EXTRA-TERRITORIAL LEGISLATION.

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To the competence of every legislative body, whether great or small, there is one natural limitation. This limitation is to be found in the obvious fact that no statute can ever be effective except in so far as it can be enforced by the judicial and executive organs of the community. For example, the English law provides that treason, murder, manslaughter, and bigamy, shall be treated as crimes against the law of England, if they have been committed by a British subject beyond the limits of the British Dominions. What these statutes mean in effect is that persons committing these offences can be punished, if and when they come within reach of the British executive arm. If Parliament were to enact that a Frenchman committing murder in France were to be punishable in England, the same principle would apply, and there would be no legal difficulty either in the enactment or in the enforcement of such a law. The fact that such statutes are not enacted is due to reasons of international comity, and not to any lack of legislative competence.

All other limitations upon the competence of a legislature must be artificial in their nature. For example, under our Federal system all the legislative bodies of Canada are limited by the Colonial Laws Validity Act of 1865, and also by the express distribution of powers laid down in the British North America Act. In the United States there is a somewhat similar distribution, and the competence of the various legislatures is further limited by the fact that the Constitution imposes a total prohibition upon certain types of law-making, a principle which also finds expression in the Constitutions of Australia and of Ireland. All such restrictions are essentially artificial and the auth-
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ority for them must be found in the text of the constitutional documents governing each case.

If this simple principle had been steadily borne in mind we should never have been confronted with any special difficulties arising out of extra-territorial statutes enacted by colonial assemblies, and we should have been spared a certain amount of intricate and confusing legislation. In this respect the needs of a Dominion or a colony are precisely similar to those of the mother country. In the case of every community it is equally necessary, if the work of the State is to function effectively, that the law should in certain instances attach legal consequences within the frontiers to acts which take place beyond them. For example, every Province of Canada makes certain provisions for the service of legal process outside its own boundaries. Thus by the Quebec Code of Civil Procedure the legal rights of a litigant in the Quebec Courts may in certain defined cases depend upon an act, namely the service of a writ, which takes place under the authority of the Quebec legislature in the Province of Ontario. Is there any reason why the legal liability of a Canadian to suffer punishment in Canada should not similarly be made to depend upon an act which he has committed beyond the frontiers of Canada?

In principle there is obviously no distinction between the two cases, and if courts were always guided by principle the question of extra-territorial legislation would never have presented any difficulties. Unfortunately the application of the principle has been quite needlessly confused by the interference of an undefined and imperfectly analysed idea, which has sometimes been expressed in the old Latin tag, Extra territorium jus dicenti impune non paretur. Like most maxims of its kind the phrase is of little practical help in the solution of actual legal problems. If it means that laws may be disobeyed with impunity where the executive power to enforce them does not extend, the statement is perfectly true, but somewhat obvious. If
it meant that a legislature could never attach legal consequences to acts taking place beyond its own territory, the maxim would be palpably absurd and would be clearly contrary to the practice of every legislature in the world. In its original context (Digest II. 1. 20), it is used quite properly in relation to the jurisdiction of courts and their power to enforce their decrees. The maxim has nothing whatever to do with the question of legislative competence.

Nevertheless it is in connection with legislative power that the phrase has been cited in the Privy Council, and we must now proceed to examine carefully the decision which is the only semblance of authority for the theory that the Parliament of Canada cannot make laws with regard to acts done beyond the borders of Canada. I will venture to contend that the judgment of the Privy Council in Macleod v. New South Wales, is no justification for any such doctrine.

Macleod was convicted of bigamy in New South Wales under a colonial statute expressed in the following terms:

"Whosoever being married marries another person during the life of the former husband or wife, wheresoever such second marriage takes place, shall be liable to penal servitude for seven years."

The lawful marriage had been celebrated in New South Wales and the bigamous union had been contracted in Missouri after a divorce, which the colonial court could not recognize. The draftsmanship of the statute was certainly very clumsy, and Lord Halsbury quite rightly pointed out that

"upon the bare words, any person, married to any other person, who marries a second time anywhere in the habitable globe, is amenable to the criminal jurisdiction of New South Wales, if he can be caught in that Colony."

1 [1891] A. C. 455.
Even apart from the question of the competence of the legislature it was obvious that an enactment of this kind, if literally interpreted, "would be inconsistent with the most familiar principles of international law." In the corresponding British statute, of which the colonial act was a very imperfect copy, it was carefully provided that only British subjects could be convicted in England of bigamous marriages contracted outside the King's dominions. The Privy Council, therefore, interpreted the word "whosoever" as meaning "whosoever, being married, and who is amenable, at the time of the offence committed, to the jurisdiction of the Colony of New South Wales."

Passing then to the word "wheresoever" their Lordships interpreted this as meaning that the liability of any person to be punished for bigamy was not to be affected by any questions of local venue within the Colony.

"It is intelligible that the 54th section may be intended to make the offence of bigamy justiciable all over the Colony, and that no limits of local venue are to be observed in administering the criminal law in that respect. 'Wheresoever,' therefore, may be read, 'Wheresoever in this Colony the offence is committed.'"

Nothing more was necessary for the decision of the case, and if the judgment had stopped at this point we should merely have had an ordinary example of a court doing its best to put a reasonable construction upon a very clumsy piece of legislation. But their Lordships were unable to resist the temptation to indulge in an obiter dictum, the wide implications of which were perhaps not fully appreciated at the time.

After disposing of the two points upon which the case turned Lord Halsbury went on to say:

"Their Lordships think it right to add that they are of opinion that if the wider construction had been applied to the statute, and it was supposed

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1 Offences against the Person Act, 24 & 25 Vict. c. 100, s. 57.
that it was intended thereby to comprehend cases so wide as those insisted on at the bar, it would have been beyond the competence 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."

After citing a well-known passage from the judgment of Baron Parke in the copyright case of Jefferys v. Boosey, the Lord Chancellor continued:—

"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 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. Their Lordships are far from suggesting that the Legislature of the Colony did mean to give themselves so wide a jurisdiction."

The reader will observe that in the passage last cited Lord Halsbury suggests that a colonial legislature is under no disability that is not equally applicable to the Imperial Parliament itself. That is to say, it can only enact criminal laws either for its own territory or for its own subjects beyond that territory. If we limit the reference of this passage to the question of criminal law there is clearly no objection to such a statement. Whether or not the Imperial Parliament is theoretically subject to any such limitation, in practice it always acts as if it were. All the statutes which

2 (1854) 4 H. L. C. 815.
provide for the trial in England of offences committed abroad are qualified by the restriction that, except in the case of piracy *jure gentium*, the offender must be a British subject. Criminal legislation that attempted to go further than this would generally create international difficulties, and there is presumably no desire in Canada to transgress the limits which are observed in practice by the Parliament of Great Britain.

It is not unreasonable to maintain that the Privy Council intended the earlier sentences of the judgment, in which the maxim from Paulus was cited, to be read in the light of the more explicit statement which follows. They cannot possibly have meant that a colonial legislature has no power to attach legal consequence within its own territory to acts which take place abroad. To have suggested this would have been to ignore the actual practice of legislation in every country. For example, the courts in Canada are prepared in certain cases to entertain actions and award damages for torts committed abroad. It necessarily follows that the provincial legislatures are competent to define the conditions on which damages in these cases should be awarded, in so far as the matter relates to civil rights within the provinces. Obviously there is no logical reason why the Dominion Parliament should not be equally competent, in relation to such a matter as criminal law, to attach penal consequences in Canada to an act committed by a Canadian citizen in a foreign country.

I would, therefore, submit that the decision in *Macleod v. New South Wales* is an authority for nothing more than the proper construction to be placed upon a particularly ill-drawn statute. The concluding paragraph is in the nature of an *obiter dictum*, and in any event it need not be read as meaning that a colonial leg-

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islature is more narrowly limited in the matter of criminal legislation than the Imperial Parliament itself.

Apart from this case there is no judicial authority for the view that a Dominion or Colonial Parliament cannot legislate with regard to matters beyond its own boundaries, and the actual practice of law-making directly contradicts any such theory. The reported decisions entirely support the argument for competence.

Allusion was made to the matter in the case of *Canada v. Cain and Gilhula,* where an attempt was made to argue that a statute authorizing the expulsion of undesirable aliens was *ultra vires,* because it authorized the Canadian officials to use physical force outside the frontier in causing the alien to be taken into custody and returned to his own country. The Privy Council decided in favour of the validity of the Act on the broad ground that the power of expulsion and deportation was an essential part of the power to control immigration. The decision is important as indicating the true principle for the solution of such problems. Every Parliament finds it necessary in some cases to legislate with regard to matters beyond its borders because without so doing it could not fully perform its functions within its own territory. This principle is as applicable to the Provinces as it is to the Dominion or to the Imperial Parliament itself. To recall the examples already quoted, the laws of every Province contain provisions for the service of judicial process outside the Province and for the enforcement of rights accruing under judgments obtained, or by reason of wrongs committed, in other jurisdictions. The reason for these statutes is that without them full effect could not be given to the power of the legislature to make laws relative to property and civil rights within the Province. Exactly the same principle demands that the Dominion Parliament should

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have power to penalize bigamous marriages contracted by Canadians within the United States. Without such a provision the domestic law against bigamy cannot be made fully effective, so long as some of the American States are willing to grant so-called divorces on nominal grounds to parties who have no genuine domicile within their jurisdiction.

In 1906 the same principle was applied by the Canadian Supreme Court in the case of The Ship "North" v. The King. An American schooner had been found fishing within the three mile limit off the Pacific coast in contravention of the provisions of the Fisheries Act (R.S.C., c. 94). When hailed by a fishery cruiser she escaped outside the territorial limit, where she was immediately pursued and arrested. On behalf of the offending vessel the Attorney-General for British Columbia maintained that the Canadian Parliament was unable to empower its executive officers to take any action beyond the limits of the territorial waters of Canada, and the Macleod case was again cited to support this argument. This contention was rejected by the Supreme Court, the decision resting on the broad ground that the general power to regulate fisheries conferred upon the Dominion Parliament by the Constitution was not subject to any territorial limitations. Canada possessed, in the words of Idington, J., "as full power in every respect in relation to the sea-coast and inland fisheries of Canada as was possessed by the Imperial Parliament itself." In so far as the shipowner conceived his arrest to be a violation of international law the Court pointed out that his remedy should be sought through the diplomatic channel.

There was, therefore, no real reason why the Dominion Parliament should not have passed an act punishing bigamy in terms similar to those of the British statute of 1861. Canadian statutes to this effect have been in force since 1841, and the law in its present form

*37 S. C. R. 385.*
is contained in sec. 307 of the Criminal Code. The validity of this legislation was upheld by a Quebec Court in 1853, and by an Ontario Court in 1887. In 1894 a decision to the contrary was rendered in Ontario, the Court considering the question to be settled by the authority of Macleod v. New South Wales. Three years later the Dominion Government referred the matter to the Supreme Court for an advisory opinion, and four out of the five Judges held the legislation to be within the competence of Parliament. The authority of the opinions rendered on that occasion is weakened by the fact that the opposing view was not represented by counsel, but in later cases arising in the criminal courts the validity of the legislation has been uniformly upheld, and at the present day it could not be questioned, except in the Privy Council. In view of the principle laid down in Canada v. Cain it can hardly be doubted that the competence of the Dominion Parliament to enact such legislation would be authoritatively affirmed.

The theory that Dominion legislatures are subject to some vague territorial limitation from which the British Parliament is free is in reality part of the old idea, never precisely defined, that they are in some sense imperfect legislatures of an inferior type, a notion which is wholly at variance with the principle laid down in 1883 in the celebrated case of Hodge v. The Queen. In many ways this notion has had a disturbing effect upon the actual work of law-making, and has introduced an element of confusion which was wholly unnecessary. Apart from the dictum in the Macleod case it has found expression in the Colonial Laws Validity Act of 1865, whereby a colonial legislature is forbidden to enact any statute that conflicts

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4 27 S. C. R. 461.
5 See, for example, R. v. Brinkley (1907), 12 Can. Cr. Cas. 454.
6 9 A. C. 117.
7 28 & 29 Vict. c. 63.
with the provisions of an Imperial Act extending to
the colony. Considered historically this Act is the
product of a period when the idea of legislative auton-
omy in the colonies was imperfectly developed, and
when the London Government still believed that it was
necessary for Downing Street to exercise an effective
control over the course of legislation in all the colonies.
At the present day it is clearly an anachronism, and
its practical effect has been to impede or prevent the
exercise of the powers entrusted to Canada under
her Constitution. For example, the Dominion Parlia-
ment is expressly empowered to deal with the ques-
tion of copyright, but until 1911 its power to do so
was nullified in practice by the fact that the British
Act of 1842 extended throughout the Empire, with the
result that Canada was wholly disabled from passing
a copyright law of the kind which her interests
demanded. By the British Act of 1911 this particu-
lar anomaly has been removed.

A similar unsatisfactory situation exists with
regard to merchant shipping. The general body of
law on this subject is contained in an Imperial stat-
ute of 1894. By sec. 735 colonial legislatures are
given a wide, but limited, power of modifying the terms
of the Act with regard to ships registered within their
jurisdiction, and by sec. 736 they are authorized to
regulate the coasting trade. As everyone knows, the
words "coasting trade" are very difficult to define,
and both these sections have given rise to grave diffi-
culties in practice. None of these difficulties could
ever have arisen if the broad principle had been admit-
ted that a Dominion legislature possesses exactly the
same competence in regard to the question of merchant
shipping as the Parliament of Great Britain. That is
to say, it should be permitted to legislate for ships of
Dominion registry throughout the world, and to exer-

13 See Black v. Imperial Book Co. (1904), 8 O. L. R. 9, affirmed in
35 S. C. R. 488.
14 1 & 2 Geo. V. c. 46, s. 26.
15 57 & 58 Vict. c. 60.
cise such control as it may deem necessary over all shipping within its own territorial waters. In the latter case the only limitations upon its discretion should be those imposed by international law and by the comity of nations.

Apart from the question of merchant shipping the Colonial Laws Validity Act is now of very little practical importance as a check upon Dominion legislation. The British control over copyright was surrendered by the Act of 1911, and a substantial autonomy in the matter of naturalization laws was conceded by the Act of 1914. In the negotiation of any treaties affecting Canada provision is now invariably made for her separate adherence or withdrawal, and sec. 132 of the Constitution gives her full power to enact any laws that may be necessary to give effect to treaty obligations. There can be no logical reason why the competence of the Canadian Parliament to deal with merchant shipping should still be hampered by the old rule, and if this point is conceded it would seem much better that the Act of 1865 should be formally repealed. Its retention on the statute book has very little practical effect, but it constitutes a distinct badge of legislative inferiority.

In this connection the reader will observe that the third section of the Colonial Laws Validity Act is entirely inconsistent with the theory which has been built up on the foundation of the dictum in the Macleod case. By this section it is provided that:

"No colonial law shall be or be deemed to have been void or inoperative on the ground of repugnancy to the law of England, unless the same shall be repugnant to the provisions of some such Act of Parliament, order, or regulation, as aforesaid."

It will hardly be contended that the principle of the territorial limitation of a Dominion legislature forms part of the "law of England" within the meaning of this section. No statute has ever laid down any such doctrine, nor is there a single judicial decision to that
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effect to be found in the reports of any English tribunal. The whole theory rests upon the ambiguous language of Lord Halsbury's unfortunate dictum.

Even if the doctrine had any substantial foundation its practical consequences can always be evaded by a little ingenuity in draftsmanship. The way to do this may be seen by reference to the Australian case of Peninsular and Oriental Steam Navigation Co. v. Kingston.16 The object of the statute under discussion in that case was to prohibit the opening at sea of ship's stores that had been sealed by the Australian customs officers. The section in question concluded by enacting that:—

"If any ship enters any port with any such . . . seal opened . . . the master shall be guilty of an offence against this Act.

The company appealed against a conviction on the ground that the statute in effect penalized an act committed on the high seas, and relied on the Macleod case. But the Privy Council, again speaking through Lord Halsbury, pointed out that:—

"The offence created is the composite act of breaking the seals and coming into an Australian port with the seals broken."

The moral of this is obvious. If the theory of territorial limitation really prevented Canada from attaching legal consequences to acts done abroad, the situation could be easily met by simply providing that a person should be guilty of an offence who entered Canada after doing the forbidden thing. Incidentally it may be observed that the bigamy sections of our Code would be better expressed if they had been drafted along these lines. As they stand, they are extremely clumsy, for they compel the prosecution to prove, not only the fact of the bigamous marriage, but that the accused left Canada with the intention of committing it. The draftsman might have done well to ponder the wise

16 [1903] A. C. 471.
dictum of Brian, C.J., who pointed out in 1477 that "the thought of man is not triable by us, for the Devil himself knoweth not the intent of man."  

If the arguments advanced in these notes are sound they lead to the conclusion that all Dominion and Colonial legislatures have the same general power of extra-territorial legislation as is possessed by the Imperial Parliament itself. Their competence is subject to no limitations beyond those expressly laid down in their several Constitutions and those imposed by the terms of the Colonial Laws Validity Act. The effect of this statute has now been almost entirely destroyed by piecemeal legislation, and its formal repeal is therefore desirable in order to rationalize the law, and to bring it into harmony with the political development of the Empire. Such repeal would logically result in giving Canada the same power to amend her own Constitution which is already enjoyed by the other Dominions, and it is hardly necessary to add that due care would have to be taken in this connection to protect the Constitution against any changes which might imperil the legitimate rights of the several Provinces.

Y.B. 14 Edw. IV pl. 1.