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CHALLENGING THE VALIDITY OF AN ACT OF PARLIAMENT: THE EFFECT OF ENROLMENT AND PARLIAMENTARY PRIVILEGE

By KATHERINE SWINTON*

A. INTRODUCTION

Parliamentary sovereignty has proved a topic of fascination to scholars of constitutional law for many years, as the volume of literature on the subject well demonstrates. Admittedly, the interest has been greater in Commonwealth countries other than Canada. In this country, students of constitutional law have focussed their attention on the division of powers between federal and provincial governments, since federalism has presented problems requiring immediate solution. Yet even here, the question of parliamentary sovereignty has been given consideration, and it is increasingly attracting discussion as interest increases in the patriation of the constitution and statutory protection for individual and minority rights.

Within a study of parliamentary sovereignty, reference is normally made to the enrolled bill principle or rule. This precept, regarded by some as an aspect of sovereignty and by others simply as a rule of evidence, states that the parliamentary roll is conclusive — an Act passed by Parliament and enrolled must be accepted as valid on its face and cannot be challenged in the courts on grounds of procedural irregularity. Because of the complexity of the issues involved in the definition of “parliamentary sovereignty”, most commentators have focussed their attention on an elaboration of the nature of sovereignty and the ability of Parliament to bind its successors, with the result that only passing reference has been made to the enrolment issue.

Yet the enrolled bill rule is a significant factor in the analysis of sovereignty, and one meriting study. Even if it were proven that Parliaments can bind their successors by mandatory procedural requirements, the enrolled bill rule, along with a second neglected aspect of constitutional law, that of parliamentary privilege, may render such binding effect nugatory in practice. Depending on the answers to questions such as what constitutes the parliamentary roll, whether the enrolled bill principle is a rule of law, and whether royal assent is curative of irregularities in the passage of a bill, the binding effect of manner and form legislation could be non-existent.

Similarly, parliamentary privilege could prevent any enforcement of

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Ms. Swinton is Legal Secretary to The Honourable Mr. Justice R. G. B. Dickson of the Supreme Court of Canada, 1975-76. The author is deeply indebted to Professor Peter Hogg of Osgoode Hall Law School for his helpful suggestions and encouragements during the writing of this paper.

procedural provisions. Parliament has long held the right to control its internal proceedings, free from outside interference. Yet a defect in procedure may only be provable through resort to the records of proceedings of the Houses of Parliament or of a provincial legislature. Would such practice be a violation of privilege? More importantly, should the courts be able to question and overrule Parliament's interpretation of a given procedure? These are very real questions which must be dealt with if one is to decide that manner and form legislation is effective.

Privilege and enrolment, while inter-related, are separate questions. Many commentators and judges confuse the two, perhaps understandably, since the enrolment question is inextricably linked to privilege, while both may be related to parliamentary sovereignty. Within this study of the origins and scope of privilege and enrolment, reference must necessarily be made to the various types of procedural rules governing the passage of a bill and their differing effects in constitutional law, for it is clear that the courts have enforced and will continue to enforce some types of rules even though they leave others to Parliament alone to uphold.

B. ENROLMENT — THE RULE AND ITS SCOPE

Edinburgh and Dalkeith Ry. Co. v. Wauchope is the case most frequently cited to support the proposition that the parliamentary roll is conclusive. Lord Campbell made a statement in his judgment which has often been repeated:

All that a Court of Justice can do is to look to the Parliamentary roll: if from that it should appear that a bill has passed both Houses and received the Royal assent, no Court of Justice can inquire into the mode in which it was introduced into Parliament, nor into what was done previous to its introduction or what passed in Parliament during its progress in its various stages through both Houses.¹

The words appear clear and categorical: a bill must be passed by both Houses of Parliament, receive Royal assent, and be inscribed on the parliamentary roll. Once these events have occurred, the resulting Act's validity is incontestable. Yet the words are deceptively simple, for Lord Campbell makes no effort to elaborate what constitutes the "roll" to which one looks, nor does he deal with what constitutes "passage" through the Houses, nor does he examine the issue of error on the face of the record. All of these questions merit further study; however, for purposes of clarity, it will be helpful to outline first the procedure for passing an Act and enrolling it in Britain and, more importantly, in Canada.

1. *Parliamentary Records*

The term "parliamentary roll" is anachronistic, as an historical discussion will show, for the roll *per se* was eliminated in England in 1849. Up to that date, all bills passed by Parliament were engrossed on parchment rolls. These rolls constituted the official copy of the Acts of Parliament, although the original Acts, those which bore the monarch's signature, were also retained after 1487.² Since 1849, the British practice with regard to official copies of

¹ (1842), 8 Cl. & F. 710; 8 E.R. 279 (H.L.) at 285.

² *Craies Statute Law*, ed. S. Edgar (7th ed. London: Sweet & Maxwell, 1971) at 39; *Claydon v. Green* (1868), 3 C.P. 511 at 522; *May's Parliamentary Practice*, ed. B. Cocks (18th ed. London: Butterworths, 1971) at 558.

statutes has changed. Two vellum copies are made of each Act passed and are endorsed with the words of royal assent and signed by the Clerk of the Parliaments. They are kept in the Public Records Office and the House of Lords. These Acts, printed as they are from the same type face as the copies available for public purchase, differ from those documents only in the quality of their paper and the fact of the signature. Therefore, they are unlike the original "enrolled bills", which had been transcribed onto the roll, while public copies were printed just as they are today.

In Canada, the term "enrolment" is even more anomalous than in modern Britain, for it appears that no "rolls" ever existed.³ A bill introduced into the House of Commons may go through several printings in its passage through the House. After it receives approval on third reading in the House of Commons (or in the Senate if the bill originates there), all amendments are incorporated into the text by the Parliamentary Counsel, an official of the House. Under his supervision, the bill is then engrossed; that is, several copies are printed on vellum.⁴ One copy, known as the "parchment", is certified as the bill passed by the House and is signed by the Clerk of the House of Commons. This is the official copy of the bill, and all previous ones (or working copies) are regarded as internal House documents. The parchment is sent to the Senate, where, after third reading, the Senate's approval is recorded and certified by the Clerk of the Senate. If the Senate amends the bill, the amendments are typed on a separate sheet of paper, attached to the bill, and both are returned to the Commons. This Chamber's assent will be recorded on the parchment again (or on a separate sheet attached). In Canada the parchment copy, with any amendments attached, is presented to the Governor-General or his delegate for royal assent. The Governor-General's assent is recorded on the bill by signature without date, that item being added by the Clerk of the Parliaments (the Senate Clerk).⁵ The parchment is retained by the Clerk of the Parliaments for record purposes and resort is made to his office for certified copies of Acts.⁶

It is clear that the Canadian practice never resulted in an "enrolled" copy similar to the British, although it is indeed arguable that the Act as reprinted by the Queen's Printer with all amendments incorporated should be regarded as the enrolled copy. If this is so, a party attacking the validity of an Act on the ground that amendments passed by one House have not been incorporated in the final Act would not succeed. Such amendments would likely be provable with the original copy, but not with the Queen's Printer reprint. The *Canada Evidence Act* provides that every such copy is evidence of the Act and its contents,⁷ and the *Interpretation Act* provides that any copy

³ The author is indebted to Mr. Alistair Fraser, Clerk of the House of Commons, and Mr. J. P. J. Maingot, Parliamentary Counsel and Law Clerk, for the information on Canadian parliamentary procedure.

⁴ Other copies will be printed on paper for public distribution.

⁵ Pursuant to s. 5(1) of the *Interpretation Act*, R.S.C. 1970, c. I-23. The purpose of recording this piece of information is to provide the date for commencement of the Act if no other date has been specified in the Act.

⁶ *Publication of Statutes Act*, R.S.C. 1970, c. P-40, s. 3.

⁷ *Canada Evidence Act*, R.S.C. 1970, c. E-10, s. 19.

of an Act printed with the name of the Queen's Printer shall be deemed to be a copy printed thereby.⁸ This provision is found under the subtitle "Evidence" and ensures that the official nature of a statute need not be proven in a court whenever a statute is used. It should not be regarded as showing that the enrolled bill rule as applied in Canada confines one to the printed Act, for the section only "deems" the copy official; it does not state that the original Act cannot also be official. Similarly with the *Evidence Act*, the Queen's Printer copy is "evidence" of the Act's content, but it need not be conclusive evidence thereof. At common law, when an Act's validity was in question, resort was made to an enrolled copy which differed in nature and form from the copies circulated to the public. In Canada, it is likely that scrutiny would similarly be directed beyond the reprinted Act to the original Act.

A Canadian court would probably echo Lord Pearce's statement in *The Bribery Commissioner v. Ranasinghe*:

The argument that by virtue of certain statutory provisions the subsequent reprint of an Act can validate an invalid Act cannot be sound. If Parliament could not make a bill valid by purporting to enact it, it certainly could not do so by reprinting it, however august the blessing that it gives to the reprint.⁹

Therefore, the enrolled copy of an Act would appear to be the original copy retained by the Clerk of the Parliaments. This makes no reference to the number of votes recorded nor the number of readings in the passage of the bill, showing only that the House of Commons and Senate passed the bill and royal assent was recorded on stated dates. To learn of the exact number of votes in favour of a bill and the number of readings, it is necessary to refer to the Journals of the respective Houses or to *Hansard*.

The Journals are the official record of the proceedings of the House. They are compiled daily from the "scroll" of the Clerk. The scroll, in reality foolscap sheets written in longhand by the Clerk, records the events of the House, whether the tabling of documents, the readings of a bill, or the votes on a bill or an amendment.¹⁰ The Journals made up from the scroll are more comprehensive, as they include the text of amendments and the results of recorded divisions as well as the date of royal assent to bills, the Speaker's rulings on procedure and questions of privilege, and the text of royal recommendations. According to Beauchesne, any conflict between the scroll and the Journals would be solved by reliance on the Journals.¹¹

The Journals do not serve the same purpose as *Hansard*, although there is some slight degree of overlap in their content. *Hansard* records the verbatim

⁸ *Supra*, note 5, s. 24(2).

⁹ [1965] A.C. 172 (P.C.) (Ceylon) at 195. The Court also referred to the original Act in *Halpin v. A.-G.*, [1936] L.R. 226.

¹⁰ "Divisions" or votes may be taken in several ways, the normal procedure being for the Speaker to call for yeas and nays. A roll call vote follows this oral vote only if five members rise, thereby signifying a desire for a record of the yeas and nays. (S.O. 9(1)). On a recorded division the names of those supporting each position are printed in both the Journals and *Hansard*.

¹¹ A. Beauchesne, *Rules and Forms of the House of Commons of Canada* (4th ed. Toronto: Carswell Co., 1958) at 92.

proceedings of the House, that is, the speeches and comments in the Chamber. The Journals are much more cryptic and are similar to minutes of a meeting. Their judicial treatment is also potentially different: the Journals are admissible evidence,¹² whereas *Hansard* is normally excluded. In practice, it may be that the Journals can rarely be admitted due to parliamentary privilege, but they are at least potentially open to judicial scrutiny.

With this brief introduction to parliamentary practice and records, it is now possible to proceed with a scrutiny of the enrolled bill rule and its relationship to parliamentary sovereignty.

2. *The Scope of the Enrolled Bill Rule*

The initial question in a discussion of enrolment might be whether such a rule as the conclusiveness of the parliamentary roll even exists. Both May and Bourinot express doubts on the subject, citing examples of defects in the passage of Acts which the legislature thought fatal; rather than rely on royal assent and enrolment to protect the defective Acts from challenge, the English Parliament thought it best to repair defects by passing remedial legislation.¹³ Such remedial conduct is incompatible with the *dictum* of Lord Campbell in *Wauchope* which implied that the face of the Act was conclusive as to the statute's validity.

One must, however, accept that statement with caution. It was clearly *obiter* to the case, which focussed on the plaintiff's objection to the defendant's obtaining an amendment to the private Act of Parliament establishing the defendant's railway line without giving prior notice to private interests affected, as required by the Standing Orders of the House. This Act had given the plaintiff a right to royalties, and it was his contention that the lack of notice made the Act inapplicable with regard to his rights. This assertion was abandoned on appeal,¹⁴ and the decision in favour of the plaintiff rested on statutory construction as to an allowable basis for calculating royalties.

Nevertheless, Lord Campbell's statement on enrolment requires further study. The Act with which he dealt was a private one, and it might be asked whether conclusiveness applies with regard to public Acts as well. Lord Campbell answered, again in *obiter*:

Due effect will be given to every Act of Parliament, private as well as public, upon what appears to be the proper construction of its existing provisions.¹⁵

¹² *Senate and House of Commons Act*, R.S.C. 1970, c. S-8, s. 6. This section appears to have been enacted to facilitate introduction of Journal copies. The British case of *Chubb v. Salomons* (1851), Car. & K. 75; 175 E.R. 469 had excluded the copies and said only the scroll would be admissible.

¹³ May, *supra*, note 2 at 558; G. Bourinot, *Parliamentary Procedure and Practice in the Dominion of Canada* (4th ed. Toronto: Canada Law Book Co., 1916) at 553. Bourinot gives the example of a Quebec statute which was not printed among the sessional statutes because it had only received two readings in the legislature. May deals with two statutes which were remedied legislatively: the Cotton Factories Regulation Bill, 1829 and the Schoolmaster's Widows Fund (Scotland) Bill, 1843.

¹⁴ *Supra*, note 1 at 720 (Cl. & F.); 283 (E.R.).

¹⁵ *Id.* at 725 (Cl. & F.); 285 (E.R.).

This statement is consistent with those by subsequent judges, who have refused to distinguish between public and private Acts.¹⁶

A further area of concern in *Wauchope* is the nature of the defect with which Lord Campbell was dealing, a possible breach of the Standing Orders of the House.

Parliament can be subject to different types of procedural rules, the observance or non-observance of which carry differing results. While Lord Campbell's precept may be correct with regard to a breach of House rules, it may not be so if the procedure ignored is in the constitution or if one House fails to assent to the Act.

A second case, usually cited in conjunction with *Wauchope* to show that the roll is conclusive, also deals with a private Act involving a railway company. *Lee v. Bude and Torrington Junction Ry. Co.* arose on an application for *scire facias*. In answer to a demand to the company's shareholders to pay the amount owing on shares subscribed for, the shareholders asserted that the Act under which the claim was made was invalid, procured by fraudulent misrepresentation. In rejecting such a claim, Willes, J. made the following statement:

I would observe, as to these Acts of Parliament, that they are the law of this land; and we do not sit here as a court of appeal from parliament. . . . We sit here as servants of the Queen and the legislature. Are we to act as regents over what is done by parliament with the consent of the Queen, lords and commons? I deny that any such authority exists. If an Act of Parliament has been passed improperly, it is for the legislature to correct it by repealing it; but, so long as it exists as law, the Courts are bound to obey it.¹⁷

The contribution of these words to the enrolment principle is at least questionable. The issue is not mentioned explicitly, although the reference to the overriding importance of the consent of the three constitutional elements of Parliament impliedly raises it. In fact, enrolment need not be regarded as the basis for the holding. One could just as easily regard the case as supportive of the principle that courts do not look into the internal proceedings of Parliament because of parliamentary privilege.¹⁸ Gough refers to it as the final appearance of a doctrine of fundamental law and a final rejection thereof.¹⁹ Marshall regards it as the nearest example of judicial espousal of parliamentary sovereignty.²⁰

¹⁶ *British Railways Board v. Pickin*, [1974] 1 All E.R. 609; [1974] 2 W.L.R. 208 (H.L.) Part G is the most recent case to approve *Wauchope*. See text, *infra*, for further discussion.

¹⁷ (1870-71), 6 C.P. 576 at 582.

¹⁸ See, e.g., D. V. Cowen, *2 Legislature and Judiciary* (1953), 16 Mod. L. Rev. 273 at 281, where *Lee* and *Wauchope* are discussed in the context of Parliament's privilege to control its internal proceedings. *Wauchope*, however, is also discussed with reference to enrolment. Cowen doubts that there is a rule making the roll conclusive.

¹⁹ J. Gough, *Fundamental Law in English Constitutional History* (Oxford: Clarendon Press, 1955) at 203.

²⁰ G. Marshall, *Parliamentary Sovereignty and the Commonwealth* (Oxford: Clarendon Press, 1957) at 27.

The *Lee* case, like *Wauchope*, fails to deal with the question of what constitutes "passage" of a bill by the Houses of Parliament and whether the courts can consider this. Both seem to regard a printed statute as unchallengeable. While it may not be acceptable for a court to review a policy decision by Parliament, one might argue that a court can inquire whether Parliament has assented in the proper form so as to "pass" the Act. Some later decisions meet this issue, but before studying them one should look at the early cases in which enrolment was first raised, for they are appropriate to a determination of whether the rule actually exists.

Three cases are of importance: *Pylkington's Case*,²¹ *The Prince's Case*,²² and *Arundel*.²³ The first dates from 1450 and is cited to show that the parliamentary roll is not always conclusive as to statutory validity.²⁴ The House of Commons passed an Act in 1450 summoning John Pylkington on a charge of rape to appear before it "before the Feast of Pentecost next ensuing." Because statutes were backdated to the beginning of parliamentary sessions in this era, the critical date would have been in 1450 and already passed by at the time the bill was enacted. The House of Lords therefore amended the statute to read "before the Feast of Pentecost which shall be in 1451." Pylkington challenged the validity of the statute as passed, because the Commons had not agreed to the amendment. Two members of the Bench supported him, although a third, Fortesque, C.J., was more cautious. Despite the assertion that the case proves that the roll is not conclusive, the case carries little weight as a precedent, since the Act was referred back to Parliament and no final judgment was reported.

The Prince's Case is a more important judgment since a decision was reported. The plaintiff was James I, who claimed lands in Cornwall on behalf of his eldest son. These and other lands had been granted to the eldest son of Edward III, along with the title of Duke of Cornwall, in a charter inscribed in the parliamentary roll. Elizabeth I had granted the contested lands to one of her subjects and James' assertion of title could succeed against this occupant only if the original grant by Edward had been by statute. In finding that the original charter was of a statutory nature, the Court made some important comments on enrolment:

[I]f they be entered in the Parliament roll, and always allowed for Acts of Parliament, it shall be intended that it was by authority of Parliament: but if an Act be penned, that the King, with the assent of the Lords, or with the assent of the Commons, it is no Act of Parliament, for three ought to assent to it, *scil.* the King, the Lords, and the Commons or otherwise, it is not an Act of Parliament, and by the record of the Act it is expressed which of them gave their assent, and that excludes all other intendments that any other gave their assent.²⁵

The words contain two significant principles. First, they show that there is a

²¹ Discussed in W. Lloyd, *Pylkington's Case and Its Successors* (1920-21), 69 U. of Penn. L. Rev. 20.

²² (1606), 8 Co. Rep. 1a; 77 E.R. 481 (Ch.).

²³ *The King v. The Countess Dowager of Arundel*, Ho. 109; 80 E.R. 258 (Ch.).

²⁴ Cowen, *supra*, note 18 at 277.

²⁵ *Supra*, note 22 at 39 (Co.); 505 (E.R.). See, also, *The Earl of Oxford v. Lord Willoughby* (1675), Jones 101; 82 E.R. 53 (Parli.).

rule holding that the roll is conclusive as to the validity of an Act, despite the postulate of some commentators to the contrary. Secondly, and equally importantly, they show that the roll only safeguards "Acts of Parliament". Statutes which by the face of the roll (or the original Act in Canada) are shown to have been passed without the assent of all three organs of Parliament will not be regarded as true Acts of Parliament. The logical corollary of this statement is that the assent of all three organs must be shown expressly on the face of the roll. While *The Prince's Case* is authority for the rule that the parliamentary roll is conclusive only in the absence of an error on the face of the roll, there was little assistance provided to aid in the definition of errors. Whether the total absence of assent by one organ of Parliament is the only "error" vitiating statutory effect is left unsettled. One can only speculate whether Coke and his contemporaries would have considered failure to comply with internal procedures in one House as fatal to its assent and equivalent to absence of assent.²⁶ Such matters concern us today, but they would be completely foreign to the evolving Parliament of Coke's day, which was still significantly judicial in function.²⁷

The Prince's Case can be of assistance in explaining and narrowing *Wauchope* and *Lee*, which did not mention error on the face of the roll. In both those cases, the court was asked to restrict the operation of a statute because it was procured through fraud and breach of the Standing Orders. Neither of these allegations could be proven through scrutiny of the roll, for the subject-matter would never appear on the face of the Act and would only be provable by extraneous evidence. Therefore, *Lee* and *Wauchope* were correct in stating that the roll was conclusive without referring to error of law, for their concern ended with the record of assent; neither needed to deal with the *extent* to which the parliamentary roll was conclusive.

The *Arundel* case is another judgment on enrolment. In this case, a bill to ratify the King's award in a land dispute was passed by the House of Commons with the endorsement "subject to the proviso annexed." However, the bill which the Lords passed and to which the King assented did not contain the terms of such proviso. The defendant claimed that the inconsistency between the bills to which the two Houses assented invalidated the plaintiff's title, a contention rejected by the Court. In the absence of the terms of any condition to the acceptance of a bill, assent must be regarded as absolute.²⁸ Even though the Journals of the House of Commons contained a summary of the proviso in question, this could not affect the Commons' assent to the bill. As the Court held:

The journal is of good use for the observation of the generality [*sic*] and the materiality of the proceedings and deliberations as to the three readings of any bill,

²⁶ Assuming such failure would be shown on the parliamentary roll, a fact that is doubtful. But see *infra*, the discussion of *Harris v. Minister of Interior*, [1952] 2 S.A.L.R. 428; reported *sub. nom. Harris v. Donges*, [1952] 1 T.L.R. 1245 (S.C.(A.D.)). D. V. Cowen analyzes the case in 1 *Legislature and Judiciary* (1952), 15 Mod. L. Rev. 282.

²⁷ 4 Holdsworth, *A History of the English Law* (London: Methuen & Co., 1966) at 182-84.

²⁸ *Supra*, note 23 at 110 (Ho.); 259 (E.R.).

the intercourse between the two Houses, and the like, but when the Act is passed, the journal is expired. . . . But if the record of the Act it self carry its deaths wound in it self, then it is true that the parchment, no nor the Great Seal, either to the original Act, or to the exemplification of it will not serve.²⁹

Arundel supports the proposition raised in *The Prince's Case* suggesting that an Act of Parliament can be challenged for error on the face of the record.³⁰ Unfortunately, it gives no edification as to what constitutes a fatal error. While the Court categorically rejects recourse to the Journals for evidence of invalidity, it implies that the roll can be bypassed to the extent of scrutiny of the original Act, an issue more important in England than in Canada.

More modern cases have adopted an "error on the face of the record" principle and a more restricted view of conclusiveness of the roll. This approach is contrary to the broad scope advocated by classical theorists of parliamentary sovereignty, relying on *Wauchope* and *Lee*. The South African case of *Harris v. Minister of the Interior*³¹ and the Privy Council decision in *The Bribery Commissioner v. Ranasinghe*³² both deal with enrolment and both endorse the principle that error on the face of the record could be fatal to the statute.

Harris is the first in a series of famous South African cases arising out of the Government's effort to impose an apartheid policy. The South African constitution was embodied in the *South Africa Act of 1909*, an Imperial statute, which, by section 35, entrenched certain voting rights in order to protect the franchise of coloured voters in the province of the Cape of Good Hope. To alter the entrenched provisions, a two-thirds majority of both Houses sitting together was required. This procedural provision was also entrenched, in that the same majority was required for its alteration. In 1951, the South African Parliament, by normal bicameral procedure, passed the *Separate Representation of Voters Act* which, as its title implies, provided separate parliamentary representatives for European and non-European voters and was inconsistent with the entrenched voting rights. When the validity of the statute was challenged, one of the defences raised by the Government was the conclusiveness of the roll, which prevented the courts from scrutinizing the procedure preceding enactment. Centlivres, C.J., in the Appeal Division of the South African Supreme Court, rejected the defence and affirmed the Court's right to look into the procedure used. The importance of his words merits their quotation in full:

Had Act 46 of 1951 stated that it had been enacted by the King, the Senate and the House of Assembly in accordance with the requirements of sections 35 and 135 of the South Africa Act, it *may* be that Court of law would have been precluded from inquiring whether that statement was correct, but that Act states that it was enacted by the King, the Senate and the House of Assembly. *Prima facie*, therefore, each constituent element of Parliament functioned separately in passing the

²⁹ *Id.* at 111 (Ho.); 260 (E.R.).

³⁰ A similar view was expressed in *College of Physicians and Cooper or Hubert* (1675), 3 Keb. 587; 84 E.R. 894 (Parli.): "[I]f upon the body of the Act itself, it appeared by the Commons and Lords without the King, Sc. it were void."

³¹ *Supra*, note 26.

³² *Supra*, note 9.

Act. The *original of that Act* signed by the Governor-General and filed with the registrar of this Court bears the certificate of the President of the Senate and the Speaker of the House of Assembly to the effect that it was passed by the Senate and the House of Assembly respectively. This clearly shows that the Act was not passed by the two Houses of Parliament sitting together. (emphasis added)³³

While Centlivres, C.J.'s first phrase is consistent with the principle of conclusiveness of the roll, it is interesting to note that he uses the word "may", rather than "is", in describing the restrictions on judicial review. This terminology is important, for it leaves open the possibility that the Court could look beyond error on the face of the record when an Act's validity is challenged. Admittedly, the words are *obiter*, for the situation here is one of error on the face. Once the Court determined that the *Separate Representation of Voters Act* purported to amend the entrenched provisions of the constitution, the special majority rule was mandatory and the enrolled Act showed that it was not used. Nonetheless, Centlivres, C.J., shows that the enrolled Act may not be conclusive, for example, in cases where it has been fraudulently altered.

It is interesting to note, too, that the Court does not attribute a presumption of validity to the Act. In *Lee*,³⁴ the Court showed trust in Parliament's actions. One must grant that the *Lee* case differed greatly on its facts from the present one, for there fraud was supposedly perpetrated on Parliament, while here it is Parliament which was the offender (a notorious fact in South Africa at the time). Still it is interesting to note the Court's attitude. In stating that the Act was *prima facie* passed normally, Centlivres, C.J. seems to imply that failure to specify compliance with a special mandatory procedural requirement on the face of the Act is equivalent to an error on the face of the record.³⁵

This view of His Lordship's statement is consistent with the Court's position in another South African case, *R. v. Ndobe*. In fact, this case was approved in *Harris. Ndobe*, too, dealt with section 35 of the *South Africa Act of 1909*. The defendant argued that an Act to alter the title system in Cape Province fell within section 35 of the constitution and must be passed by a two-thirds majority, because land tenure formed one of the bases of the franchise. The Court rejected the proposition that section 35 was in issue, but made an interesting statement *obiter* on enrolment:

The Court naturally assumes, until the contrary appears, that any Act of Parliament has been validly passed. Act 38 of 1927 is an Act which on the face of it deals with matters other than the matters dealt with by sec. 35, and must therefore be assumed to have been validly passed by Parliament as usually constituted. To assume that it was passed by the two Houses of Parliament sitting together as prescribed in sec. 35 would be to assume that the Act was not validly passed. If the Act therefore contained a clause offending against sec. 35, the Court would have to assume that the clause was *ultra vires*, in the absence of some indication in the Act or proof *aliunde* that such clause was passed as contemplated in the section.³⁶

If the cases do postulate a new way of looking at error of law, the scope of

³³ *Harris, supra*, note 26 at 1263 (T.L.R.).

³⁴ *Supra*, note 17.

³⁵ See Cowen, *supra*, note 18 at 277-78 for a suggestion that this could be the approach used.

³⁶ [1930] A.D. 484 at 496.

their definition will be difficult to delimit. If one were to require extrinsic evidence or proof on the face of the Act to prove compliance with every procedural rule, the result would be to undermine the policy of certainty behind the conclusiveness of the roll, for every Act would be open to judicial review. There must be some self-imposed restrictions by the courts on the scope of judicial review. On the other hand, the *Ndobe* test of error of law is beneficial to the effectiveness of procedural safeguards, for, without such an approach, an individual or group would be precluded from questioning an Act simply by words of assent.

To balance these interests and to harmonize *Harris* and *Ndobe*, one could say that what the courts have done is to define a test whereby the traditional presumption of validity continues to be applicable in every case. In fact, the presumption could be better described as a presumption of "regularity", comporting passage in the regular manner. Where special procedures have been devised, as in section 35 of the *South Africa Act*, the presumption would continue to apply; in other words, one presumes normal procedure in all cases. But the result of such an approach is obvious: the regular procedure constitutes an error of law in the special situation. This can only be rebutted by evidence of compliance with the necessary procedure.

While the *Ndobe* case appears to provide an effective way to safeguard procedural rules by getting around the enrolled bill rule, it may be inapplicable to Canada. A recent Privy Council case, *Akar v. A.-G. Sierra Leone*, contains comments on the requisite form of endorsement for an Act of Parliament. The Sierra Leone constitution required a two-thirds majority in the House of Representatives to pass general amendments to the constitution. For certain sections, such as section 23 which dealt with discrimination, a special procedure of passage by the House in two successive sessions with a dissolution between sessions was required. *Act No. 12* of 1962 purported to amend the constitution to restrict citizenship to those of Negro African descent and to make the Act retroactive to independence in 1961. Lord Morris of Borth-Y-Gest, who wrote the judgment of the Privy Council, held *Act No. 12* to be *ultra vires* because it was a discriminatory law contrary to section 23 of the constitution. He then went on to discuss the defendant's allegation that the endorsement reading that the Act was "passed" by the House implied passage in the ordinary method and not by the special majority:

Their Lordships do not think it right to draw any such inference. There is no reason to suppose that there was any irregularity. It is recorded by the Clerk of the House of Representatives that the bill was passed. There is no basis for any suggestion that the bill was not properly passed or for supposing that a procedural requirement was forgotten or ignored.³⁷

The statement is *obiter*, but so is that of the Court in *Ndobe*, and since Lord Morris' words are more loyal to the traditional view of presumption of validity, they may be followed. One wonders, though, if His Lordship's reaction would have been different if in *Akar* he had known of a total disregard for the procedure, as occurred in *Harris*.

The view in *Akar* is not completely harmonious with an earlier Privy

³⁷ [1970] A.C. 853 at 868.

Council decision on a Ceylonese case, *The Bribery Commissioner v. Ranasinghe*. Since a decision on the enrolled bill rule was directly relevant to the outcome of this case, the Court's words may be more weighty than those in *obiter* in *Akar*. The Ceylon (Constitution) Order-in-Council, the constitution of the country, required a two-thirds majority in the House of Representatives for an amendment to the constitution. Section 29(4) of the Order, which gave the power of amendment, went on to state:

Provided that no Bill for the amendment or repeal of any of the provisions of this Order shall be presented for the Royal Assent *unless it has endorsed on it a certificate under the hand of the Speaker* that the number of votes cast in favour thereof in the House of Representatives amounted to not less than two-thirds of the whole number of Members of the House (including those not present). Every certificate of the Speaker under this subsection shall be conclusive for all purposes and shall not be questioned in any court of law. (emphasis added)³⁸

Ranasinghe challenged his conviction by a judge appointed under the *Bribery Amendment Act, 1958* on the basis of that Act's invalidity on procedural grounds, specifically the failure to acquire a two-thirds majority for its passage. The Government claimed that the Court could not deal with this issue: it should confine its scrutiny to the official copy of the statute, rather than look behind it to the original Act for details of the statute's enactment. Lord Pearce, who wrote the opinion of their Lordships, rejected the contention, stating that the reprinting of an invalid Act cannot validate it:

Once it is shown that an Act conflicts with a provision in the Constitution, the certificate is an essential part of the legislative process. The Court has a duty to see that the Constitution is not infringed and to preserve it inviolate. . . . [A]fter the Royal Assent was added one original was filed in the Registry where it was available to the court. It was therefore easy for the court, without seeking to invade the mysteries of parliamentary practice, to ascertain that the Bill was not endorsed with the Speaker's certificate.³⁹

The case is significant, for it expressly recognizes a judicial capacity to look beyond the traditional parliamentary roll (here, the official reprint) when questioning the validity of a statute, seemingly without restricting the action to situations involving error on the face. How far beyond the roll one can go is open to question — whether to the original Act receiving royal assent (as here) or beyond that to the Journals? If only to the original Act, the case may not be especially helpful to Canadian litigants, for, as suggested earlier, the original Acts appear to be accessible already. However, this assertion as to the identity of the enrolled bill could be vulnerable to attack, in which case *Ranasinghe* would assist.⁴⁰

The *Ranasinghe* case may prove valuable in evading the obstacle posed by the enrolled bill rule. Whether or not it is so depends on which of four possible interpretations is given to the case. First, it could be regarded as

³⁸ *Supra*, note 9 at 194.

³⁹ *Id.* at 194-95.

⁴⁰ The Court in *Harris* (*supra*, note 26) also appears to have looked at the original Act. However, Cowen believes that Centlivres, C.J.'s decision rested on his scrutiny of the enrolled bill. It is true that this document may have been sufficient to prove invalidity in the case; the Court in *Ranasinghe* nevertheless remarked on the reliance on the original Act.

illustrative of the expanded view of error of law on the face of the Act that was suggested in *Harris* and *Ndobe*. Alternatively, *Ranasinghe* could be regarded as authority for a redefinition of the parliament roll (or of the enrolment rule), by holding that the original Act, not an enrolled one, is conclusive evidence of statutory validity. Thirdly, one could narrow this hypothesis by saying that recourse to the original Act is permitted only when the court is implicitly (or explicitly) instructed to review that document by a constituent instrument. Finally, and much more broadly, one could view *Ranasinghe* either as present authority for, or as the basis for the future judicial formulation of, the proposition that mandatory procedural rules impliedly revoke the enrolment rule, thereby imposing a duty on the courts to scrutinize Acts for procedural regularity.

The first postulate can be quickly disposed of. That there is an error of law here is clear: the constitution made the Speaker's certificate a condition precedent to the presentation of an amending bill for royal assent, and non-compliance would invalidate the purported Act.⁴¹ One might say that the Privy Council approached the problem from the view taken in *Harris* (that is, presuming an error of law in a situation involving special procedural requirements unless compliance with the rules is proved) when it stated, "If the presence of the certificate is conclusive in favour of such a majority, there is force in the argument that its absence is conclusive against such a majority."⁴² However, the Court appears to go beyond relying on presumptions of regularity and error of law to find a *duty* to investigate regularity.

By the narrowest view of the holding in the case, one could say that the Court is *required* by the constitution to look to the original of the Act to ensure that it has been endorsed according to the mandatory form. Thus, one regards the constitution as impliedly precluding the roll, as traditionally constituted, from being conclusive. Lord Pearce's statements on the judicial "duty" to preserve the constitution support such a view and the words of section 29(4) of the Constitution Order-in-Council reasonably allow one to draw this conclusion, for they provide that no bill is to be presented for royal assent without the Speaker's Certificate, which is to be conclusive of procedural compliance. That certificate could only be discovered by scrutiny of the original bill presented for royal assent. An enrolled one could be no help. If this approach is to be regarded as the correct one, it limits *Ranasinghe* to the few situations in which procedural forms are set out in a written constitution and only observable by study of the original enactment.

Alternatively, the case might be regarded as holding that error of law on the face of the Act can be proven by the use of either an official copy of the Act (*i.e.*, the enrolled bill) or by the original enacted copy and this is so regardless of whether or not one deals with procedure enshrined in a constitutional document. Such a view extends the law as stated in *Wauchope*,⁴³ where Lord Campbell held that the parliamentary roll is conclusive. To an

⁴¹ *Id.* at 200.

⁴² *Id.* at 194.

⁴³ *Supra*, note 1.

argument based on *Wauchope*, Lord Pearce replied that he believed that the Court there would have resorted to the original bill just as he had done if confronted with circumstances similar to those in the case at issue.⁴⁴ The circumstances of which he speaks might be characterized as ones in which procedures are statutorily imposed, as contrasted to the Standing Orders in *Wauchope*. While Lord Pearce's words might seem to imply that the roll of any parliamentary system is not conclusive if certain procedural rules are not followed, one must put his words in context. First, resort to the original Act does not necessarily mean that the statute is invalid for procedural irregularity. Even if the fact of non-compliance were determinable from the face of the original Act, the effect thereof would depend on the nature of the procedure. Secondly, other statements in the judgment seem to distinguish the United Kingdom's constitution from Ceylon's written document, and one wonders if the presence of the "governing instrument" is the determinant factor here.⁴⁵ However, that is a very narrow view and one not supported by other statements in the case.

From Lord Pearce's words, it seems clear that the *Ranasinghe* case at least provides authority to look beyond the face of the reprinted Act to the original Act in *all* cases. However, in some cases, one may want to look beyond the original Act. Seemingly, one is not precluded from using the case even where procedural forms are contained in other than constitutional documents in order to argue that it shows that procedures similar to those here, whether constitutional or statutory, impliedly repeal the enrolled bill rule. In other words, where special procedures have been established there is an implied repeal of that rule and an implied duty on the courts to ensure that those procedures have been followed. The evidence may be the original Act (as in *Ranasinghe*) or it may be the Journals of the House or even extrinsic evidence⁴⁶ — the courts should use whatever material is necessary to ensure that an "Act" exists.

This gives a very broad interpretation to *Ranasinghe*, yet it is submitted that such a view is feasible in countries such as Australia and Canada where judicial review of statutes on federal grounds is an acceptable and customary practice. In the United Kingdom such an interference with Parliament would appear to be a great extension of judicial power.⁴⁷ Yet even in that country, a court might acceptably look beyond the enrolled Act in a given case. Suppose, for example, that an Act were passed without the assent of the House

⁴⁴ *Supra*, note 9 at 195.

⁴⁵ *E.g., id.* at 195:

[I]n the Constitution of the United Kingdom there is no governing instrument which prescribes the law-making powers and the forms which are essential to those powers. There was, therefore, never such a necessity as arises in the present case for the court to take any close cognisance of the process of law-making.

⁴⁶ The author is ignoring the problem of parliamentary privilege, which will be discussed in Part I. Lord Pearce showed his awareness of this issue in *Ranasinghe*, *id.* at 195.

⁴⁷ W. Friedman expresses such a view in *Trethowan's Case, Parliamentary Sovereignty, and the Limits of Legal Change* (1950), 24 *Aust. L.J.* 103 at 106.

of Lords. Friedmann believes that even an English court would rule the Act invalid, and he argues that the procedural irregularities which would spark intervention should be determined by gauging the political and psychological reaction provoked by noncompliance.⁴⁸ While Friedmann is right to differentiate the effects of different types of procedural irregularity, his test of "political and psychological reaction" is impractical, for in most cases the public is unaware that a given procedural form is required. Furthermore, public reaction would be more likely against the omission of a referendum (Friedmann's example of a procedure that the courts would not enforce) than a special majority or possibly even the consent of the second House; yet the special majority might be the most vital provision for a certain interest group. Special procedures are often instituted to protect minorities, a fact precluding widespread reaction to noncompliance. In reality, Friedmann's test is somewhat unsatisfactory because of the vagueness and uncertainty attending it. What Friedmann really means when he talks of reaction is that of the courts, not the public, and this will often be difficult to predict.

However, to summarize from the cases discussed, it is clear that there exists a rule which treats statutes as conclusive to some extent.⁴⁹ There is weighty precedent for the assertion that errors of law on the face of the enrolled Act can cause invalidity, as can those on the original Act to which royal assent was given. Whether a court can look further than the face of the Act is not settled conclusively, yet *Harris* seems to alter the presumption of validity where special procedures exist. More importantly, *Ranasinghe* if interpreted as implying repeal of the enrolled bill rule can be regarded as laying the foundation for a new approach to statutory validity.

Traditional advocates of parliamentary sovereignty would decry this proposition. Whether one can say that they have grounds for objection necessitates a study of the origins of the enrolled bill rule and its relationship to sovereignty.

C. ENROLMENT AND PARLIAMENTARY SOVEREIGNTY

It is not surprising that enrolment is linked to a discussion of parliamentary sovereignty, for both are addressed to the issue of the scope of judicial review of Parliament's actions. Similarly, parliamentary privilege is usually raised in conjunction with these issues, as it too excludes the courts in some situations.

E. C. S. Wade is a major protagonist of the position that exclusion of judicial review by enrolment and privilege is illustrative of parliamentary sovereignty,⁵⁰ and he cites *Wauchope* and *Lee* as authorities. The phrase "parliamentary sovereignty" has been the subject of an extensive debate for

⁴⁸ *Id.* at 107.

⁴⁹ This statement is consistent with those in *Craies' Statute Law*, *supra*, note 2 at 38; Marshall, *Parliamentary Sovereignty*, *supra*, note 20 at 23, J. D. B. Mitchell, *Sovereignty of Parliament — Yet Again* (1963), 79 L.Q. Rev. 196 at 220.

⁵⁰ E. C. S. Wade, "Introduction", Dicey, *Introduction to the Study of the Law of the Constitution*, E. C. S. Wade, ed. (10th ed. London: MacMillan & Co., 1965) at xlii-iii.

decades, for the term "sovereignty" is a difficult one with which to deal.⁵¹ Technically it means unlimited power. In applying the term to Parliament, Dicey reached the conclusion that Parliament has the right to make any law whatsoever, and no person or body has the right or power to override or restrict such legislation: an Act of Parliament must be applied.⁵² Because the enrolled bill rule and parliamentary privilege are consistent with this exclusionary principle in requiring the courts to accept Parliament's actions unquestioningly, Wade regards them as aspects of parliamentary sovereignty.

Wade's view has been subject to attack on two fronts: on the basis that the enrolled bill rule is not as rigid as he defines it and on the ground that parliamentary sovereignty, which does not preclude all judicial review, is separate from the enrolled bill rule.

Support for the first position can be drawn from the earlier discussion of *Harris* and *Ranasinghe*. The second position involves further refinement of the term "parliamentary sovereignty." Proponents of some degree of judicial review are wary of the term "sovereignty" because of the preconceptions associated with the word, which restrict in advance the type of questions and, therefore, the answers as to the scope of authority of the institution to which the term applies.⁵³ Jennings prefers the use of the phrase "parliamentary supremacy" rather than "sovereignty", since Parliament is not truly sovereign because of its answerability to the electorate. However, he does use the term "legal sovereignty" as well.⁵⁴ In so doing, he is careful to give a definition, for Dicey described Parliament as the "legal sovereign" as well and reached different conclusions. For Jennings, legal sovereignty is a term of art which describes the relationship between the legislature and the judiciary and denotes that the courts must enforce any Act passed by the King, Lords and Commons, including one that alters the rules for passing an Act.⁵⁵ The courts must enforce every statute, but in so doing they have a duty to scrutinize the procedure of enactment to ensure that "Parliament" has acted. This exercise is a necessity in any situation where the sovereign is not a single person. In such a case,

⁵¹ Hans Kelsen, *Peace Through Law* (Chapel Hill: U. of N. Carolina, 1944) speaks cynically of the term:

We can . . . derive from the concept of sovereignty nothing else than what we have purposely put into its definition. Consequently, the incompatibility derived from our definition means, at bottom, that something is incompatible with our wishes.

Kelsen was discussing sovereignty in the international sphere, but Marshall notes the same difficulties in discussing Parliament: G. Marshall, *Parliamentary Supremacy and the Language of Constitutional Limitation* (1955), 67 *Jurid. Rev.* 62.

⁵² *Supra*, note 50 at 39-40.

⁵³ Marshall, *Parliamentary Supremacy*, *supra*, note 51 at 73, 75-76 prefers an approach whereby one asks "What are the powers of Parliament?" or "Is a given provision a restriction on its power to act?" In other words, one approaches the question empirically rather than the framework of a traditional concept.

⁵⁴ I. Jennings, *The Law and the Constitution* (5th ed. London: U. of London Press, 1959) at 149-51. S. A. deSmith registers his discomfort with the term as well: *Constitutional and Administrative Law* (2d ed. Middlesex: Penguin Education, 1973) at 66.

⁵⁵ The view is well-expressed by numerous authors, including R. F. V. Heuston, *Essays in Constitutional Law* (London: Stevens & Sons Ltd., 1961) at 16-21; Marshall, *Parliamentary Sovereignty*, *supra*, note 20 at 23-27; deSmith, *id.* at 84-88.

rules are necessary for the identification of the sovereign and for the ascertainment of his (its) will.⁵⁶ One is not interfering with the exercise of that will; rather, these rules, which are logically prior to the sovereign, are a necessary pre-condition to the validity of his (its) acts.⁵⁷ Such a view is applicable to Parliament because "sovereignty" inheres not in the individual members but in the institution made up by the collective will of the members acting in a determinable way.⁵⁸ From this postulate Heuston elaborates the "new" view of parliamentary sovereignty: one asks not "what is sovereignty?", but "what rules define Parliament's composition?" Heuston notes:

(1) Sovereignty is a legal concept: the rules which identify the sovereign and prescribe its composition and functions are logically prior to it.

(2) There is a distinction between rules which govern, on the one hand, (a) the composition, and (b) the procedure, and, on the other hand, (c) the area of power of a sovereign legislature.

(3) The courts have jurisdiction to question the validity of an alleged Act of Parliament on grounds 2(a) and (b), but not on ground 2(c)⁵⁹

Thus, those who espouse such a view do not exclude all judicial review, but only that going to substance. To them, enrolment is a rule of evidence which has nothing to do with parliamentary sovereignty. It only restricts the scope of the courts' review of compliance with the rules defining Parliament. Depending on the accepted scope of the enrolled bill rule, a court should be able to investigate the Act or the Journals to determine whether the necessary rules of procedure have been followed.

Wade does not accept the enrolled bill rule as an evidential restriction, although at one point he concedes that it could be so regarded. However, the rigidity of his view of that rule precludes any advantage to his concession:

If Parliament speaks according to fixed rules, the courts are only concerned with the question, 'Has Parliament spoken?' To this it is submitted there can be only one answer if the evidence is found on the Parliament Roll.⁶⁰

The statement is surprising in its assumption that Parliament might be subject to fixed rules, a matter contrary to the orthodox view of parliamentary sovereignty. However, the point makes no difference, as Wade looks only to the roll to see if Parliament has acted, and seemingly would make no concession for an error on the face of the original Act and perhaps even for error on the enrolled one.

For Wade all judicial review is precluded by the sovereignty principle, and enrolment and privilege⁶¹ only buttress the fundamental rule that courts

⁵⁶ Even where the sovereign is an individual, rules may be necessary to determine whether "law" is made or only a whim expressed. See Marshall, *id.* at 13.

⁵⁷ R. T. E. Latham, *The Law and the Commonwealth* (Toronto: Oxford U. Press, 1949, first printed in 1 Hancock, *Survey of British Commonwealth Affairs* (Oxford U. Press, 1937) at 510) at 523.

⁵⁸ See, Marshall, *Parliamentary Supremacy*, *supra*, note 51 at 67.

⁵⁹ *Supra*, note 55 at 6-7.

⁶⁰ *Supra*, note 50 at 1x.

⁶¹ Enrolment precludes review *after* an Act is passed. Privilege, while operative at the time as well, can also serve to prevent interference with bills *during* passage through Parliament.

cannot question Parliament's actions. With all due respect, this view must be regarded as erroneous. A historical overview will show that enrolment predated parliamentary sovereignty, while cases such as *Arundel*, *The Prince's Case*, and *Ranasinghe* show that the courts have a duty to ensure that they enforce only "Acts of Parliament". While enrolment (and privilege) may restrict the courts' scrutiny, the power of review still exists.

D. HISTORICAL ORIGINS

To discuss the origin of the enrolment principle, one must look to the very beginnings of Parliament, to the time when it was evolving from a court of law into a legislative body. Many of Parliament's present attributes, including privilege and conclusiveness of the roll, derive from its legal inception.⁶² Parliament's role as a court predominated over its legislative function until the Tudor period. In a manner similar to the other medieval courts of common law, which possessed parchment rolls recording pleas, Parliament kept parliament rolls⁶³ and statute rolls.⁶⁴

The conclusiveness of the parliamentary roll was only a manifestation of the rule of conclusiveness applicable to the records of any court of record. Such courts had several characteristics, of which one was the power to fine or imprison (the basis of Parliament's privilege to punish for contempt) and another was the infallibility of the formal record.⁶⁵ The underlying rationale for the rule, which excludes extrinsic evidence of court proceedings, lies in the fact that the record itself constitutes the judicial act; it is not "evidence" of what occurred, but the event itself.⁶⁶ The common law courts were originally endowed with this characteristic because of their special relationship with the King: just as the monarch's assertions as to what occurred in his presence

⁶² For a detailed discussion of the origins of Parliament, see, C. H. McIlwain, *The High Court of Parliament and Its Supremacy* (Hamden, Conn.: Archon Books, 1962) at 148-49, McIlwain shows that the confusion of judicial and legislative roles was typical for many years, for example among Coke and his successors:

On the very eve of Parliament's great practical demonstration of its legislative sovereignty, and in fact long after that, men kept on citing the old precedents for judicial supremacy, and it is often clear that they themselves did not notice that the legislative power they were actually advocating was anything different from the old powers of the High Court of Parliament.

⁶³ 1 Pollock & Maitland, *The History of English Law* (2d ed. Cambridge: Cambridge U. Press, 1968) at 199-200; McIlwain, *id.* at 19-23. Parliament rolls ceased to exist in 1503, to be replaced by the Journals of the two Houses of Parliament: 2 Holdsworth, *supra*, note 27 at 421-22.

⁶⁴ The statute rolls were preserved in Chancery as records of the statutes passed, although one might query their usefulness for interpretation purposes. See *Claydon v. Green*, *supra*, note 2; *Barrow v. Wadkin (No. 2)* (1857), 24 Beav. 327; 53 E.R. 384 (Rolls Ct.).

⁶⁵ 5 Holdsworth, *supra*, note 27 at 158.

⁶⁶ In 4 *Wigmore on Evidence* (Toronto: Little, Brown & Co., 1972) at 3456, the theory of judicial records is described as follows:

The judgment roll, as finally made up, embodies in itself alone the entirety of the controversy as adjudicated, and thus supersedes the miscellaneous mass of oral and written pleadings, motions, and orders, which have gone to make up the proceedings.

were incontestable, so were those of his special courts.⁶⁷ Unfortunately, the medieval historians leave us with little information as to what constitutes the record — the statute roll, the original Act, or the Journals — and Parliament's continuing development as a legislative body hindered a clear enunciation of the enrolled bill rule.

The principal characteristic of the British constitution, parliamentary supremacy or sovereignty, evolved through the seventeenth century struggles of Parliament and the Crown, which climaxed in 1688 with the Glorious Revolution. Parliament's legislative supremacy had been proven by the end of the fifteenth century, although there was still some debate as to whether its Acts were subject to review to ensure consistency with natural law (or common law).⁶⁸ With the Glorious Revolution it was recognized that no such doctrine of fundamental law could exist in Britain. To have subjected Parliament to constraints in the common law would have been to concede a distinct advantage to the royal prerogative, which was founded in common law. The theory of parliamentary sovereignty was thus an invention of common law lawyers to solve the problem of the *locus* of power.

While it is recognized that the conclusiveness of the roll may have assisted in the development of parliamentary sovereignty by keeping outside agencies from reviewing parliamentary actions,⁶⁹ yet it need not be looked on as an integral part of the principle. This brief historical overview shows that the enrolment rule preceded the theory of parliamentary sovereignty by many years and that it is judicial in origin, while parliamentary sovereignty is rooted in Parliament's legislative role. This difference in origin, it is submitted, supports the argument that the enrolled bill rule should be regarded as a rule of evidence rather than a concomitant of sovereignty.

A historical discussion can teach one something about process as well as fact. Current concepts did not emerge fully developed; they were initially pragmatic solutions devised to solve a problem, and, without degrading them in any way, they can be studied in terms of modern values and historical evolution to determine their present relevance and scope.⁷⁰ This was the approach taken in the early case of *Stockdale v. Hansard*,⁷¹ which made a distinction between Parliament's judicial and legislative functions with regard to the issue of privilege, an approach that should be adopted with respect to enrolment. While there was logic in holding the roll conclusive in *The Prince's*

⁶⁷ Pollock & Maitland, *supra*, note 63 at 669.

⁶⁸ Coke's *dictum* in *Bonham's Case* inspired the debate. McIlwain (*supra*, note 62) believes that a limitation on Parliament existed, but see *contra*, T. Plucknett, *Bonham's Case and Judicial Review* (1926), 40 Harv. L. Rev. 30 and Gough, *supra*, note 19. Gough argues convincingly at 35-36 that seventeenth century courts were using "natural law" as an aid in construction of statutes and assuming that Parliament would not violate the common law rights to freedom and property. The courts would not necessarily refuse to enforce a statute contrary to these values.

⁶⁹ Gough, *id.* at 27 remarks on this assistance from Parliament's judicial character.

⁷⁰ See McIlwain, *supra*, note 62 at 370; Marshall, *Parliamentary Sovereignty*, *supra*, note 20 at 48.

⁷¹ *Stockdale v. Hansard* (1839), 9 Ad. & E. 1; 112 E.R. 1112. McIlwain praises this approach: *supra*, note 62 at 245-46.

Case and other medieval judgments, such a rule is questionable today. If one's concern is truly the validity of statutes and this is easily determinable by public record, one should look for the assent of each House in the public documents available instead of adhering to ancient practice — unless today there are other important policies militating against such inquiry.

E. THE ENROLLED BILL RULE IN CANADA

Discussion of parliamentary sovereignty might initially seem superfluous to the Canadian situation, since Dicey rejects the possibility of colonial legislatures or those within a federal system being sovereign, governed as they are by a superior law, whether an Imperial statute or a written constitution.⁷² Even though the preamble and provisions of the *British North America Act* confer on Canada "a Constitution similar in Principle to that of the United Kingdom",⁷³ Dicey believes that sovereignty was not a characteristic conferred because the Canadian Parliament relied on an Imperial statute for its powers.

Jennings, in contrast, believes that it is not inconsistent to speak of sovereignty when referring to colonial or federal legislatures:

If sovereignty is merely a legal phrase for legal authority to pass any sort of laws, it is not entirely ridiculous to say that a legislature is sovereign in respect of certain subjects, for it may pass any sort of law on those subjects, but not on other subjects.⁷⁴

On this view, sovereignty can be a characteristic of a legislature in any constitutional framework, provided that the body acts within its legal powers, whether defined by a constitution or the common law. Cases such as *Hodge v. The Queen*⁷⁵ and *Webb v. Outrim*⁷⁶ are consistent with such a view, holding as they do that a colonial legislature, acting within its legislative jurisdiction under the constitution, possesses plenary power. Its Acts cannot be restricted by judicial review on the grounds of reasonableness or other substantive grounds, so the legislature is "sovereign" in these areas.

Jennings' words are logical and easily applicable to Canada. However, in a discussion of procedure and Parliament, it is common to avoid the debate over sovereignty and just speak of the applicability of the various characteristics of the British constitution to the colonies. Significant in this regard are those of "illimitability" and "flexibility" (or the "uncontrolled" nature of the constitution, as it was described in *McCawley v. The King*).⁷⁷ A flexible constitution, as distinct from a rigid or controlled one, can be amended by ordinary statute; no special procedure is required to change it. That this attribute is operative to some degree in Canada by virtue of sections 91(1) and 92(1) of the *B.N.A. Act* is clear. These sections confer on the Parliament of

⁷² *Supra*, note 50 at 92, 145-51, where he says that the Canadian constitution is more similar to that of the U.S. than that of Britain except with regard to Cabinet and parliamentary institutions.

⁷³ 30 & 31 Vict., c. 3 (Imp.).

⁷⁴ *Supra*, note 42 at 151.

⁷⁵ (1883), 9 App. Cas. 117 (P.C.) (Ont.).

⁷⁶ [1907] A.C. 81 (P.C.) (Aus.).

⁷⁷ [1920] A.C. 691 (P.C.) (Aus.).

Canada⁷⁸ and the provincial legislatures respectively the power to amend their constitutions. The power is limited substantively, as the federal government cannot alter the distribution of powers or minority education and language rights, while the provinces cannot alter the office of Lieutenant-Governor. But there are no procedural limitations on amendment.

The fact that the legislature is subject to a written constitution is no bar to the flexibility of the constitution. In *McCawley*, the fact that the constitution of Queensland was written was irrelevant. A constitution can be uncontrolled even if it “. . . finds its genesis in an originating document which may contain some conditions which cannot be altered except by the power which gave it birth.”⁷⁹

Similarly, the doctrine of illimitability confers on Parliament or a legislature the power to pass any laws within the scope of its constitutional jurisdiction. The legislative body cannot be prevented from repealing or amending these laws, regardless of any terms therein which might try to prevent such action. *Hodge* and *Webb v. Outrim* recognize this plenary power.

Therefore, the Canadian Parliament, despite its lack of sovereignty according to the orthodox view,⁸⁰ possesses many of the characteristics of the British constitution because it is fashioned on that model. The question that remains to be determined is whether the enrolment rule is applicable in Canada because of that rule's inherence in the British parliamentary system, specifically in relation to attributes such as flexibility and illimitability.

That the enrolment principle has been operative in Canada is proven by the *Irwin* case, where the Court refused to look for a royal recommendation preceding the introduction of a money bill, as required by section 54 of the *B.N.A. Act*:⁸¹

It is a matter of elementary law that when a statute appears on its face to have been duly passed by a competent legislature, the courts must assume that all things have been rightly done in respect of its passage through the legislature, and cannot entertain any argument that there is a defect of parliamentary procedure lying behind the Act as a matter of fact. . . .⁸²

The force of the *dictum* may be somewhat weakened by the Court's subsequent determination that the Act in question was not a money bill within section 54. Even if this were so, *Irwin* provides a clear endorsement of the enrolled bill rule.

⁷⁸ Only since 1949: see *B.N.A. (No. 2) Act 1949*, 13 Geo. VI, c. 81 (U.K.).

⁷⁹ *Supra*, note 77 at 704.

⁸⁰ Indeed, Dicey's view could be regarded as applicable only to Britain. If so, “parliamentary sovereignty” could be regarded as only a historical phenomenon and other systems modelled on the British would have to rely on theories of “flexibility” versus “rigidity” to rationalize their operations.

⁸¹ S. 54 of the *B.N.A. Act* reflects traditional British procedure. Appropriations from the public revenue can only be made on the “recommendation” of the Sovereign which, in Canada, is contained in a document printed in the House of Commons' *Order Paper* and its *Votes and Proceedings* and is attached to the money bill. For further information, see May, *supra*, note 2 at 579, 749 ff.

⁸² [1926] Ex C.R. 127 at 129.

The case should perhaps be tempered by the reading of *Gallant v. The King*.⁸³ In that case, the Supreme Court of Prince Edward Island declared an Act invalid because the Lieutenant-Governor assented thereto several months after his predecessor withheld assent. In determining that his actions contravened sections 55 and 90 of the *B.N.A. Act*, the Court made reference to the extrinsic evidence of the *Royal Gazette* and made no mention of the enrolment principle whatsoever. If adhering to that principle, the Court would have held the Act valid, since the face of the Act showed the requisite consent of Crown and legislature.

Despite *Gallant*, there is at least one Canadian precedent for the enrolled bill rule and the question which must be determined is its origin. There is good reason to hold that the rule does not rest on British roots in Canada, particularly if one regards that rule as deriving from Parliament's judicial origins rather than parliamentary sovereignty, as postulated above. The case of *Kielley v. Carson*, although concerned with parliamentary privilege in colonial legislatures, can be applied by analogy to the question of enrolment in colonial legislatures. In *Kielley*, the defendant Speaker of the Legislative Assembly argued that the Assembly had power to commit for contempt, drawing an analogy to the contempt power of courts of record. Baron Parke, writing the opinion of the Privy Council, did not accept the proposition:

This Assembly is no Court of Record, nor has it any judicial functions whatever; . . . all those bodies which possess the power of adjudication upon, and punishing in a summary manner, contempts of their authority, have judicial functions, and exercise this as an incident to those which they possess, *except only the House of Commons*, whose authority, in this respect, rests upon ancient usage. (emphasis added)⁸⁴

Since the Canadian Parliament and provincial legislatures have never had judicial functions, it is arguable that the enrolment principle must be founded elsewhere than in the British court of record analogy.

Resort might be had to the argument that the conclusiveness of the roll is an inherent attribute of Parliament aside from judicial considerations and, therefore, applicable to all legislatures modelled upon it. The Court in *Kielley* rejected such an argument to support the privilege claimed, saying that the British House derived many of its privileges from the *lex et consuetudo parliamenti*, a part of the English common law conferring unique privileges on the British Parliament which were in no way related to its representative function.⁸⁵ One could argue that enrolment is similarly unique to the British House.

Of course, such a view might run counter to E.C.S. Wade's position that both privilege and enrolment are aspects of parliamentary sovereignty and

⁸³ [1949] 2 D.L.R. 425.

⁸⁴ (1842), 4 Moo. P.C. 63 at 90; 13 E.R. 225 at 235 (P.C.) (Nfld.). *Kielley* overruled *Beaumont v. Barrett* (1836), 1 Moo. P.C. 59; E.R. 733 (P.C.) (Jamaica), where such contempt power was conceded. *Kielley* has been followed in *Fenton v. Hampton* (1858), 11 Moo. P.C. 347 at 396; 14 E.R. 727 at 745 (P.C.) (Van Dieman's Land); and *Doyle v. Falconer* (1866), 4 Moo. P.C. (N.S.) 203 at 218; 16 E.R. 293 at 299 (P.C.) (Dom.).

⁸⁵ *Kielley*, *id.* at 89 (Moo.); 235 (E.R.).

automatically operative in a system with a sovereign Parliament. *Kielley* seems to conflict with the argument, for it shows that privilege (and, arguably, enrolment) derives from the judicial antecedents of the British Parliament and not the political theory known as "parliamentary sovereignty."

Kielley did not negate the existence of parliamentary privilege in colonial legislatures; rather it proposed a "necessity" test to determine the powers of those bodies.⁸⁶ It is not illogical to apply a necessity principle in determining the existence and extent of the enrolment principle. Whether the conclusiveness of the roll is a necessity to the legislature's operation is a question which *Irwin* seems to have implicitly answered to some degree. Discussion of the United States' experience may also prove helpful, for the enrolled bill rule is not limited to any one kind of constitutional system (a fact providing further evidence of its separate existence from parliamentary sovereignty).⁸⁷

In the United States, there is a divergence of opinion as to the limit on judicial review of procedural regularity of a bill. The federal courts and those of many states adopt an enrolled bill rule, while other states accept a Journal entry rule, allowing resort to the certified House and Senate Journals to establish regularity. In both cases, there is a presumption of validity accorded to the enrolled statute and the rule is characterized as one of evidence.⁸⁸

The arguments in support of each rule may give some guidelines in determining a Canadian rule. Those favouring the enrolled bill rule justify their position on the need for certainty: the public must be able to assume that an enrolled Act is valid so that people can organize their affairs without risk of attack on the statutes upon which they rely. A further, although lesser, goal is to prevent inconsistent treatment among different courts.⁸⁹ This problem would be avoided to some degree by *stare decisis*. Another reason for refusing to look past the roll rests on the doctrine of separation of powers. This argument is not transferable to Canada where the judiciary is not a co-equal of the legislature. Parliament's theoretical superiority allows it to overrule judicial decisions by legislation, provided it acts within the sphere of its constitutional powers under the *B.N.A. Act*.

Those who advocate the Journal entry rule propound three arguments against the conclusiveness of the roll based on legal theory, practical policy and constitutional necessity. The legal theory argument is relevant to the British system, for it attacks the court of record analogy. Opponents to the rule reject the idea that the enrolled Act is "an event in writing", for the enrolled bill has not been dealt with by the legislature in its final form. The enrolled bill is only a certified copy of the *true* legal act, which occurred on

⁸⁶ *Id.* A legislature has such powers "as are necessary to the existence of such a body, and the proper exercise of the functions which it was intended to execute."

⁸⁷ Federal statutes are "enrolled" in the United States after authentication by the Speaker of the House of Representatives and the President *pro tempore* of the Senate, approval by the President, and deposit with the Secretary of State.

⁸⁸ See, 82 *Corpus Juris Secundum* 83 at 136-38; 73 *American Jurisprudence* (2d) 90 at 317-18.

⁸⁹ *Field v. Clark* (1891), 143 U.S. 649 (S.C.).

the voice vote given to the original bill.⁹⁰ Therefore, there is no logical reason for the enrolled bill rule, and while the Journals are no more the original enactment than the enrolled bill, they at least record the votes on the bill. Wigmore, while agreeing that the court of record analogy is inaccurate, still favours conclusiveness of the enrolled bill on the basis of the policy reasons given in favour of finality of judicial records, especially the need for certainty.⁹¹

The second reason to attack the enrolled bill rule is the practical desire to prevent fraud, error or misrepresentation by the legislature. Of course, there is clearly an equivalent danger of error or fraud in the Journals. While this may be a reason to use caution before turning to them, one should not ignore the important data available from them that one cannot find on the face of the Act, nor should one ignore their value in discovering innocent errors made in passing and engrossing a bill.

Finally, the constitutional argument is founded on a belief in the judicial duty to protect the constitution from conscious or unconscious violation by the legislature. This raises once again the question of whether and to what extent judicial review is desirable. In the U.S., judicial review is an acceptable practice, as it is in Canada today on questions relating to legislative jurisdiction, the office of the Lieutenant-Governor, and the exceptions to section 91(1) of the *B.N.A. Act*, despite the constitutional assumption that the legislature is superior to the judiciary.⁹²

This supervision has not normally extended to procedural matters affecting parliamentary operations, perhaps a reflection of the lack of errors in procedure or the inability to assert standing to challenge a statute.⁹³ Active intervention in procedural matters might raise opposition from those who criticize judicial supervision of elected legislatures.⁹⁴ However, the traditional reason for this sympathy for the legislature has been the courts' interference in areas of substantive law, such as the delineation of sections 91 and 92 of the *B.N.A. Act*. Admittedly, there is definite ground for judicial deference in the review of substantive law, as recognized by existing presumptions of validity. Nevertheless, some degree of judicial review can be justified to ensure a degree of certainty and to protect certain interests and values enshrined in the constitution.

Here the focus is on procedural matters, and the arguments in favour of judicial review on substantive matters continue to apply. While deference

⁹⁰ 2 Wigmore, *supra*, note 66 at 816.

⁹¹ *Id.* at 810.

⁹² See, B. Strayer, *Judicial Review of Legislation in Canada* (Toronto: U. of T. Press, 1968) ch. 1; W. Tarnopolsky, *The Canadian Bill of Rights* (2d ed. rev. Toronto: McClelland & Stewart Ltd., The Carleton Library No. 83, 1973) at 93-94 for a discussion of the origin of judicial review in Canada.

⁹³ *Gallant, supra*, note 83, appears to be one of the few Canadian cases where the courts have interfered directly with parliamentary procedure. However, the rules as to standing now appear to be more favourable to individual litigants than in the past. See, *Thorson v. A.-G. Canada* (1974), 43 D.L.R. (3d) 1 (S.C.C.); *Nova Scotia Board of Censors v. McNeil* (1975), 55 D.L.R. (3d) 632 (S.C.C.).

⁹⁴ See, e.g., P. Weiler, *In the Last Resort* (Toronto: Carswell/Methuen, 1974) especially ch. 6.

to the legislature remains an important policy, there need not be the same reluctance to allow judicial review in procedural as in substantive matters. The courts are trying to determine if an Act of Parliament exists⁹⁵ and they will have much less difficulty finding guidelines for review. Many of the procedural provisions will be straightforward questions of fact, such as, "Was there a two-thirds majority?" While the courts will have to determine whether procedures are mandatory or directory, and what should be left to parliamentary expertise, the issues are much more clear-cut.

Wigmore rejected this argument for two reasons. First, there is no greater protection in the Journals than in the enrolled bill, so why go to them? This point has been dealt with already. Secondly, it is argued that there may be legal wrongs without legal remedies, and this issue is one best left to a political solution. This last proposition brings us back full circle to respond with the traditional arguments in favour of judicial review.

What, then, is the Canadian position with regard to the enrolled bill rule? The *Irwin* case would imply that the rule is applicable in Canada, yet the *Gallant* decision could be cited to the contrary. Thus, there is no clear answer whether the traditional British rule applies in Canada. One can use the American arguments to weigh the "necessity" of the conclusiveness of the enrolled bill in Canada. *Irwin* seems to indicate a judicial favour for the certainty criterion, while *Gallant* may indicate a preference for protection of the constitution (and therefore resort to the Journals where necessary).

There are indeed advantages in resorting to the Journals, as the following section will indicate. Nevertheless, there may be greater value in emphasizing certainty and limiting the occasions when scrutiny of the Journals and Acts of Parliament will be permitted. The earlier discussion of *Ranasinghe* indicated that the enrolled bill rule need not always operate to prevent judicial protection of the constitution. Therefore, the most advantageous policy in Canada might be to rely on the enrolled bill rule (as *Irwin* suggests) except in the limited situations where the courts are impliedly instructed to intervene to safeguard interests that are protected by special procedures. In this way, both parliamentary independence and minority interests can be respected.

F. USE OF THE LEGISLATIVE JOURNALS

In deciding how far to look for errors in parliamentary procedure, one makes a significant decision concerning the binding nature of procedural safeguards. While this discussion focusses on the use of the Journals as opposed to the enrolled bill rule, one might well inquire why the scrutiny should stop with the daily records if the court's purpose is to protect the constitution; surely the logical next step is to oral evidence.⁹⁶

As between the Journals and the enrolled bill, there are evidential advantages in resorting to the Journals, for they can provide real evidence of

⁹⁵ Heuston, *supra*, note 55, quoted at note 59.

⁹⁶ See, text, *infra*, Part J.

procedural compliance. While the face of a bill may only show assent of the respective bodies, the Journals will prove that special majorities, if required, founded that assent.⁹⁷

The early British cases on enrolment were not favourable to the introduction of the Journals.⁹⁸ However, one should be wary of too great reliance on such cases, since they date from a period when the parliamentary roll performed a significant function.

While there is no modern authority dealing with the use of the Journals, Jennings advances a logical argument for their consideration, basing it on historical fact, although it bears some resemblance to the legal theory argument used in the United States to justify the Journal entry rule. Jennings starts with the traditional proposition that the enrolled bill rule originated in the conclusiveness of judicial records. It is in defining the record for parliamentary purposes that he departs from the usual theory, for he believes that the Journals should be consulted. Traditionally, the Lords and Commons sit and assent to bills separately, so that the endorsement of the royal assent as "with the Lords Spiritual and Temporal and Commons in this present Parliament assembled" (emphasis added) does not comport with legislative reality. Only the Journals of each House ensure that the body has in fact assented. Furthermore, says Jennings, each House is recognized to be a court of record to some degree,⁹⁹ so that the Journals should be regarded as conclusive of the events there recorded. Extrinsic evidence of proceedings should be excluded.

While the courts in Canada could not appeal to the court of record analogy to justify scrutiny of the Journals,¹⁰⁰ there is some validity to Jennings' first statement on the logic of resort to the Journals to determine assent. The endorsement on statutes in Canada differs from that in the United Kingdom, stating "Her Majesty, by and with the advice and consent of the Senate and House of Commons, enact . . .".¹⁰¹ There is no mention of the "assembled" bodies assenting, so one could argue that the *Interpretation Act* contemplates consultation of the records of each House to ensure that such assent was given. Error on the face of the record could be determined from the Journals.

While Jennings' resort to the Journals seems logical, it must be justified on policy or historical grounds, at least in England, rather than by a strict enrolled bill rule. Still, one may be able to convince a court that resort to the Journals is consistent with "best evidence" principles without conflicting with the historic rationale for the conclusiveness of the roll.¹⁰² Lloyd has remarked that in the United States the favour shown to the Journal entry rule as opposed

⁹⁷ The special majority would, of course, only be proven if the division were recorded. See, *supra*, note 10.

⁹⁸ See, *Arundel, supra*, note 23; *Bowes (1649)*, Style 155; 100 E.R. 606.

⁹⁹ Jennings, *supra*, note 54 at 141. McIlwain, *supra*, note 62 at 234, doubts whether either House alone could be regarded as a court of record.

¹⁰⁰ Because of the holding in *Kielly v. Carson, supra*, note 84.

¹⁰¹ *Interpretation Act*, R.S.C. 1970, c. I-23, s. 4.

¹⁰² That is, the Journals are the closest counterpart to court records in the sense of the "legal act" that those records constitute.

to the enrolled bill rule fluctuates over time, depending on the popular support for (or suspicion of) the courts and legislatures.¹⁰³

In Canada, the position is unsettled, since *Irwin*¹⁰⁴ restricts review beyond the enrolled bill and *Gallant*¹⁰⁵ goes to extrinsic evidence. When one considers the importance of the information found in the Journals which is not found on the face of the Act, it is difficult to argue that the courts should be precluded from scrutinizing the Journals. They need not invalidate an Act that fails to conform with *any* procedural requirement, no matter how minor. A decision as to whether a procedure is applicable in a given situation can often be left to Parliament's discretion, as a matter of privilege. In other cases where special procedures are applicable, the courts will be able to protect the constitution by using the Journals.

Nevertheless, even if the traditional enrolled bill rule is operative in Canada because of *Irwin*, it is virtually certain that Canadian courts, with their tradition of judicial review, will not ignore a serious procedural irregularity, such as the failure to procure a special majority. A broad interpretation of *Ranasinghe*¹⁰⁶ will support their intervention despite the enrolled bill rule. The courts will likely find a "duty" to ensure procedural compliance and an implied revocation of the enrolled bill rule.

What then are the types of errors which will support judicial review and a finding of invalidity for failure to observe procedural requirements? There is a variety of possibilities, including violation of constitutional provisions, nonconformity with statutory manner and form requirements, and failure to follow Standing Orders. Furthermore, one might ask if the courts should intervene if a statute has been procured through fraud on Parliament.

G. FRAUD AND MISTAKE AS GROUNDS OF INVALIDITY

The question of fraud on Parliament is often linked to the question of the extent to which courts should examine compliance with Standing Orders of the House, a matter which will be discussed separately. Most cases which have arisen concern the validity of private Acts or amendments to such legislation, with a person affected thereby claiming that Parliament was not informed of the bill's effect on his rights at the time of enactment or was misled. Usually the situation has been one in which the Standing Orders require notice to affected parties.

The *Lee* case¹⁰⁷ arose out of such a dispute, involving allegations that Parliament was deceived into incorporating a company that had no shares or shareholders. The Court refused to consider the matter once it was shown that the Act was validly passed, a holding consistent with that in two earlier cases dealing with fraud, *Stead v. Carey*¹⁰⁸ and *The Waterford, Wexford*,

¹⁰³ Lloyd, *supra*, note 21 at 34.

¹⁰⁴ *Supra*, note 82.

¹⁰⁵ *Supra*, note 83.

¹⁰⁶ *Supra*, note 9.

¹⁰⁷ *Supra*, note 17.

¹⁰⁸ (1845), 1 C.B. 495; 135 E.R. 634 (C.P.).

Wicklow & Dublin Ry. v. Logan.¹⁰⁹ No reasons were given for rejecting the fraud claim in the second case, so one might possibly regard it either as a rejection on the merits or as a rejection on the grounds of inadmissibility. The last-mentioned view is more reasonable, perhaps, because the issue was disposed of on a motion for leave to plead. In contrast, Tindal, C.J. in *Stead* clearly refused to consider the issue of whether deception was practised in obtaining the Act. The statute was to be applied without question.¹¹⁰

A Canadian case, *The London & Canadian Loan and Agency Co. v. The Rural Municipality of Morris*, showed that courts may consider fraud issues, because the Court made a finding that there was no evidence of fraud,¹¹¹ instead of refusing to consider the admissibility of the claim of fraud. However, the judgment went on to show that the defendant admitted that the Act in question had been passed, so the fraud allegation was irrelevant to the decision. It was not discussed in the appeal to the Supreme Court of Canada.

More enlightening are two Privy Council cases which deal with the fraud issue. *Tukino v. Aotea District Maori Land Board*¹¹² and *Labrador Co. v. The Queen*¹¹³ both discuss fraud although the second case is also cited as authority when one discusses the effect of mistake in a statute.¹¹⁴ Mistake can logically be treated at the same time as fraud on the legislature, for mistake involves the court in the same considerations of parliamentary privilege. The *Labrador Co.* case contains *dicta* which are quoted frequently to support the enrolment rule and/or parliamentary sovereignty:

Even if it could be proved that the legislature was deceived, it would not be competent for a court of law to disregard its enactment. If a mistake has been made, the legislature alone can correct it. . . . The courts of law cannot sit in judgment on the legislature, but must obey and give effect to its determination.¹¹⁵

If the last phrase is used as authority for the enrolled bill rule, the words should properly be read in the context of the defect under discussion. The theoretical reason for conclusiveness of the roll in a situation where Parliament has been misled lies in the likelihood that Parliament will act to correct the error.¹¹⁶ Furthermore, it is difficult to prove that Parliament has been misled. This would probably entail consideration of Parliament's internal proceedings and would certainly necessitate consideration of materials other than the bill itself or even the Journals, which are probably privileged.

Of course, there is a pragmatic policy reason for arguing for judicial intervention in fraud cases. While theoretically Parliament would repair errors, in reality parliamentary time is precious and there will likely be little interest

¹⁰⁹ (1850), 14 Q.B. 672; 117 E.R. 259.

¹¹⁰ *Supra*, note 108 at 552 (Q.B.); 644 (E.R.).

¹¹¹ (1890), 7 Man R. 128 (C.A.), *aff'd* (1891), 19 S.C.R. 434.

¹¹² [1941], A.C. 308 (P.C.) (N.Z.).

¹¹³ [1893] A.C. 104 (P.C.) (Que.).

¹¹⁴ See, e.g., *Craies' Statute Law*, *supra*, note 2 at 43, discussing the conclusiveness of facts as stated in an Act.

¹¹⁵ *Supra*, note 113 at 123. *Tukino*, *supra*, note 112 at 322, contains similar broad *dicta* on the judicial duty to accept an enactment as the law, although again the words should be read within their context.

¹¹⁶ See, *Pickin* (H.L.), *supra*, note 16 per Lord Reid.

in altering an Act fraudulently obtained, particularly if the Act is a private one, as is the usual case. There is also a possibility that the alleged misrepresentation will never reach Parliament's attention, unless a member agrees to raise the issue. Perhaps these considerations would warrant a different treatment for private Acts. However, the House of Lords clearly rejected such a pragmatic approach in the recent *Pickin* decision, with Lord Morris stating explicitly that there was to be no difference in the treatment of private and public Acts in cases of fraud.¹¹⁷

The House of Lords in *Pickin* was asked to strike out the plaintiff's statement of claim on the ground that it was frivolous and vexatious. The plaintiff claimed that the British Railways Board had deceived Parliament into passing the *British Railways Act, 1968*. The Act purported to relieve the defendant Board from the operation of section 259 of the *Bristol & Exeter Railway Company Act, 1836*, which provided that the railway lands, if abandoned or unused for three years, should vest in the owners of adjoining property. The plaintiff, who claimed to be such a landowner, alleged that the Board untruthfully stated in the preamble to the bill that it had notified such landowners that their interest was being compulsorily acquired, as required by the Standing Orders. It is interesting to note that the plaintiff was not requesting that the Act in question be declared invalid; rather he wished only that it not be applied to him. The Court, however, treated the claim as an attack on statutory validity and struck out his statement of claim.

It is interesting to note that the House of Lords in this case demonstrated a judicial reluctance to intervene even in a relatively conservative manner which would stop short of a declaration of invalidity yet still take notice of the reality of parliamentary reluctance, or inability, to return to private Acts once enacted. Lord Denning adopted an interesting and novel approach in the Court of Appeal:

Suppose the court were satisfied that this private Act was improperly obtained, it might well be the duty of the court to report that finding to Parliament, so that Parliament itself could take cognizance of it. . . . In my opinion it is the function of the court to see that the procedure of Parliament itself is not abused.¹¹⁸

The House of Lords rejected this idea. While Lord Denning's approach may be the way of the future, one might question the extent to which the court would assist by such action, if its only force is recommendatory. After all, a Member can draw such fraud to the attention of the legislature.

As the law now stands, even the reporting function is precluded, and the enrolled bill is conclusive with regard to allegations of fraud or mistake. Despite the paucity of Canadian cases, it is submitted that the judicial treatment in Canada would be the same as that in Britain.

H. MANDATORY AND DIRECTORY PROCEDURE AS GROUNDS OF INVALIDITY

It appears that an enrolled bill is not immune from attack at least to the extent of an error on the face of the Act (original or reprinted). Unlike the

¹¹⁷ *Id.* at 622.

¹¹⁸ [1973] 1 Q.B. 219; [1972] 3 W.L.R. 824 (C.A.) at 831.

fraud situation, procedural errors are normally provable by use of the enrolled Act or the Journals, absent fraudulent misrepresentation by parliamentary officials, a fact which reduces, although it does not eliminate, the danger of infringing parliamentary privilege.

The difficulty is the determination of what constitutes a fatal error of law. Does failure to comply with *any* procedural rule, whether in the Standing Orders, a statute, or the constitution, invalidate the statute? Clearly, such a proposition would be harsh, and for policy reasons it is necessary to differentiate procedures that are mandatory from those that are directory. A mandatory procedure is one which will affect the validity of a statute, for its observance is a condition precedent to enactment. In contrast, directory procedures do not affect the validity of an Act, although some cases have required substantial compliance for validity. Therefore, non-observance of mandatory procedure renders the resulting statute invalid; non-observance of directory procedures is regarded as only an irregularity.¹¹⁹ The problem with which the court is faced is the formulation of a test to distinguish the two types of procedure. Also, aside from the question of whether a procedure is mandatory, there remains a serious problem of whether a sovereign Parliament can be bound by procedural rules, especially those imposed by statute.

1. *Constitutional Procedural Provisions*

Whether or not most constitutional procedural provisions¹²⁰ had been complied with in respect of a particular statute would only be determinable from an examination of the Journals. If one were to follow the broadest interpretation of error of law posited with regard to *Ndobe*¹²¹ and *Harris*¹²² earlier, every Act passed in the Canadian Parliament would be examinable from a procedural standpoint. To avoid such inconvenience, *Ndobe* should be limited to cases of special procedures. Then the *B.N.A. Act* procedures, as measures of general application which are operative in respect of all statutes, would be protected from judicial review by the enrolled bill rule.

This last statement must be read subject to *Gallant* for that case dealt with constitutional procedures.¹²³ There the Lieutenant-Governor of Prince Edward Island withheld assent to a bill amending *The Prohibition Act*. Eight months later the decision was reconsidered by his successor and royal assent was conferred. The facts of the case are interesting, for the defendant, prosecuted under the Act for illegal possession of liquor, was not guilty if the amendment were valid and guilty if it were ineffective. Both the Crown and

¹¹⁹ See, S. A. deSmith, *Judicial Review of Administrative Action* (3d ed. London: Stevens & Sons Ltd., 1973) at 122-26; D. Mullen, *Administrative Law* (Toronto: Carswell Co., 1973) at 3, 77-78.

¹²⁰ The sections of the *B.N.A. Act* dealing with parliamentary government and its procedure include s. 18 (privilege), ss. 35 and 48 (quorum of the Senate and the House), s. 50 (duration of the House), s. 53 (money bills in the House), s. 54 (royal recommendations), ss. 55-57 (royal assent), and s. 90 (making some of the foregoing provisions application to the provinces).

¹²¹ *Supra*, note 36.

¹²² *Supra*, note 26.

¹²³ *Supra*, note 83. For case comments, see, K. M. Martin (1946), 24 Can. B. Rev. 434 and B. Laskin (1946), 24 Can. B. Rev. 625.

the defendant assumed the statute's validity and the Crown had acted in reliance thereon for three years, yet the Court proceeded to consider that issue on its own initiative.

The decision in *Gallant* rested on an interpretation of section 55 of the *B.N.A. Act* dealing with royal assent, withholding assent and reservation of bills (applicable to the provinces by section 90). It was the Court's holding that refusal of assent rendered the Lieutenant-Governor *functu officio*; that is, he held no further power with respect to the bill unless it was presented again by the Legislature.¹²⁴ The judgment can easily be criticized for its lack of analysis. Nowhere is there mention of the enrolled bill rule, yet the Court is declaring an Act invalid which has at least the ostensible attributes of a statute, that is, the assent of the Assembly and the Crown. It is doubtful that the error appeared on the face of the Act, but whether or not it did, the Court looked to and relied on the Royal Gazette for evidence of the date of royal assent.¹²⁵ Further, the Court does not discuss the question whether the procedure in section 55 is mandatory or directory, although it is implicit in the result that it found the section mandatory. This conclusion was reached without consideration of the criteria for mandatory procedure as discussed in the New Zealand case of *Simpson v. A.-G. New Zealand*¹²⁶ and without reference to statements such as that of Dicey that royal assent is only a convention of the British constitution because the Crown should not veto a bill.¹²⁷ This statement implies that assent is a formality, so one need not be too concerned at its timing. Despite such serious omissions, *Gallant* can be used to argue that enrolment is not conclusive, at least with respect to constitutional procedure. It also shows that the courts will declare invalid a statute in conflict with mandatory procedural provisions.

No more satisfying in its analysis is the *Irwin* case. There the question examined was compliance with section 54 of the *B.N.A. Act* requiring a royal recommendation for the appropriation of public revenues. The Court held that the enrolled bill was conclusively valid and refused to consider whether there was "a defect in *parliamentary* procedure in passing the Act" (emphasis added).¹²⁸ With all due respect, the Court fails to deal adequately with the issue of mandatory *constitutional* procedure. While royal recommendations are admittedly a traditional part of parliamentary procedure (and are dealt with by the Standing Orders of the House),¹²⁹ they are also expressly required

¹²⁴ *Id.* at 430-31. In contrast to the situation where assent has been withheld, the *B.N.A. Act* makes express provision for further action after assent has been given (by disallowance, s. 56) and for approval after reservation (s. 57). Martin, *id.* at 436, believed that assent could be given at any time but Laskin, *id.* at 625, rejected this assertion as ignoring s. 55 which at least arguably rendered the Lieutenant-Governor *functus* after rejection of the bill.

¹²⁵ *Id.* at 429.

¹²⁶ [1955] N.Z.L.R. 271 (C.A.). One of the issues raised in the case was the validity of royal assent given after dissolution of the legislature. At 284, Hutchison, J., held that even if the Governor-General were obliged to consent during the session, such a rule would be directory only.

¹²⁷ Dicey, *supra*, note 50 at 26.

¹²⁸ *Supra*, note 82 at 129.

¹²⁹ S.O. 62.

by the constitution in Canada. While one might agree with the result in *Irwin*, the judgment would have been more weighty as concerning the applicability of the enrolled bill rule if the above issue had been met.

More enlightening on the question of mandatory constitutional procedure are the cases of *Simpson v. A.-G. New Zealand*¹³⁰ and *Clayton v. Heffron*.¹³¹ The *Simpson* case is interesting on its facts, for the plaintiff challenged the validity of the 1946 parliamentary election, which would have had the result of rendering all subsequent legislation invalid, as well as preventing the effective election of a new Parliament. Provisions in the New Zealand constitution provided that election writs were to be issued by the Governor-General within seven days of dissolution of Parliament. The life of a Parliament was three years from the date of return of the writs, which meant that Parliament would dissolve on October 11, 1946. However, the Governor-General's writs were not issued until November 6. The issue in the case was the effect of the failure to abide by the time limit in the constitution: did the Governor-General lose the power to issue writs seven days after dissolution or did the royal prerogative continue to subsist? Arguably the Court need not have considered such issues if the enrolled bill rule applies despite constitutional procedures, for all Acts receiving the assent of the Governor-General and the Assembly would thereby be regarded as valid. While one's logic may rebel against such a statement, since the Acts of an irregularly elected body seem not to constitute "Acts" of the "Assembly", the enrolled bill rule so holds.

Several judges made reference to the principle of enrolment, although not under this term. They referred to the *Interpretation Act*, requiring the Clerk to note the date of the royal assent on a bill, a practice also required in Canada.¹³² Hutchison, J., queried without deciding, if this showed that Acts so annotated are valid,¹³³ while McGregor, J. regarded such provision as conclusive of the validity of such Acts.¹³⁴

In coming to a decision that the Parliament had been validly elected, the full court of the Supreme Court of New Zealand concentrated on the question whether the time limit for the writs was mandatory or directory. The Court found it to be directory on the basis of the test for determining mandatory procedure found in *Montreal Street Ry. Co. v. Normandin*:

When the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty would work serious general inconvenience, or injustice to persons who have no control over those entrusted with the duty, and at the same time would not promote the main object of the Legislature, it has been the practice to hold such provisions to be directory only, the neglect of them, though punishable, not affecting the validity of the acts done.¹³⁵

Certainly, one must question the practicability of applying to Parliament a test which includes lack of punishment for noncompliance, for it would render

¹³⁰ *Supra*, note 126.

¹³¹ (1960), 105 C.L.R. 214.

¹³² *Interpretation Act*, *supra*, note 5, s. 5(1).

¹³³ *Supra*, note 126 at 284.

¹³⁴ *Id.* at 286.

¹³⁵ [1917] A.C. 170, as quoted in *Simpson*, *id.* at 275.

most procedural provisions dealing with the legislature directory. One can punish particular officials, but it is difficult to see how one can punish the legislature for noncompliance, a fact that makes the test ineffectual. Obviously, a court would not confine itself to this factor.

In reality, the Court's finding that the procedural rule was only directory rested on consideration of the drastic public inconvenience caused if the procedure was mandatory: there would be no way to call a new legislature! While one might be pedantic and insist that the legislative intent in instituting the procedure *was* to restrict the royal prerogative, it is difficult to disagree with the result of the case.

In *Clayton v. Heffron*, the High Court of Australia came to a similar conclusion on the nature of a procedural provision in the constitution of New South Wales. The constitution required the approval of both Houses and a referendum for a statute abolishing the Legislative Council, the upper house of New South Wales. If the Council twice refused to pass or twice rejected an abolition bill, there was to be a conference between the managers of the Assembly and the Council, followed by a joint sitting. If agreement was still not reached on the abolition bill, the Governor-General could submit the issue to a referendum without Council's approval of the bill. The case arose because the Council refused to participate in a conference. The Government proposed to continue with a referendum without the conference and the joint sitting, with resulting dispute over whether each stage of the abolition procedure was mandatory. The Court, using considerations of duty, public inconvenience, and legislative intent, decided that the procedural requirement of a conference and joint sitting was directory. Kitto, J. commented in words that indicate a pragmatic and practical judicial approach to statutes:

In the case of a legislative body, the prescription of something to be done in the course of law-making should no doubt often be treated as in the nature of a direction to the Legislature or to one or more of its constituent elements, and not as laying down conditions of validity for legislation — that is to say, as matters of purely internal concern for the law-making body itself, and not of concern to the courts or other bodies. . . .¹³⁶

Therefore, despite *Irwin*,¹³⁷ it appears that courts should always consider the nature of a procedural element in the constitution to decide if it is mandatory or directory. If the procedure is directory, the courts should not be concerned to see if it was followed for purposes of statutory validity: the enrolled bill rule should conclusively prevent scrutiny. But if the procedure is mandatory, it is the duty of the courts to look for compliance, as the courts did in *Ranasinghe*,¹³⁸ for the procedure is a condition precedent to enactment. The enrolled bill rule should not operate to protect an "Act" that has not really been passed by Parliament.

2. Standing Orders

The Standing Orders are rules of each House, passed by resolution and without statutory effect. In fact, Dicey described them as possessing the status

¹³⁶ *Supra*, note 131 at 266.

¹³⁷ *Supra*, note 82.

¹³⁸ *Supra*, note 9.

of constitutional conventions,¹³⁹ as did K. C. Wheare. Wheare's rationale lay in the fact that they do not receive recognition in a court of law.¹⁴⁰ Such reasoning is difficult to refute by authorities, and criticism perhaps rests only on semantic grounds. A convention is a non-legal rule which the courts do not enforce. Standing Orders might appear to fall within this category because the courts refuse to enforce them,¹⁴¹ and they are passed by only one House. Yet Marshall argues that it is a matter of *law*, not convention, which causes the courts to act in this way; that is, "the law simply gives effect to certain parliamentary transactions."¹⁴² Indeed, the rules of parliamentary procedure can be regarded as a unique form of law — the *lex et consuetudo parliamenti* as it is called in Britain — which is different in character from convention. Although not enforceable by the courts, it is enforceable within the precincts of Parliament and sanctions can be imposed by the House for infringement of the rules.¹⁴³

However, a person challenging an Act faces two obstacles in alleging non-compliance with such rules: the apparent lack of binding effect just outlined and the danger of infringing the privilege of Parliament to control its internal proceedings. The House of Lords in *Pickin* recognized these two obstacles and Lord Morris' words are illustrative of the general feelings of the court:

It must surely be for Parliament to lay down procedures which are to be followed before a bill can become an Act. It must be for Parliament to decide whether its decreed procedures have in fact been followed. It must be for Parliament to lay down and construe its standing orders and further to decide whether they have been obeyed; it must be for Parliament to decide whether in any particular case to dispense with compliance with such orders.¹⁴⁴

Despite Lord Denning's concern for adherence to parliamentary rules,¹⁴⁵ the courts have consistently refused to look at the question whether Standing Orders have been followed. Each House of Parliament is best able to interpret and enforce the rules which it has set down for its efficient operation.

3. Statutory Procedure

The question of the binding effect of mandatory procedural rules enacted by statute, more commonly called "manner and form legislation", raises very complex issues. It is almost a cliché to state that it is a precept of constitutional law that Parliament cannot bind its successors. Any commentator would agree, but undoubtedly many would register *caveats*, for they might be concerned with the problem of what constitutes "Parliament", and is it unchanging

¹³⁹ Dicey, *supra*, note 50 at 28, where he says, "[T]he whole of our parliamentary procedure is nothing but a mass of conventional law; it is, however, recorded in written or printed rules".

¹⁴⁰ K. C. Wheare, *The Statute of Westminster and Dominion Status* (5th ed. London: Oxford U. Press, 1953) at 13.

¹⁴¹ See, e.g., *Wauchope, supra*, note 1.

¹⁴² G. Marshall, *Constitutional Theory* (Oxford: Clarendon Press, 1971) at 8.

¹⁴³ Jennings, *supra*, note 54 at 115; May, *supra*, note 2 at ch. ix. The House can punish by expulsion from the Chamber, arrest, and confinement.

¹⁴⁴ *Supra*, note 16 at 620. See, also, Lord Reid at 618.

¹⁴⁵ *Supra*, note 116.

or does it act in some forms in one situation and in others at another time? The debate has been, and continues to be, an animated one and it is of interest in Canada, where many statutes contain special procedural rules.¹⁴⁶

While the focus in this section is the constitutional possibility of enacting manner and form legislation, it should be kept in mind that a court considering such procedure would be involved in a two-stage process. It would first have to look at a given procedure to decide if it is intended to be mandatory, and therefore determinative of whether "Parliament" has passed the Act, or if it is intended to be directory, and therefore only in the nature of internal procedure with no effect on the statute's validity.¹⁴⁷ If the procedure is to be mandatory, the court would have to decide if such an intention can be effective in constitutional law. If not, the courts would have to resort to the first stage and read the provision as directory only.¹⁴⁸

There have been few cases elaborating the principle of parliamentary sovereignty, perhaps because it is to a great extent a philosophical or political concept rather than a legal rule. Perhaps, too, there have been a few opportunities to test it, since it so clearly sustains the validity of statutes. There are three cases, however, which commentators regard as authority to prove the ineffectiveness of manner and form legislation: *Ellen Street Estates Ltd. v. Minister of Health*,¹⁴⁹ *Vauxhall Estates Ltd. v. Liverpool Corp.*,¹⁵⁰ and *British Coal Corp. v. The King*.¹⁵¹

However, before dealing with these cases, it is important to know the theoretical basis for opposition to manner and form legislation. Dicey's explanation of parliamentary sovereignty rests on the precept that no body can question the authority of Parliament: its Acts must be enforced. As a fundamental corollary to this statement, one can say that Parliament cannot bind its successors, for the doctrine requires that the Acts of each Parliament be enforced as passed. While this appears to place a limit on Parliament's sovereignty,¹⁵² in truth it is not incompatible with that doctrine. In order to preserve Parliament's sovereignty and to ensure that no vacuum is created within the sphere of powers exercisable by the sovereign, there can be no restriction on the power to legislate, except the one limitation against binding

¹⁴⁶ The most famous is the *Bill of Rights* with its "notwithstanding" clause (R.S.C. 1970, App. No. III, s. 2), but see, also, the *Canada Pension Plan Act*, R.S.C. 1970, c. P-5, s. 115 (discussed in K. Lysyk, *Comment* (1965), 4 Alta. L. Rev. 154); the *National Parks Act*, R.S.C. 1970, c. N-13, as am. by S.C. 1974, c. 11, s. 3.1. (2),(4),(5); the *Veterans Land Act*, R.S.C. 1970, c. V-4, s. 31, as am. by S.C. 1974, c. 3, s. 1(3); the *Anti-Inflation Act*, S.C. 1974-75, c. 75, s. 46.

¹⁴⁷ See, Marshall, *Parliamentary Sovereignty*, *supra*, note 20 at 23-24.

¹⁴⁸ If we continue to follow the hypothesis based on the broad reading of *Rana-singhe*, *supra*, note 9, where the procedure is directory, the enrolled bill rule would apply, because the procedure is not a "special" one which revokes the rule.

¹⁴⁹ [1934] 1 K.B. 590 (C.A.).

¹⁵⁰ [1932] 1 K.B. 733.

¹⁵¹ [1935] A.C. 500 (P.C.) (Que.).

¹⁵² The discussion of parliamentary sovereignty raises the logical dilemma associated with the concept of "sovereignty": if God is omnipotent, he can do all things, even restrict himself; but if God can limit his powers, how can he be all-powerful?

a future Parliament, a restriction which is logically necessary to the doctrine. The Parliament which legislates, in the orthodox view, is the body so regarded at common law, Queen, Lords and Commons, apparently acting by simple majority.

Supporters of this view refuse to recognize any restraints on a future Parliament, even procedural ones. While Parliament can alter the common law by legislation, it cannot alter that part of the common law which holds that the courts must enforce the statutes passed by Parliament. The rationale for such a proposition lies in the nature of that part of the common law requiring enforcement of statutes, for it is "fundamental law". As H. W. R. Wade states, the rule rests not on a legal fact, but on "the ultimate *political* fact upon which the whole system of legislation hangs."¹⁵³ A fundamental law is not alterable by legislation, for it is the source of all law and prior to it. Therefore, it can be changed only by revolution,¹⁵⁴ which can be peaceable, since the court's recognition of a change in the fundamental law is characterized as a "revolution".

Despite Wade's seemingly logical argument, one is left with some disquieting questions about his espousal of the fundamental law: what are the "Acts of Parliament" which the courts are to enforce and, for that matter, how does one determine what is "Parliament"? From his discussion, one must assume that "right reason" operates to allow us to accept Parliament as the medieval institution, unchanged today; yet surely that is an unhistorical approach and one that fails to answer the question. According to Wade, manner and form provisions, as attempts to alter the constitution of Parliament and, therefore, the fundamental law, are unenforceable. Their adoption would have to be regarded as revolutionary.¹⁵⁵ But such a proposition leads Wade to logical absurdities. For example, he describes the legislation passed by the English Parliament under the *Parliament Acts* of 1911 and 1949 (which eliminate the necessity of the Lords' assent in certain situations) as delegated legislation, because "Parliament" cannot be changed.¹⁵⁶ It would be much more in keeping with reality to accept a legal redefinition of Parliament.

The orthodox view of parliamentary sovereignty draws support from the *Vauxhall Estates* and *Ellen Street Estates* cases,¹⁵⁷ which both dealt with the same legislation, the *Acquisition of Land (Assessment of Compensation) Act, 1919*. Section 7 stated that expropriation acts or orders would have effect subject to the present Act and "so far as inconsistent with this Act those provisions shall cease to have or shall not have effect."¹⁵⁸ In both cases, a subsequent statute in 1925 conflicted with the 1919 Act's method of determining compensation and the plaintiff claimed that the earlier Act overrode the later until expressly repealed. The words of Maugham, L.J. in *Ellen Street Estates*

¹⁵³ H. W. R. Wade, *The Basis of Legal Sovereignty*, [1955] Camb. L.J. 172 at 188.

¹⁵⁴ Latham, *supra*, note 57 discusses the concepts of fundamental law (or *Grundnorm*) at 522-25 and the necessity for (technical) revolution to change it at 540.

¹⁵⁵ *Supra*, note 153 at 193-94.

¹⁵⁶ *Id.* at 190.

¹⁵⁷ *Supra*, notes 149 and 150.

¹⁵⁸ 9 & 10 Geo. V, c. 57.

have often been cited as authority to show the ineffectiveness of manner and form legislation. In denying that section 7 could restrict Parliament, he said:

The Legislature cannot, according to our constitution, *bind itself as to the form* of subsequent legislation, and it is impossible for Parliament to enact that in a subsequent statute dealing with the same *subject-matter* there can be no implied repeal. (emphasis added)¹⁵⁹

The words are explicit, yet they need not be fatal to all manner and form legislation. The 1919 Act could be regarded as an effort to bind subsequent Parliaments substantively, a proposal impossible by both the orthodox and newer views of parliamentary sovereignty since it would create a vacuum in Parliament's powers. Maugham, L.J.'s words on subject-matter restrictions are consistent with this view. Alternatively, the section might be regarded as a manner and form provision requiring express repeal before contradictory legislation would be valid, and this was the argument of the plaintiffs' counsel in both cases. If the section were meant to be procedural (a debatable point),¹⁶⁰ then it should have been discussed in terms of mandatory effect, although His Lordship did not do so. While Lord Maugham correctly states a sovereign legislature can amend statutes expressly or impliedly,¹⁶¹ he asks the wrong questions with regard to this section. He fails to distinguish between those procedural rules which *bind* Parliament and those which *define* it when he says Parliament cannot bind itself as to form. None of the other five judges in the two cases went so far, and since the form *dictum* was not a major part of the judgment, its weight need not be regarded as too great.

The concept of "redefining Parliament" for certain purposes is the foundation of the argument supporting the validity of manner and form legislation. The newer view of parliamentary sovereignty concerns itself with the identification of the sovereign. As Heuston pointed out, there are rules of law logically prior to the sovereign and these are determinable by the courts.¹⁶² These rules which define Parliament, being part of the common law, are alterable by legislation. Only the fundamental rule that Parliament cannot bind its successors is unchangeable, because it rests on political, not legal, facts. The concept of "Parliament" can be altered (although H. W. R. Wade would disagree) since rules defining it are not part of the fundamental rule. It is Parliamentary, *as constituted by the rules operative at any given moment*, which cannot bind its successors.

The difference between Wade's view and this view lies in the attitude towards the constancy of Parliament's composition, with Wade regarding it as immutable and part of the *Grundnorm*.

¹⁵⁹ *Supra*, note 149 at 597.

¹⁶⁰ Two of the three judges in *Vauxhall*, *supra*, note 150 at 743, held that the section restricted only those Acts passed prior to 1919. Often, similar statutory provisions are regarded only as rules of construction. See, e.g., the treatment of s. 4 of the *Statute of Westminster* in *British Coal Corp.*, *supra*, note 151 and *Copyright Owners Reproduction Society Ltd. v. E.M.I. (Australia) Proprietary Ltd.* (1958), 100 C.L.R. 597 (H.C.).

¹⁶¹ This is the major attribute of a flexible constitution: see *McCawley*, *supra*, note 77.

¹⁶² See, text, at note 59.

According to the newer view of parliamentary sovereignty, any statute which is to be regarded as valid legislation must be passed by Parliament as defined by the rules operative at that time. In compliance with this view, a manner and form provision is not a restriction on Parliament's power to legislate; rather, it is definitional, explaining what *is* the Parliament which can exercise that power.

The earliest case to support the validity of manner and form legislation is *A.-G. for N.S.W. v. Trethowan*.¹⁶³ The case was concerned with the binding effect of section 7 of the 1929 amendment to the New South Wales Constitution Order, which required the approval of a majority vote in a referendum before the Legislative Council could be abolished. Not only did the abolition require a referendum; so, too, did the repeal of the procedural section. Despite the entrenched procedures, the Legislature, in an effort to repeal the section and abolish the Council, presented two bills in the ordinary manner. The plaintiffs, members of the Council, sought a declaration and an injunction to prevent presentation of the bills for royal assent.

Section 5 of the *Colonial Laws Validity Act, 1865* was operative, and it provided that:

Every Representative Legislature shall, in respect to the Colony under its Jurisdiction, have, and be deemed at all Times to have had, full Powers to make Laws respecting the Constitution, Powers and Procedure of such Legislature; provided that such Laws shall have been passed in such Manner and Form as may from Time to Time be required by any Act of Parliament, Letters Patent, Order in Council, or Colonial law for the Time being in force in the said Colony. (emphasis added)¹⁶⁴

The Privy Council, in granting the injunction sought, relied on the Imperial Act without dealing more generally with the scope of manner and form legislation. It stated that the proviso to section 5 required that a bill to abolish the Legislative Council, as a measure to alter the Constitution of the Legislature, must be passed in conformity with procedures set out in laws operative in the state. Therefore, a bill abolishing the Council which received royal assent prior to approval in a referendum would not be a valid Act.¹⁶⁵

The High Court of Australia had dealt more fully with the manner and form issue. Dixon, J., (as he then was) expressed an opinion that even the British Parliament could effectively be bound by manner and form legislation.¹⁶⁶ Rich, J., described the referendum as constituting the electorate a

¹⁶³ [1932] A.C. 526 (P.C.P.), *aff'g* (1931), 44 C.L.R. 394 (H.C. Aus).

¹⁶⁴ 28 & 29 Vict., c. 63, s. 5. The Act is still applicable to the Australian states, because the *Statute of Westminster, 1930*, 22 Geo. V, c. 4, did not extend to them. This is in contrast to the Canadian provinces, which are expressly freed from the operations of the Act by s. 7(2) of the *Statute of Westminster*.

¹⁶⁵ Lord Sankey made an interesting comment that may support the earlier proposition to the effect that the enrolment rule does not operate in the face of mandatory procedures (either on the basis of *Ranasinghe, supra*, note 9, or *Harris, supra*, note 26). He states that a bill which received the royal assent without the referendum procedure "would not be a valid Act of the Legislature" (at 541). Yet the orthodox enrolled bill rule, if operative, would not allow such a determination.

¹⁶⁶ *Trethowan, supra*, note 163 at 426 (C.L.R.).

new "element" in the legislative process and one required for constitutional enactment,¹⁶⁷ a description which comports with manner and form theory. Gavan Duffy, C.J., in a dissenting opinion, refused to regard the referendum as a binding form which changed the legislature's method of proceeding, for, in his view, the legislature had plenary power and could not derogate from the power of its successors. His Lordship describes the referendum as a "condition for approval", but apparently he is not using the term "condition" according to its legal meaning, for he says that the legislature can alter the provision at issue by ordinary methods. He does concede, however, that redefinition of the legislature might be possible.¹⁶⁸

While *Trethowan* is an important case, it has been distinguished on the basis that although the procedure was statutory, its applicability to the New South Wales legislature was compelled by the *Colonial Laws Validity Act*, an Imperial statute which the legislature of New South Wales was powerless to alter. A more significant case, perhaps, is *Harris*,¹⁶⁹ for there the procedural provisions in question were embodied in the South African constitution. Admittedly, this was an Imperial statute, but under section 2(2) of the *Statute of Westminster*¹⁷⁰ it was fully amendable by the South African Parliament without reference to the British Parliament.

The *Harris* case is the first to elaborate the idea that manner and form provisions do not *bind* a sovereign Parliament in the sense of preventing legislation, but rather *define* it. Although section 2(2) of the *Statute of Westminster* conferred upon the South African Parliament the power to amend any Imperial statute, according to the Appeal Division of the South African Supreme Court, "Parliament" is to be read subject to the definition thereof in South Africa's constitution. To quote Centlivres, C.J.:

In my opinion one is doing no violence to language when one regards the word "Parliament" as meaning Parliament sitting either bicamerally or unilaterally in accordance with the requirements of the South Africa Act. . . . Legal sovereignty may be divided between two authorities. In the case of the Union, legal sovereignty is or may be divided between Parliament as ordinarily constituted under section 63 and the proviso to section . . .¹⁷¹

Thus Parliament can have different definitions according to the legislative situation. Clearly, the courts will enforce rules defining Parliament and will refuse to concede validity to enactments of a body that does not comply with them, for the authority of Parliament lies not in the individual members but in the institution which they form as a collectivity. *Harris* seems to support the "new" view of parliamentary sovereignty.¹⁷²

But *Harris* was dealing with procedures in a constitutional document imposed by a superior body, albeit the procedures were amendable. The problem is to decide if one can extend the holding to support the proposition

¹⁶⁷ *Id.* at 421.

¹⁶⁸ *Id.* at 413.

¹⁶⁹ *Supra*, note 26.

¹⁷⁰ *Supra*, note 164.

¹⁷¹ *Supra*, note 26 at 1258-59.

¹⁷² See, text at note 59.

that a "sovereign" legislature can impose binding procedural provisions on itself. *Trethowan* shows that self-imposed procedures are possible, but the weight of the case is vitiated by the Privy Council's reliance on the *Colonial Laws Validity Act*. The *Harris* case is equivocal, since the issue was never directly dealt with. Similarly, *Ranasinghe* did not confront the question directly, although it may imply that self-imposed procedure can bind Parliament. In dealing with the binding effect of the Constitution Order's requirement of a two-thirds majority and a Speaker's certificate to signify its occurrence, Lord Pearce, writing for the Privy Council, stated:

No question of sovereignty arises. A Parliament does not cease to be sovereign whenever its component members fail to produce among themselves a requisite majority. . . . The minority are entitled under the Constitution of Ceylon to have no amendment of it which is not passed by a two-thirds majority. The limitation thus imposed on some lesser majority of members does not limit the sovereign powers of Parliament itself which can always, whenever it chooses, pass the amendment with the requisite majority.¹⁷³

Again the procedure was contained in an organic instrument, as in *Harris*, but here the Court expressly divorced the question of manner and form from sovereignty. In fact, another statement by Lord Pearce expressly recognizes the Ceylonese Legislature as sovereign.¹⁷⁴ This has led several commentators to postulate that statutory manner and form provisions can be legislated in any parliamentary system, even that of the United Kingdom.¹⁷⁵

Marshall says that *Ranasinghe* does not prove that self-imposed manner and form legislation is effective, but it does put an end to some of the arguments against the proposal; for example, by giving judicial recognition to the distinction between procedural and substantive limitations on a subsequent legislature.¹⁷⁶ All Marshall can postulate is that manner and form legislation may be possible, depending on the judiciary's definition of the *Grundnorm*. The courts must decide if the rule is that "the courts must enforce an Act of Parliament" (the latter always in the same form) or that "the courts must enforce an Act of Parliament passed in compliance with the rules necessary for valid enactment at that time." There is no logical reason to preclude such self-imposed redefinition of Parliament, since all that it changes is the common law of what constitutes Parliament without affecting the power to legislate.¹⁷⁷

An alternative way to regard the redefinition theory is in terms of abdication. Those who follow Dicey agree that a sovereign¹⁷⁸ can abdicate his powers, whether territorially or to a new institution. E. C. S. Wade would

¹⁷³ *Supra*, note 9 at 200.

¹⁷⁴ *Id.* at 197.

¹⁷⁵ See, H. R. Gray, *The Sovereignty of Parliament and the Entrenchment of Legislative Process* (1964), 27 Mod. L. Rev. 705 at 709; de Smith, *supra*, note 54 at 91; P. J. Hanks, *Re-Defining the Sovereign: Current Attitudes to Section 4 of the Statute of Westminster* (1968), 42 Aus. L. J. 286 at 292.

¹⁷⁶ G. Marshall, *Parliamentary Sovereignty: A Recent Development* (1966-67), 12 McG. L. J. 523 at 526; Marshall, *Constitutional Theory*, *supra*, note 142 at 56-57.

¹⁷⁷ Although Marshall discusses some logical problems associated with the redefinition of basic rules in *Constitutional Theory*, *id.* at 46-48.

¹⁷⁸ E. C. S. Wade commenting on Dicey, *supra*, note 50 at 68-69, note 1.

appear to restrict the abdication to a new institution to situations where *all* power is passed on. While it may be difficult to convince a court that application has occurred,¹⁷⁹ it could be argued that Parliament as it now exists could abdicate within a given field of legislative jurisdiction in favour of another legislative body so long as no legislative vacuum arises. However, this approach would create problems in Canada because of the "exclusivity" of the powers possessed by Parliament and the provinces.

Generally, the question whether or not the Canadian Parliament can impose binding procedures on itself is unsettled.¹⁸⁰ Because of the nature of the constitution, especially the plenary nature of the legislative powers conferred, arguments applicable to the British parliamentary system are relevant here on the viability of mandatory procedure. *Ranasinghe*¹⁸¹ suggests that such a situation is legally possible, and it would likely be followed in Canada. If so, then one must ask whether there are limitations on Parliament's ability to impose such procedures. There is a danger that manner and form provisions could be so rigorous as to prevent effective compliance, thus limiting a future Parliament's substantive power.¹⁸² A two-thirds majority in Parliament is a reasonable expectation, but a ninety per cent majority would be virtually impossible to achieve in contentious or politically sensitive areas, with the result that a procedural rule, technically defining Parliament, would effectively prevent later Parliaments from legislating on a given matter.

Commentators who support the concept of manner and form legislation are well aware of this problem, but those familiar with Canadian and Australian constitutional law do not regard the difficulty as insurmountable. A "pith and substance" test could be adopted, with the courts asking whether, under the guise of a procedural form, the legislature was "in pith and substance" purporting to regulate substance.¹⁸³ The answer would be determined by studying the effects of the legislation. One is not interfering with parliamentary sovereignty by this judicial review, for, as de Smith says, the issue is whether a "legislative vacuum" is created,¹⁸⁴ such a phenomenon being inconsistent with the doctrine of parliamentary sovereignty.

¹⁷⁹ Witness the debate over the constitutional effect of s. 4 of the *Statute of Westminster* in *British Coal Corp.*, *supra*, note 151 and *Copyright Owners*, *supra*, note 160. A similar controversy exists in Britain now regarding the effect of the Treaty of Rome and membership in the E.E.C.: see Trindale, *Parliamentary Sovereignty and the Primacy of European Community Law* (1972), 35 Mod. L. Rev. 375, and *Blackburn v. A.-G.*, [1971] 1 W.L.R. 1037 (C.A.).

¹⁸⁰ The cases decided on the effect of the *Bill of Rights* have not squarely met the issue of manner and form procedure, although Laskin, C.J.C. described the Bill as a "quasi-constitutional document" with "suppressive effect" on federal legislation in a dissenting opinion in *Hogan v. The Queen* (1974), 18 C.C.C. (2d) 65 (S.C.C.) at 76, 81.

¹⁸¹ *Supra*, note 9.

¹⁸² McTiernan, J. recognized this danger in his dissenting judgment in *Trethowan*, *supra*, note 163 at 442.

¹⁸³ See, Friedmann, *supra*, note 47 at 106: Marshall, *Parliamentary Sovereignty*, *supra*, note 20 at 42. But see, H. Gray, *The Sovereignty of Parliament Today* (1953-54), 10 U. of T. L.J. 54 at 71, where he acknowledges the problem of restrictive procedural provisions but states that the courts have no choice but to enforce them as "Acts of Parliament."

¹⁸⁴ deSmith, *supra*, note 54 at 91.

A further restriction on the scope of manner and form legislation may be found in the express words of the constitution in Canada. Section 91 of the *B.N.A. Act* gives "Parliament" exclusive legislative authority over matters not granted to provincial jurisdiction; section 92 confers a similarly exclusive power on the provincial legislatures to deal with certain enumerated matters. Would a provision requiring a referendum prior to the enactment of a bill be prevented by the word "exclusive"?

The reference on Manitoba's *Initiative and Referendum Act* may provide some insight into the question. By that statute, eight per cent of the registered voters of Manitoba could petition the Legislature requesting the passage of a given bill. If the bill was not enacted, it was to be submitted to a referendum and, if approved, was to take effect as a statute. The legislation was successfully attacked as *ultra vires* because it purported to alter the office of Lieutenant-Governor, contrary to section 92(1) of the *B.N.A. Act*. The Privy Council found that the statute altered the Lieutenant-Governor's office in that it compelled him to submit a bill to a body *distinct* from the Legislature which he headed and (more importantly, it is submitted) removed his discretion to assent to or refuse assent to a bill. The vote of the populace was to be determinative of legal effect.¹⁸⁵ One might question the persuasiveness of the Privy Council's reasoning with regard to the second point. While theoretically the Lieutenant-Governor has the power to refuse assent, in practice the power has fallen into disuse and royal assent has become a formality. In 1919, though, this trend may not have appeared as clear as it does today.

Whether the *Initiative* case holds that the conferral of power on the "Legislature" precludes any alteration in the legislative process which adds different elements thereto is open to argument. Lord Haldane stated, in *obiter*, that section 92 entrusted power only to the provincial legislature and prevented establishment of a new legislative power.¹⁸⁶ His words reflect those of H. W. R. Wade when he recognizes the Legislature's right to create *subordinate* agencies, so long as it preserves its own capacity. Possibly he would accept minor changes to the existing body, so long as the Legislature is not radically transformed into what is, in effect, a new body. However, there is good reason to read the case as dealing only with the impossibility of altering the vice-regal office and not precluding all manner and form provisions.¹⁸⁷

Trethowan's case¹⁸⁸ shows that a referendum is a possible condition precedent in a parliamentary system, which can re-cast the existing legislative process. More important for Canadian purposes is *R. v. Nat Bell Liquors, Ltd.* which discussed Alberta's *Direct Legislation Act*. Under that statute, an initiative petition requesting enactment of a statute could be presented to the Legislature by a prescribed number of voters. If the Legislature did not enact

¹⁸⁵ *In re the Initiative and Referendum Act*, [1919] A.C. 935 (P.C.) (Man.) at 944.

¹⁸⁶ *Id.* at 945.

¹⁸⁷ That is, regard the statements on altering the legislative process as *obiter*, as Lord Haldane admitted they were. See, also, S. A. Scott, *Constituent Authority and the Canadian Provinces* (1966-67), 12 *McG. L. J.* 528 at 547.

¹⁸⁸ *Supra*, note 163.

the proposed statute, it was then to be submitted to a referendum, and, if approved by the voters, was then to be passed by the Legislature. The accused, prosecuted under *The Liquor Act*, claimed that the statute was invalid because it had been passed by this special procedure. Lord Sumner, writing on behalf of the Privy Council, rejected the defence:

[I]t is clear that the word "exclusively" in s. 92 of the British North America Act means exclusively of any other Legislature, and not exclusively of any other volition than that of the Provincial Legislature itself. . . . A law is made by the Provincial Legislature when it has been passed in accordance with the regular procedure of the House or Houses, and has received the royal assent duly signified by the Lieutenant-Governor on behalf of His Majesty.¹⁸⁹

The words seem to endorse the validity of new forms of procedure, including binding referendal procedure, so long as they are part of the elements of the existing Legislature and not equivalent to the establishment of a *new* Legislature.¹⁹⁰ However, Lord Sumner goes on to say that he will not deal with the validity of the *Direct Legislation Act*, describing the passage of a bill by the Legislature after referendum approval as "deference to the will of the people." He makes no comment as to whether the Legislature could be compelled to act on petition and referendum. Nevertheless, he does describe the Legislature's action as pursuant to a "statutory duty", and, implicitly at least, he appears to have considered the validity of the *Direct Legislation Act* and seemingly endorsed the possibility of the re-definition of the Legislature.¹⁹¹

It would appear that *Nat Bell* and *Trethowan* could be used to buttress an argument that the type of manner and form provisions imposed by either the federal Parliament or the provincial Legislatures is unrestricted, subject to the express limitations of section 92(1), the impossibility of giving power to another legislative body (as opposed to the re-definition of the internal elements of the existing institution), and the colourability test. "Parliament" can have a different makeup in different situations, and the courts should be and are capable of scrutinizing a given "Act of Parliament" to ensure that it is passed by Parliament as constituted by the rules applicable to the occasion.

The question now to be considered is one of evidence. Earlier it was postulated that error on the face of the Act would ground a finding of invalidity and it was debated whether resort to the Journals of the House of Parliament could or would be made to determine compliance with procedural rules. Whether or not such reference can be made, or whether further types of evidence such as parol evidence can be considered, are issues raising difficult questions of parliamentary privilege.

¹⁸⁹ *R. v. Nat Bell Liquors, Ltd.*, [1922] 2 A.C. 128 (P.C.) (Alta.) at 134.

¹⁹⁰ See, Marshall, *Parliamentary Sovereignty*, *supra*, note 20 at 99. This judicial approach shows the difficulty of using the "abdication" approach to manner and form in Canada.

¹⁹¹ Scott, *supra*, note 187 at 560 rejects this interpretation. He feels that words such as "defence" show that the Privy Council did not believe that the Alberta Legislature acted pursuant to a statutory *duty*. Alternatively, if it was acting pursuant to a duty, it was not a mandatory one. Then, the popular consultation did not constitute an "element" in the legislative process. See, also, Marshall, *id.* at 98.

I. PARLIAMENTARY PRIVILEGE

Parliamentary privilege, unlike other types of privilege, is less a rule of evidence than a substantive area of the common law, albeit a specialized one. Parliamentary privilege is concerned with the rights and immunities ascribed to Members of Parliament individually and to the Houses of Parliament in which the Members act collectively.¹⁹² The term "parliamentary" privilege is a little misleading in that it is each House and not Parliament *in toto* which claims the special rights.

The most distinctive characteristic of privilege is its ancillary character; that is, it comprises those rights and immunities which are considered necessary for the Members and the House in order to carry out their functions.¹⁹³ Individual privileges include freedom from civil arrest for forty days before and after a session of Parliament, freedom from testifying as a witness during the session, and, by far the most important, freedom of speech in "proceedings in Parliament" (largely in debate).¹⁹⁴ Collectively, each House has the right to control its own proceedings and to punish for contempt.¹⁹⁵ Contempt is more aptly described as an offence against the authority of the House than as a breach of privilege.

The concern in a study of the obstacles to proving irregularity in statutory procedure is the scope of the privilege which grants control over internal proceedings. Does this exclude all review of internal proceedings? If so, the definition of the phrase "internal proceedings" is extremely important, for its scope decides whether a litigant is prevented from proving procedural irregularities.

While E. C. S. Wade and others claim that parliamentary privilege is one facet of parliamentary sovereignty,¹⁹⁶ it is submitted that this view is incorrect. Parliamentary sovereignty describes the *legislative* supremacy of the three organs of Parliament acting collectively. Parliamentary privilege, on the other hand, is unrelated to the legislative power of Parliament. Furthermore, there is no total "Parliament" with privilege, for parliamentary privilege attaches to each House or legislative component separately. Finally, as subsequent discussion will show, parliamentary privilege cannot totally exclude judicial review of the activities of a House of Parliament nor empower a House to make its decisions on what constitutes privilege unquestionable in the courts.

Still, it must be admitted that privilege became a subject of controversy

¹⁹² May, *supra*, note 2 at 64; E. Campbell, *Parliamentary Privilege in Australia* (London: Melbourne U. Press, 1966) at 1; U.K. H. of C. Select Committee on Parliamentary Privilege, *Report*, (Dec., 1967).

¹⁹³ May, *supra*, note 2 at 64.

¹⁹⁴ This freedom is far from unlimited and has been the subject of a great deal of litigation and discussion in literature. See, e.g., S. A. deSmith, *Parliamentary Privilege and the Bill of Rights* (1958), 21 Mod. L. Rev. 465 and Campbell, *supra*, note 192.

¹⁹⁵ Wade & Phillips, *Constitutional Law* (8th ed. London: Longmans, 1970) at 154-57.

¹⁹⁶ E. C. S. Wade, *supra*, note 50.

and was accorded recognition at the same time that parliamentary sovereignty became established in England, a fact which implies a closer link (although not an identity) between privilege and sovereignty than exists between sovereignty and the enrolled bill rule.

Privilege did not become an issue until fairly late in Parliament's history, surfacing in the mid-seventeenth century with the struggles between the respective Houses of Parliament and between Parliament and the King over their respective legislative jurisdictions. Parliament, and more particularly the House of Commons, desired exclusive control over the initiation of legislation, the agenda of proceedings, and the interpretation of its privileges. None of these claims could be satisfied on legal grounds; their assertion was a political one, based on a need for independence.¹⁹⁷ While the impetus for privilege claims came from Parliament's legislative role, the character which the privileges took on came from Parliament's judicial origins.¹⁹⁸ For example, the rationale for a court's inability to interfere with Parliament's decisions on questions of privilege was founded on the inability of an inferior court to question the decision and proceedings of a higher court. Here, the superior body was the High Court of Parliament. The privileges of Parliament were given statutory recognition in the *Bill of Rights* of 1688,¹⁹⁹ which guaranteed the rights of freedom of speech and control over internal proceedings to Parliament.

Colonial legislatures could not rely on British traditions to confer on them the privileges of Parliament. As *Kielley v. Carson*²⁰⁰ and numerous subsequent cases made clear, the privilege of a colonial legislature was based upon a principle of necessity. Its scope was to be determined by asking what was necessary to protect the exercise of the legislative function. No analogy could be drawn to the British Parliament to support a claim of privilege because that legislative body possessed unique privileges because of its judicial origins as the High Court of Parliament. Because of this difference in origin, colonial legislatures never possessed an inherent power to arrest and commit for contempt except to the extent necessary to prevent actual disruption of a legislative session. Committal for contempt was a judicial power which could only be acquired by statute.²⁰¹ Colonial legislatures with plenary power to legislate for the peace, order and good government of the colony had authority to enact contempt powers after the passage of section 5 of the *Colonial Laws Validity Act*, if they had not had such power before.²⁰²

¹⁹⁷ Campbell, *supra*, note 192 at 4.

¹⁹⁸ McIlwain, *supra*, note 62 at 230.

¹⁹⁹ 1 Wm. & Mary, sess. 2, c. 2. This statute is only declaratory of rights already in existence according to May, *supra*, note 2.

²⁰⁰ *Supra*, note 84. The necessity principle is also adopted in "Opinion on the Privileges of the House of Assembly and Casting Vote of the Speaker of the Legislative Council" (Dec. 30, 1815) presented to the Earl of Bathurst, reprinted in W. P. M. Kennedy, ed., *Documents of the Canadian Constitution, 1795-1915*, (Toronto: Oxford U. Press, 1918) at 297.

²⁰¹ *Barton v. Taylor* (1806), 11 App. Case 197 (P.C.) (N.S.W.); M. P. Clarke, *Parliamentary Privilege in the American Colonies* (New York: Da Capo Press, 1971).

²⁰² Campbell, *supra*, note 192 at 20.

Since 1867, the federal Parliament in Canada has had a constitutional basis for its privileges. Section 18 of the *B.N.A. Act* gives Parliament authority to define its privileges, subject to the proviso that they must not exceed those possessed by the British Parliament at the time of the passage of the statute. This power has been exercised in the *Senate and the House of Commons Act* to confer on Parliament all the privileges exercised by the British House in 1867 and those which any Act of Parliament sets out (subject to the proviso above).²⁰³ Thus, if the British Parliament created a new privilege, Canada could also implement it by enactment. The power is of questionable worth today, when the concern seems to be to narrow, rather than to expand, Parliament's privileges.

While the provincial legislatures are not mentioned in section 18 of the *B.N.A. Act* and their privileges are not the subject of consideration in any other part of that statute, they do have constitutional authority to legislate with regard to their own privileges, either through the continuation of pre-Confederation authority originally conferred by the *Colonial Laws Validity Act* or because of section 92(1) of the *B.N.A. Act*, giving power to amend the provincial constitution.²⁰⁴

Regardless of the origin of a legislature's privileges, inherent, historical, or statutory, the body will possess the privilege of control over its own proceedings, for this is one of the most significant attributes of an independent legislative institution.

J. CONTROL OVER INTERNAL PROCEEDINGS

The words of Article 9 of the *Bill of Rights* of 1688 must always be the starting point in a discussion of this subject, for they confirm Parliament's long-standing claim for security from outside interference:

That the freedom of speech, and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament.²⁰⁵

Article 9 carries with it protection for both the individual's freedom of speech and that of the House as a whole.

The prohibition on questioning proceedings in Parliament in any court would appear broad enough to exclude all judicial dealings with the workings of Parliament. However, a line of cases has narrowed the meaning of the words of Article 9 and at least explored, if not clarified, the relationship between the courts and Parliament with regard to matters of privilege, rejecting Parliament's claim to exclusivity of jurisdiction and establishing a judicial right to come to an independent determination as to what is privileged.

The most famous of these cases is *Stockdale v. Hansard*, in which the parliamentary printer was sued for libel because of a parliamentary report which he had published. The House of Commons passed a resolution declaring that publication was a necessity for the operations of Parliament and that

²⁰³ R.S.C. 1970, s. S-8, s. 4.

²⁰⁴ *Fielding v. Thomas*, [1896] A.C. 600 (P.C.) (N.S.) at 610.

²⁰⁵ *Supra*, note 199.

Parliament had sole authority to determine the scope of the privileges of the House. The Court rejected a defence based on the resolution, making it clear that there was a distinction between a court's inquiring whether a given subject was within the exclusive jurisdiction of the House and a court's interfering with the House's judgment in a matter which was within its exclusive jurisdiction. The first question was the relevant one here, and the rationale for the review is clear:

If the doctrine be that the Houses, or rather the members constituting the House are the sole judges of the existence and extent of their powers and privileges, I cannot see what check or impediment exists as to their assuming any new powers and privileges which they may think fit to declare.²⁰⁶

It has long been settled that neither House has the power to create a new privilege by itself. Otherwise, each House would be legislating, a fact which would alter the common law rule that only "Parliament" legislates.²⁰⁷ Only "Parliament" can alter this rule on the method of legislation, not one House alone. Therefore, when considering questions of privilege, the courts are only determining whether a House possesses the privilege which it claims and not questioning the exercise of any privilege acknowledged.²⁰⁸

The difficult questions for determination are the scope of each privilege and what is to remain "exclusive" to the House. Theoretically, since privilege is part of the common law and unchangeable by resolution, it is determinable objectively; yet the definition has not been easy.

May, the leading authority on parliamentary procedure, says that the judicial ability to review the activities of a legislative body to ensure that they are authorized by privilege is not unrestricted; it is his belief that internal proceedings are still a matter for exclusive parliamentary jurisdiction.²⁰⁹ While the courts might have to define "internal proceedings" in difficult cases, they would usually have no problem in stating what falls within the scope of the phrase.

May's "clear-cut" distinction between internal proceedings which are subject to the House's exclusive jurisdiction and privileges which are not exclusive starts to become blurred when he states that an action exercisable outside the House which affects the rights of persons would be subjected to scrutiny by the courts in order to determine if the House has jurisdiction to order the act and, if so, whether the act as executed was within the scope of the order given. Surely one could say that almost any act undertaken by Parliament affects outsiders.

With all due respect to May, it would seem from the cases that the courts *always* decide if a matter is within the scope of internal proceedings. If so, they can *always* look at the action taken in the case of privilege to ensure that

²⁰⁶ *Supra*, note 71 at 192 (Ad. & E.); 1184 (E.R.) *per* Patterson, J.

²⁰⁷ See, Jennings, *supra*, note 54 at 149-51.

²⁰⁸ See, *R. v. Bunting* (1885), 7 O.R. 524 (Q.B.) at 536 for a similar justification for judicial action by an Ontario Court. The issue there was the Court's jurisdiction *vis-à-vis* the Legislature's with regard to the punishment of a conspiracy to bribe a member.

²⁰⁹ *Supra*, note 2 at 194-95.

it is protected. The courts may be less inhibited in interfering with Parliament's determination as to the bounds of privilege when an individual is immediately involved than when Chamber business is in issue, but the courts can always decide. There is a fine line for the courts to draw between defining the scope of privilege (within which Parliament has exclusive decision-making power) and reviewing the determination of Parliament within that area. Perhaps some cases may help to illustrate the problem.

Bradlaugh v. Gossett contains several well-known statements on Parliament's privilege, among which the most famous is the following:

What is said or done within the walls of Parliament cannot be inquired into in a court of law.²¹⁰

If the words are thus read out of context, they would seem to preclude any judicial review with regard to procedure. However, one should be careful to link the words to the facts of the case. Bradlaugh, elected as a Member of Parliament, sought judicial assistance in his effort to enter the Chamber of the House and take his seat. He had been excluded by resolution of the House and prevented from taking the oath required of all elected Members. Both the regulation of admission to the Chamber and of the constitution of the House are traditionally matters within Parliament's sole cognisance. Lord Coleridge recognized this privilege in words which followed the above quotation but are less often quoted:

The jurisdiction of the Houses over their own members, their right to impose discipline within their walls, is absolute and exclusive.

If one were to adhere to the test which May outlined for judicial intervention, one might query the result of the *Bradlaugh* case. May said that the courts would intervene to ensure actions taken by the House were within jurisdiction if outside interests were affected by parliamentary actions. Surely Bradlaugh's constituents had been affected by the denial of their Member's seat and vote.²¹¹ It would appear that May's test must be refined to recognize that the courts always review the jurisdictional question, but the degree of scrutiny depends on the *direct* effect of Parliament's actions on outsiders. Here, the constituents were only indirectly affected.

According to May, there are certain areas in which the courts can clearly say that Parliament has exclusive jurisdiction; yet even here one can find evidence of judicial review. The definition of and compliance with Standing Orders is fairly free from judicial scrutiny. These rules of procedure are drafted for the efficient operation of Parliament and, as the earlier discussion of *Pickin* showed,²¹² the courts do not concern themselves with the House's adherence thereto. But even though courts will not review matters within internal proceedings, such as conformity with the rules, the judiciary will look at the Standing Orders to ensure that they are indeed rules of procedure and not statutory amendments passed by one House. In *Harnett v. Crick*, the

²¹⁰ (1884), 12 Q.B.D. 271 at 275.

²¹¹ Although Campbell *supra*, note 192 at 77 describes *Bradlaugh* as a case dealing directly with proceedings within Parliament and only cognisable there.

²¹² *Pickin*, (H.L.), *supra*, note 16.

New South Wales Legislature had adopted a Standing Order allowing suspension of a Member of the House pending the outcome of a criminal trial. While the authorization for the adoption of standing rules and orders was contained in the New South Wales Constitution Order whereas in Canada it is based on a common law rule of necessity, it is submitted that the approach of the courts would be the same in both countries.

The Privy Council upheld the validity of the Standing Order and stated:

Two things seem to be clear: (1) that the House itself is the sole judge whether an "occasion" has arisen for the preparation and adoption of a standing order regulating the orderly conduct of the Assembly, and (2) that no Court of law can question the validity of a standing order duly passed and approved, which, in the opinion of the House, was required by the exigency of the occasion, unless, upon a fair view of all the circumstances, it is apparent that it does not relate to the orderly conduct of the Assembly.²¹³

This provides a fair and reasonable approach, although it is contrary to May's assertion that the courts do not look at the exercise of power related to internal proceedings unless individuals are affected. While the Court apparently shows substantial deference to Parliament's judgment as to the rules necessary for the orderly operation of the House, it will intervene to declare invalid a Standing Order that bears no possible relationship to the orderly conduct of proceedings. Compliance with the rules of business will be left to the House.

May believes that Parliament will be free from scrutiny as to compliance with rules even in those areas in which procedure is set out in statutes. As he says:

[T]he House is not responsible to any external authority for following the rules it lays down for itself, but may depart from them at its own discretion. . . . This holds good even where the procedure of a House or the right of its members or officers to take part in its procedure is dependent on statute. For such purposes the House can practically change or practically supersede the law.²¹⁴

Again, May's words must be subjected to restrictions, for, as they stand, they appear inherently contradictory of the well-known proposition that a House cannot add to its privileges by resolution. In certain areas of privilege May's words are more appropriate than in others; for example, the courts have constantly refused to interfere in disputed elections except to the extent that they are authorized to do so by statute.²¹⁵ Although the legislature or one of its officials may refuse to comply with statutory electoral procedure, the courts will not intervene, even to decide whether the official should act. While the result of such inaction may be, in effect, to allow the House to "redraft" a statute, the judicial approach is understandable. The constitution of the membership of the House has been an important and long-accepted area of

²¹³ [1908] A.C. 470 (P.C.) (N.S.W.) at 475-76. See, also, *Barton, supra*, note 201 for a discussion of review of the Standing Orders.

²¹⁴ *Supra*, note 2 at 82.

²¹⁵ See, *R. ex rel. Stubbs v. Steinkopf* (1965), 47 D.L.R. (2d) 105 (Man. Q.B.); *R. ex rel. Tolfree v. Clark*, [1943] 3 D.L.R. 684 (Ont. C.A.), leave to appeal to S.C.C. denied; *Temple v. Bulmer*, [1943] S.C.R. 265. For comment on these cases, see, (1943), 21 Can. B. Rev. 662.

privilege, and it has been held that to remove or restrict any privilege express words are necessary.²¹⁶ As a result, the courts reason that they have no jurisdiction over election appeals or a person's right to hold a seat unless they are expressly given such power. The result of this approach is to leave a great part of the legislature's activity free from judicial scrutiny. The view is harmonious with the approach in *Bradlaugh*, for one could characterize this as a matter directly affecting Parliament's proceedings and rights exercisable in the House and thus a matter always left to Parliament. Still, one might express concern today, whether the electorate's right to have a properly elected Parliament and a voting representative should not outweigh the legislature's desire for freedom from judicial scrutiny. The original rationale for the privilege in medieval times, to prevent royal interference with parliamentary elections, is at least deserving of reconsideration today and possibly even rejection.

Of great concern is the treatment of statutes other than electoral ones which are applicable to Parliament. *R. v. Graham-Campbell, ex parte Herbert* was a case in which the applicability within the Parliament Buildings of the *Licensing (Consolidation) Act, 1910* was in issue. A. P. Herbert sought a writ of *mandamus* against the members of the House of Commons Kitchen Committee and the manager of the Refreshment Department because the refreshment bar was serving liquor without a licence. The three-man bench was unanimous in dismissing Herbert's claim. Each judge gave separate reasons for his decision, with Lord Hewart, C.J. adopting a surprisingly broad view of the privileges of the House:

[T]he magistrate was entitled to say . . . that in the matters complained of the House of Commons was acting collectively in a manner which fell within the area of the internal affairs of the House, and, that being so, any tribunal might well feel, on the authorities, an invincible reluctance to interfere. . . .²¹⁷

Surely one must ask why a court should not be able to consider whether the *Licensing Act* applied. That was an Act of general application, and review of its terms in no way involved the Court in the intricacies of parliamentary procedure. Nor would the Courts be threatening the independence of Parliament's legislative operation by considering if the Act applied and ordering it enforced.²¹⁸ As the decision stands, one House of Parliament could with impunity ignore express statutory provisions applicable to it, and, in effect, amend the statute. Such a proposition is contrary to the rule that one House cannot legislate alone. Furthermore, the conduct is contrary to the original rationale for parliamentary control of internal proceedings, which was to allow freedom of action and speech. Surely, enforcement of laws of general application would not prejudice those values, as Parliament itself consented to their enactment.

A better approach for the Court in *Graham-Campbell* would have been

²¹⁶ *Duke of Newcastle v. Morris* (1869-70), L.R. 4 H.L. 661; *Theberge v. Laudry* (1866-67), 2 A.C. 102 (P.C.) (Que.) at 107-08; *Valin v. Langlois* (1893), 5 App. Cas. 115 (P.C.) (Que.).

²¹⁷ [1935] 1 K.B. 594 at 602.

²¹⁸ *Campbell, supra*, note 192 at 78.

to consider first whether the Act was in fact intended to apply to Parliament, rather than holding that one House could decide the issue itself. In fact, Lord Hewart went on to say that the bulk of the Act did not apply to the House of Commons, while Avory, J. held that the licensing section itself was not applicable. Since the Houses of Parliament are unique and privileged entities, it would have been preferable to hold that they are not subject to general Acts unless clearly included therein.

This last proposition is extremely important if the courts are to be able to undertake review for compliance with statutory procedural provisions. In this area, if the *Bradlaugh* test of "direct" effect on individuals²¹⁹ is operative, one could argue that Parliament has exclusive jurisdiction over procedural matters. After all, the method of acting in the Chamber has always been a matter directly affecting Parliament's interests. Yet the effectiveness of such statutory procedures as a protection for certain groups or values may be jeopardized if Parliament is the sole judge of the statute's application.

It is well to note the nature of the court's task when dealing with a question of privilege and statutory procedure. The court is only deciding the preliminary issue whether it is even competent to deal with compliance with the procedure and to order a remedy; that is, the concern at this point is the scope of judicial inquiry. The court is not coming to a decision on the Act's validity. Privilege cannot cure defects in an Act. A decision on validity revolves around the earlier questions of whether the procedure under review is directory or mandatory. If parliamentary privilege is held to exclude *all* judicial scrutiny of procedure, then a litigant would be unable to prove an Act invalid even though it was not passed by the necessary procedural rules. Conversely, if privilege does *not* exclude judicial review, then a determination as to whether a procedure is mandatory or directory should not make any difference as to the scope of review. That is, if privilege does not preclude the court from looking for compliance with mandatory procedure, then there is no reason to prevent it from looking at directory procedure as well. It would be on the basis of the enrolled bill rule of the legal effect of mandatory procedure that the courts would decide that an Act was valid or invalid, and not because of privilege.

The court's jurisdiction to look into the observance of statutory procedure is a difficult issue. Procedure seems to be inherently a parliamentary matter, directly affecting matters in the Chamber. Therefore, it raises somewhat different problems from those in *Graham-Campbell*, where the statute involved was one generally applicable. There are three possible rationales for intervention. First is the oft-repeated phrase that one House cannot legislate by resolution. To allow the House to interpret a procedural statute and possibly ignore it is to allow an amendment to the statute by one House. Of course, this proposition does not preclude the courts from showing deference to the House's interpretation of the procedure. For example, in the *Irwin*²²⁰ case the question of the need for a royal recommendation was raised. In deciding

²¹⁹ *Supra*, note 210.

²²⁰ *Supra*, note 82.

whether a recommendation was needed, the Court could have used the deferential approach shown in *Harnett*²²¹ and adopted the expert opinion of the Speaker of the House.²²² Thus the statutory procedure would be assured of compliance without substantial interference with the operations of the House.

The traditional sanctity of House proceedings is not immutable, as is shown by recent Canadian provisions for affirmative and negative resolutions which were adopted in 1970.²²³ While the provisions were instituted to allow parliamentary scrutiny of delegated legislation,²²⁴ they expressly provide that an instrument will come into force if affirmed (or cease to have effect if negated) "in accordance with the rules of the House." One could regard these provisions as an implied instruction to the courts to look into the proceedings for this limited purpose, thus showing that the courts are not always excluded from procedural matters.

A second rationale for judicial review of procedure would be on the basis that privilege, being statutory in origin (as authorized by section 18 of the *B.N.A. Act*), cannot preclude review by the courts, at least with regard to constitutional procedures. The rationale for this proposition would be in the judiciary's duty to ensure the integrity of the constitution.²²⁵ Whether one can say that there is merit in the assertion is difficult to determine, although the *Harris* case may give some enlightenment. The South African Supreme Court made reference there to the statutory origin of privilege in South Africa and went on to hold that there could be no interference under the guise of privilege with the entrenched sections of the Constitution.²²⁶ One might be able to prevent judicial scrutiny of procedural matters by a statutory provision to that effect, but only if the statute enacting this privilege had been passed by the special constitutional procedure. The underlying reasoning for the Court's holding is clear and reasonable: if the Court did not preclude privilege from hampering its review, then a matter of statutory origin (privilege) would, in effect, override the Constitution.

In Canada, the statutory origin of privilege is acknowledged. However, this need not be regarded as justifying judicial review of constitutional procedure in all cases. One could argue that the federal Parliament, through its power to amend the constitution and because of the flexible nature of that

²²¹ *Supra*, note 213.

²²² There are many Speaker's rulings on the need for a recommendation and the scope of the financial initiative of the Crown; e.g., the ruling that the bill entitled "An Act for the Dissolution of the Dominion Coal Board" infringed the privilege of the House of Commons because the bill, involved 116 H. of C. Journals (79-80). It had been argued that the bill violated ss. 53 and 54 of the *B.N.A. Act* as well. It is submitted that rulings such as these should be given some weight by courts.

²²³ *Interpretation Act*, R.S.C. 1970, c. I-23, as am. by R.S.C. 1970 (2d Supp.), c. 29, s. 28.1.

²²⁴ See, J. E. Kersell, *Parliamentary Supervision of Delegated Legislation* (London: Stevens, 1960) at 85-92.

²²⁵ Strayer, *supra*, note 194 at 141.

²²⁶ *Supra*, note 26. This could be regarded as a colourable attempt to alter the Constitution. The South African Supreme Court struck down such an attempt in *Harris v. Minister of the Interior*, *supra*, note 26. See, also, Wade, *supra*, note 50 at 1xi.

instrument, could enact a privilege statute which would prevent judicial scrutiny of the *B.N.A. Act* procedures, such as section 54 (royal recommendations). In effect, such an Act would impliedly amend the constitution by preventing judicial review. It might be difficult to argue that the present provision of the *Senate and House of Commons Act*, which confers privileges on Parliament,²²⁷ is sufficient to exclude the courts. The words used are general in nature, and a Canadian court, with its propensity for review to "protect" the constitution, would probably require an explicit exclusion of judicial review, that is, a clear privative clause, before abstaining from reviewing constitutional procedure. Section 4 would be regarded as reserving to Parliament only traditional areas of internal proceedings, such as compliance with Standing Orders. Nevertheless, it is submitted that an express privilege statute could be enacted which would amend the constitution and prevent judicial review.

The hypothesis outlined above would operate with procedures of general application. However, if a special mandatory procedure were implemented in the constitution or in a statute applicable to only a few limited situations, then the *Harris* precedent might apply. If the procedure, for example a two-thirds majority requirement to alter language rights, were in the constitution, one could argue that the statute dealing with privilege could not operate to exclude judicial scrutiny for compliance with the requirements. This would result because the privilege statute had not been passed by that procedure and, therefore, could not indirectly amend the constitution. Even if the special procedure were statutory in origin, there is reason to believe that privilege could not exclude judicial review. Only the legislative body known as Parliament in this situation could enact such a provision and that body would function by a two-thirds majority. The courts are concerned that Parliament, as constituted by the rules applicable in any given situation, should be the only body to legislate.

A third rationale to allow intervention would be a policy one, based on a balancing of competing values, that of Parliament to protect the sanctity of its proceedings and that of individuals to safeguard their rights. The privilege to control internal proceedings was devised to protect the Houses from outside interference and to facilitate legislative business. While the protection goal is no longer as significant as it once was, there is still need to allow the House freedom to operate without vexatious interference. This is not to say that judicial review to ensure that a statutory procedure has been followed need always be vexatious. A test could be devised whereby observation of special procedures, as opposed to those of general application such as those in the *B.N.A. Act*, could be studied by the courts. Cowen suggests that the courts intervene where special provisions are legislated in order to protect the substantive rights of individuals or groups of citizens.²²⁸

Whichever justification is used, it appears that the courts will intervene in internal procedural matters in Parliament in some instances. In *McDonald*

²²⁷ R.S.C. 1970, c. S-8, s. 4. This discussion ignores questions of enrolment. The enrolled bill rule may be sufficient to exclude the courts from review of a statute already passed by Parliament. See, *Irwin*, *supra*, note 82.

²²⁸ *Supra*, note 18 at 282.

v. *Cain*,²²⁰ the High Court of Australia found authority to decide whether a bill to establish an electoral district commission was one which must be passed by the special procedure for the alteration of the constitution, or one which fell into the exception thereto which allowed a simple majority if the Act altered only the qualifications of members or changed electoral districts. The Court based its jurisdiction to determine the question on the controlled nature of the constitution, holding that the Court did no more than determine a question of law, that is, whether the Act fell within the proviso. The case does not adopt any of the three rationales discussed, although its decision resembles the second, in that the Court here claimed to protect the constitution's integrity.

The issue of statutory procedure versus privilege has yet to be adjudicated in Canada, although there may be some indications of judicial attitude in privilege cases which have been decided on other grounds. The early case of *Landers v. Woodworth*²³⁰ showed a surprising willingness in the Supreme Court of Canada to intervene in parliamentary affairs and a judicial suspicion of the House's activity.²³¹ Although this is a contempt case dealing with the expulsion of a Member, and not a procedural case, it is one in which a strict view of privilege was taken. All the judges entered into a consideration of the merits of the privilege claim and only Taschereau, J. deferred to any degree to the judgment of the House as to the necessity for its action.

One might believe that there had been a significant transformation in judicial attitude over the years when one reads the recent case of *Roman Corp. v. Hudson's Bay Oil and Gas Co.* Aylesworth, J., in the Ontario Court of Appeal, endorsed a broad view of proceedings in Parliament and explained that "consideration of the public interest in this regard overbears the usual solicitude in our law for the private individual".²³² While the Supreme Court of Canada dismissed the plaintiff's appeal on other "narrower" grounds, Martland, J. approved the lower court's statement.

In a recent case, in *Re André Ouellet*, Hugessen, J., in the Quebec Superior Court, Criminal Division was critical of the scope of the language used by the Ontario Court of Appeal. The Minister of Consumer and Corporate Affairs, the Honourable André Ouellet, was convicted for contempt of court as a result of statements made to reporters in the Government Lobby of the House of Commons regarding the acquittal of several sugar companies on charges under the *Combines Investigation Act* in a trial before Mackay, J.²³³ One of the Minister's defences to the charge of contempt was parliamentary privilege. In rejecting the defence, Hugessen, J. said, in words that contrast with Aylesworth, J.A.'s above:

²²⁰ [1953] V.L.R. 411 (H.C.) (Aus.).

²³⁰ (1879), 2 S.C.R. 158.

²³¹ A similar view is expressed by Wilson, J. in *Bunting*, *supra*, note 208.

²³² (1973), 36 D.L.R. (3d) 413 (S.C.C.), *aff'g.* (1972), 23 D.L.R. (3d) 292 (Ont. C.A.) at 299.

²³³ *The Queen v. Atlantic Sugar Refineries Co. Ltd.*, Unreported, January 23, 1976. The Minister is currently appealing the conviction.

Absolute privilege is a drastic denial of the right of every citizen who believes himself wronged to have access to the courts for redress and should not be lightly extended. It is not the precinct of Parliament that is sacred, but the function and that function has never required that press conferences given by members should be regarded as absolutely protected from liability.²³⁴

One must be wary of a hasty application of *Roman* and other cases expressing broad views of parliamentary proceedings to cases of procedural irregularity²³⁵ because they deal with the privilege of freedom of speech accorded to the individual member. There is an unfortunate tendency among some commentators to use such cases interchangeably with those dealing with the privilege of members in their collective capacity, a practice that is unwise. There are policy reasons for differentiating the privileges of individual members from those of the collectivity, particularly the need for protection from libel actions. Freedom of speech is the most basic safeguard of the members' position.²³⁶ The same considerations of public policy do not apply to the House as a collectivity, and judicial restrictions, through enforcement of Parliament's own statutes, need not be regarded as an onerous burden.

It would appear probable that Canadian courts would accept that parliamentary privilege excludes scrutiny by the judiciary of the day-to-day operations of Parliament. But where statutory procedures have been enacted, particularly those designed to protect minority interests, the courts would not feel constrained by privilege. This would leave Parliament free to operate according to its own rules and procedures most of the time.

One might ask what effect this proposed solution would have on the admissibility of evidence such as the Journals or working copies of bills. While the *Senate and House of Commons Act* makes the Journals admissible in a court²³⁷ and they are public documents, in a normal case they would be irrelevant, since privilege would preclude investigation into the procedure for enactment. But where a statutory procedure established the court's jurisdiction to consider a statute's enactment, the Journals would be relevant evidence. Since they are available publicly, Parliament would not be troubled by the court's action in using the Journals. However, the working copies of bills, as internal House documents and property could not be admissible since the court would then be directly interfering with the House by demanding them. Similarly parol evidence by officials or members would be direct interference and not permissible.

This proposition, while it would allow resort to the Journals in specific situations, would prevent "fishing expeditions" for procedural errors in each and every Act. If the enrolment rule did not preclude scrutiny by the courts, privilege would do so. The result would be to leave an Act which contained amendments not passed by both Houses beyond judicial scrutiny,²³⁸ yet such

²³⁴ *Id.*

²³⁵ See, e.g., *A.-G. Ceylon v. De Livera*, [1963] A.C. 103 (P.C.); *Bunting*, *supra*, note 206 per O'Connor, J., in dissent.

²³⁶ Although the British H. of C. Committee on Privilege, *supra*, note 192, recommends a restriction on the privilege of freedom of speech.

²³⁷ *Supra*, note 227, s. 6.

²³⁸ As in *Field v. Clark*, *supra*, note 89.

a result need not be regarded negatively, for it is not incompatible with the goal of certainty.

K. REMEDIES AND PRIVILEGE

The final question to be addressed is that of the remedies which the courts can order with regard to irregular parliamentary proceedings. While standing may be a problem for a challenger, the courts in *Trethowan* and *Clayton* both found that the plaintiff had the ability to bring an action.²³⁹ The serious issue is whether the applicant can seek an injunction or declaratory relief before the bill is enacted. If the enrolment principle will prevent judicial review of an Act which has received royal assent, an injunction to prevent that assent would be the only feasible way to attack the bill. In *Trethowan*, an injunction was issued to prevent presentation of a bill for royal assent. Surprisingly, the legality of this order was not discussed in the High Court of Australia or in the Privy Council; only at trial were the issues of injunction and privilege raised.²⁴⁰ Only Long Innes, J. expressed concern about the privilege question. He ordered the injunction with apparent reluctance and only on the basis that the potential injury to the plaintiff by refusing the order was greater than that to the legislature by granting it.²⁴¹

Trethowan has not been followed in British cases in which injunctions were sought, and even in Australia it has been distinguished on the basis that the Constitution contained an express negative provision which made it "unlawful" to present the bill for royal assent without the referendum, and therefore the Court was only following a statute. There has been an apparent reconsideration of the decision in *Hughes and Vale Pty., Ltd. v. Gair*, where the High Court of Australia refused to issue an injunction. Dixon, C.J. explicitly stated that he had doubts as to the correctness of the injunction order in *Trethowan*.²⁴²

Sawer describes the real reason for the decision in *Trethowan* as a "crypto-sociological" one. The Australian courts, accustomed to judicial review and knowing that they would have to discuss the Act after royal assent, decided to ignore technical objections and deal with the issue when first presented.²⁴³ A British court, in contrast, would be reluctant to interfere at this stage. A long line of British cases seems to uphold Sawer's thesis. An injunction has never been ordered, although several judges have reserved the

²³⁹ *Trethowan*, *supra*, note 163; *Clayton*, *supra*, note 131. And see *Thorson v. A.-G. Can.*, *supra*, note 93.

²⁴⁰ *Trethowan v. Peden* (1931), 31 S.R. (N.S.W.) 183. E. McWhinney, in *Trethowan's Case Reconsidered*, (1955) 2 McG. L. J. 32, expresses surprise at the unusual approach of dealing with the grounds for issuing an injunction without first discussing the jurisdiction to order it.

²⁴¹ *Id.* at 235.

²⁴² (1954), 90 C.L.R. 203 at 205. D. Cowen comments on the case in *The Injunction and Parliamentary Process* (1951), 71 L.Q.R. 336.

²⁴³ G. Sawer, *Injunction, Parliamentary Process and the Restriction of Parliamentary Competence* (1944), 60 L.Q.R. 83 at 85.

right to issue one.²⁴⁴ A typical *dictum* is that in *Bilston Corp. v. Wolverhampton Corp.*:

It is difficult to conceive a case in which this jurisdiction, although it undoubtedly exists, can properly be exercised.²⁴⁵

The British cases in which injunctions were sought all involved private Acts of Parliament. They usually arose when the defendant sought an amendment to a private Act and the applicant for the injunction tried to prevent the amendment by blocking the defendant from presenting the bill to Parliament. The applicant usually asserted that the injunction would not interfere with the exercise of parliamentary privilege, as it would be directed to the individual respondent and not to Parliament. The legislative body could proceed, unprejudiced, with its work. The courts rejected the assertion, even in *Bilston*. In that case the applicant for the injunction relied on a *statutory* provision in which the respondent had agreed not to intervene unless he were affected if the applicant sought an amendment to its statute. However, when the applicant sought an amendment, the respondent intervened. This caused the applicant to seek the injunction, which the Court refused. On grounds of public policy, the courts feel that it is better to leave the decision on the plaintiff's claim to Parliament, realizing that even if the injunction were issued against an individual, it would interfere with parliamentary proceedings by preventing consideration of a claim submitted to Parliament. As some of the judgments point out, an injunction's purpose is to enforce legal rights. This purpose is inconsistent with Parliament's task, which is to abrogate existing rights and to create new ones.²⁴⁶

If an injunction is not awarded in the above situation, where it would not be directly applied against Parliament, it would be difficult to see how a court would justify such an order in the case of a public Act, where Parliament or its officials must be the respondents to the application.²⁴⁷ It would be more consistent with parliamentary privilege to let the legislature act, and give it a chance to comply with mandatory procedures, rather than submit it to judicial supervision. Campbell expresses impatience with this view, saying that if Parliament is not going to comply, as in *Trethowan*, there is no need to await the illegal outcome before acting.²⁴⁸ Still, it is submitted that the legislative branch should be accorded some deference by the judiciary, which would include a presumption that it will act legally. This should operate until conclusively proved invalid, that is, until *after* illegal enactment.

Sawyer suggests a way around the privilege problem: legislation entrench-

²⁴⁴ *E.g.*, *Heathcote v. North Staffordshire Ry. Co.* (1850), 2 Mac. & G. 100 at 109; 42 E.R. 39 at 43 (Ch.).

²⁴⁵ [1942] Ch. 391 at 393. Holdsworth comments on *Bilston* in (1943), 59 L.Q.R. 2. See, also, *Ware v. The Grand Junction Water Co.* (1831), 2 Russ. & M. 470; 39 E.R. 472 (Ch.); *Stevens v. South Devon Ry. Co.* (1851), 13 Beav. 48; 51 E.R. 18 (Rolls Ct.); *Lancaster and Carlisle Ry. Co. v. NorthWestern Ry. Co.* (1856), 2 K. & J. 293; 69 E.R. 792 (Ch.); *Steele v. North Metropolitan Ry. Co.* (1867), 2 Ch. App. 237; *In re London, Chatham & Dover Ry. Arrangement Act, ex parte Hartridge* (1869), 5 Ch. App. 671.

²⁴⁶ *Heathcote, supra*, note 244 at 109-10 (Mac & G.); 43 (E.R.).

²⁴⁷ B. Laskin, *Injunctions and Legislative Proceedings* (1955), 33 Can. B. Rev. 215.

²⁴⁸ *Supra*, note 192 at 89.

ing a mandatory procedure could expressly recognize an individual's right to seek an injunction before royal assent if the procedure were not followed.²⁴⁹ A plaintiff would then be protected from both the problem of privilege and the potential obstacle of the enrolled bill rule.

Less difficulty with regard to privilege may be encountered if, instead of an injunction, a declaration were sought prior to royal assent, as there is not the immediacy of judicial interference in parliamentary affairs that an injunction brings. *Rediffusion (Hong Kong) Ltd. v. A.G. Hong Kong* was an action seeking a declaration that a proposed ordinance of the Hong Kong Legislative Council to amend the Imperial *Copyright Act* would be *ultra vires* section 2 of the *Colonial Laws Validity Act*. In reply to an objection to the Court's jurisdiction based on privilege, Lord Diplock, writing on behalf of the Privy Council, replied:

The question of the extent of the immunity which is necessary raises a conflict of public policy between the desirability of freedom of deliberation in the legislature and the observance by its members of the rule of law of which the courts are the guardians.²⁵⁰

If no remedy would be available to the plaintiff after the bill was passed and if the plaintiff might be harmed by the unlawful conduct, His Lordship held that necessity would be such as to warrant a judicial remedy *before* the enactment.²⁵¹ However, there was no declaration here, so the debating and passing of any bill would be lawful. If the bill received royal assent, then it would be illegal and void, but not until that time. Therefore, while the Court appears to show a flexible approach to privilege, it is still more deferential to Parliament than the Court in *Trethowan*,²⁵² for it waits for illegality to occur (that is, awaits a true disregard for statutory procedure) before it intervenes. Apparently, at that time the Court would not feel restricted by parliamentary privilege from inquiring into the procedure used in enactment, even looking at parliamentary records if this were necessary to protect the "rule of law." With all due respect to the Court in *Trethowan*, this seems to be the better approach to take.

L. SUMMARY AND CONCLUSIONS

At the outset of this paper, it was stated that mandatory procedural forms may be constitutionally possible in Canada, although their effectiveness may be limited by enforcement problems. The rules providing for the conclusiveness of the enrolled bill and parliamentary privilege (particularly control over internal proceedings) could block any attempt to prove the existence of procedural irregularity in the enactment of a statute.

1. *Conclusiveness of the Parliamentary Roll*

The enrolled bill rule provides that the face of the parliamentary roll is conclusive. No one can look beyond the face for irregularities, and if the

²⁴⁹ *Supra*, note 243 at 86.

²⁵⁰ [1970] A.C. 1136 at 1157.

²⁵¹ *Id.* at 1157.

²⁵² *Supra*, note 236.

assent of all three organs of Parliament is shown on the enrolled copy of the Act, then the statute must be regarded as valid. In Canada, where there are no parliamentary rolls, it is the face of the original Act, as signed and certified by the Clerks of the House of Commons and Senate and the Governor-General, to which one looks. While it could be asserted that the reprinted Act, as sold to the public, constitutes the enrolled copy, it is unlikely that a Canadian court would agree that its scrutiny is confined to the reprint.

Even though the enrolled bill rule does protect some Acts, whether public or private, which have been passed irregularly, it will not protect an Act containing an error on its face. Obviously, omission of the assent of one House would be fatal, while *Harris*²⁵³ makes it at least arguable that failure to show compliance with special mandatory procedures on the face of the Act constitutes an error of law. *Harris* introduces the concept described earlier as a "presumption of regularity", which, in reality, may be a presumption of "irregularity" in its assumption that normal, rather than the required, procedure has been used. Later cases such as *Akar*²⁵⁴ show that reliance on *Harris* is a somewhat tenuous proposition.

The enrolled bill rule need not always prevent judicial review on procedural matters. *Ranasinghe*²⁵⁵ is an important case, for it shows that the original (as opposed to the enrolled) Act is always accessible to a court inquiring into compliance with statutory procedural provisions. There is good reason to treat this case as authority for the proposition that special mandatory procedures impliedly revoke the enrolled bill rule, thus empowering the court to look into all evidence not protected by parliamentary privilege to ensure procedural regularity.

2. *The Enrolled Bill Rule and Parliamentary Sovereignty*

The debate over the scope and operation of the enrolled bill rule is inextricably related to the doctrine of parliamentary sovereignty. Classically, that doctrine held that all judicial scrutiny of matters related to the functioning of Parliament was prohibited. Therefore, enrolment and parliamentary privilege were logically regarded as concomitants of parliamentary sovereignty. However, the newer view of that doctrine assumes that some degree of judicial review is acceptable; that is, review to ensure that Parliament has acted according to the rules defining it. Matters of substance are held inviolate from the judiciary, as is the question of compliance with directory, or "non-definitional", rules of procedure. The enrolled bill rule is regarded as evidentiary limiting the scope of the procedural review but unrelated to the theory of sovereignty and the freedom of the legislature in substantive areas of the law. This view is the more correct one, as historical discussion shows that the enrolled bill rule is judicial in origin and that it pre-dated by many decades the doctrine of parliamentary sovereignty.

3. *The Enrolled Bill Rule in Canada*

In Canada, the enrolled bill rule has not been clearly established, but

²⁵³ *Supra*, note 26.

²⁵⁴ *Supra*, note 37.

²⁵⁵ *Supra*, note 9.

it is likely that the paucity of judicial statements on the matter rests on the lack of challenge to the validity of statutes on the basis of procedural irregularity rather than on the absence of the rule. The major concern of courts in Canada in matters of statutory validity has been the distribution of powers between the federal and provincial governments.

There is no doubt that a rule on the conclusiveness of statutes will be developed. Its basis will have to be found in the principle of necessity rather than theories of sovereignty or the judicial origin of Parliament. Since the rule is not yet clearly established, there is room for consideration of the value of a Journal entry rule as opposed to an enrolled bill rule, similar to that adopted in several American states. A weighing of the competing values of certainty versus legal theory, protection of the constitution, and prevention of fraud may bring Canada to accept a Journal entry rule, but that remains for the courts to decide. Even if the traditional enrolled bill rule is adopted, the "implied revocation" theory postulated with regard to *Ranasinghe*²⁵⁶ would be sufficient to safeguard any manner and form provisions.

4. *Grounds for Statutory Invalidity*

The enrolled bill rule will, obviously, serve to protect some irregularities in statutes. It will not cure them, but it will shield them from review. Matters of fraud or misrepresentation perpetrated on Parliament or mistake by the legislative body will always be screened from review. This is understandable, as parliamentary privilege reserves to Parliament the control over such internal proceedings. Similarly, compliance with Standing Orders is not reviewable, partly because the Standing Orders are not "laws", but largely because they are a matter of interest only to the House which instituted them.

When it comes to procedural rules entrenched in the constitution, there is more difficulty in deciding how far statutory validity should be assumed. The *Simpson* case,²⁵⁷ with its distinction between mandatory and directory procedures, provides the most attractive solution, and hopefully Canadian courts will adopt it. A mandatory procedure is one necessary to the statute's validity, a fact which leads the courts to assert that they have a duty to ensure that it is observed. Mandatory procedures are of the type in the *Ranasinghe* case,²⁵⁸ which render the enrolled bill rule inoperative. In contrast to mandatory procedures are those described as directory. They do not affect the validity of the Act, so that compliance with the procedure is not necessary to the enactment of the statute (although lack of compliance may give rise to penalties to certain officials). As a result, the court's review should stop with the enrolled Act once the directory nature of a procedure is determined.

The treatment of self-imposed procedural rules embodied in statutes should be the same as that accorded to constitutional procedures. That is, the initial question for a court to determine is whether a procedure is mandatory or directory. Of course, this assertion rests on the assumption that a sovereign legislative body can bind itself as to manner and form. The debate on the

²⁵⁶ *Id.*

²⁵⁷ *Supra*, note 126.

²⁵⁸ *Supra*, note 9.

subject is an ongoing one, but *Ranasinghe*²⁵⁹ implies that a sovereign Parliament can implement procedures which are a condition precedent to "Parliament" acting. The procedures must not be so demanding as to bind subsequent Parliaments substantively, and in Canada they cannot create new legislative institutions (because legislative powers are "exclusive" to the "Legislatures" and "Parliament"), although seemingly they can alter the process of the existing institutions.

5. Parliamentary Privilege

While the enrolled bill rule is not fatal to the enforcement of manner and form provisions, parliamentary privilege still presents a problem. Privilege, resting on section 18 of the *B.N.A. Act* and the principle of necessity in Canada, is designed to shield the legislative body from outside interference. Fundamental to parliamentary privilege is the rule that Parliament has the right to control its internal proceedings. While the courts have not allowed privilege to interfere with individual rights outside the Chamber, they do concede to Parliament the right to control matters *in* the Chamber.

Matters of procedure seem to fall within the second category established by the judiciary, especially if the *Herbert* case²⁶⁰ is interpreted as allowing Parliament to decide if statutes of general application fall into that protected area. However, the courts will always decide *if* a matter is truly within a privileged area, and it is submitted that Canadian courts, at least, would not feel that parliamentary privilege required them to ignore a failure to comply with a mandatory procedure, especially one affecting minority rights. Their basis for acting would probably be that one House of Parliament cannot legislate alone. To allow the House to ignore the special procedure is to allow it to amend the statute enshrining the rule.

6. Remedies

This judicial attitude towards privilege comes through in the cases dealing with remedies for lack of procedural compliance. While an injunction to prevent further action with a bill is an interference with Parliament and an infringement of privilege (*Trethowan*²⁶¹ notwithstanding), relief in the form of a declaration after enactment is not. The circumstances in which the courts would give relief show that parliamentary privilege will neither shield the process of enactment from review nor protect the Act once passed. Deference may (and should) be shown to the legislative institution's actions, but once an Act has been "passed" in disregard of a mandatory procedural provision, neither the enrolled bill rule nor parliamentary privilege should shield the statute from judicial scrutiny. Action by the courts would in no way reduce the powers of Parliament; it would only ensure that "Parliament" has acted.

²⁵⁹ *Id.*

²⁶⁰ *Supra*, note 217.

²⁶¹ *Supra*, note 240.

