

DELEGATION OF POWERS OF PARLIAMENT.

In the CANADIAN BAR REVIEW, Vol. IV, September, 1926, in an Article under the above heading, the statement is made at p. 429 that "every Canadian lawyer understands the power in a British country of a legislative body in matters within its jurisdiction to delegate its authority to a body of its own creation."¹ This was too sanguine a statement: quite recently, in a work intended to be used by the legal profession in Ontario, it was in the original draft said: "Of course, the Dominion Parliament cannot delegate its power": fortunately this was revised by the Consulting Editor.

It may be of interest to mention a little known instance in English history of ratification by Parliament, *ex post facto*, of legislation by another body—*omnis ratificatio retrotrahitur et mandato priori aequiparatur*.

The troubled times of Charles I and the Commonwealth yield to none in constitutional interest.

Legislation was expressed to be "by the King's most Excellent Majestie, the Lords and Commons of this present Parliament assembled" until and including some of that of 17 Car. I (1642, N.S.): part of this year's legislation in the name of "The Lords and Commons now assembled in Parliament," although the King is also mentioned.

In 1653, the legislation reads: "The Lords and Commons assembled in Parliament do . . .", the King's name no longer appearing; and this was the style until 1649, N.S. Charles being executed in January, 1649, the House, March 19, solemnly declared that it had "been found by too long experience that the House of Lords is useless and dangerous to the people of England," and enacted that it should be abolished. *Anno* 1648, O.S. (1649, N.S.) cap. 17. But before this time and a fortnight before the death of Charles, "the Commons assembled in Parliament" had as early as January 16, passed legislation without either King or Lords—who disappear from the Statute Book for a time.

¹ Of course, this is not true in the United States with its written "Constitutions"—Cooley: *A Treatise on the Constitutional Limitations*, Boston, 1903, p. 163; Black, *Handbook of Constitutional Law*, St. Paul, 1910, p. 374; Riddell, *The Constitution of Canada*, Dodge Lectures, Yale University, 1917, p. 140, *seq.*

The House was the enacting body until 1653 when Cromwell dismissed the Long Parliament. The "Little Parliament" or "Barebones Parliament" followed for a few months; but by the end of the year (December 12), the better part of the Members with the Speaker returned their powers to Cromwell. This might, perhaps, be considered as an express delegation of Parliamentary powers; but as we shall see, it was considered wise to give a retroactive ratification.

Late in 1653, N.S., we find legislation by "Oliver, Lord Protector of the Commonwealth of England, Scotland and Ireland, and the Dominions thereto belonging, having the Exercise of the Chief Magistracy, and the Administration of Government within the said Commonwealth, invested and established in His Highness assisted with a Council who have Power until the Meeting of the next Parliament (which is to be on the third day of *September*, now next ensuing) to make Laws and Ordinances for the Peace and Welfare of these Nations, where it shall be necessary which shall be binding and in force until Order shall be taken in Parliament, concerning the same." *Anno* 1653, O.S., cap. 4, passed December 26, a fortnight after the surrender of powers to Cromwell.

This, by the way, will remind the Canadian lawyer of the provision in the Canada or Constitutional Act of 1791, 31 Geo. III, cap. 31 (Imp.), sec. 50, making it lawful before the First Meeting of the Colonial Parliament "for the Governor or Lieutenant-Governor of such Province . . . with the Consent of the major Part of (the) Executive Council . . . to make temporary Laws and Ordinances . . .," these to be valid and binding until after six months from such first Meeting.

The last legislation in the name of Protector and Council seems to be September 2, 1654.

When the new Parliament met, September 17, 1656, the legislation was in the names of "His Highness, the Lord Protector and the Parliament," and by Statute, *Anno* 1656, cap. 10, it was recited: "Whereas since the twentieth day of *April*, One thousand, six hundred fifty-three, in the great Exigences and Necessities of these Nations, divers Acts and Ordinances have been made without the consent of the people assembled in Parliament, which is not according to the Fundamental Lawes of the Nations and the Rights of the people [i.e. not "constitutional" in our British sense of the word: does anyone hear an echo in the language of July 4, 1776?] and is not for the future to be drawn into Example": and it proceeds

to declare much legislation since April 20, 1653, to September 3, 1654, valid, effective, and continued along with certain legislation with which we have here no concern.

While it is permissible to look upon this episode not as delegation of legislative power *a priori*, it is an interesting instance of delegation *a posteriori*.

It may perhaps not be without interest to note that in his period of absolute power—for everyone admits that after a few ineffective struggles, his Council obeyed his directions—Cromwell preferred—and said so—that men or at least Englishmen should be free rather than sober by compulsion—thus antedating Archbishop Magee. To the Scottish clergy, he said that “it will be found an unjust and unwise jealousy to deprive a man of his natural liberty upon the supposition that he may abuse it . . . to keep all wine out of the country lest a man should be drunk”—but then the 18th Amendment and Volstead were not yet.²

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² Of course, the legislation of the Commonwealth was not considered binding on the Restoration in 1660 or later; it will be found in the 4to: *A Collection of Acts and Ordinances* . . . by Henry Scobell, Esq., Clerk of the Parliament, London, 1658.