depends upon the support of the public of Canada who must be aroused to the problem and be ready to meet the advancement of crime with appropriate steps to deal efficiently with the problem of the protection of society.

MAGISTRATE IAN V. DUBIENSKI, Q.C.*

QUO WARRANTO AND THE LEGISLATOR, STUBBS AND STEINKOPF RE-VISITED

The case of *Regina ex rel Stubbs vs. Steinkopf*[1] raises, but does not answer the question of whether legislators and cabinet ministers be susceptible to proceedings of *quo warranto*. The reasoning of the learned Judge of first instance[2] demonstrates the possible danger of Canadian courts being overawed by the fact that Canadian institutions being patterned to some extent after those of the United Kingdom. The clear similarity surely exists: the specific realities may differ greatly. In the five years since the Manitoba Court of Appeal allowed the relator's appeal in the Stubbs and Steinkopf case no similar proceedings in Canada appear to have been reported, and the effluxion of time may now permit a dispassionate look at the circumstances of the *Stubbs and Steinkopf* case.

The respondent was purportedly elected as a Member of the Legislative Assembly of Manitoba in the general election of December, 1962. The relator was a duly qualified elector for the electoral division in which the respondent was purportedly nominated and elected. The respondent was appointed a member of the Cabinet, but prior to his purported election the respondent was a government contractor or agent by virtue of his involvement in certain financial and realty transactions concerning the acquisition by the Government of Manitoba of lands in the City of Winnipeg. In May, 1964, during a television program in which the respondent was personally present the Premier of Manitoba asserted in the respondent's presence:

> "I discovered, it was brought to my attention in the dying days of the last session, that in spite of the fact that the transaction was completed, some of the actual paper work involved in this still continued after Mr. Steinkopf was elected and it threw doubt on his eligibility to be elected. This, I think is a technicality, but it is a technicality which cannot be

* Of the Winnipeg Magistrates Court.

1. (1965) 50 W.W.R. 643, 48 D.L.R. (2d) 671 (C.A.)
2. (1964) 49 W.W.R. 759, 45 D.L.R. (2d) 105 (Q.B.)

overlooked. When the House was in session, I consulted with people of all political points of view with respect to this matter and proposed the introduction of a remedial bill to bring this matter to public attention and to make sure it was properly dealt with. Unfortunately as I say, it came up the dying days of the session and needed the unanimous consent of every member in order to proceed with it then under the circumstances and there is one gentleman who did not give us that consent. So the bill is printed, it's waiting for action and I intend to introduce it at the next session of our Legislature so to place this matter beyond peradventure."

The Legislative Assembly Act provided:

"17. No person, directly or indirectly, alone or with any other, by himself, or by the interposition of any trustee or third party, holding or enjoying undertaking or executing, any contact or agreement, expressed or implied, with or for the Crown in right of the province or with or for any officer of the Crown, for which public money of the Crown is to be paid, shall be eligible to be nominated for, or elected as, a member of the Legislative Assembly or to sit or vote in the assembly.

19. Where a person ineligible to be nominated for, or elected as, a member of the Legislative Assembly is nevertheless elected and returned as a member, his election and return shall be void.

20. (1) Where a member of the Legislative Assembly becomes disqualified from sitting or voting in the assembly under sections 11, 12, or 17, his election shall become void and his seat shall be vacated.

(2) In any case mentioned in subsection (1) the vacancy shall be treated as on occurring through death.

(3) Notwithstanding anything in this section, the person may be re-elected if he is eligible."[3]

Because it was never alleged by the relator that there existed any corrupt practice or bribery, or defect in the mechanics of the purported election in this case, the Controverted Elections Act[4] of Manitoba could be of no assistance to invoke the provisions ss. 17, 19, and 20 of The Legislative Assembly Act. The relator simply could not articulate and bring his complaint of a breach of the cited sections by the respondent within the provisions of the controverted elections statute, and therefore the relator sought expression of his complaint in *quo warranto* proceedings.

An Originating Notice of Motion was filed, and service of it effected on the respondent, on August 17th, 1964, while the Legislative Assembly was actually in session. The Originating Notice expressed itself to be returnable in Chambers on August 27th, 1964. On August 21st, 1964, the respondent resigned his purported membership in the Legislative Assembly of Manitoba, in conformity with A. 22 (a) of The Legislative Assembly Act. In compliance with A. 56 of that Act, an entry from the Votes and Proceedings of the house on that day was tendered and admitted as evidence of the resignation before the learned Chambers Judge. It recorded:

3. R.S.M. 1954, c. 141
4. R.S.M. 1954, c. 45

> "From his place in the Legislative Assembly, The Honourable Maitland B. Steinkopf, member for the Electoral Division of River Heights, rose on a matter of personal privilege and advised Madam Speaker that he had tendered his resignation to Premier Roblin as a Cabinet Minister and member for the Electoral Division of River Heights".

The relator then attempted to withdraw his application because the respondent had voluntarily done all that the Court, after trying the issues, might have compelled him to do — that is: vacate his seat in the Assembly. The learned Chambers Judge, however, characterized the application as "an improper use of court procedure" and dismissed it, with costs. The Court of Appeal which addressed itself entirely to the propriety of dismissing the application in face of the relator's attempt to withdraw it (in view of the respondent's intervening resignation), gave leave to withdraw, and allowed the relator's appeal with costs.

The crucial questions although raised, remain at large. In contemplation of statutory enactments such as the cited sections of "The Legislative Assembly Act of Manitoba, does an elected member of a Legislative Assembly hold an "office" in connection with which the Court can require him or her to demonstrate by what authority he or she holds it, on peril of being ousted? It is submitted that membership in the Legislative Assembly is "an office of a public and substantive nature", in spite of the *dicta* to the contrary expressed in *Tolfree vs. Clark*.[5] The dissertations particularly of Gillanders and Laidlaw JJ. A. in that case as to whether membership in the assembly be an office subject to *quo warranto* proceedings are merely *obiter dicta* as indicated by Riddell, J.A.:

> "I refrain from going into the facts, as it was on the argument of the appeal admitted on all hands that the real — substantially the sole — the matter to be decided was the power of the Legislature of Ontario to extend its term of office by a statute."[6]

Indeed, upon a fair reading of that case, it does appear that the substance of the ratio was to the effect that the statute attacked was *intra vires* and further, that the proper method of attacking the constitutional validity of a statute is not by the oblique approach of *quo warranto* proceedings, (it is to be noted, parenthetically, that such proceedings were not oblique in the *Stubbs* and *Steinkopf* case, because the substance of the relator's case was to uphold the validity and operation of The Legislative Assembly Act and in particular, ss. 17, 19, and 20). It is, however, remarkable that Riddell, J.A. referred to the attempt by the Legislature to extend "its term of *office* by a statute."[7] Clearly, Riddell, J.A. did not flinch at describing the collective membership of the assembly as an "office". How then can it be said that an individual member does not, *ipso facto*, hold office? Or is this thought simply a semantic quibble? It

5. [1943] O.R. 501
6. Ibid, at p. 509
7. Italics, mine. On the same page of the judgment, 509, the learned judge also said: "The Legislature of Ontario, by a statute extended its fixed term of *office*" (italics, mine).

may be; but it is submitted that the dicta in *Tolfree vs. Clark* on this point (i.e. a "seat" is not an "office") all amounts to a strained semantic quibble.

Membership in a municipal council has always been regarded as "office of a public and substantive nature": *Tod vs. Mager*;[8] *The King vs. Beer*;[9] Rex ex rel. *Tuttle vs. Quesnel*;[10] Rex ex rel. *Matheson vs. Huber*.[11] Membership in a local school board has been accepted, also, to bejust such an office: Rex ex rel. *McArthur vs. Maycock*.[12] If the Legislative Assembly be "the grand inquest of the Province"[13] by what line of reasoning can membership in the Assembly be less of a public substantive office than a seat on a municipal council or school board?

In *Rex ex rel. Tolfree vs. Clark* Gillanders, J.A. in his *obiter dicta* on this point asserted:

> "So far as the authorities cited to us go, and they were very exhaustive, no case has ever occurred in which it has been held that a member of Parliament or of a Legislative Assembly in the British Empire holds an office or franchise . . ."[14]

Apparently the cited authorities did not go far enough, for authorities of a most persuasive nature abound.

In *Rex vs. Speyer and Cassel*,[15] the court considered that the position of Privy Councillor was such an office, and further, the court held that proceedings by way of *quo warranto* to remedy alleged disqualification were properly instituted in contemplation of The Act of Settlement,[16] in which s.3 provides:

> "No person born out of the kingdoms of England, Scotland, or Ireland, or the dominions thereunto belonging (although he be naturalized or made a denizen, except such as are born of English parents) shall be capable to be of the Privy Council or a member of *either* House of Parliament or to enjoy any office or place of trust either civil or military or to have any grant of lands, tenements or hereditaments from the Crown, to himself or to any other or others in trust for him."

In the case of *Bay of Islands Election Petition*[17] Hosking, J. for the court, held:

> ". . . we consider the word "office" is apt to designate a seat in the Legislative Council. A seat in the Council carries with it the discharge of the highest public duties on behalf of the people of the Dominion. That of itself would seem to be sufficient to enable the appointment to be described as an "office". One of the meanings attached to that term in Webster's Dictionary is "a special duty, trust or charge" conferred by authority and "for a public purpose"."

8. (1912) 22 Man. R. 136, esp. Perdue J.A. at p. 143
9. [1903] 2 K.B. 693
10. (1909) 19 Man. R. 23
11. [1924] 2 W.W.R. 596 (Man.)
12. [1924] 3 W.W.R. 540 (Man.)
13. Landers vs. Woodworth (1877-79) 2 S.C.R. 158, at p. 195
14. Supra, note 5 at p. 513
15. [1916] 1 K.B. 595
16. 12 and 13 Will. 3 (1700), c. 2
17. (1915) 34 N.Z. L.R. 578, at pp. 583-5

> "In Ireland, the matter of *The Borough of Waterford Election Petition* (2 O'M & H. 25), a seat in the Town Council was held to be an office within the meaning of that term in the English Act. Having in view the object of the provisions with regard to corrupt practices we do not think a narrow meaning should be attached to the word "officer", or that its meaning should be cut down by its association with the words "place of employment". . . . In principle we consider the corrupt offer of a seat in the Council is on the same footing on which a corrupt offer of a post in the Public Service would stand at common law. There is, therefore, no good reason in law for cutting down the meaning of the word "office". The Irish case is at any rate, an authority for holding that the relationship of employer (p. 585) and employed is not an essential ingredient of an office. If it is essential that the office should be one of profit, we have it in this case, inasmuch as an appointment to the Legislative Council carries with it a fixed payment at the rate of 200 per annum for the member's attendance in discharge of his duties. . . . We are therefore of the opinion that a seat in the Council is an office within the meaning of the paragraph."

In Edwards vs. Attorney General, for Canada[18] it was stated by Lord Sankey, L.C.:

> "It must, however, be pointed out that a careful examination has been made by the assistant keeper of public records of Canada of the list containing the names of the Executive and Legislative Councils and House of Assembly in Quebec (including those of Upper and Lower Canada) of the Province of Canada, of the Province of Nova Scotia and of the Province of New Brunswick down to 1867, and on none of the lists did he find the name of a person of the female sex.
>
> Such briefly is the history and such are the decisions in reference to the matter under discussion.
>
> No doubt in any code where women were expressly excluded from *public office* the problem would present no difficulty, but where instead of such exclusion those entitled to be summoned to or placed *in public office* are described under the word "person" different considerations arise."

Although its subject-matter was libel, the case of *Pratten vs The Labour Daily Ltd.*[19] contains the following observations by Cussen, J.:

> "It was contended for the defendant that the only offices referred to in authorities such as we have mentioned were offices held by persons professing skill who might be held up to "contempt" if a statement were made that they did not possess such skill. We do not agree with this contention.
>
> We do not think it is necessary to decide whether a Member of Parliament or a Minister of State for the Commonwealth holds an office in the strict common-law sense of the term, though it seems probable that the latter position, at all events, involves the holding of an office in that strict sense. But, as we have already indicated the words "office etc." are but typical, and herein respect of both positions, there is either an office in the strict sense of something analagous to such an office, and in respect of both there may be a diminution of reputation. It may be noticed in passing, that in respect of both, payment is provided. See *Commonwealth Constitution*, sec. 48 and 66, and subsequent legislation.

If memberships of diversity ranging through the Privy Council, Legislative Council, municipal councils and school boards be offices of a public and substantive nature, then it is submitted that there can be no logical exclusion of membership in the Legislative Assembly of Manitoba from that designation. *Quo warranto*, originally a common-law, and not a

18. [1930] A.C. 124, at p. 133
19. [1926] Vict. L.R. 115, at p. 125

statutorily provided remedy, is still proper where there has been usurption of any office of a public and substantive nature, for the purpose of ousting a *de facto* occupant, where that person is not in possession *de jure*, if some other statutory remedy has not been provided excluding *quo warranto*.[20]

If there be no adequate statutory remedy provided excluding *quo warranto*, then the latter process is proper in the case to invoke the jurisdiction of the Queen's Bench.

It is to be observed that the cited sections of The Legislative Assembly Act provide for the voiding *ab initio* of the purported member's election and right to sit and vote in the Assembly, or for the subsequent voiding of a duly elected member's election and rights, and that no time limit is prescribed for such voiding. However, the Act does not indicate how ss. 17, 19, and 20 are to be involved. The well known rule in such a case was expressed by Viscount Haldane in the case of *Board vs. Board*,[21] in which he said:

> "If the right exists, the presumption is that there is a Court which can enforce it, for if no other mode of enforcing it is prescribed, that alone is sufficient to give jurisdiction to the King's Court of Justice. In order to oust jurisdiction, it is necessary, in the absence of a special law excluding it altogether, to plead that jurisdiction exists in some other Court . . . independently of the rule just referred to, there is another principle of construction which would, in their opinion have been, by itself, sufficient to dispose of the question whether the words of the Act of 1907 excluding matrimonial jurisdiction. The Act set up a Superior Court, and it is the rule as regards presumption of jurisdiction in such a Court that, as stated by Wiles, J. in London Corpn. v. Cox, (L.R. 2 H.L. 239, at p. 259, 36 L.J. Ex. 225, 16 Mews 741), nothing shall be intended to be out of the jurisdiction of a Superior Court, but that which specially appears to be so."

One will look through the Legislative Assembly Act and The Controverted Elections Act in vain to find any provision which specifically suppresses the jurisdiction of the Queen's Bench to entertain a case such as this one. There is, therefore, no other means in the premises, of articulating the cited substantive provisions of The Legislative Assembly Act that *quo warranto* proceeding in the Queen's Bench. It is submitted, therefore, that the Court of Queen's Bench, indeed has jurisdiction to entertain and determine the matter upon proper application made. Support for this contention can be found in the case of *Tod vs. Mager*:

> "It seems clear that if there is a remedy by petition, then there is not remedy by *quo warranto*: Queen vs. Morton, (1892) 1 Q.B. 39; The King vs. Beer, (1903) 2 K.B. 693 — in this case a writ of *quo warranto* will lie".[22]
>
> "It seeems clear that, where the remedy is by petition, under section 217 of "The Municipal Act", there is no remedy by *quo warranto* and the

20. The Queen's Bench Act, R.S.M. 1954, c. s. See also 7 C.E.D. (Western, 1925), p. 81, para. 7.
21. [1919] 2 W.W.R. 940, at pp. 945-6 (P.C.)
22. Supra, note 8, per Howell C.J., at p. 139

> question simply is whether, in this case, the remedy could have been had under that section".[23]
>
> "The real question to be dealt upon this appeal is, whether a proceeding in the nature of *quo warranto* is open to the applicant, or does Section 127 of "The Municipal Act" compel him to proceed by election petition only? (at p. 145) I think that proceeding by way of *quo warranto* was proper in this case . . ."[24].

This decision of the Manitoba Court of Appeal was followed by another, that of *Martin vs. Erlendsson*:

> "Such a ground (of irregularity) could not be set up in a petition under section 192, there being no provision in the section enabling a complainant to do so. The section confines the grounds of complaint under a petition to three matters specifically mentioned. If there is any other ground than those mentioned in the section, the complainant must proceed by information in the nature of *quo warranto*".[25]

The above contentions are not based on any imagined inadvertence of the drafters of the relevant statutes. After all, legislation is introduced in the Assembly itself. If the Assembly had wished to suppress the Court's jurisdiction it could easily have done so by plain language. It did not do so. The statutes give no indication whatever that such jurisdiction is excluded and so the Queen's Bench properly has it and may exercise it.[26]

The case of *Chamberlist vs. Collins*[27] is one in which the legislative body *itself* deprived the plaintiff of his seat "because in its view the plaintiff had an interest in a contract respecting a public work for which Territorial funds were to be expended" — grounds much akin to those expressed in Section 17 of "The Legislative Assembly Act" of Manitoba. In that case Parker, J. concluded that the "Yukon Act"[28] gave the council of the Yukon Territory substantially the powers of a Legislative Assembly.

The Yukon Act, a federal statute, does not, it must be emphasized, express any provision akin to A. 17 of the Manitoba statute. Here, the Court declined to exert jurisdiction holding that neither it nor any other court could interfere or question the correctness of the Council's decision. Again however, the learned Judge went too far, one might contend, in stripping his Court of jurisdiction according to reasons applied in British cases. What if Parliament had enacted in the Yukon Act a provision the same as that articulated in the Manitoba statute, and the Territorial Council had declined to oust the member and therefore had refused to invoke, apply or recognize that provision? Would the member's constituents be without recourse to the law? If it would be thought right and just that the electors should be able to invoke the solemnly enacted statute law by recourse to the Courts, then upon what grounds, (in the *actual* situation in

23. Ibid, per Richards J.A., at p. 139
24. Ibid, per Perdue J.A., at p. 143
25. (1917) 27 Man. R. 464, per Perdue J.A. at p. 468
26. Indeed, see s. 47 of The Legislative Assembly Act
27. (1962) 32 D.L.R. (2d) 64 ( )
28. S.C. 1952-3, c. 53

Chamberlist vs. Collins), should the Court's diffidence to articulate jurisdiction preclude the member himself from recourse to an adjudication? The better answer, it seems, would have been for the Court to hold that, because the Council had apparently acted and adjudicated according to law (whether "written" or "unwritten") the matter was actually already adjudicated. The real issue did not arise in the *Chamberlist* case, because the Territorial Council *did* expel the impugned member: it arises where the Legislative body neglects or refuses to expel a person who remains in its midst in defiance of the law, as in the *Stubbs and Steinkopf* case.

While it is no doubt true that certain privileges of Parliament are engrafted to the Legislature of Manitoba there are distinctions to be drawn. The Parliament at Westminster is a bicameral Legislature, whose "upper" chamber not only participates in the legislative process, but also constitutes the supreme court of the Kingdom. This bicameral Legislature in a unitary state is quite distinct from that which exists in Manitoba, with its unicameral Legislature in a confederated state whose written constitution delineates legislative powers. In Canada the practice has always been to avoid the merging of the legislative and judicial powers in a single institution. Therefore, the diffidence expressed by some British courts in adjudicating on matters which might intrude upon the privileges of the House of Commons needs not to give pause to a Canadian judge. The situation envisioned by Stephen J. in *Bradlaugh vs. Gossett*[29] that in such a case, by the process of appeal, the House of Lords could adjudicate upon the privileges of the House of Commons is no spectre in a state wherein the upper house is not an appellate tribunal or where the legislature is unicameral.

The *Stubbs and Steinkopf* case, of course, does not strictly involve the privileges of the Assembly; it rather involves the qualifications and rights of persons, who purport to be members, in the continuing of their purported membership in the Assembly. It might be conceded, for the purposes of this article that if the Assembly (where all legislation is initiated) had chosen to enact the pertinent qualifications, prohibitions and rights as Rules of the Assembly, the courts ought not to presume jurisdiction. Courts have not interfered in those proceedings proper to the Legislature which transpire, so to speak, within the walls of the Legislature. But the Assembly formulated and subsequently the Legislature of Manitoba, (the distinction is more difficult in the unicameral legislature) chose to enact the qualifications, rights and prohibitions in The Legislative Assembly Act as part of the public, substantive statute law of the land. It is surely not a matter of any regret whatever that the courts should be asked to construe the statute and should do it, in the same manner as any other statute. Canadian courts,

29. (1883-4) 12 Q.B.D. 271, at p. 287

it is, respectfully submitted, ought to cleave to the observation of Lord Coleridge, C.J. in the cited case of *Bradlaugh vs. Gossett*, who asserted that the court will:

> ". . . give judgment — according to its motions of the law, and not according to a resolution of either House of Parliament, Cases may be put, cases have been put, in which, did they ever arise, it would be plain duty of the Court at all hazards to declare a resolution illegal and no protection to those who acted under it."[30]

Again in *Edwards vs. Attorney General for Canada* Lord Stankey pointed out:

> "The judgment of the Chief Justice in the Supreme Court of Canada refers to and relies upon these cases, but their Lordships think that there is great force in the view taken by Duff J. with regard to them, when he says that s. 24 of the British North America Act, 1867, must not be treated as an independent enactment. The Senate, he proceeds, is part of a parliamentary system, and in order to test the contention based upon this principle that women are excluded from participating in working the Senate or any other institution set up by the Act, one is bound to consider the Act as a whole and its bearings on this subject of the exclusions of women from public office and place . . . Their Lordships do not conceive it to be the duty of this Board — it is certainly not their desire — to cut down the provisions of the Act by a narrow and technical construction, but rather to give it a large and liberal interpretation so that the Dominion to a great extent, but within certain fixed limits, may be mistress in her own house, as the Provinces to a great extent, but within certain fixed limits, are mistresses in theirs. 'The Privy Council, indeed, has also laid down that Courts of law must treat the provisions of the British North America Act by the same methods of construction and exposition which they apply to other statutes. But there are statutes and statutes; and the strict construction deemed proper in the case, for example, of a penal or taxing statute or one passed to regulate the affairs of an English parish, would be often subversive of Parliament's real intent if applied to an Act passed ensure the peace, order and good government of a British Colony': see Clement's Canadian Constitution, 3rd ed. p. 347 . . . Finally, with regard to S. 33, which provides that if any question arises respecting the qualifications of a senator or a vacancy in the Senate, the same shall be determined by the Senate . . . We must assume that the Senate would decide in accordance with the law".[31]

Canadian courts ought to regard their constitutional integrity as not merely an accidental oversight of the constitution; they ought not to hasten to strip themselves of jurisdiction in the anxious attempt to accord to Canadian legislatures that which is imagined to be necessary to render them identical to the "mother" of Parliaments. They were never constituted or intended to be identical. That pre-eminent authority on constitutional law and procedure, Sir John George Bourinot, advising Lieutenant-Governor Schultz, albeit on quite a different matter, wrote in a letter dated April 17th, 1895:

> "Federalism means legalism — the predominance of the judiciary in the constitution, the prevalence of a spirit of legality among the people. That a federal system can flourish only among communities imbued with a legal spirit and trained to reverence the law is as certain as can be any conclusion of political speculation."[32]

30. Ibid, at pp. 274-5
31. [1930] A.C. 124, at pp. 130-1, 136-7 and 142
32. Manitoba Archives

Bourinot, was of course, not speaking of political speculation in the shifting, temporary partisan sense, but rather as a matter of constitutional consideration. The provisions of The Legislative Assembly Act are enacted for the province at large and their operation is not confined within the four walls of the Assembly. In any event, and without denigrating those undoubted privileges which the Assembly does enjoy and exercise, the Assembly is not greater than the Legislature and it must be taken to be willing to obey, and to see obeyed, the law of the land, even though it has the means of amending that law.

As Lord Reading says in *Rex vs. Speyer & Cassel*:[33]

> "This is the King's Court; we sit here to administer justice and *to interpret the laws of the realm* in the King's name. It is respectful and proper to assume that *once the law is declared* by a competent judicial authority *it will be followed* by the Crown."[34]

But the institution in Canada which the constitution accords a separate and distinct integrity to interpret and declare the meaning of the law is the Court. In the *Stubbs and Steinkopf* case the office which the respondent purported to hold as a member of the Assembly, and the qualifications, rights and prohibitions attaching to that office were all created by the sovereign with the advice and consent of the various legislative chambers, and not by a mere rule or resolution of the assembly itself. The way is clear, then, for such qualifications, rights, eligibility and privileges to be questioned by *quo warranto* proceedings: *Darley vs. The Queen*[35] is a case in which the House of Lords adopted the opinion of the judges delivered by Tindal, C.J. that there is no distinction be maintained between an office created by Charter or by assent to an Act of Parliament; in both cases the assent of the sovereign is necessary. Thus, the Legislature having committed the incidents of membership in the Assembly to the public law, it would surely be unseemly of the court to flinch at performing its proper role of construing the law.

If this case presents matters of doubtful application then both the doctrine of public policy and also the inarticulate major premise may come into operation. The following observations are expressed to serve as they may in this field. Firstly, it is obvious that the administration of the law ought not to be brought into partisan political are, even though the court may at times be called upon adjudicate cases in which there may be a partisan political scent; such is, doubtless, one of the hazards to which Lord Coleridge referred. But the court at all times must prevent the scent of partisanship from polluting its atmosphere, (partisanship having its proper place, surely does not pollute *all* atmospheres, but it has no place in the dispassionate administration of law). The court is the proper tri-

33. Supra, note 15 at p. 610
34. Italics, mine.
35. (1845) 8 E.R. 1513

bunal to adjudicate, insofar as it may, issues such as are raised in this case because the court is naturally and singularly non-partisan. In Canadian history partisanship has ever bedevilled the dispassionate administration of this branch of law. In *The Canadian House of Commons — Representation*[36] Norman Ward, the author, indicates:

> "The four provinces which came together in 1967 agreed in general terms on a definition of corrupt practice . . .";
>
> "They also had similar views how that action for corrupt practice should be begun (by a simple petition signed by either an elector or candidate), and had adopted somewhat similar ways of trying the actual election cases, though their procedures varied in detail. Thus the assembly of the province of Canada had a general committee of elections, appointed by the Speaker subject to the sanction of the House, which was charged with preparing two panels of chairman and members from which election committees consisting of a chairman and four members were finally chosen. Nova Scotia and New Brunswick sent controverted elections directly to a Select Committee. Manitoba and British Columbia, when they entered the federation, used the ordinary judicial system and tried election disputes like other cases. In the provinces where committees of the assembly were used, the procedure was similar to that of a court; the committee members were sworn to uphold justice; witnesses were examined under oath; and the parties concerned were represented by counsel. It is to be feared, however, that judicial impartiality was noticeably absent in the rendering of verdicts";
>
> "In 1938 R. B. Bennett, referring to a bill to limit candidates' election expenditures said:
>
> 'So long as we leave the corrupt elections act as it is today, we might as well conclude that we are wasting our time — if a thousand dollars has to be put up as a deposit, and all the machinery of the law resorted to, with all the technicalities which can be relied on by those who defend themselves against an attack on their seat.
>
> There has grown up — not limited entirely to one party . . . a class of men whose one purpose in life is to flourish at election times and see how much they can get out of the candidate and the use they can put it to for the purpose of prostituting the electorate . . . You have this type of person dealing with a situation about which he does not want the candidate to know anything, and about the candidate does not want to know anything.'
>
> The Prime Minister here revealed the great paradox of the law governing electoral corruption. On the one hand, no one is charged with its enforcement, and its effective operation, as the record shows, cannot safely be left to rival party organizations; if it is to function at all, it must do so on the initiative of members of the general public. But on the other hand, unlike most all criminal matters, every conceivable difficulty exists to discourage the public from reporting violations of the law. The Controverted Elections Act has thus been stultified not merely by the practices which have grown up around it, but by some of its own terms."[37]

Thus, it is in the public interest that members of the general public ought to be left with the initiative to approach the courts to move them to administer the law, as the courts are constituted to do.

A further thought in this view is that if it is held that the Queen's Bench has no jurisdiction to entertain the kind of application by a private relator then of course, it would have no jurisdiction to adjudicate a similar

36. (University of Toronto Press, 1950)
37. Ibid, Chapter XIV, at pp. 240, 241, and 257-8, respectively

application at the instance of an Attorney-General. It would certainly avoid any obvious danger if the administration, of which some future Attorney-General were a member, could not command a majority disposition of such case as this in the Assembly, that the Crown's minister be free to resort to the court to have the matter adjudicated. For, if the court be powerless, then so might be the Crown, the ministry, and of course the substantive law, itself. It surely cannot be in the public interest that there exists the not far-fetched possibility of the law being flouted or ignored by the very institution which participated so intensely in its solemn enactment.

Again, to quote Lord Sankey in *Edwards vs. Attorney-General for Canada*:

> "Over and above that, their Lordships do not think it right to apply rigidly to Canada of today the decisions and the reasons thereafter which commended themselves, probably rightly, to those who had to apply the law in different circumstances, in different centuries, to countries in different stages of development. Referring therefore to the judgment of the Chief Justice and those who agreed with him, their Lordships think that the appeal to Roman law and to early English decisions is not of itself a secure foundation on which to build the interpretation of the British North America Act of 1867."[38]

The Supreme Court of Canada, although it did not purport to quash the resolutions of the Nova Scotia Assembly, nevertheless awarded damages against the Speaker and others who purported to act under such resolutions in *Landers vs. Woodworth*.[39] It did not decline jurisdiction, flinch, or stand in awe of the Assembly.

The common law was imported to Manitoba at the stage of development it had reached in 1870, and not in the times of the Tudors and the Stuarts. It is not surprising that Levinz J. dared not pronounce that which he thought an intrusion into electoral matters in *Onslow vs. Rapley*.[40] That case is most distinguishable because the judge there asserted that to grant the relief sought would be to *breach* an Act of Parliament — here the relator's application sought to have the court *enforce* the cited provisions of the statute. But judges today are not ground down, dismissed or imprisoned as they were in the days of conflict between Commons and Crown. The law which Manitoba inherited in 1870 had not fully emerged or matured in those perilous earlier days, and the decisions drawn from those times are not to be imported unquestioningly into present-day cases. The spirit of *Landers vs. Woodworth* was engendered at a more pertinent stage of our law's development. As Sir Wm. B. Richards, C.J.C. is reported:[41]

38. Supra, note 31 at pp. 134-5
39. Supra, note 13.
40. A case cited by the Chambers judge in Stubbs and Steinkopf
41. Supra, note 13, at p. 196

> "Even in England, the courts will see whether what the House of Commons declares to be its privileges really are so, the mere affirmance by that body that a certain act is a breach of their privileges will not oust the courts from enquiring and deciding whether the privilege claimed really exists."

See also, in *Barnard vs. Walkem*, the words of Begbie, C.J.:[42]

> "It will be said — "The Act itself declares the vacancy." But the Act itself must by some competent tribunal be declared to apply to the case; the facts must in some way be legally ascertained; and the consequent results legally declared. It cannot surely be that any person in the Province has a right and power to declare a forfeiture, and to have the seat treated as vacant, merely on his own opinion."

At the risk of being repetitious one is moved to observe that although Canadian institutions have been, at least, until now, largely patterned on those of the United Kingdom, the scrupulous constitutional separation of the judge from the legislator in Canada, obviates the concern expressed by Mr. Justice Stephen in *Bradlaugh vs. Gosset.* Canadian jurisprudence ought to be cognizant of Canadian realities. In a confederated nation it is obvious that no legislature can arrogate — or be accorded — all the majestic supremacy of the Parliament of a unitary state. The interposition of the Courts, if no other external authority be constituted, must prevail to assure that the Legislature and the legislator alike observe the laws which apply to each. It cannot be considered to be gratuitously officious of the Court at least to maintain the minimal means of enforcing the law. This unstartling conclusion surely proves itself to be conclusively Canadian!

FRANCIS C. MULDOON*

ROY ST. GEORGE STUBBS — AN OVERVIEW OF HIS LEGAL WRITING TO DATE (CONCLUDED)[1]

A descriptive phrase which Roy Stubbs has been prone to apply to those about whom he has written, and which I believe he borrowed from Lord Campbell, can be applied quite aptly to himself: he is without doubt one of the brightest ornaments of the Manitoba Bar, making his contribution not only as a lawyer and now as the Senior Judge of the Winnipeg Family Court, but particularly as a writer. In the 1969 issue of this Journal I dealt with the four books which Mr. Stubbs has published

42. (1867-89), B.C.R. 120 at pp. 132-3.

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1. The first part of this comment can be found in (1969) 3 M.L.J. 92.