LEGISLATIVE SUPREMACY IN THE UNION OF SOUTH AFRICA.

The principle of legislative supremacy in the Union of South Africa is recognised in the so-called *Ndlwana Case*[1] of the Appeal Court of the Union. The term used in that case is the "sovereignty" of the Parliament of the Union, but modern writers prefer the term "legislative supremacy" because sovereignty has several different meanings. Not only is the King spoken of as the sovereign, but sovereignty of the Parliament is not the same as sovereignty of the Union.

For instance, in the Status of the Union Act 1934 the Union is called in the preamble a "sovereign independent state", and in section 2 it is said that the Parliament of the Union shall be "the sovereign legislative power in and over the Union." In international law sovereignty means independence, i.e., equality with all other independent states, while in constitutional law sovereignty means supremacy over the other organs of a state.

Dicey, in his *Law of the Constitution,* uses the term sovereignty in the latter sense in his Introduction: "The principle of parliamentary sovereignty means neither more nor less than this, namely that "Parliament" has "the right to make or unmake any law whatever; and further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament."[2] In this sense the term sovereignty is used in the *Ndlwana Case.* When constitutional authors attack that decision, while sovereignty has several meanings their reasoning is quite irrevelant; but the use of the term "legislative supremacy" used by the Americans and several modern English writers, when they contrast the English principle of legislative supremacy with the American principle of judicial supremacy, is preferable, although it is not at all doubtful in what sense the term sovereignty is used in the *Ndlwana Case.*

After asking the preliminary question "whether this Court has any power at the present time to pronounce upon the validity of an Act of Parliament duly promulgated and printed by the proper authority, in as much as Parliament is now, since the passing of the Statute of Westminster, the supreme and sovereign law-making body in the Union", the judge states the great principle of sovereignty in the following terms:—"An Act of Parliament, in the case of a sovereign law-making body, proves itself by mere production of the printed

[1] Ndlwana v. Hofmeyr, [1937] A.D. 289.
[2] At xviii (8th ed. 1924).

form, published by the proper authority," and further, "Parliament's will, therefore, as expressed in an Act of Parliament cannot now in this country (as it cannot in England) be questioned by a Court of law whose function it is to enforce that will not to question it," and "It is obviously senseless to speak of an Act of a sovereign law-making body as ultra vires. There can be no exceeding of powers, when that power is limitless."

In the judgment the Status of the Union Act is cited; "Parliament has moreover, in the Status Act of 1934, defined its own powers and declared them 'sovereign'." It is clear that in the Status Act and in the *Ndlwana Case* "sovereignty" of the Parliament means that the principle of "legislative supremacy" is now accepted in the Union of South Africa and that other definitions of sovereignty do not matter at all as far as concerns the Union of South Africa.

The principle of "legislative supremacy" is, of course, not the foundation of the constitutional law in federal states or dominions. It is therefore quite irrelevant to quote American, Canadian, or Australian lawsuits to prove that the principle of legislative supremacy cannot be the foundation of the constitutional law of the Union. In federal states the legislative powers are divided between the central parliament and the legislative bodies that compose the federal state. So, for instance, the legislative powers of the Canadian provincial parliaments are exclusive, the Dominion parliament being debarred from making laws over the subjects granted by the British North America Act exclusively to the provinces.

In the Union there does not exist any division of legislative power between the Union Parliament and the provincial councils. The legislative power given to the provinces is not exclusive but concurrent. Over the subjects granted to the provinces the Union Parliament has the same full power to make laws for the peace, order, and good government of the Union (South Africa Act 1909, sec. 59) as over other subjects, and according to sec. 86 of the Act "Any ordinance made by a provincial council shall have effect in and for the province as long and as far only as it is not repugnant to any Act of Parliament."

To quote cases of the Privy Council or the Appeal Court of the Union of South Africa decided before December 6, 1931, the date of the Statute of Westminster, is equally irrelevant, because as stated by the Privy Council in *Moore's Case*[3] it is the Statute of Westminster that removed the fetter lying on the Parliament of the Irish Free State in virtue of the Colonial Laws Validity Act 1865, sec. 2—"Any colonial

[3] Moore v. Attorney-General for the Irish Free State, [1935] A.C. 484.

law which is or shall be in any respect repugnant to the provisions of any Act of Parliament extending to the colony to which such law may relate, or repugnant to any order or regulation made under authority of such Act of Parliament, or having in the colony the force and effect of such Act, shall be read subject to such Act, order, or regulation, and shall, to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative."

The South Africa Act 1909 granted to the Union Parliament a power to repeal or alter that Act, but that power was conditioned by sec. 152; it was not a full power, but a limited power; "Parliament may by law repeal or alter any of the provisions of this Act: Provided that no provision thereof, for the operation of which a definite period of time is prescribed, shall during such period be repealed or altered; and provided further that no repeal or alteration of the provisions contained in this section, or in sections thirty-three and thirty-four (until the number of members of the House of Assembly has reached the limit therein prescribed, or until a period of ten years has elapsed after the establishment of the Union, whichever is the longer period), or in sections thirty-five and one hundred and thirty-seven, shall be valid unless the Bill embodying such repeal or alteration shall be passed by both Houses of Parliament sitting together, and at the third reading be agreed to by not less than two-thirds of the total number of members of both Houses. A Bill so passed at such joint sitting shall be taken to have been duly passed by both Houses of Parliament."

The Statute of Westminster, 1931, went still further by giving in sec. 2 an unlimited power to the two unitary Dominions, Ireland and the Union of South Africa, to repeal or amend any Act of the Parliament of the United Kingdom: "No law and no provision of any law made after the commencement of this Act by the Parliament of a Dominion shall be void or inoperative on the ground that it is repugnant to the law of England, or to the provisions of any existing or future Act of Parliament of the United Kingdom, or to any order, rule or regulation made under any such Act, and the powers of the Parliament of a Dominion shall include the power to repeal or amend any such Act, order, rule or regulation in so far as the same is part of the law of that Dominion."

Exceptions, however, are made for the federal Dominions, Canada and Australia, and also for New Zealand, in secs. 7, 8 and 9 of the Statute.

That all fetters are removed by the Statute of Westminster is recognised by the decision of the Privy Council in *Moore v. Attorney*

General for the Irish Free State[4] concerning the validity of the Constitution (Amendment No. 22) Act 1933 abolishing the right of appeal from the Supreme Court of the Irish Free State to His Majesty in Council.

The new position is summed up as follows:

(1) The treaty of December 1921 between Great Britain and Ireland and the Irish Free State Constitution Act of 5 December 1922 respectively formed parts of the statute law of the United Kingdom each of them being parts of an Imperial Act.

(2) Before the passing of the Statute of Westminster it was not competent for the Irish Free State Parliament to pass an Act abrogating the treaty because the Colonial Laws Validity Act forbade a Dominion legislature to pass a law repugnant to an Imperial Act.

(3) The effect of the Statute of Westminster was to remove the fetter which lay upon the Irish Free State legislature by reason of the Colonial Laws Validity Act. That legislature could not hitherto pass Acts repugnant to an Imperial Act. In this case it had done so. The simplest way of stating the situation was to say that the Statute of Westminster gave to the Irish Free State a power under which it could abrogate the Treaty, and that as a matter of law it had availed itself of that power.

It was the Statute of Westminster that laid down in the statute law of the United Kingdom the great turning point in inter-imperial relations after the first world war. In 1926 the Imperial Conference stated the new relations between Great Britain and the Dominions in the following well known terms: *"They are autonomous Communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations."*[5]

But the Imperial Conference was, of course, not a legislative body. What it did and only could do was to *declare* the new constitutional position. It was fully aware that the existing statute law in the United Kingdom and the Dominions was not in accord with the newly stated position and that it was necessary to lay that position down in

[4] [1935] A.C. 484.
[5] Imperial Conference, 1926: Summary of Proceedings (Cmd. 2768) 14.

what can be called a new Dominion Laws Validity Act. The Statute of Westminster 1931 was the result.

Now it was self-evident that the Statute of Westminster as a Dominion Laws Validity Act superseded not only the Colonial Laws Validity Act 1865 but also all other British Acts based on the former position of the Dominions as subordinate units in the British Empire. It "removed the fetter" as the *Moore Case* stated. It was not necessary at all that these older British Acts should be formally repealed or altered. Only the Colonial Laws Validity Act was formally repealed as far as the Dominions were concerned; for instance, the Privy Council Acts of 1833 and 1844 were not repealed by the Statute of Westminster, but repugnancy to these Acts made a Canadian statute, abolishing in certain respects appeals to His Majesty in Council from a judgment of a Canadian Court of Justice no longer invalid, as stated in the Privy Council judgment in *British Coal Corporation v. The King.*[6]

The same is true of repugnancy to two Imperial Acts relating to the Irish Free State, both of 1922, namely, the Irish Free State (Agreement) Act and the Irish Free State Constitution Act, as stated in *Moore v. Attorney General for the Irish Free State.*[7] It was the Statute of Westminster that abrogated the invalidity.

In both judgments of the Privy Council it is accepted as a matter of course that the later British Act superseded the former Act. The same is true of the South Africa Act 1909, that granted to the Union Parliament a power, though limited to a certain extent, of repealing or altering sections of that Act without mentioning at all the Colonial Laws Validity Act that forbade repugnancy of a colonial law to every British Act relating to the colony.

That the Statute of Westminster did not repeal by express words the limitations of sec. 152 and 35 of the South Africa Act on the power of the Union Parliament to repeal or alter sections of that Act, is unimportant. The Statute of Westminster in its clear terms, without any ambiguity, superseded all former British Acts that were not in conformity with that Statute. An unlimited power to alter or repeal any British Act was granted to the Dominion Parliament and there was no reason to except any section of the South Africa Act that made the alteration of certain sections of that Act more difficult by prescribing a two-thirds majority, thus giving to the opposition a right of veto that they could use to hamper effective legislation. Moreover, the sections of the Statute of Westminster relating to the Union of South Africa, set forth in the schedule to the Status of the Union Act 1934,

[6] [1935] A.C. 500.
[7] [1935] A.C. 484.

were declared by sec. 3 of that Act to be deemed an Act of the Parliament of the Union. So the principle that the Parliament of the Union shall have the power to repeal or amend any British Act and the principle that no Union Act shall be void or inoperative on the ground that it is repugnant to an Act of the United Kingdom is made part of the statute-law of the Union. In the Union the fetters of secs. 35 and 152 of the South Africa Act are not only removed by a British Act but also by a Union Act without a two-thirds majority of both Houses of Parliament sitting together. Would it be possible for the Appeal Court to declare sec. 3 of the Status Act therefore invalid?

As mentioned above, the Status Act declared in full conformity with the Statute of Westminster that the Union Parliament is "the sovereign legislative power in and over the Union", assuming thereby that the Union Parliament had the same right to declare the law in a declaratory Act as the British Parliament possessed.

The legal conflict in the Union is essentially a conflict between the opposing fundamental principles of legislative and judicial supremacy, the first having been fully recognised by the Appeal Court in the *Ndlwana Case*.[8] The passing of the Separate Representation of Voters Act of 1951 was strictly in conformity with the decision of the Appeal Court in 1937.

By rejecting its former decision the Appeal Court was responsible for the conflict. The reason for it was formulated by the Appeal Court in *Harris and Others v. Minister of Interior*[9] as follows: "That decision, if correct, enabled Parliament to deprive by a bare majority in each House sitting separately individuals of rights which were solemnly safeguarded in the Constitution of the country. This is a potent reason why this Court, on being satisfied that its previous decision was wrong, should not hesitate in declaring the error of that decision."[10]

First a fundamental question about the character of the South Africa Act 1909. Was it indeed a "pactus unionis" as the constitution of the United States was in its full sense, namely a compact freely adopted without the least influence from without? Or was it a compromise between England and South Africa?

What was the legal position of South Africa?

Berriedale Keith[11] writes about the limitations on the powers of the Dominion Parliaments by remarking that in law they were re-

[8] Ndlwana v. Hofmeyr, [1937] A.D. 289.
[9] 1952 (2) South African L.R. 428.
[10] *Ibid.*, at 472.
[11] RESPONSIBLE GOVERNMENT IN THE DOMINIONS (2nd ed. 1928).

stricted by a number of considerations. In the first place there were restrictions resting on the fact that these Parliaments are the legislatures of dependencies, not of fully sovereign states. The conventions, composed of delegates not only of the Cape and Natal but also of the newly conquered territories of Transvaal and the Free State, had to accept that condition of dependency. The British King was to be their King as the conqueror; the British Parliament was to be accepted as the sovereign Parliament of the British Empire. Every law of the Union Parliament could by reservation or disallowance be subjected to the final decision, formally of the King, but practically of the British Government.

The concept of the South Africa Act, approved by the conventions of delegates of the several colonies (the Cape, Natal, Transvaal and the Orange Free State) was essentially the concept of a "Dependency Act." Why did the Boer leaders of the two conquered republics consent to that concept? First, they had no choice. To declare the Union a sovereign independent state as twenty-five years later the Act on the Status of the Union 1934 did in its preamble was, of course, out of the question. To condemn the conquest, to pronounce the principle of self-determination of peoples, as General Smuts did after the first world war in conformity with the message of President Wilson to the Congress of the United States, was impossible. They had to make the best of the situation.

A second reason was that they had to support the new Liberal Government in England. That government, often called a "Pro-Boer" government, was a friendly government towards them, but that government had to avoid by all means the reproach of the Conservative opposition that they were breaking up the Empire. An election was at hand and a mandate of the electors to curtail the power of the House of Lords was wanted after the conflict of the House of Lords and the House of Commons in 1909.

So it was in the first place the British Government and the British Parliament that were responsible for the South Africa Act. The South Africa Act was not a constitution in the sense of the constitution of the United States, it was an Act of the British Parliament. To give it a higher value than a later British Act is against the rule that a later Act supersedes an earlier Act. Professor Beinart of the Cape University lays great stress on the character of the South Africa Act as the "Grundnorm" of the South African constitutional law. He adopts the theory of Professor Kelsen, an Austrian who fled to the United States, that the constitution of every country is based on a "Grundnorm" as he calls it. He agrees, however, that this

"Grundnorm" is not a "lex aeterna", it can be changed for instance by revolution, it is not a law of nature. To a certain extent that doctrine is also accepted by the Appeal Court of the Union in its decision in *Harris' Case.*

In that case the Court declares its potent reason for disregarding its former judgment in *Ndlwana's Case* as above mentioned.[12]

But is it still true that the South Africa Act is the "Grundnorm" of the constitutional position of South Africa, or is the "Grundnorm" the unlimited power of the Dominion Parliament to alter and repeal every British Act granted by the Statute of Westminster, and "the sovereignty" of the Union Parliament declared by the Status of the Union Act? Is the "Grundnorm" not the declaration of the Statute of Westminster, that no Dominion law shall be void or inoperative on the ground of repugnancy to any Act of the Parliament of the United Kingdom? It is not by revolution that the "Grundnorm" is altered, but by evolution of the Union from a "dependency" to a sovereign international state.

In a short article as this must be, it is not possible to discuss all the aspects of the question, but if it is assumed that sec. 2 of the Statute of Westminster is not ambiguous but perfectly clear in its terms and that the Statute declares in its terms the principle of the legislative supremacy of the Parliament of South Africa, the final decision is not the decision of the Appeal Court but the declaration of the new position of the Union of South Africa by the Union Parliament, which has the same right as the British Parliament possesses to declare the legal position by a declaratory Act. The "Grundnorm" is the principle of legislative supremacy.

H. VER LOREN VAN THEMAAT.*

[12] At p. 64, *supra.*

**Dr. Jur., Dr. Jur. Pol. (Leyden); Extraordinary Lecturer in Law, University of Stellenbosch.*