of 1840, Lord John Russell again brought forward "An act to reunite the provinces of Upper and Lower Canada, and for the government of Canada". It was signed on the 23rd of July and went into effect on the 10th of February 1841.[1]

This act,[2] after declaring the union of the two provinces and repealing certain parts of the constitutional acts no longer applicable, enacted that there should be within the province one legislative council and one assembly with power to make laws not repugnant to any of the Parliamentary acts extending to either province or to them united. The legislative council was to consist of not less than twenty life members, summoned by the Crown, and the assembly was to be composed of eighty-four deputies, elected by the people for a term of four years, either province sending 42. The local legislature was given power to alter the system of representation, and the existing

1. Bourinot (H) 166
2. 3 & 4. Vict, C. 35

election laws of the two provinces were to apply until changed. The Crown, of course, reserved the right to disallow any measure, and the records of both houseswere to be in the English language.

All judicial and ministerial authority vested in the governor or executive council of either province was to be vested in the same officers in the united province. All laws, statutes, and ordinances in force in either of the provinces were to continue, except as varied or repealed by this act or by any measure passed later by the local legislature. All courts of civil and criminal jurisdiction not abolished by this act or by act of the local legislature were to continue.

It now remained for the home government to give effect to the other change suggested in Durham's report; namely, the introduction of responsible government. Accordingly in a dispatch bearing the date of February 5, 1841, Lord John Russell instructed the governor-general to call to his councils "Those persons who by their position and character have obtained the general confidence and esteem of the inhabitants of the province," and "only xxx to oppose the wishes of the assembly when the honor of the Crown or the interest of the Empire are chiefly concerned." Differences arose, however, for some years as to the manner of carrying responsible government into effect, but finally in 1847, Lord Elgin was expressly instructed "to act

generally on the advice of the executive council and receive as members of that body persons" pointed out to him as "possessing the confidence of the assembly".[4] To affect this important change no Parliamentary act was necessary. The alteration and insertion of a few paragraphs in the instructions of the governor were sufficient and by 1848 the provinces of Canada, Nova Scotia, and New Brunswick were enjoying this system.[2]

The year 1848 witnessed a liberal concession to the French Canadians. The clause of the constitution of 1840 which restricted the use of the French language in the legislature had given great offence. This measure intimated in the report of Lord Durham had been adopted for accelerating the general policy of anglicizing the province. In 1848, however, the clause so obnoxious to the French element was repealed.[3]

The repeal of this clause was evidence of the harmonious operation of the union and of the better feeling between the two elements of the population.[4] But a great change was to take place in the government before many years. In response to an address of the legislative assembly the Imperial Parliament passed, in 1854, an act[5] to empower the legislature to alter the constitution of the legislative

1. Munro 20.
2. Bourinot (C) 39-40
3. 11 & 12 Victoria c. 56.
4. Bourinot (C) 47
5. 17 & 18 Victoria c. 118.

council. Accordingly in 1856 the Canadian legislature passed a bill which provided for an elective upper house. The province was divided into forty-eight electoral divisions, each section containing twenty-four, and twelve members to be elected every two years.

Other changes, however, of a legal nature were going on. The French regime had contributed its full share of trouble to the period. The seigniorial tenure had certain advantages in assisting settlement and promoting the comfort of the inhabitants; but as the population increased the system became unsuited to the conditions of the country. In 1852 a bill was introduced and passed through the assembly. This bill limited the amount of rents and left the seignior to recover his rights by legal means but it failed to pass the legislative council.[1] The question, however, was practically settled in 1854 when the legislature passed a bill, brought in by Mr. Drummond, the Attorney-General of Lower Canada, which provided for the appointment of a commission to ascertain the amount of compensation that could be reasonably asked by the seigniors for the cession of their rights. In all the seigniors received about one million dollars. It also became necessary to revise those old French laws which affected the land tenure in the Lower province. Accordingly in 1856 Mr . George

1. Bryce 417.

Carter, the Attorney General of Lower Canada, in the Taché-Macdonald ministry, introduced the legislation necessary for the codification of the civil law.[1]

The harmonious period which followed was finally disturbed by questions of representation in either province. These difficulties only hastened the development of the idea of a union of all the provinces, which project had been agitated from time to time in the various colonies. The question of union was laid before the government in a dispatch written to the colonial ministry by the Canadian delegates who visited England in 1858. They represented that the progress of population had been more rapid in the western province and that claims were made on behalf of its inhabitants for representation in the legislature in proportion to the numbers. In 1859 the reformers of Upper Canada held a large convention at Toronto and adopted a resolution stating that the best practicable remedy for the evils encountered in the government of Canada was to be found in the formation of two or more local governments to which should be committed matters of a local character, and a general authority charged with matters common to both provinces. Finally the difficulties between the provinces became so great and the parties so equally divided that stable government was no longer possible.

The Maritime provinces, in the meantime, were

1. Bourinot (H) 186-187.

taking steps for the purpose of forming a union among themselves and in 1864 a conference was arranged at Charlottown between delegates from the three provinces of Nova Scotia, New Brunswick, and Prince Edward Island. Canada, however, had already formed a coalition government pledged to bring in a measure for the purpose of forming a federation with both the Maritime provinces and the Northwest Territories. But on hearing of the proposed conference at Charlottown, the government decided to send a delegation thither.

The conference beingfound favorable to the union of all the provinces, it was decided to hold another conference in October at Quebec for a thorough consideration of the question.[1] The next step in the formation of a union was the Quebec convention, but since the procinces of Novia Scotia, New Brunswick, Prince Edward Island, and Newfoundland were all so represented, it will be necessary to consider briefly the history of those colonies with respect to the introduction of English law, before taking up the conference itself.

NOVA SCOTIA.

The province of Nova Scotia, including New Brunswick and Prince Edward Island, was claimed by England on the ground of the discoveries of Cabot at the close of the

1. Bourinot (H) 194-198

15th century. In 1632, however, it was ceded to France by the Treaty of St. Germains,[1] but in 1713, it again changed hands when France ceded it back to England by the Treaty of Utrecht.[2]

In 1719 a commission was issued to Governor Phillips who was authorized to appoint a council of not less than twelve persons. The legislative power of this council was very slight, but it possessed advisory and judicial functions. This provisional system of government continued until 1749,[3] when a scheme[4] for encouraging officers and privates, lately dismissed from the land and sea forces, to settle in the province proved successful and was carried into affect by the Honorable Cornwallis, who was appointed governor. In the same year Halifax was founded and the seat of government was transferred thither from Annapolis.

The commission of Cornwallis gave him authority to appoint a council consisting of not more than twelve persons and with the consent of that council, he could summon a general assembly of free holders and planters. With the advice and consent of the council and assembly the governor could make laws, but all such laws were not to be repugnant to the laws of Great Britain. He was further empowered, with the advice and consent of the council, to erect courts for determining all cases, civil and criminal.[5]

1. Munro 32.
2. MacdonaldNo. 47.
3. Bourinot (H) 52
4. Houston 7-9
5. Houston 9-16

Cornwallis on his arrival, formed a council and this council exercised both legislative and executive functions. After consulting with the council, the new governor erected three courts, (1) a court of sessions (2) a County Court for the whole province, which sat every month and exercised powers equal to those of the courts of the King's Bench (excepting in criminal matters), Common Pleas, Court of Exchequer, from which lay and appear to the general court, and (3) General Court, which was a Court of Assize and general gaol delivery, and the Court of Appeal from the county court, and in which the governor and council sat with the judges. In 1752, the county court was transformed into a court of Common Pleas, and in 1754, a Supreme Court was substituted for the General Court.[1]

Unlike Upper and Lower Canada, no formal constitution was conferred on Nova Scotia. Its early constitution is to be found in the commissions issued to successive governors, in the royal instructions accompanying such commissions as modified from time to time by dispatches from Secretaries of State, and in the acts of the local legislature. It would seem, too, that English law was tentatively introduced by the governor's commission of 1749 and Cornwallis persudd this course by establishing the above mentioned courts to try and determine civil and criminal cases according to the laws of England.[2]

1. Munro 22-23 2. Bourinot (H) 55.

The governor, as we have already seen, had power to call an assembly, but for nine years he carried on the government without this body, and with the council passed a number of ordinances, some of which imposed duties on trade for the purpose of raising revenue. Chief Justice Belcher, however, questioned the legality of their acts and was sustained by the opinion of the English law officers, who called attention to the governor's commission, which limited the council's powers.[1] After this opinion was given together with the requirement of the Lords of Trade and Plantation, a plan was adopted at a council held at the governors house in Halifax on Monday the 3rd of January,1757 for the constitution of the proposed legislative assembly. According to this plan the assembly was to consist of twenty-two members and no person was to be qualified to vote or be elected who was a popish recusant or who was under the age of twenty-one.[2] The elections being held, the representative assembly met for the first time at Halifax on the second of October, 1758.[3]

Until the year 1838 the council continued to exercise both executive and legislative functions, but in that year the assembly passed a series of resolutions (afterwards recinded) which among other things expressed the view that a separation should be made between the

1. Bourinot (H) 52-53; also Houston 16-18
2. Houston 18-21
3. Munro 24.

legislative and the executive functions of the council, similar to that effected in the Canadas in 1791 and in New Brunswick in 1832. This suggestion being adopted by the home government, instructions were issued in 1838 to Lieutenant Governor, Earl Durham, to appoint an executive council of not more than nine members, and a legislative council of not more than fifteen . Power to extend the number of the members of the legislative council to twenty-one was granted by the commission given to Lorg Monck.[1]

The constitution of Nova Scotia remained in the above form down to the union and with a few changed made by the British North American Act of 1867, is not essentially different at the present time.[2] English law had, for the most part, full force and authority.

NEW BRUNSWICK.

As we have seen the present province of New Brunswick was originally a part of Nova Scotia. The American Revolution, however, brought about a change in the character of the country. A large number of refugees came northward along the sea coast and settled in British territory. It is estimated that over twelve thousand loyalists, largely drawn from the disbanded loyal regiments of the old colonies, settled in New Brunswick. The name of Parrtown was first given, in honor of the governor of Nova Scotia, to the

1. Munro. 24-25 ~~(2)~~ 2. Munro 25.

infant settlement which became the city of St. John in 1785, when it was incorporated. The first landing of the loyal pioneers took place on the 18th of May 1783, at what is now the Market Slip of this interesting city. Previous to 1783 the total population of the province did not exceed seven hundred souls, chiefly at Maugerville and other places on the great river. The number of loyalists who settled on the St. John River was at least two thousand, of whom the greater proportion was established at the mouth of the river which was the base of operations for the peopling of the new province.[1]

This influx of population had for its result the separation of New Brunswick from Nova Scotia, which took place in 1784. In that year the commission to Thomas Carleton was almost identical with that of Governor Cornwallis of Nova Scotia.[2] The government was intrusted to a governor and a council possessing legislative and executive functions with power to call an assembly of the free-holders. All laws and ordinances made by the governor and legislature were not to be repugnant to the laws of England. The governor and council were empowered to erect courts of justice to try both criminal and civil cases. The purpose of all this seems to have been to give the inhabitants the benefit of English law.

The first governor was Colonel Thomas Charleton,

1. Bourinot (H) 83.
2. Houston 22-23 also Note 3D p. 25.

who remained in office until 1803. After his retirement the government was carried on by the president of the executive council, who during the war with the United States was a military and not a civil officer. A regular governor was appointed in 1818, but the council continued to possess legislative power until 1832, when a separate legislative council was appointed.[1]

After gaining control of finance the next step taken by the assembly was to secure the responsibility of the ministers to their own chamber. In 1847 the theory of responsible government as applicable to the provinces was laid down in a dispatch from Earl Gray, as Colonial Secretary, to the governor of Nova Scotia. It was declared that the executive councillors should hold office only while they retained the confidence of the house, and that all government officials should be excluded from both branches of the legislature. In the following year the assembly passed a resolution for the application of the principles just mentioned and after that the responsibility of ministers was fully recognized.[2]

Like Nova Scotia, New Brunswick received no formal constitution. There is also silence with respect to English law, but, since the province was settled by loyalists from the United States, that very silence proves that the laws of the mother country were administered by the courts.

1. Munro 25.
2. Munro 26.

PRINCE EDWARD ISLAND.

Prince Edward Island, like New Brunswick received no formal constitution and was originally a part of Nova Scotia. In 1770, however, it was separated from the mother colony and a commission was issued to Walter Paterson, as governor. By his commission, he was required to execute his office in accordance with his commission, the royal instructions, and such laws as might be passed by the council and assembly. But laws passed by the local legislature were not to be repugnant to, but, as far as the circumstances of the colony would ~~prevent~~ permit, in harmony with the laws of England. This, of course would lead to the gradual introduction of at least the principles of English law. The council ~~passed~~ possessed both executive and legislative functions, and the governor and council had power to call an assembly of the free-holders and planters. After the meeting of the first assembly, all laws were to be passed by the governor, council or assembly, the Crown reserving the right of disallowance. The governor was further authorized with the advice of the council to erect courts of justice for hearing and determining all causes, criminal and civil, according to law and equity.[1]

The first assembly consisting of eighteen members met in 1773.[2]

1. Houston 21-22, also Note 29, p. 25
2. Munro 32.

In the year 1839 the separation of the legislative and executive councils took place and in 1862 an act was passed making the latter elective.[1]

The assembly in an address to the crown in 1847 represented that the executive council should be the constitutional advisers of Her Majesty's representatives. But in 1849 Earl Grey expressed the view that the conditions which would warrant the introduction of responsible government were wanting. Two years later, however, after the assembly had refused supplies, the concession was made.[2]

NEWFOUNDLAND.

Although Newfoundland was discovered in 1497, by John Cabot, it did not come into prominence in colonial history until the early part of the 17th century when Lord Baltimore failed in his attempt to establish a colony there. Later Sir David Kirke, a brave English sea-captain, received the grant of the whole of the island. Kirke governed well and put forth every effort to aid colonization in the country. His settlement was very prosperous, but he, being a loyalist, when the civil war broke out was deprived of his grant. But through the efforts of Claypole, Cornwallis's son-in-law, Kirke was reinstated and returning to the island, died there in 1655.[3]

1. Munro 32.
2. Munro 32-33
3. Hatton & Harvey 1, 25, 27-28.

Newfoundland, at this time, contained a population of about three hundred and fifty families, or nearly two thousand inhabitants, distributed in fifteen small settlements along the eastern coast. Aside from these resident inhabitants, there was a floating population of several thousand, who frequented the shores during the summer months for the sake of the fisheries, which had by this time become well known. As early as 1626 one hundred and fifty vessels went annually to the island from Devonshire alone, and the French were even more active than the English in this enterprise. On one hand the wealth of the adjacent seas added greatly to the importance of the country, on the other hand it proved to be locally injurious, for it retarded more than a century the settlement of the island, and gave rise to social disorder and flagrant misrule.[1]

As far as the English were concerned, the fisheries were carried on by merchants, ship-owners and traders in western England. They considered it their interest to discourage settlement, since they wished to retain the harbors and fishing coves for the use of their servants, and all settlers on the land were regarded as interlopers. Hence the most strenuous efforts were made to keep the resident population within the marrowest possible limits. In this way, of course, there sprang up a strong antagonism between the merchants, whose servants visited the island during the summer, and the few settlers who were striving

1. Hatton & Harvey 28-29.

to cultivate the soil. But the wealthy merchants, being influential at home, were able to secure the enactment of unjust and oppressive laws. Among these were measures prohibiting settlement within six miles of the shore, forbidding any one to proceed to the country as a settler, and ordering that all fishermen, at the close of the season, should return to England. Masters of vessels were compelled to give bonds of £100 as a pledge that they would bring back the persons they took away with them.[1]

This policy began in 1633 and its source was the notorious Star Chamber. In obedience to a petition from the merchants, requesting legal enactments to preserve order and repress crime, the Star Chamber proceeded to legislate, but their measures were altogether one-sided. The code by which Newfoundland was to be governed among other things declared that if a man killed another, or stole to the value of forty shillings, the offender was to be brought to England, and the matter was to be tried by the Earl Marshal, and if the fact was proved by two witnesses, he was to suffer death. No person was to deface or spoil any stage, cook-room, or other building. The master of the ship that first entered a harbor was to be admiral of the same for the season. No person was to steal any fish, salt or provisions belonging to the fishing-ships, or rob the nets. The company were to assemble themselves on Sundays to hear divine

1. Hatton & Harvey 28-29.

service. The mayors of Southampton, Weymouth, and certain other towns were to take cognizance of all offences or crimes committed on the soil of Newfoundland.[1] This last enactment is a curious specimen of the jurisprudence of those days, and shows how scanty was the amount of justice meted out to the resident population.

In 1670 the same court confirmed the enactments of 1633 and made additional provisions declaring that no master or owner of any ship should transport any persons to Newfoundland who were not of the ship's company, or such as were to plant or settle there. The Admiral, Vice Admiral, and Rear Admiral were to put these orders into execution and preserve the peace, and were to bring offenders, for any crime, to England.[2] In support of these provisions the Lords of the Privy Council issued an order to the magistrates of the western ports to take care that no shipmasters carried any but the ship's company to Newfoundland, or those engaged in the fisheries.[3]

Another source of trouble to the resident population was the presence and aggression of the French. At this time the French ruled Nova Scotia, Cape Breton and Canada, and boasted that they would be strong enough to drive the English Colonists into the sea. But before long was begun that struggle between England and France which

1. Reprint of Rules of Star Chamber, Prowse 154.
2. Reprint of Rules of Star Chamber, Prowse 155.
3. Hatton & Harvey 30-31.

resulted in 1763 in the loss on the part of the latter of most of her territory in North America. Since Newfoundland was not only valuable for its fisheries but for its stratigic position with respect to Canada, it had long been a favorite object of conquest with the French statesmen and therefore suffered much during the conflict with France.[1]

But just before these wars broke out the attention of the British Parliament was turned toward Newfoundland and its fisheries and the result was the passing of a statute,[2] in 1698, entitled "An Act to Encourage the Trade to Newfoundland." By this measure the set of regulations, which rested on the questionable authority of orders in council from the Star Chamber, were given the force of law, since nearly the whole of the old barbarous code was embodied in the statute. Among other things the fishing admirals were reinstated and with almost unlimited powers, accused persons could be carried to England for trial, and the only appeal offered from the Admirals' decisions was to the commanders of His Majesty's ships of war appointed as convoys. In short the resident population was at the mercy of the dictatorships of masters of fishing-vessels who were generally rude and ignorant men. Each autumn, too, at the close of the season, tha admirals, and all under their immediate charge, disappeared, leaving the inhabitants without even the semblance of law or order to pass the

1. Hatton & Harvey 32-33
2. 10 & 11 Will. lll. c. 25

winter as best they could.[1]

The condition of affairs in the island is described in a representation addressed to the home government in 1715 by a number of the settlers. It reads as follows:- "The admirals prove generally the greatest knaves, and do most prejudice, being generally judge and party in hearing suits for debt; and ~~xhxxxx~~ when they have served themselves, then they will do justice to others. So it will be requisite to have a civil government, and persons appointed to administer justice in the most frequented places, that we may be governed as Britons, and not live like banditti or forsaken people, without law or gospel."[2]

The oppressed inhabitants found their best friends and helpers in the commodores and commanders of the royal ships who periodically visited the island. Theseofficers were unprejudiced observers of the disorder and injustice which prevailed and they made frequent representations on the subject to the Imperial authorities and urged the necessity of a new system of government. Finally, in 1728, the commodore in charge of the station at Newfoundland, Lord Vere Beauclark, made such strong representations to the Board of Trade that the home government was at length induced to send out a governor with a commission to establish some form of civil government. Captain Henry Osborne re-

1. Hatton & Harvey 37.
2. Hatton & Harvey 37-38.

ceived the appointment and although the obnoxious statute of William lll. was left unrepealed and the governor instructed to enforce its provisions, yet the new form of government was a great improvement upon that of the fishing admirals. But the good intentions of the home government were almost thwarted by the limited character of the powers conferred upon the first governor and his successors. The commission Osborne received gave him authority to administer the oaths to government officials and appoint justices of the peace and other necessary officers and ministers for the better government of the island. But neither the governor nor the justices were to act contrary to the statute of William lll, nor were they to obstruct the powers conferred by the statute upon the admirals of harbors or captains of the ships of war, andthe justices were to assist the maritime officers in executing the measure. The governor was to erect a court house and prison, and all officers, both civil and military, were to assist him in executing this commission.[1]

During the next half century, the history of Newfoundland is to a great extent the history of the conflict between the new order of things introduced by the appointment of a governor, together with the rudiments of a local civil government on the one side, and the old regime on the other.[2]

1. Hatton and Harvey 38-41
2. Hatton & Harvey 44.

Due to the efforts of the governors another step was taken in 1750 for the extension of civil government. Owing to the great inconvenience resulting from sending over to England, for trial, all persons charged with capital felonies, the commission given Captain Francis William Drake contained a clause empowering him to appoint commissioners of Oyer and Terminer, before whom felons might be tried within the bounds of the colony. Although this measure of justice was dealt out with a sparing hand, it proved a valuable boon and inaugurated a new era of civil progress.[1]

War with France again broke out and resulted, as we have seen, in the loss of most of her North American possessions, but she still tried to acquire Newfoundland until this effort was also found useless. The Treaty of Paris[1] (1763), however, gave her fishermen extended rights over that of Utrecht, and later caused trouble in adjusting the differences between the fishermen of the two nations. Notwithstanding these difficulties, the civil government of the island was greatly strengthened in 1765 by the extention to her soil of the navigation laws and by the declaration that it was one of His Majesty's plantations or colonies.[2] This was a fatal blow to the old system by which it had been kept as a fishing station for the benefit of certain English capitolists. Ten years later (1775), through the efforts of ex-governor Pallisor, an act[3] was passed designated to

1. Macdonald No. 54
2. Hatton & Harvey 51.
3. & 15 Geo. lll. c. 31.

remedy some of the defects and enforce the provisions of William lll's famous statute. This act made a number of improvements by adjusting the difficulties between the fishermen and their masters, and by securing to the former their wages at the close of the season. At this time, many of the fishermen were settlers.

Under the various restrictions, the authority of the fishing admirals had already ceased, the administration of justice being assumed by the commanders of the king's ships, who came to the island in the summer and held courts for determining all causes of complaints. To these commanders the governor gave the title of surrogates. In the absence of the commanders during the winter, justice was administered by the Courts of Session, composed of the justices of the peace for the several districts. The Vice Admiralty Court, established in 1765, had been gradually extending its jurisdiction until it assumed the right to adjudicate in matters of debt and others of a civil nature.[1] The Imperial Parliament now passed a new act[2] which continued the bounties on the fisheries for ten years and striped the Vice Admiralty Court of a part of its power. The latter arrangement raised a large amount of opposition and it was found expedient to put an end to the judicature of Surrogates, Courts of Session, and Vice-Admiralty. After an inadequate

1. Hatton & Harvey 59-60.
2. 26 Geo. lll. c. 26.

measure[1] in 1791, an act[2] was passed in 1792 which created a Supreme Court of the island of Newfoundland with power to hold plea of all crimes and misdemeanors, and to determine suits and complaints of a civil nature, according to the law of England, as far as applicable. This court was to be held by a chief justice appointed by the crown. The governor was given authority with the advice of the chief justice to institute courts of civil jurisdiction, called Surrogate Courts, in different parts of the island, and these courts were to render decisions, as far as possible, according to the law of England. In actions of more than 10 l, on the request of the defendant, a jury was to be summoned, but if less than the required number of twelve appeared, then the case was to go to trial without the jury.

The purpose of the provisions sighted in this act was to give the settlers the benefit of English law and trial by jury.

The measure was to remain in force one year, but was continued annually until 1809, when the supreme court was made perpetual together with the courts of judicature instituted under it.[3] The addition was also made that a jury should be summoned on request of either the defendent as before, and that this request could be made in cases

1. 31 Geo. lll. c. 29.
2. 32 Geo. lll. c. 46.
3. 49 Geo. lll. c. 37.

exceeding forty shillings in place of 10 l in the former arrangement. An appeal was given from the Surrogate Court to the Supreme Court in actions above 40 l and from the Supreme Court to the Privy Council in those exceeding 100 l.

This arrangement lasted for a number of years, but in 1819 accurred the well known case of Butler and Lundrigan. At a Surrogate Court held in Harbour Grace before Captain David Buchan, H.M.S. Grasshopper, and the Rev. John Leigh, Episcopal Missionary, Lundrigan, not appearing upon a summons, was held to be guilty of contempt of court and sentenced to receive thirty-six lashes on his bare back. He was tied up and flogged by the boatswain of the ship until he fainted under the severity of the punishment. This incident caused a great deal of excitement and a meeting was held in St. John's on the 14th of November, 1820, at which resolutions were adopted concerning the proceedure.[1]

The agitation about Butler and Lundrigan caused the British Parliament to consider the whole question of the administration of justice and the formation of constitutional government in the colony. As a result an act[2] was passed in 1824 for the better administration of justice in Newfoundland.[3] By this measure the Supreme Court was to consist of a chief judge and two associate judges, being

1. Prowse 411.
2. 5 Geo. IV. c. 67.
3. Prouse 421-2.

rexpectively barristers in England or Ireland of at least three years standing, or in some of His Majesty's colonies or plantations. Issues of fact originally brought before the Supreme Court were to be tried by a jury of twelve men. The governor was given power to divide the colony into three districts in each of which the crown could institute circuit courts. All cases, both civil and criminal, cognizable in these circuit courts, were to be tried by the circuit judge and a jury of twelve men, according to the rules and course of the law of England, as far as the circumstances of the colony would permit. Criminal cases brought before the Circuit Courts, if less than the number of jurymen should appear, were to be tried by the circuit judge and three assessors, and civil actions before the same courts, if there was not the full number of jurymen, were to be tried by the judge alone.

Right of appeal was granted from the Circuit Courts to the Supreme Courts and from the Supreme Court to the King in Council. The act also brought to an end the old Surrogate Courts.

It is hardly necessary to comment upon the great concessions made to the island by the act just discussed and by previous ones. The settlers gradually received the benefits of ~~the~~ English institutions and laws. The Supreme Court, however, was not constituted until the 2nd of January, 1826 when it was opened with due ceremony by the governor and

judges appointed.[1]

Six years later, in 1832, Newfoundland was granted a representative assembly.[2] This body was very similar to that of Nova Scotia and New Brunswick. The general election took place in the autume of 1832 and on the 1st of January, 1833 the first house of assembly was opened.[3]

This change in the constitution was the cause of much trouble in the legislature during the next few years. There was no arrangement for securing harmony between the two Chambers. On the one hand the assembly, composed of representatives of the people, naturally supported popular rights and claimed to exercise thesame functions as the British House of Commons. On the other hand, the council, made up of nominees of the crown, could swamp the measures passed by the lower house. Very little legislation, therefore, could be made. To this difficulty was added religious trouble. The population at this time was divided about equally between the Protestants and the Roman Catholics, the latter being Irish or of Irish descent. The Catholics had been relieved of all civil disability in 1829 and the introduction of representative government proved to be the apple of discord among the churches.[4]

As a result of the discord between the two Chambers, the Imperial Parliament, in 1842 passed an act[5]

1. Prowse 422-23
2. Preamble of 5 & 6 Victoria c. 120/
3. Prowse 429-31
4. Hatton & Harvey 86-87
5. 5 & 6 Victoria c. 120/

for amending the constitution of Newfoundland. By this statute the crown was given authority to appoint an executive council for advising the governor and to abolish the council as a distinct branch of the legislature, but the number of members was not to exceed two-fifths of the whole number of the members of the assembly. The crown, however, could reestablish the legislative council as a separate house. This arrangement known as "The Amalgamated Assembly" lasted until 1848, when the old constitution of 1832 was restored.[1] But a popular agitation which had been going on for some time and had for its object the attainment of a more complete power of self government than the constitution of 1832 had secured, finally accomplished its purppse in 1855 when responsible government was intreduced. This completed the formation of the constitution.

The situation with respect to the laws in force in the colonies thus far discussed may now be stated with some degree of certainty. In Nova Scotia, New Brunswick, Prince Edward Island, Newfoundland, and Upper Canada English law, modified by local conditions, was applied in both civil and criminal cases. In Lower Canada, on the other hand, English criminal law was in force, but the old Canadian civil code had been revised and codified.

This brings us down to the Quebec convention. We shall see what effect the establishment of a general

1. Prowse 463.

government had upon the colonial constitutions.

The Quebec Conference and the Federation.

Thirty-five delegates from the above colonies met in Quebec on the 10th of October, 1764. The conference sat for eighteen days and then adopted the celebrated "Seventy-two Resolutions"[1] upon which the Act of Union was afterwards based. These resolutions were submitted by each delegation to its own government.[2]

In Canada the legislature met in January, 1865. The council after a fortmight's debate, adopted the resolutions by a vote of 45 to 15. In the assembly the debate lasted for five weeks, but the resolutions were adopted by a vote of 91 to 33.[3]

The general election of New Brunswick, which took place in 1865, resulted in the return of an assembly hostile to the scheme. But in the following year the legislative council declared for the union, the ministry resigned, a general election followed, and the new assembly on the 30th of June declared in favor of confederation.

The assembly of Nova Scotia, in 1866, carried the resolutions by a vote of 31 to 15.

The question of union was introduced in the legislature of Newfoundland by the governor at the opening of

1. Houston 305-316.
2. Munro 37-38
3. Munro 38.

the session in January 1866. But the assembly, on the 8th of March, after sitting in committee for several days, adopted the following resolution:

"That while duly regardful of the momentus character of the subject and of the promise to His Excellency to give it attention, yet, as no information has been received demanding its immediate reconsideration, the House does not deem it expedient to enter upon its discussion with a view to any decision thereon".[1]

In Prince Edward Island the scheme was not received favorably and it was not until several years after the Union Act was passed that this island joined the dominion.

While these controversies with respect to the Quebec Resolutions were going on, the Imperial Parliament passed a measure which it will be well to turn aside, for a few moments to consider. This act,[2] signed the 29th of June, 1865, had for its purpose the removal of doubts in regard to the validity of colonial laws. It provided that any law passed by the local legislature, so far as repugnant to any act of Parliament extending to the colony or repugnant to any order or regulation having the force of an Imperial statute, should be void. But no colonial law was to be void on the ground of repugnancy to the law of England except as stated above.

This measure, of course, would insure a much wider

1. Munro 38.
2. 28 & 29 Victoria c. 63.

range to colonial legislation, especially in those cases in which English law would be obnoxious or inapplicable owing to the different circumstances in the provinces.

As we have already seen, Canada, New Brunswick, and Nova Scotia had by 1866 declared in favor of the Quebec Resolutions and in that year delegates were appointed to arrange the details and determine the character of the Imperial Act necessary to carry the union into effect. These delegates met in London in December 1866, Honorable John A. Macdonald being president, and on the 7th of February 1867 Lord Carnarvon introduced the bill[1] for the union of the provinces. The measure[2] received the support of all parties and was signed on the 29th of March.

This act authorized the Queen in Council to declare by proclamation that on a certain day, within six months, the provinces of Canada, Nova Scotia, and New Brunswick should form one Dominion, under the name of Canada. Canada was to be divided into four provinces, Upper and Lower Canada constituting the provinces of Ontario and Quebec respectively.

The executive authority was vested in the crown represented, of course, by a governor general who appointed as his advisers a privy council.

There was to be one Parliament, consisting of the queen, an upper house, styled the senate, and a house

1. Munro 39.
2. 30 & 31 Victoria c. 3.

of commons. The senate consisted of seventy-two members, appointed for life, in the queen's name, by the governor general . The house of commons was composed of one hundred and eighty-one members, elected from the four provinces for a term of five years, subject to dissolution by the governor general.

Each province was to have a lieutenant governor, appointed by the governor general in council. The legislature of Ontaria was to consist of the lieutenant-governor and of one house, composed of eighty-two elected members; that of Quebec of the lieutenant-governor and of two houses, a legislative council composed of twenty-four members, appointed by the lieutenant governor in the queen's name, and a legislative assembly, consisting of sixty-five members, elected by the people. But the legislatures of Nova Scotia and New Brunswick were to continue as before, subject, of course, to the provisions of this act.

In the division of legislative power between the general and provincial goverments among other things the Parliament of Canada was given authority over criminal law, except the constitution of courts of criminal jurisdiction, but including the procedure in criminal matters. This power, if exercised, would mean a uniform criminal code. On the other hand, among the things over which the provincial legislature's authority extended were property, civil rights, and the administration of justice in the province,

including the constitution, maintenance, and organization of provincial courts, both of civial and criminal juriddiction, and including civil procedure in those courts. The Dominion Parliament, however, was given authority to make provision for the uniformity of the laws relative to property and civil rights, and of the procedure of the courts in Ontario, Nova Scotia, and New Brunswick, but such a measure was not to have effect in any province unless adopted as law by its legislature. Quebec having a civil code of its own was not included in this provision. Nothing has ever been done, however, to bring about the uniformity thus provided for.[1]

Except as otherwise provided by this act, all laws, courts of civil and criminal jurisdiction, and officers were to continue in the provinces.

To prevent further trouble arising in regard to the use of the French and English languages, it was provided that either might be used by any person in the debates of the Dominion Parliament or in those of the Quebec legislature, and both were to be used in the records and journals of those houses. Either was permissible in the courts of the Dominion, established under this act, or in those of the province of Quebec.

For the extension of the Dominion provision was

1. Houston 236, note 53.

made for the admission of Newfoundland, Prince Edward Island, and British Columbia, also Rupert's Land and the Northwestern Territory.

While this act had but little to do with the transfer of English law to the colonies, yet it did combine and strengthen the principles of law and government already at work.

As already stated, the act authorized Her Majesty in Council to declare the union. Accordingly the necessary proclamation was issued on the 22nd of May and the 1st of July was fixed as the day upon which the union should take effect[1] upon which date the Dominion of Canada took its place among the federated states of the world.[2] There was, however, a great work to be accomplished in perfecting and extending the general government and it is that extention which furnishes the key to the remainder of our subject.

Rupert's Land and the Northwestern Territories.

As we have seen, the British North American Act provided in general terms for the addition of the vast territories lying west and north-west of the province of Ontario. The portion of this territory which lies east of

1. Munro 59.
2. Bourinot (H) 216.

the Rocky Mountains is divided by three great basins, Hudson Bay basin, with probably, a drainage of 2,250,000 square miles; the Winnipeg sub-basin tributary to the former, with nearly 400,000 square miles; the Mackenzie River basin with about 700,000 square miles.[1] For two centuries the great Hudson Bay Company claimed exclusive trading privileges over a large part of this territory, called Rupert's Land, a charter being given, by Charles 11, on the 2nd of May, 1670,[2] to Prince Rupert and a number of other notable Englishmen. The Hudson Bay Company confined its early operations to the vicinity of Hudson and James Bays. For many years the French disputed the claims of the English Company to this great region, but the Treaty of Utrecht confirmed the rights of the English and, about twenty years after the Treaty of Paris was signed, the North-West Company was established at Montreal for trading in the North-West Territories, where the French traders had gone. This situation finally led to friction between the two companies.[3]

The North-West Company employed a large number of young men chiefly Scotch. Indian maidens cast in their lot with those employed and with the wintering partners of the Company, and due to those marriages and those between the French traders and Indians a large portion of the inhabitants came to be half-breeds. After the Hudson's Bay Company

1. Bourinot (H) 221.
2. Begg 1. Appendix No. 1.
3. Bourinot (H) 224-225.

entered the country, their officers and servants followed the example of those of the North-West Company in having Indian wives and the mixed blood increased in proportion. The half-breeds of French parantage far outnumbered those of the English and Scotch. In the rivalry and strife between the two great fur companies those half-breeds played a prominent part, but not until Lord Selkirk appeared upon the scene did the companies perpetrate any serious outrages upon each other.[1]

Thomas Douglas, fifth Earl of Selkirk, having purchased a controling interest in the Hudson's Bay Company's stock, succeeded in obtaining in May, 1811, a large grant of about 116,000 square miles in the Red River country. His object was to colonize the country, but his efforts to people Assiniboia, the Indian name he applied to his grant, were baulked by the opposition of the employees of the North-West Company, who regarded this scheme as fatal to the fur trade. The quarrel between the settlers who were under the protection of the Hudson's Bay Company and the North-Westers, chiefly composed of French Canadians and French half-breeds, culminated in 1816, when a skirmish occurred between a band of men under Governor Semple and a numberof half-breeds, which resulted in the death of Semple and twenty-six other persons connected with the colony. This caused the abandonment of the Red River settlement for

1. Begg 1: 161-162.

about a year, but most of the settlers returned to Red River under the protection of Lord Selkirk and his company of Metrons.[1]

In 1820 Lord Selkirk died and in March, 1821 the North-West Company united with the older company. An Act[2] of Parliament was signed on the 2nd of July 1821, giving the king authority to give grants for exclusive trade with the Indians in such parts of North America as were not already granted to the Hudson's Bay Company, and not being part of Her Majesty's Provinces. Such grants could be made for the term of twenty-one years. Accordingly on the 15th of December, 1821 a royal license was issued to the Hudson's Bay Company and to W. & S. McGillivray and Edward Ellice for the exclusive privilege of trading with the Indians in such parts of North America as should be specified, not being part of the lands or territories already granted to the Hudson's Bay Company. This to be sure was a direct recognition of the charter of 1670 by the crown. The license was to expire in 1842, but on May 30th, 1838, an extension was granted by Queen Victoria, for a further term of twenty-one years, and on this occasion it was issued to the Hudson's Bay Company alone, Messrs. McGillivray and Edward Ellice having surrendered their rights and interests under the previous licence.[2] The importance of this extension of the sway of the Hudson's Bay Company will appear as we now investigate the various

1. Begg 1: 161-184; Bourinot 224-225.
2. 1 & 2 Geo. 4. c. 66.

steps in the establishment of government in the North-West.

As early as 1803, it had been enacted[1] by the Imperial Parliament that offences committed within any of the Indian Territories should be tried in the same manner as if committed within the provinces of Lower or Upper Canada. The governor of Lower Canada was also given authority to empower persons to act as justices for the Indian Territories for committing offenders until conveyed to Canada for trial.

By act[2] passed in 1821 the provisions stated above were to extend to the territory granted to the Hudson's Bay Company. The courts of judicature established in Upper Canada were to take cognizance of causes in the Indian territories, but actions relating to lands not within Upper Canada were to be decided according to the law of England and were not to be subject to any local acts of the legislature of that province. It was also made lawful for His Majesty to issue commissions empowering justices to hold courts of record for the trial of certain minor criminal and civil offences. But the Hudson's Bay Company was to retain all rights and privileges exercised under its charter.

The supreme control of the Hudson's Bay Company's affairs was vested in a council or committee, sitting in London. This committee consisted of five members, presided over by a governor and deputy-governor. After the coalition of the two companies, these functionaries delegated their

1. 43 Geo. lll. c. 138.
2. 1 & 2. Geo. lV. c. 66.

authority to an official resident in America who was called the Governor in Chief of Rupert's Land, and whose commission extended over all their colonial possessions, with an unlimited tenure of office. The first person to fill this high position was Sir George Simpson, who retained the office until he died in September, 1860, a period of nearly forty years. He absorbed all the offices and responsibilities distributed among petty heads at the various posts, and during his long tenure of office he exerted an autocratic and supreme authority, it being impossible to overrule his final judgment or decision. His council which was composed of "chief factors"with occasionally a few "chief traders", met usually at Norway House, at the northern end of Lake Winnipeg, which then became the distributing point for the whole country.[1] But the council usually did not interfere with the affairs of the Red River settlement, which were carried on by another body known as the "Governor and Council of Assiniboia" and until 1848 the presiding officer was often the one in charge of the Company's trading interests in the colony.[2]

Before many years the people began to regard the officers of the Hudson's Bay Company with much less favor. To understand this change in sentiment we must go back to the early days of the colony. During Selkirk's time, the settlers were supplied with goods on credit but after the

1. Begg 1: 202-203.
2. Begg 1: 204.

union of the two companies in 1821, the credit system was abolished, and that of ready money introduced. This led to a curtailment of the supply of goods and a consequent rise in the prices which acted against the poorer class of settlers and in favor of the wealthier people. The result was that private persons imported supplies. This new class of traders was encouraged by Governor Christie until they began to take advantage of the position the credit system gave them to oppress the people. The Company, then, took a hand in the affair and by keeping a better and larger stock of goods and by selling cheaper than the free traders captured the trade. The small dealers were naturally incensed and accused the Company of trying to monopolize the trade in goods as well as in furs. Another difficulty arose with the half-breed plain hunters who had become very numerous and who brought in from the plains a largerquantity of pemmican than the company could purchase. They became angry at the company for not buying all they supplied. No act of violence, however, was done until 1834, but in this and the following year there were outbreaks which were quieted with some difficulty.[1]

In the meantime the executors of Lord Selkirk's estate, wishing to rid themselves of the responsibility incurred through the ownership of the Red River colony arranged to transfer it to its original holders, the Hudson's Bay Company.[2]

1. Begg 1: 232-3 2. Begg 1: 233-4

Up to this time the inhabitants at Red River may be said to have lived without laws and without protection. For a number of years, a few councillors to assits the governor aided by a small body of constables, nominally appointed, had been the only machinery of government existing in the settlement. But the hostile attitude of a part of the community against the company convinced the governor and council in London that it was time to adopt some system by which law and order could be better maintained. Accordingly the company, immediately after its acquisition of the settlement, took steps to organize something like local regulations, courts of justice, and a code of laws for the colony, which they were empowered to do under their charter. New councillors, therefore, selected from among the influential inhabitants of the colony, were nominated and commissioned by the committee in London and these with the governor in chief at their head, were to constitute a legislative council with power to make laws in criminal as well as civil matters.[1]

This council was convened for the first time, on the 12th of February, 1835, and framed a number of enactments, which were passed into law, and most of them gave general satisfaction. According to these the settlement was to be divided into four districts and a magistrate appointed for each district who should hold quarterly courts

1. Begg 1: 234.

of summary jurisdiction. These courts were to have power to pronounce final judgment in all civil cases, where the debt or damage claimed did not exceed five pounds, and in all trespasses amd misdemeanors, which, by the rules and regulations of the District of Assiniboine, not being repugnant to the laws of England, might be punished with a fine not exceeding the sum mentioned above. Difficult or doubtful cases could be referred to the supreme tribunal of the colony, the Court of Governor and Council of Assiniboine. The Court of Governor and Council, in its judicial capacity, was to sit on the third Thursday of February, May, August and November; and at such other times as the Governor in chief of Rupert's Land, or in his absence, the Governor of Assiniboine, might deem fit. In all contested civil cases, which involved claims of more than ten pounds, and in all criminal cases, the verdict of a jury was to determine the facts in dispute.[1]

After the establishment of this form of government, law and order generally prevailed. There was always, however, a certain amount of ill feeling against the company, whose great object was to keep out the pioneers of settlement, and disclose no secrets in regard to the value of the vast territory they controlled. But some years before the federation of the British American provinces, an agitation was begun by the public men of Canada, against the company,

1. Reprint in Begg 1: 236-237.

for the purpose of wresting from its monoply a country whose resources were beginning to be discovered. Nothing came of this, however, until after the federation was accomplished. Then, by an act[1] of the Imperial Parliament, signed July 31st, 1868, the Hudson's Bay Company was enabled to surrender and the crown to accept all their territories and rights enjoyed under theirletters patent. But the terms and conditions on which Rupert's Land was to be admitted into the Dominion were to be approved by Her Majesty and embodied in an address from both houses of the Dominion Parliament.

Successful negotiations took place between a Canadian delegation and the Hudson's Bay Company's representatives for the surrender of their domain. The details of the surrender thus arranged were approved by the Canadian Parliament in 1869 and an act was passed for the temporary government of Rupert's Land and the North-West Territory when regularly transferred to the Dominion.[2] An address was also presented to Her majesty for the admission of the new territory and on the 24th of June, 1870, it was declared, by order in council, that from the 15th of July, 1870, the North-West Territory and Rupert's Land should be a part of Canada.[3]

This transfer caused a great deal of dissatisfaction

1. 31 & 32 Victoria c. 105.
2. Bourinot (H) 227.
3. Munro 27.

among the Red River settlers, especially among the ignorant French half-breeds who believed that they were to be deprived of their lands. These rebellious half-breeds were led by one Louis Riel, who was himself a French Canadian half-breed and had much influence over his countrymen.[1] A provisional government was formed in which the English at last consented to take a part for the sake of peace. It was decided that the council should consist of twenty-four members, twelve from the English and twelve from the French-speaking population. The president of the government could not be one of the twenty-four members and a two-thirds vote would overrule the president's vote. Nearly all the persons appointed to office were English, but Reil, through the aid of his friends was chosen for the most important position of all, that of president.[2]

This council of the provisional government met on the 15th of March, 1870 and set forth their attitude toward the transfer of the settlement to the Dominion in the following motions which were carried:

1st, That we, the representatives of the inhabitants of the North-West, consider that the Imperial Government, the Hudson's Bay Company, and the Canadian Government, in stipulating for the transfer of the government to the Dominion Government, without first considering, or even notifying the people of such transfer, have entirely ig-

1. Bourinot (H) 227-228.
2. Begg 1: 462.

nored our rights as people of the North-West Territory.

2nd, That notwithstanding the insults and sufferings borne by the people of the North-West heretofore, which sufferings they still endure, the loyalty of the people of the North-West towards the Crown of England remains the same provided the rights, properties, usages and customs of the people be respected; and we feel assured that as British subjects such rights, properties, usages, and customs will undoubtedly be respected.[1]

In the second session of the provisional government, which ended the 9th of May, a number of good laws were passed. These bore the date of the 7th of May, 1870, and were to come into operation on the 20th of the same month. Until that time the laws under which the country had been governed were to remain in full force. On the 20th of May, all the old laws were to be repealed.

As will appear, these laws were very much in line with those of Assiniboia, under the Hudson's Bay Company. Among the general provisions it was enacted that unless special regulation was to the contrary, every wrong should have its remedy under the general law of the country. The law of England was to be the law of the land in relation to crimes and misdemeanors and generally in all civil rights except as modified by the local law. There was to be trial by jury in the Supreme Court except when both parties desired otherwise.[1]

1. Synopsis, Begg 1, Appendix No. 10/

While these events were taking place in Assiniboia, the Canadian Parliament was busily engaged trying to form a government for the newly acquired territory. Some time before this the Canadian government had enlisted in the interest of law and order the services of Donald Smith who had been long connected with the Hudson's Bay Company. Through the efforts of Smith, who had visited the Red River Settlement on his mission, Assiniboia had sent delegates to Ottawa to confer with the Dominion Government. On the 17th of June, 1870, Rev. Richot, one of the delegates from Ottawa arrived in the settlement, and on the 24th met a special session of the legislative assembly of the provisional government. He presented the Manitoba Act, as passed by the Parliament of Canada, and it was formally accepted by the representatives on behalf of the people of Red River.[1]

This act,[2] which was passed before the North-West Territory and Rupert's Land were to be admitted into the Dominion, had for its purpose the establishment of a government for the Province of Manitoba, the boundaries of which it defined. A constitution similar to that of the other provinces was granted to the colony. The provin ce was given representation in the Dominion Parliament and was to have a lieutenant -governor. The lieutenant-governor was to appoint his own executive council. The legislature of the province was to consist of the lieutenant-governor and of two houses,

1. Begg 486.
2. Reprint of Act in Begg 1, Appendix No. 11.

a legislative council of seven members appointed by the lieutenant-governor for life and a legislative assembly of twenty-four members, elected by the people for a term of four years. The lieutenant governor was also to have jurisdiction over the portion of Rupert's Land and the North-West Territory not included in the procince of Manitoba, and this portion was to be known under the name of the North-West Territories. The Act, already referred to, for the temporary government of the new territory, when united with Canada, was to continue in force until the 1st of January, 1871.

This measure is silent with respect to English Law, but by its second section, it provided that the British North American Act should be applicable to Manitoba as to the other provinces of Canada. Now, by section 91 of the British North American Act, the powers of the Dominion Parliament were to extend to the criminal law, except the constitution of courts of criminal jurisdiction, but including the procedure in criminal matters, and the exclusive power of the provincial legislatures was to extend to the administration of justice in the province, including the constitution, maintenance, and organization of provincial courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in those courts. This division of power would have given the Dominion Parliament a right to change a large portion of the laws already passed by Assiniboia, but since these laws were in line not only

with the policy of the Dominion government, but with that of the home government as well, there was but little danger of this being done.

The province of Manitoba was only a small part of the vast North-West Territories, over which the Dominion government now exercised control. The progress, however, of this small province was very rapid and in 1881 the boundaries were extended to include considerable more territory.[1]

Although the Canadian government bestowed upon this small district a responsible government, armed with all the authority, and equipped with all the machinery necessary for the establishment of law and order, yet the balance of the territory which was many times larger she left for the present to govern itself. But before long events occurred which changed the whole current of life on the plains and rendered the speedy introduction of law and its enforcement a necessity.[2]

The construction of the Union Pacific Railway through the southern plains had driven the buffalo northward and had also furnished easy access to the country. A dangerous class of adventurers and desperadoes penetrated to the far west, and engaged in so-called trade with the Indians. Owing to the vast herds of buffalo, a brisk trade in robes sprang up, and whiskey was made the chief currency of this

1. Begg ll. 370, 382.
2. Begg ll. 228.

trade. The Indians were given whiskey and when drunk, robbed of their robes. If they resisted the outrage, they were brutally murdered. A veritable reign of terror set in, and the western plains became the scene of indiscribable debauchery.[1]

This condition of things could not be endured very long. A rude form of government was established and finally by a Dominion act passed in 1875 executive and legislative powers were conferred upon a lieutenant-governor and a council of five members subject to instruction given by Order in Council or by the Canadians Secretary of State. Provision was also made for the election of representatives to the council by districts containing a population of 1000 adults and when the number of elected members should reach twenty-one the council was to cease and the members to constitute a legislative assembly.[2]

The vast territory lying east and north of Manitoba had not been definitely understood as coming under the general description of the North-West Territories. The government thought it best to define the boundaries of this territory and place it under the jurisdiction of the lieutenant-governor of Manitoba. Accordingly an act was passed, in 1876, which described the new district of Keewatin, the name applied to the territory. The criminal laws and that prohibiting traffic in liquor were extended to the new district, over which the courts and officials of Mani-

1. Begg 11. 229.
2. Munro 36.

toba were given jurisdiction, but, until the act was declared in force by proclamation, the affairs of Keewatin were to be administered by the North-West council.[1]

The long delayed proclamation, which was to put in force the North-West Territories Act, was at last published on the 7th of October, 1876, and a lieutenant-governor and council were appointed. Among other things the lieutenant-governor and council were empowered to deal with matters coming within the following classes of subjects: property and civil rights in the Territories; the administration of justice in the Territories, including the maintenance and organization of courts, both of civil and criminal jurisdiction, and including procedure in civil matters in those courts, but the appointment of judges of the courts was to be made by the governor-general in council; and generally, all matters of a merely local or private nature.[2]

The progress of the North-West Territories was phenomenal and before many years had passed away their southern portion between Manitoba and British Columbia, was formed into four provisional districts, Assiniboia, Saskatchewan, Alberta, and Athabasca.[3] Out of these four districts have recently been formed the provinces of Alberta and Saskatchewan, which were admitted into the Union on September 1, 1905.[4]

1. Begg 11. 242-244
2. Begg 11. 245-246.
3. Munro 36
4. The Statesman's Year Books, 1906, 271-272.

BRITISH COLUMBIA.

Passing to British Columbia, we find that this province cannot be said to have had a colonial existence until it was organized as a crown colony in 1858. Before that time a number of acts had been passed to extend the civil and criminal laws of the courts of Lower and Upper Canada over certain territories outside the limits of any province, otherwise the territory was a hunting ground for the Hudson's Bay Company.[1] But an event occurred which changed the character of this region. In 1857 the report was abroad that gold had been discovered on the Thompson and Fraser Rivers. The news spread rapidly and before long great companies of people were on the way to that region. The San Francisco Herald of the 20th of April, 1858, stated that the excitement was equal to that in the Atlantic States due to the reports of the gold discoveries in California in 1848-9. According to John Nugent, who was consular agent for the United States in May, June and July, 1858, about twenty-three thousand persons went from San Francisco by sea, and eight thousand by land in the course of the season. The same authority states, however, that all but about three thousand of this vast number returned to the United States

1. Munro 29.

before January, 1859.[1] The disputes and difficulties which arose from the influx of miners resulted in the revocation of the license of the Hudson's Bay Company and the passing of an Imperial Act, signed the 2nd of August, 1858, for the government of British Columbia.[2]

By this act[3] Her Majesty in Council was given power to authorize the person, whom she should appoint as governor, to make provision for the administration of justice, and to establish laws and institutions for the good government of the colony. The governor was to constitute a legislature consisting of himself and a council, or council and assembly. After the proclamation of this act in the colony the authority of the courts of Upper Canada was to cease. But all judgments in civil suits in British Columbia were to be subject to appeal to Her Majesty in Council in the same manner as appeals were brought thither from the civil courts of Canada. The Queen in Council could annex Vancouver's Island on receiving a joint address from the two houses of the legislature of the Island.

Sir James Douglas was appointed governor and his commission authorized him to make laws, institutions, and ordinances, by proclamation issued under the public seal of the colony. By one of the proclamations thus issued English civil and criminal law as it existed on the date of the proclamation of the 21 & 22 Victoria c. 99 i.e. 19 Nov. 1858,

1. Begg 263-267.
2. Munro 29.
3. 21 & 22 Victoria c. 99.

was declared to be in force in the colony. Until 1864, the governor continued to legisla te by proclamation, but in that year his proclamations gave way to ordinances passed by the governor and legislative council. The legislative council was composed of five officials, five magistrates, and five other members selected from the inhabitants.[1]

Until the year 1863, the governor of British Columbia was also governor of Vancouver's Island. This island was a much older colony than British Columbia. Although the island was discovered in 1592, it remained practically unknown to Europeans for nearly two centuries and it was not until 1848, when the island was granted to the Hudson's Bay Company, that a governor was appointed.[1] An Imperial Statute, signed the 28th of July of this same year, provided for the administration of justice in the island.[2] By this act the authority of the courts of Upper Canada was to cease and the crown was to make provision for the administration of justice and for this purpose to constitute courts of record and other courts. But as soon as a local legislature had been established, it was to have power to make alterations in the constitution or jurisdiction of these courts. All judgments given in any civil suit in the island were to be subject to appeal to Her Majesty in Council in the same manner as appeals were brought

1. Munro 30.
2. 12 & 13 Victoria 48.

from the civil courts of Canada.

The first governor called a legislative council of nine members under the direction of the Secretary of the colonies.[1]

By a peculiar arrangement made in the year 1858 the seat of government in British Columbia had been fixed at New Westminster, but Victoria in Vancouver Island as the governor's residence. Because of the complaints of the inhabitants of the mainland regarding the continual absence of the governor from the seat of government, an Imperial Statute[2] was passed in the year 1863, which continued the constitution of British Columbia of 1858 and declared that the boundaries of that colony should not include Vancouver's Island. This measure, therefore, established separate governments at Victoria and New Westminster.[3]

But ~~in~~ the legislature of the island adopted, in 1865, a series of resolutions in favor of union with British Columbia which union was accomplished by the Imperial Act[4] signed the 6th of August, 1866. The form of government in Vancouver's Island as a separate colony was to cease and the number of members in the legislative council of British Columbia, the name given to the united colony, was raised from fifteen to twenty-three. Laws relative to the revenue of customs in force in British Columbia were to extend to

1. Munro 30.
2. 26 & 27 Victoria c. 83.
3. Munro 31.
4. 29 & 30 Victoria c. 67.

Vancouver's Island. All other laws in force in each colony were not to be affected by the union.

According to this act, then, each of the united colonies was to retain its own laws with the exception stated above. As we have seen, the English civil and criminal law had been introduced into British Columbia by proclamation. In Vancouver's Island the administration of justice under a formally constituted judiciary had begun with the order in council of April, 1856, wherein Her Majesty had created the supreme court of civil justice of the colony of Vancouver's Island with a chief justice, registrar, and sheriff. By patent from the governor, the functions of the chief-justice were extended to criminal cases; he acted also as judge of the vice-admiralty court of the island. Prior to the establishment of a legislative council and assembly, the statutory laws, as well as the common law of England were in force.[1]

But the laws in force in British Columbiawwere modified by the ordinance of the 6th of March, 1867, which enacted that the English law as it existed on the 19th of November 1858 should apply so far as not inapplicable from local circumstances.[2]

On the 18th of March, 1868, the legislative council of British Columbia unanimously adopted a resolution which expressed the desire that the province should be admitted

1. Bancroft 32: 419-20.
2. Munro 30.

into the union. Terms were agreed upon by both the Dominion and the legislature of the colony. Accordingly Parliament, an Order in Council declared that British Columbia should become a province of the Dominion on the 20th of July, 1871.[1] Two years later Prince Edward Island was admitted into the union.[2] The Dominion then extended from the Atlantic to the Pacific.

In summing up, we may say that in the province of Quebec the French law, derived from the Contume de Paris, has come down from the days of the French regime, and prevails in all civil matters and the civil laws of that territorial division, including those of procedure, have been duly codified as the "Civil Code of Lower Canada". But in the other provinces and in Newfoundland, the sources of law are the common law of England, brought into the country by the English settlers, and the statutory laws passed from time to time by the legislative authorities. The criminal law is generally uniform throughout the whole Dominion, including Quebec, and is, according to section 91 of the British North American Act, under the jurisdiction of the Parliament of Canada, except in so far as relates to the constitution of courts.[3]

Leaving the provinces of British North America, we shall take up next the Australasian colonies.

1. Munro 31, Bourinot (C) 60.
2. Bourinot (C) 60.
3. Bourinot (C) 170-171.

AUSTRALIA.

New South Wales and Tasmania.

It was Captain Cook, an adventurous English seaman, who first made a survey of the eastern coast of Australia and pointed out how advantageously the newly explored territory might be colonized.[1] But a number of years passed away before any definite step was taken to establish a settlement. In the meantime England became involved in war with her American colonies and many difficulties arose to prevent the transportation of convicts to the Carolinas whither they had hitherto been sent.[2] In consideration of these difficulties, an act was passed in 1779, which gave the court, pronouncing a sentence of transportation, authority to order the person so adjudged to be sent to any ports beyond the seas, either in America or elsewhere.[3] This act was to remain in force five years, but in 1784 the time was extended three years and it was also added that the king in council might appoint the place beyond the seas to which convicts should be sent.[4] Accordingly in 1786, the king in council appointed the eastern coast of New South Wales, or the islands adjacent[5] and a statute, passed the following year, provided for the establishment of a government in the

1. Payne 122.
2. Payne 166.
3. 19. Geo. 3. c. 2.
4. 24. Geo. 3. c. 56.
5. 27 Geo. 3. c. 2 Preamble.

proposed settlement.[1] By this measure the governor was given authority to convene a court of criminal jurisdiction which was to consist of the Judge Advocate, appointed for the place, together with six officers of His Majesty's land or sea forces. Only the opinion of the major part of the members was required for a decision. But a capital sentence was not to be executed without His Majesty's approval, unless five members of the court had agreed to the death penalty. The court was also to be a court of record and to have all the powers belonging to such a court by the laws of England.

The same year, 1787, a fleet of several vessels, containing 850 male and female convicts, was dispatched to Botany Bay, under the command of Captain Arthur Phillip. But Phillip quitted Botany Bay as soon as he arrived, and after exploring Port Jackson decided to make his settlement there. Accordingly on the shores of the vast harbour to which port Jackson leads, he began the little convict settlement of Sidhey.[2] The government, under the statute mentioned above, was strictly military. The court of justice was expressly authorized by the Letters Patent which created it, to take notice of any criminal offence against the laws of England, and thus English criminal law was implicitly introduced, but the court was also empowered to proceed without strict regard to the technical rules of English law, and

1. 19. Geo. 3. c. 74.
2. Payne 167.

this it freely did.[1] It would seem that the statute[2] made no express provision for the creation of civil courts, but the commission of the Judge-Advocate gave him power to decide in civil cases and he appears to have acted upon this authority. A Vice-Admiral's Court was also established, but this was equally military in character.[3]

The greater part of the settlers had already forfeited their title to the rights of free Englishmen, and therefore it was considered no hardship that they should be left completely to the discretion of their governor. The only free settlers were government officials and soldier s, and they were subject to the commands of their chief. Over the governor, of course, was the authority of the Home Government. The powers claimed and exercised, therefore, by the early governors such as publishing general orders on their own authority, interferring substantially with the common-law rights even of freemen, and exercising summary punishment upon offenders, were all military in their character and were tolerated under the general plea that a state of war practically existed between the authorities and the convict settlers.[4]

For the encouragement of good conduct on the part of the settlers, the governor was empowered, in 1790[5] to pardon any convict or to diminish the term of his

1. Jenks 149.
2. 27. Geo. 3. c. 2.
3. Jenks 150.
4. Jenks 148-149.
5. 30. Geo. 3. c. 47.

transportation. This led in time to a considerable number of free inhabitants.

Similar convict settlements were made on Norfolk Island,[1] and in 1795 and Imperial Statute empowered the lieutenant-governor of this islandtto hold a criminal court on the model of that at Sidney, with only four assessors.[2] But these settlements never prospered, and after a trial of several years they were removed in 1807 to Van Diemen's Land.[3]

As the various settlements became more thrifty the old system of administering justice proved inadequate, and in 1814 a great improvement was made by the creation of independent courts of civil jurisddction. These courts were of two kinds - the "Supreme Court" and the "Governor's Court".[4] The Supreme Court was made up of a professional judge, appointed for the purpose, by His Majesty, and two magistrates appointed by the governor. It heard all cases involving more than 50 pounds, and held sittings both in New South Wales and Van Diemen's Land. The Governor's Courts were two in number - one in New South Wales, composed of the Judge-Advocate and two inhabitants appointed by the governor, and one in Van Dieman's Land composed of the deputy Judge-Advocate and two inhabitants appointed by the lieutenant governor. Their jurisdiction was limited to cases involving 50 pounds and under.[5]

1. Payne 167 (2)
2. Egerton 266 and Jenks 150.
3. Payne 168.
4. Egerton 266.
5. Jenks 151-152.

The first judge of the Supreme Court was Barron Field who arrived at Sydney in 1817. As far as possible, he followed the practice of the English courts, but there was no jury and the extent to which English law was really binding was very uncertain. He permitted all convicts to give evidence, and those not actually serving a sentence to bring and defend actions, but he opposed the proposition of the Governor to make such a practice positive law.

The defects of this judicial system were the absence of the jury and the dual position of the Judge-Advocate, who had to set in motion crown prosecutions and, at the same time, act as judge of their validity.[1] As a result, however, of the report submitted by a special commissioner, who was appointed by the Home Government to investigate the administration of justice in Australia, these defects were remedied and a number of improvements made[2], by an Imperial Statute[3] passed in 1823. The crown was empowered by this act to establish new Supreme Courts in New South Wales and Van Diemen's Land, and these courts were to consist of a Chief-Justice and if it should appear necessary two other judges and were to be courts of record and to have jurisdiction in all cases civil and criminal, and even the power of trying offenders for crimes committed in New Zealand and other places in the Pacific. But they were not

1. Jenks 153.
2. Jenks 156.
3. 4 Geo. 4. c. 96.

expressly bound to conform to English law. All criminal cases were to be tried by the judge and a jury of seven military officers and civil actions by a judge and two magistrates appointed from time to time by the governor. In criminal trials, the officers were liable to challenge on the ground of prejudice or interest and in civil cases, the magistrates for any cause for which a juror could be challenged in England. But in civil actions at law if both parties desired the issue ~~by~~ tried by a jury of twelve men it was to be tried by such a jury. And the crown was given authority to extend the jury system as it saw fit by Order in Council. Also there were to be courts of Quarter session and the governor was empowered to create inferior local courts as "Courts of Request", while in the Court of Appeals the Chief-Justice was substituted for the Judge-Advocate, in association with the governor.

The Act of 1823 also provided for the establishment of a legislative council. It was to consist of not more than seven nor less than five persons, and although it had no initiative in legislation nor could even prevent the governor from legislating against its will in certain extreme cases, yet the governor could not promulgate any ordinance without first laying it before the council. To put a positive check on the power of the governor the provision was added that no ordinance should ever be proposed

to the council unless the Chief-Justice had previously certified that its terms were consistent with the laws of England, so far as the circumstances of the colony would permit. The Crown, of course, reserved to itself the right to disallow all legislation.

This act did not prove very satisfactory. English law in many cases was not complied with by the courts and the right of trial by jury vaguely promised. But notwithstanding these defects, the administration of justice was much improved by the substitution of the work of civil judges for the military jurisdiction of the Judge-Advocate, the Quarter Sessions for the arbitrary tribunals of individual magistrates.

This scheme was put in operation in New South Wales in 1825, when seven councillors were appointed, four of whom were Government officials and three private settlers whose names had been sent to the Secretary of State by the governor. At first, the council dared exercise but little authority in affairs, but by continually suggesting to the Governor subjects for legislation, and by freely discussing money bills, it soon acquired a prominent place both in legislative and administrative matters. In Van Diemen's Land similar changes were made. This colony under a special provision ofthe Act of 1823[1] had been made a

1. 4 Geo. 4 c. 97. s. 44.

Lieutenant Governorship, and, later, an independent Governorship, with a Supreme Court, and Executive and Legislative Councils of its own.[1][2]

The year 1824 is also memorable in the history of Australia for in that year freedom of the press[2] was formally proclaimed in New South Wales and although the liberty was at first abused and caused much trouble during the stormy governorship of Sir Ralph Darling, yet under his successor, the difficulties were removed, and the problem of reconciling free government and free criticism in a large measure solved.

It now remained to repair the weak places in the constitution of 1823 and for this purpose an amending statute was passed in 1828.[3] Under this Act the Crown was empowered to establish by Charters or Letters Patent Courts of judicature in both colonies and these courts were to be styled "The Supreme Court of New South Wales", and "The Supreme Court of Van Diemen's Land". Each court was to be held by one or more judges, not exceeding three, appointed by the crown, and was to have such other officers, as should be necessary, appointed according to the provisions of the Charter or Letters Patent. These courts were to be Courts of Record and to have cognizance of all pleas, civil, criminal, or mixed, and jurisdiction in all cases, within their respective territories, equal to that exercised by the courts

1. Jenks p. 159.
2. Jenks p. 56.
3. 9 Geo. 4 c. 83

of the King's Bench, Common Pleas, and Exchequer at Westminster. And persons convicted were to suffer penalty, as if convicted of the same offence in England.

The crown was also empowered to authorize the governor of the colonies to convene courts, as often as occasion should require, for the trial of various crimes and misdemeanors. They were also to be courts ofRecord and consist of a judge, appointed by the crown, and other persons, not fewer than three nor more than five, appointed by the governor. Offenders might be adjudged to any corporal punishment, not extending to life or limb, but in all cases the particulars of every sentence had to be made known by the judge to the governor for his approbation.

Any action at law brought in the Supreme Courts was to be tried by one or more judges of the court and by two assessors, being magistrates or justices of the peace; but the courts had the power to grant a trial by jury, on the application of either the plaintiff or defendant.

By Order in Council, either governor might be authorized to extend further with the advice of the Legislative Council, the manner of proceeding by grand and petit juries, and so far as this system should be extended, the other forms of proceeding were to cease.

The Supreme Courts were also to be Courts of Equity and of Ecclesiastical Jurisdiction. As Courts of Equity they were to have such jurisdiction as exercised by the Lord

High Chancellor of Great Britain and as Courts of Ecclesiastical Jurisdiction such authority as given by the Charters or Letters Patent.

The Crown was further empowered to appoint circuit courts, held by one judge of the Supreme Court, and to allow an appeal from the Supreme Court to the Privy Council, while each Governor was given authority to establish Courts of General and Quarter Sessions with jurisdiction over all offences not punishable by death, and, with the advice of his legislative council, to erect courts of civil jurisdiction called "Courts of Request", for the recovery of debt or assessment of damages, not exceeding ten pounds. Aside from this, the governor, with the assistance of the judges of the Supreme Courts, might settle forms of process and rules of practice for the Courts of Sessions and Requests.

It was provided that the crown might appoint in each colony, a council of persons resident therein, not exceeding fifteen nor less than ten, and this council could make laws, not repugnant to the laws of England. But no measure could be passed ~~before~~ unless the governor had first laid it before the council and unless he had made its general object public, at least eight days before its passage. In all cases, the judges of the Supreme Court were to pass upon the legality of the measures within fourteen days, and, if they were found repugnant to the laws of England, but the governor in council still adhered to them, then they were to

be in force until His Majesty's pleasure should be known.

But it was specifically declared that all laws and statutes in force in the realm of England should be applied in the administration of justice in the courts of New South Wales and Van Diemen&s Land, so far as the circumstances in those colonies would premit. In case any doubt should arise with respect to the application of any law, the governor, with the advice of the legislative council, was to declare whether it should be deemed to extend to that colony. But in the meantime, the Supreme Court was to decide, in all cases brought before them, with respect to the application of English law.

Such were the provisions of the Constitutional Act of 1828. Its success may be judged by the fact that it was continued from time to time by Parliament, and by the rapid progress made in the political life of the colonies. The increase in the number of the members in the council naturally placed the official members of that body in a minority in questions upon which the government and the settlers as a whole were divided in opinion, and although the council could not pass, or even discuss a proposed law, without the governor's consent, its position in legislation was materially improved. In the ordinary administrative work the governor was still practically supreme, except, of course, when he chose to fetter his own action by giving his consent to colonial laws which controlled

lt.[1] But with respect to the administration of justice, the clause which introduced all existing English law, although it subsequently gave rise to some technical difficulty, afforded the ordinary colonist substantial protection against the arbitrary action of the government, while to the great satisfaction of the settlers, the jury system was gradually introduced.[2]

The constitution of 1828 was continued by various acts until 1839 when, since it was found inapplicable in many cases on account of the extension of the colonies, the local legislatures were given authority[3] to make provision for the better administration of justice, and for defining the constitution of the courts of law and equity, and of juries. But these changes had to be made in a manner prescribed by the constitution and were subject to its conditions and provisions. Thus amended, the constitution was to be in force for one year, but at its expiration, the time was extended and Her Majesty empowered[4] to erect into a separate colony any islands which were comprised within New South Wales. In case a new colony were established, it was to have, at once, a legislative council which could enact laws not repugnant to the laws of England.

1. Jenks 58.
2. Jenks 160.
3. 6 Will. IV. c. 46., 7 Will. IV. & 1 Victoria. c. 42; 1 & 2 Victoria c. 56.
4. 1 & 2 Victoria c. 70.

The next great land mark in this constitutional and legal development is the Imperial Act of the year 1842.[1] By this act a legislative council was constituted in New South Wales consisting of thirty-six members, twelve appointed by the crown, and twenty-four elected by the inhabitants. There was to be a session of the council once at least each year and every council was to continue for five years, subject to prorogation or dissolution by the governor. At the time of the first meeting, the council was to elect some one of its members as speaker, but this choice could be disallowed by the governor, in which case another member had to be chosen, and so on until a suitable person was selected. The governor could give or withhold Her Majesty's assent to bills or reserve them for Her Majesty's consideration. But the crown had the right to disallow any measure assented to by the governor.

It was made lawful for the governor, by Letter Patent, issued under the great seal of the colony of New South Wales, to incorporate the inhabitants of every county, parts of counties or divisions, and in each of these districts to establish a council which should be elective after the first nomination. This local council was to have power to make orders and by-laws, a copy of which had to be sent to the governor who could, with the advice of his executive council, disallow them.

1. 5 & 6 Victoria c. 76.

Her Majesty was given authority to define the limits of the colony of New South Wales and to erect any part of its territory into a new colony, except that portion lying south of the twenty-sixth degree south latitude. Any new colony thus established, was to have a legislative council, appointed by the crown, and this council, guided by the instructions of the Queen in Council, could make ordinances, but both instructions and ordinances had to be consistent as far as possible, with the laws of England.

So much of the constitutional act of 1828 and of the various acts that continued or amended it as related to the constitution, appointment, and powers of the council of New South Wales was to continue until the first writs should issue for the election of members of the legislative council and after that was to be repealed. But the other parts of the acts were to become permanent, both with rspect to the colony of New South Wales and the colony of Van Diemen's Land.

It plainly appears that the act of 1842, unlike its predecessors, had to do almost entirely with legislation and administration. The principle of political representation was introduced and the council given real initiative in the matters of legislation. As far as the scheme of local government is concerned the statute was a failure. The rural districts showed great reluctance in being incorporated and not until ten years later was a successful system

of rural self-government developed. But in regard to the central government, the act in the main proved successful. The reorganisation of the council made it impossible for the nominee members to pass a measure against public opinion or to prevent the passing of one which the community wished. The weak point in the arrangement was the position of the government officials who could hold six nominee seats and who could never be subject to the criticism of an election, and when the home government refused, in 1845, to allow its salaried officials to accept elective seats in the council, it put a stop to an attempt to establish, in a modified form, responsible government under the constitution of 1842.[1] But the constitution of 1842 was so far successful that it was extended to a number of the younger Australian colonies in the year 1850. No change was made up to the latter date except that in the year 1844[2] an Inperial Statute relieved the governor of New South Wales from the task of reserving bills for the approval of the crown.

1. Jenks 163.
2. 7 & 8 Victoria c. 74.