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EXTRA-TERRITORIAL BIGAMY.[1]

For the purpose of the case, it is assumed that the Canadian Parliament has passed an Act amending section 307, subsection 4, of the Criminal Code, to read as follows:

> No person shall be liable to be convicted of bigamy in respect of having gone through a form of marriage in a place not in Canada, unless at the date of the bigamous marriage, such person is a Canadian citizen or a British subject resident in Canada.

The prisoner, a Canadian *citizen*, is indicted in Canada in respect of an alleged bigamous marriage committed by him in the United States, after the Act came into operation. He now moves to quash the indictment on the *ground that it is beyond the competence of the Dominion Parliament to attach criminal consequences to his action in the United States.*

The prisoner invokes, in support of the proposition on which his motion is based, not a few expressions of opinion emanating from Courts, Judges and writers whose views are certainly entitled to respect.

Are those opinions so founded in sound reason, or do they carry with them such weight of authority by reason of the positions and learning of those who have expressed them, as to justify our accepting them or impose upon us such acceptance?

Or, on the other hand, does a careful examination of the law bearing on the question raised lead to, and are we free to adopt, the opposite conclusion?

Let us first make that careful examination of the law.

[1] A judgment delivered by the Right Honourable C. J. Doherty, P.C., K.C., LL.D., former Minister of Justice of the Dominion of Canada, as President of a Moot Court held at McGill University.

The question is purely one of law. As a constitutional question, it is one which, falling to be determined by a Court of Law, must be so determined by the application of the law of the Constitution.

It is not for such a Court to look for guidance to the Conventions of the Constitution.

Nor is it the function of a Municipal or Domestic Tribunal to determine whether or not the Municipal Law is in accord with the rules of International Law, and to apply or refuse to apply such Municipal Law accordingly as it may be found to be or not to be so in accord with those rules.

The Conventions of the Constitution are for interpretation and application by Statesmen.

The rules of International Law bind States as between each other. Alleged violations of them are matter for diplomatic action.

The Municipal Law governs the citizens and inhabitants of each State in their relations with each other and with the State. It is the law to which, in adjudicating in regard to such relations, the Municipal Courts must have regard. Those Courts are concerned with rules of International Law only in so far as such rules may have, by adoption, express or tacit, that is by assent thereto evidenced by Statute or custom, become part of the Municipal Law. In no event are they justified in invoking such rules as conferring upon them authority to override the express statutory laws of their country. If there be conflict between such laws and any rules or rule of International Law, the former must, before the Municipal Courts, prevail.

The Domestic Court is purely and simply the State administering and applying its own law. A legislative enactment which, under the State's own constitutional law, is an existing law, is not subject to have its validity questioned by the Court which the State has constituted as its instrument to interpret and apply such law.

It is only when, under some Domestic Law enacted by competent authority, a power is withheld from a legislative body or a restriction imposed upon the exercise of a power belonging to it, that the Courts are entitled to examine and pass upon the question whether or not a particular enactment of such legislative body is or is not within its competence. If it be not within such competence, by reason of the withholding or restriction above referred to, then it is not a law, and the duty of the Court is to ignore it.

But, in the absence of any such withholding or restriction, it is not the function of the Court to judge the law which the legis-

lative body has made, nor to refuse to apply it, because in the opinion of the Court, the enactment and application of such law may contravene some constitutional convention or subject the action of the State so enacting and applying it to question by other States as being in violation of the rules of International Law.

Certainly the principal—if not indeed the only—statutory enactment of the Constitutional Law of Canada in which we must seek for any disposition withholding from the Canadian Parliament the power to enact the law embodied in the amendment above quoted, or imposing any restriction upon the exercise of such power, is the British North America Act of 1867.

That Act creates the Dominion of Canada and its Parliament. It confers and defines the powers of the latter.

It likewise creates the Legislatures of the different Provinces, and confers and defines their powers.

With these latter, however, we are not directly concerned, though we shall have to consider the extent of the legislative field which is, by the Act, partitioned between Parliament and the Provincial Legislatures, and the effect of that partition upon the powers of the former.

The authority of the British Parliament to enact the British North America Act will not be questioned.

Does the Act confer upon the Canadian Parliament power to enact the law with which we are concerned? Does it impose any restriction upon the exercise of any power so to legislate which it may have conferred?

The sections in which the answers to these two questions are found are sections 91 and 92 of the Act.

The preamble indicating, as it does, the purpose and principle of the entire Act, furnishes valuable guidance in the interpretation and determination of the effects of the sections cited.

Section 91 tells us what laws the Parliament of Canada may or may not make.

The contribution of section 92 to the answer we are seeking is the specification of the matters to which the law making authority of Parliament does not, under the terms of section 91, extend.

The material portion of section 91 reads as follows:

> It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and Good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

Two things, and two things only, are, under this provision, required to bring a law within the legislative power of Parliament. Such law must be:

1. A law for the peace, order and good government of Canada, and

2. A law relative to a matter not coming within the classes of subjects by the Act assigned exclusively to the Legislatures.

That the law now under consideration meets the second of these requirements, a glance at section 92 puts beyond question. The matter to which this law relates certainly comes within none of the classes of subjects which this section assigns exclusively to the Legislatures.

So far, therefore, as the matter it relates to affects the power of Parliament to pass it, this law is within the power conferred by section 91. That power extends to *all matters* with the exception only of those coming within the classes assigned exclusively to the Legislatures, and the matter of this law is not within the exception.

There remains for us to inquire whether it meets the first of the two requirements of section 91. Is it a law for the peace, order and good government of Canada?

The obvious purpose of this enactment is to ensure that persons being Canadian citizens or British subjects resident in Canada shall not, while found within the jurisdiction of Canadian Courts, enjoy absolute immunity from any penal consequences which the law of Canada imposes upon persons who have been guilty of acts which, in the eye of that law, are criminal. So far as the law applies to persons who have been guilty of such acts within Canada, no question of the right of Canada to enforce such penal consequences, of course, arises. But the purpose of the law whether applied to persons whose reprehensible action has taken place within the country, or persons who, having committed the same reprehensible acts without its territory, are found within the jurisdiction of its Courts, is absolutely the same. That purpose is to protect the Canadian community from having in its midst unpunished persons who have been guilty of the acts which the law condemns.

The law looks to the deterrent effect of the punishments it imposes to ensure this protection.

That effect must be very seriously diminished if the guilty may within Canada and while being its citizens or residents, entirely escape the punishment imposed merely because it was not within Canada that their act was done. It would seem hardly to be disputable that public order in Canada must be seriously perturbed

by the presence within her limits, in the enjoyment of all the privileges of her citizenship or of residence within her territory and of absolute immunity from the punishment her law prescribes, of any number of persons guilty of actions which her law ranks as criminal. The purpose of this law is to prevent that serious disturbance of public order in Canada. It seems difficult to conceive of such a law being described as being other than a law for the "order" of Canada. There seems no good reason why such a law dealing in the same way with any crime committed outside of this country might not be considered as a law for the order of Canada. But this particular crime tending, as it necessarily does, if it go unpunished, to weaken respect for the sanctity of the obligations of marriage, is one whose impunity would, in a very special manner, threaten the public order of any country in which it would be tolerated. What touches the sanctity of the marriage relations and weakens the general public respect for that sanctity is a source of danger to the family, and it is on the family that the State is built and on it that rests the stability of the community.

A law, therefore, having for purpose and effect to preserve the general respect for the inviolability of lawful marriage is, in the very nature of things, a law of vital importance for the public order of any community. The Parliament of Canada, at all events—as its action demonstrates—so considered it.

The law which this Court is asked to enforce is, therefore, one which, from the point of view as well of its purpose as of the matter to which it relates, is within the express terms of the empowering provisions of the B.N.A. Act.

To deny to the Canadian Parliament the power to enact it, is to deny that Parliament a power which the section cited of the B.N.A. Act gives it in express terms.

This conclusion might be safely left to rest upon the unambiguous words of the provisions recited.

That we have not given these provisions any wider meaning or attached to them any more far-reaching effect than their terms justify is, we may add, put beyond question by repeated holdings of their Lordships of the Judicial Committee.

In a number of cases, that body has defined the extent of the field of legislation open to the Canadian Parliament and our Provincial Legislatures, and made clear the nature of the powers conferred upon those legislative bodies to be exercised within their respective portions of that field.

They hold that the Federation Act exhausts the *whole range of legislative power,* and *whatever is not thereby given to the Provincial Legislatures* rests with Parliament.[2]

Again in the case of the *Attorney-General for Ontario* v. *Attorney-General for Canada,*[3] the Lord Chancellor (Loreburn) delivering the judgment of the Judicial Committee, said:

In 1867 the desire of Canada for a definite Constitution embracing the entire Dominion was embodied in the British North America Act. Now, there can be no doubt that under this organic instrument the powers distributed between the Dominion on the one hand and the provinces on the other hand cover the whole area of self-government within the whole area of Canada. It would be subversive of the entire scheme and policy of the Act to assume that any point of internal self-government was withheld from Canada. Numerous points have arisen, and may hereafter arise, upon those provisions of the Act which draw the dividing line between what belongs to the Dominion or to the province respectively. . . . In the interpretation of a completely self-governing Constitution founded upon a written organic instrument, such as the British North America Act, if the text is explicit the text is conclusive, alike in what it directs and what it forbids. When the text is ambiguous, as, for example, when the words establishing two mutually exclusive jurisdictions are wide enough to bring a particular power within either, recourse must be had to the context and scheme of the Act. Again, if the text says nothing expressly, then it is not to be presumed that the Constitution withholds the power altogether. On the contrary, it is to be taken for granted that the power is bestowed in some quarter unless it be extraneous to the statute itself (as, for example, a power to make laws for some part of His Majesty's dominions outside of Canada) or otherwise is clearly repugnant to its sense. For whatever belongs to self-government in Canada belongs either to the Dominion or to the provinces, within the limits of the British North America Act.

As to the nature of the legislative power, their Lordships are equally emphatic.

In the case of *Hodge* v. *The Queen,*[4] they held, upon a contention of the appellants, that the local legislatures of Canada could not delegate their powers, that this objection was founded on an entire misconception of the true character and position of the Provincial Legislatures, which were in no sense delegates of or acting under any mandate from the Imperial Parliament, that:

When the British North America Act enacted that there should be a legislature for Ontario, and that its legislative assembly should have exclusive authority to make laws for the Province and for provincial purposes in relation to the matters enumerated in sect. 92, it conferred powers not in any sense to be exercised by delegation from or as agents of the Imperial Parlia-

[2] *Bank of Toronto* v. *Lambe,* 12 A.C., 575.
[3] [1912] A.C. 571, at 581 and 583.
[4] 9 A.C., 117 at p. 132.

ment, but authority as plenary and as ample within the limits prescribed by sect. 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow. Within these limits of subjects and area the local legislature is supreme, and has the same authority as the Imperial Parliament, or the Parliament of the Dominion, would have had under like circumstances to confide to a municipal institution or body of its own creation authority to make by-laws or resolutions as to subjects specified in the enactment, and with the object of carrying the enactment into operation and effect.

It seems unnecessary to point out that, though their Lordships are here dealing with Provincial Legislatures, within their portion of the legislative field, what they so unmistakably hold applies equally to the Canadian Parliament within its allotted part of that field.

The principle was reaffirmed by Lord Watson, in the later case of the *Liquidators of the Maritime Bank of Canada* v. *Receiver-General of New Brunswick.*[5]

It may be well to anticipate an objection that may be rested on the use of the words "within the whole area" and "*internal* self-government" and the exclusion of power to make laws *for* some part of His Majesty's dominions outside of Canada," in the judgment in *Attorney-General for Ontario* v. *Attorney-General for Canada* (*supra*). It may be suggested that these words limit locally or territorially the operation of laws made by the Canadian Parliament to the area of Canada, and that because they so do, they make inoperative even within Canada laws which relate to anything that transpires outside of Canada.

That these words were intended to and do limit the *operation* of Canadian laws to Canadian territory is fully conceded. Indeed, had they not been used, no one would have understood their Lordships to have intended to convey the idea that Canadian laws could operate outside of Canada, or the Canadian Parliament make laws for any country but Canada. In that respect, Canadian laws are like all other laws.

But it is one thing to seek to make a law to be operative outside of the territory, to make a law for a country other than that of the law-maker, and quite another to make a law whose operation is confined entirely within the limits of the latter country, which is made solely for that country, even though such law attach consequences to something done or which has happened outside its limits. The entire operative effect of such a law is within Canada, it is enforceable only against persons found within the jurisdiction of Canadian Courts and by such Courts acting within the limits

[5] [1892] A.C. 437, 441-3.

of that jurisdiction. It is, moreover, by its terms applicable only to persons who, as citizens or residents of Canada, fall under its authority.

Such a law is in no sense extra-territorial either in its purpose or its operation. We may have something further to say in development of the proposition, when considering the dicta of Courts and writers invoked by the accused.

Before leaving the B.N.A. Act to pass to that consideration, it seems desirable to call attention to the principle which the preamble of the B.N.A. Act indicates as being the underlying principle of the Constitution which it enacts.

That indication confirms the view herein expressed of the effect of the sections cited, as well as what has been said with regard to the position of the Courts in face of a law of Parliament enacted in the exercise of its powers under that Act.

The preamble recites the desire of the Provinces to be united into one Dominion under the Crown, with a *constitution similar in principle to that of the United Kingdom,* and the enactment of the Act is based upon the declaration of the British Parliament, that such a Union—i.e., a Union with a Constitution similar in principle to that of the United Kingdom—would conduce to the welfare of the Provinces and promote the interests of the British Empire.

This recital and declaration put it beyond question that the underlying principle of the Constitution embodied in the Act is similar to that of the Constitution of the United Kingdom.

Now, it will not be questioned that the supremacy of Parliament is a fundamental principle of the British Constitution.

It is quite true that the Federal nature of our constitution prevents any one legislative body exercising the complete sovereignty of the British Parliament. It is also true that our Parliaments and Legislatures, being governed by the B.N.A. Act, are subordinate bodies, just as the United States Congress, being governed by the American Constitution, and, in fact, all legislative bodies of countries having constitutional laws fixing and defining the powers of such bodies are subordinate, not sovereign as the British Parliament is sovereign.

It has also to be conceded that our Parliament and Legislatures, their acts being subject to the legal possibility of disallowance by the Crown, or of being over-ridden by laws of the British Parliament—which, though it has conferred legislative power on our legislative bodies—has not parted with the power of itself making laws applicable to Canada and its Provinces—are, to the extent that these

powers may be constitutionally exercised, subject to control by these authorities. But the effect of subordination to the law of the Constitution is merely to confine the activities of Parliament and the Legislatures respectively to the matters allotted to them respectively by the B.N.A. Act; and that resulting from the existence of the power of disallowance and the possible over-riding action of the British Parliament does not prevent our Parliament and Legislatures while acting respectively within their respective portions of the legislative field from being sovereign therein, or their legislation within such field from being effective so long as neither of those powers have been exercised.

This is clear from the decisions above cited. To them may be added the opinion of Dicey:[6]

> The colonial legislatures, in short, within their own sphere copies of the Imperial Parliament. They are within their own sphere sovereign bodies; but their freedom of action is controlled by their subordination to the Parliament of the United Kingdom.

It is only in so far as that sphere is defined by the Law of their Constitutions—in our own case, the B.N.A. Act—and the Parliaments and Legislatures thereby restricted to the limits prescribed by that law—that their subordination is cognizable by the Courts. Their subordination, either to the Crown or to the British Parliament, is for enforcement by the former by disallowance or the latter by Statute.

As Dicey says at p. 109:

> When once this is admitted, (i.e. the principle that a Statute of the Imperial Parliament binds any part of the British Dominions to which the Statute is meant to apply) it becomes obvious that there is little necessity for defining or limiting the sphere of colonial legislation. If an Act of the New Zealand (or Canadian) Parliament contravenes an Imperial Statute, it is for legal purposes void; and if an Act of the New Zealand (or Canadian) Parliament, though not infringing upon any Statute, is so opposed to the interests of the Empire that it ought not to be passed, the British Parliament may render the Act of no effect by means of an imperial statute.

Here is the remedy for any intrusion by a Dominion Parliament into the field of what may be considered Imperial interests. The power of the British Parliament to effect that remedy by legislation over-riding that of the Dominion Parliament, insures that the remedy will be applied when needed. But to treat the existence of that power—though unexercised—as a cause of invalidity of Dominion laws, would be in effect to declare all such laws invalid and to

[6] Law of the Constitution, 8th Ed. p. 108.

nullify the entire legislative power of any colony—since there is no law, however manifestly within the power constitutionally conferred on a colonial legislature, which is not legally susceptible of being over-ridden by a Statute of the British Parliament expressly or by necessary implication made applicable to the entire Empire or to the particular colony.

The Parliament and Legislatures of the Dominion—subordinate though they be—exercise their powers under and in accordance with "a constitution similar in principle to the British Constitution." Now, according to the universally accepted though grotesque expression which has become proverbial: "It is a fundamental principle (of the British Constitution) that Parliament can do everything but make a woman a man or a man a woman."

Now, this, being a fundamental principle of the British Constitution and ours being similar in principle to that Constitution, must apply as well to our Parliament and Legislatures, so long as they keep within their respective limits as fixed by the law of the Constitution, as to the British Parliament. This being so, the Courts may determine whether a Parliament or Legislature has or has not got beyond those limits as defined by the B.N.A. Act, but once that question does not arise or has been resolved favorably to the competence of the legislature in question, then the Court must bow to the law our Parliament or one of our Legislatures has enacted as unquestioningly as it would to an Act of the Parliament of Great Britain. It is not for the Court to narrow the limits which the Constitutional Act has laid down, nor to impose restrictions not contained in that Act, merely because, in the opinion of such Court, such additional restriction ought to have been made, or should be implied by reason of some conception of the constitutional relations between Dominions and Mother Country—not founded on the Constitutional Act—on the part of the Court, or its members, or some incapacity on its or their part to conceive that the British Parliament, author of the Constitutional Act, can have intended to do what, by the express terms of the Constitutional Act it did do, namely, hand over to and apportion between the Parliament of Canada and its provincial Legislatures the whole field of legislation for their internal government. The words of Lord Loreburn, in *Attorney-General for Ontario* v. *Attorney-General for Canada*, may be here recalled with advantage.

To those above cited may be added his emphatic declaration which immediately precedes the second paragraph quoted that:

A Court of Law has nothing to do with a Canadian Act of Parliament, lawfully passed, except to give it effect according to its tenor . . . All that

their Lordships can consider in the argument under review is whether it takes them a step towards proving that this Act is outside the authority of the Canadian Parliament, which is purely a question of the Constitutional Law of Canada [i.e. of the B. N. A. Act which he immediately proceeds to discuss in the terms already quoted.]

Continuing that discussion, he explicitly affirms that in determining questions of the powers of Parliament:

All depends upon whether such a power (the power disputed) is repugnant to that Act (i.e. the B. N. A. Act).

When the Constitutional Act does not prohibit or exclude the exercise of a legislative power, it is not for the Courts to exclude or prohibit it. The enactment of Parliament or Legislature permitted, i.e. not prohibited, by that Act, is law—law for the Court as well as for the citizens—for the Court to apply, for the citizen to obey, for both to submit to and for neither to question or criticise.

The Court here is in face of a law of the Parliament of Canada passed for and sought to be enforced in Canada in relation to a matter not coming within the classes of subjects assigned exclusively to the legislatures. Its duty is clear: it is to apply that law. It is not for the Court to conjure up possibilities of such a law prejudicially affecting Imperial interests—there is another authority to guard them—or giving rise to international difficulties—they also, should they arise, are to be otherwise met.

Enforcing that law within Canada and as against a Canadian citizen, the Canadian Court is but doing what the Courts of Great Britain and of all civilised countries do, respecting the legislative authority of its own country and applying the law that authority has enacted.

We may then, it would seem, safely conclude that, if the question be *res integra* and the Court untrammelled by the effect of any authoritative judicial decision to the contrary binding upon it, the enactment now under consideration is within the powers of the Parliament of Canada, and the Court has no alternative but to enforce it.

We proceed, now, to examine what has been cited on the prisoner's behalf as constituting such binding authority.

Upon the judgment of their Lordships of the Privy Council, in the case of *Macleod* v. *Attorney-General of New South Wales*,[7] is the principal reliance of the accused. It is claimed on his behalf that this judgment authoritatively determines in his favour the question before us and is binding upon all Courts within the Empire.

[7] [1891] A.C. 455.

What we have first to inquire in appreciating the effect of this judgment is, what does it decide. A careful reading of the report reveals that the substantial decision is that the particular statute whose validity was questioned before their Lordships must be construed as not intended to apply in any way to persons guilty of offences committed outside of the territory of New South Wales. It is the reasoning which led their Lordships to this conclusion and by which they supported it, that is invoked as binding us to hold that no legislation by a Dominion Parliament can so operate as to attach, even within the Dominion exclusively, consequences to acts of a criminal nature committed outside of that territory. How far remarks so made in the course of such reasoning can be taken as constituting binding judicial pronouncements, seems certainly, to say the least of it, open to very serious question.

Professor Smith, in his very carefully reasoned article upon the question with which we are now concerned, to be found in the CANADIAN BAR REVIEW,[8] treats these remarks as purely *obiter dicta.*

In this view, the Court is disposed to concur and to agree with the writer that the case is not an authority for holding the Dominion Parliament to be, in the exercise of its legislative powers, subject to the restriction contended for to any greater or different extent than would be, in like case, His Majesty's British Parliament.

Having determined the interpretation of the Statute, the question of whose validity was before them, and found, in view of that interpretation, that the Statute was valid, their Lordships, at p. 458, added an expression of opinion that:

> If the wider construction had been applied to the statute, and it was supposed that it was intended thereby to comprehend cases so wide as those insisted on at the Bar, it would have been beyond the jurisdiction of the Colony to enact such a law. Their jurisdiction is confined within their own territories, and the maxim which has been more than once quoted: "Extra territorium jus dicenti impune non paretur" would be applicable to such a case. Lord Wensleydale, when Baron Parke, advising the House of Lords, in *Jeffreys* v. *Boosey,*[9] expresses the same proposition in very terse language. He says:[10] "The Legislature has no power over any persons except its own subjects— hat is, persons natural-born subjects or resident, or whilst they are within the limits of the kingdom. The Legislature can impose no duties except on them; and when legislating for the benefit of persons, must, primâ facie, be considered to mean the benefit of those who owe obedience to our laws, and those interests the Legislature is under a correlative obligation to protect." All crime is local. The jurisdiction over the crime belongs to the country where the crime is committed, and except over her own subjects, Her

[8] I.C.B. Rev. 338.
[9] 4 H.L.R. 815.
[10] 4 H.L.R. 926.

Majesty and the Imperial Legislature have no power whatever. It appears to their Lordships that the effect of giving the wider interpretation to this statute necessary to sustain this indictment would be to comprehend a great deal more than Her Majesty's subjects; more than any persons who may be within the jurisdiction of the Colony by any means whatsoever; and that, therefore, if that construction were given to the statute, it would follow as a necessary result that the statute was ultra vires of the Colonial Legislature to pass.

Now, these remarks are all as applicable to the British Parliament or to any other unquestionably sovereign Parliament or legislative body of any State, as they are to the Parliament of this Dominion. The operative authority of the legislation of all Parliaments is confined within their own territories. That is the entire effect of the maxim *Extra-territorium leges non obligant*, and the maxim invoked: *Extra-territorium jus dicenti impune non paretur* is effective to make unenforceable outside of their own territories, the pronouncements of the *jus dicens* that is the judicial, authority of all countries.

Of course, their Lordships having before them, for consideration, Colonial Legislation in their observations, speak of the effect of such Colonial Legislation. The grounds, however, upon which they deny effect to such legislation, would equally exist where the legislation in question was of the British or any other unquestionably sovereign Parliament.

They cite the advice of Lord Wensleydale to the House of Lords, in the case of *Jeffreys* v. *Boosey* (*supra*) as expressing the same proposition; and Lord Wensleydale, expressing that same proposition, was speaking of the so-called extra-territorial effect of legislation of the Parliament of the United Kingdom.

To his emphatic denial of extra-territorial effect attaching to the legislation of the latter Parliament, Lord Wensleydale makes exception for the case where the authority of that legislation is sought to be exercised over His Majesty's own subjects; and the conclusion which their Lordships, in the *Macleod case* (*supra*), based upon the observations they cite, is:—

> That the effect of giving the wider interpretation to this statute necessary to sustain this indictment would be to comprehend a great deal more than Her Majesty's subjects; more than any persons who may be within the jurisdiction of the Colony by any means whatsoever; and that, therefore, if that construction were given to the statute it would follow as a necessary result that the statute was *ultra vires* of the Colonial Legislature to pass.

This is a very different thing from declaring that, even though the legislation of a Dominion Parliament can affect no persons other than those subject to its authority, such legislation, when

applied to persons so subject, is ineffective within its own territory, because its becoming applicable is the result of something done outside of the territory. In fact, it would seem a fair inference from what their Lordships say that, had the Legislation of New Zealand in question in the case before them, been made applicable in express terms to persons subject to the authority of that Parliament, their Lordships would have recognised its effectiveness.

But whatever may be the authority which should attach to these dicta, in the *Macleod case* (*supra*), it does seem safe to say that, if they involve what is claimed in this case, on behalf of the defence, then, they have been overruled by the subsequent decisions of the Judicial Committee, in the cases of the *Attorney-General for Ontario* v. *The Attorney-General for Canada* (*supra*) and others above cited, and are inconsistent with *Hodge* v. *The Queen* (*supra*).

These cases, as has been pointed out, make clear that the entire field of legislation is open to the Parliament of Canada, with the sole exception of the particular portion of it which the British North America Act allots to the Provincial Legislatures. They further establish that, in the exercise of its legislative powers, the Canadian Parliament has all the power and authority which the British Parliament itself had or could confer.

We may therefore, in dealing with this question, consider ourselves uncontrolled by authoritative judicial decision, by reason of anything said in the *Macleod* case (*supra*).

The authority of Dominion Parliaments is in the course of the reasoning of their Lordships therein questioned, only under circumstances in which, in the opinion of their Lordships, the British Parliament itself could not have effectively legislated.

The limitation which their Lordships apparently recognise as applying to the British Parliament and equally to Dominion Parliaments—namely: that His Majesty has authority only over His own subjects and that, in consequence, the Legislation of the British Parliament can affect even within the territory, as regards acts done outside of the territory, only those who are such subjects of His Majesty—might, if, for the purposes of the present case, it were necessary to do so, be questioned.

It must be borne in mind that what we are dealing with is the question of the binding effect upon the Courts of a particular country acting within its territory, of the legislation enacted by the legislative authority of that country.

It is difficult to see in virtue of what law those Courts become entitled to refuse to give effect, within their jurisdiction, to the

laws of their own country as affecting all persons to whom such laws are, in terms, made applicable.[11]

In Great Britain, such laws are unhesitatingly applied by its Courts within their jurisdiction. It is, however, not necessary and, in view of the length of these notes and the many matters which remain to be considered, undesirable to pursue this question further.

Next to the case we have just been examining, perhaps the weightiest authority invoked by the defence is found in the observations of Sir Henry Strong, C.J., in support of the answers given by him to certain questions submitted to the Supreme Court by the Government of Canada, bearing upon the validity of the dispositions of the Criminal Code with regard to bigamy, as they stood, prior to the assumed amendment by which this Court is bound.

The report of the answers upon that reference is found in the Supreme Court Reports.[12]

The sections 275 and 276 referred to in these questions were, save a provision defining a form of marriage not material for our purposes, in the same terms as the present articles 307 and 308 of the Criminal Code.

The important difference between the provisions of law upon which their Lordships of the Supreme Court were called upon to express an opinion and the law as it stands for us in virtue of the assumed amendment, is the elimination of the departure from Canada with intent to go through a form of marriage as a necessary ingredient of the offence dealt with.

The existence under the law upon which the Supreme Court had to pronounce of this last mentioned requirement precludes the decision of the majority of the Court which rested in large measure on that requirement and was favourable to the validity of the law as it stood, from being invoked as deciding the question with which we are now concerned.

The offence under the unamended law comprised not only something done outside of Canada, but an act done in Canada coupled with an intention formed therein. Such act and intention within Canada being, under that law, a necessary ingredient of the offence, furnished a ground of support to the law which cannot be relied upon in the case before us.

But even this requirement did not, in the eyes of Sir Henry Strong, bring the law as it then stood, within the powers of Parliament. Had the law stood as—for us—it now stands, he would *a fortiori* have reached the same conclusion.

[11] Brett J., in *Niboyet and Niboyet*, 4 L.R.P.D., pp. 19-20; Cockburn, C.J., in *Reg.* and *Keyne*, L.R., 2 Ex. D., 63, pp. 152 and 165.
[12] 27 S.C.R. 461.

Having found that the criminal act under the statute was the marriage without the territorial jurisdiction of Parliament, he went on to say, at p. 466, that:—

> So far as anything essential to constitute the offence is required to be done out of Canada, it is in my opinion entirely beyond the legislative powers conferred on the Dominion by the British North America Act.

Resting the power of the Dominion Parliament to deal with the subject matter at all exclusively upon subsection 27 of section 91 of the B.N.A. Act which subsection specifically includes the Criminal Law in the matters concerning which Parliament is empowered to legislate, he bases his conclusion practically upon the judgment of the Lord Chancellor in *Macleod* v. *The Attorney-General of New South Wales* (*supra*), with which we have already dealt. There is no occasion for our repeating what has already been said in regard to that case.

In addition, he invokes the judgment of the Supreme Court of Canada, in the case of *Shields* v. *Peak*.[13]

In that case, the question of the effect of Canadian legislation with regard to acts done outside of the territory, so far as it was discussed, was in respect to the effect upon a sale made in England, of a provision of the then Canadian Insolvent Act, which subjected purchasers of goods who, at the time of their purchase, had probable cause for believing themselves to be unable to meet their engagements and concealed the fact from their vendors with intent to defraud, to imprisonment for such time as the Court might order, not exceeding two years, unless debt and costs were sooner paid.

An analysis of the remark of the Judges in this case would seem hardly useful. It can be safely said that the judgment does not decide the question we have before us.

It was contended therein that the legislation in question was not applicable to a sale made outside of the territory of Canada and that, if considered as intended to be so applicable, the legislation was *ultra vires*.

Upon neither of these pretensions was the entire Court or a majority of it agreed—and in consequence neither of them was decided. Ritchie, C.J., and Fournier, J., held explicitly that the section invoked of the Insolvent Act was *intra vires* of Parliament and that, although the fraudulent act charged was committed outside of Canada, that fact did not exempt the party committing it from the consequences attached to it by the Canadian law.

Strong, J., Taschereau, J., and Henry, J., held that the provision in question must be interpreted as intended to apply only to acts

[13] 8 S.C.R. 579.

committed within Canada and so interpreted to be *intra vires,* but not applicable in the case before them.

Gwynne, J., found that the question of *ultra vires* did not arise on the pleadings in the case.

We are, therefore, in face of a divided Court, two of whose members held that a disposition of Canadian law applicable to acts done outside of Canada was, nevertheless, *intra vires* of the Parliament of Canada and should be enforced by its Courts; three others that, because nothing in the particular disposition warranted the implication that it was to have any effect out of Canada, it must be held not to extend to a purchase made in England, but refrained from expressing any opinion upon the constitutional validity of the disposition had its terms justified the implication that it was intended to attach consequences to an act done outside of Canada, and one of whom found that the pleadings did not raise the question of *ultra vires.*

There is, in view of this result, no justification for the case being cited as it was by Strong, C.J., in the reference above referred to as authoritatively supporting the proposition that the provision of law with which we are concerned, is *ultra vires* of the Parliament of Canada.

It would unduly prolong these notes to follow the learned Chief Justice through the reasoning by which, in addition to the authorities cited, he seeks to support his conclusion. It all rests on what —I say it with all respect—seems to be an entire misconception of what is properly extra-territorial operation of a law, and of what is the duty of the Court of any country when called upon to apply the enactments of the legislative authority of that country where such enactments do not come within any inhibition contained in the law, which constitutes, or is embodied in, the constitution of such country. That misconception appears to be akin to, or perhaps rather identical with the misconception of "the true character and position of the provincial legislatures" which their Lordships of the Judicial Committee found to exist in the case of *Hodge* v. *The Queen* (*supra*)—a misconception of what the British Parliament did when it created that new thing, a Dominion under the Crown with a constitution similar in principle to that of the United Kingdom, to whose Parliaments and Legislatures—divided between them—it threw open the entire field of legislation and upon whom, in their respective portions of that field, it conferred "authority as plenary and ample as the Imperial Parliament possessed or could bestow."

That reasoning will, I trust, be found sufficiently answered by what has been said in dealing with the effect of the B.N.A. Act supplemented by the observations of the other Judges who sat upon the reference and found the legislation submitted to them to be *intra vires.*

A word may be said on the rule that all crime is local with which much play is made in the *Macleod* case (*supra*) and by Strong, C.J., on the reference. That is a very good rule of the common law. But rules of common law are not restrictive of the powers of Parliaments. It is the right and quite within the powers of the latter—it is indeed a very large part of their proper function—to abolish or modify these rules where occasion may require.

The outstanding authorities cited by the accused have now been dealt with. The Court had entertained the ambition of taking up and dealing seriatim with all of these authorities. But consideration for those who may feel it a duty to read these notes—to say nothing of the right of the accused to be put out of suspense—makes it necessary to renounce for the present the realisation of that ambition.

The renunciation is made with less regret than might otherwise be the case by reason of the conviction—perhaps too flattering to itself which the Court entertains—that the answer to all of those authorities will be found in the principles which it has endeavoured clearly to lay down in dealing, in the first part of these notes, with the question as one to be determined by examination of the law assuming the Court to be untrammelled by the pronouncements of Courts.

Should any of the learned counsel desire it, the Court will be glad to further discuss with them the authorities not herein specifically dealt with, as well as the arguments very ably urged by counsel on both sides, which have not been herein adverted to.

For the Court, the all sufficient *ratio decidendi* is that it finds itself called upon to apply a Law of the Parliament of Canada which is a law for the peace, order and good government of Canada in relation to a matter not coming within the classes of subjects by Canada's Constitution assigned exclusively to the Legislatures of the Provinces, a law which nothing in that Constitution withdraws from the authority of Parliament, and which this Court has no authority derived from any source to ignore or refuse to apply.

The motion of the accused is dismissed.