Is Referential Legislation Worth While

Horace Emerson Read
IS REFERENTIAL LEGISLATION WORTH WHILE?*

BY HORACE EMERSON READ*

DEFINITION

The purpose of this article is to examine and weigh some problems engendered alike for lawyers and laymen by the legislative device of incorporating terms in a statute merely by reference to other law, in other words, to canvass the question posed in the title. There has been occasional comment on use of the device, ranging from violent condemnation to qualified approval, but objective discussion has been rare and fragmentary.1 The writer proposes to avoid deficiency as well as depart from the traditionally insular treatment of law by referring to the recorded experience of the four principal common law countries.

As Sir Courtney Ilbert has remarked:

“All legislation is obviously referential in the widest sense. No statute is completely intelligible as an isolated enactment. Every statute is a chapter, or a fragment of a chapter, of a body of law. It involves references, express or implied, to the rules of the common law, and to the provisions of other statutes bearing on the same subject.”2

But the narrower, technical meaning with which the courts have come to use the term is precise. It designates a statute original in form, neither amendatory nor supplementary, which refers to

---

*Professor of Law, Law School, University of Minnesota.
†This article appeared in the Canadian Bar Review for June, 1940, 18 Can. Bar Rev. 415. Footnote references have been expanded to include additional American material.
2Ilbert, Legislative Methods and Forms (1901) 254.
and by reference adopts, wholly or partially, for its own purposes, one or more provisions of other statutes or one or more precepts of the common law.³

While the term does not, when used strictly, include expressly amending and repealing acts, it is sometimes loosely used to include them since they necessarily refer to pre-existing law. This latter usage has sometimes led both to confused thinking on the part of persons who have discussed the incorporation of terms by reference and, as shall be seen, to difficulties of interpretation.⁴

Reference legislation in both the strict and loose sense is well founded historically. The device of affecting provisions of earlier law merely by reference to them was in use by the English parliament at least by the thirteenth century⁵ and received the sanction of Chief Justice Beresford in 1310.⁶ Ever since, despite sporadic criticism, there has been an increasing tendency to enact statutes which borrow precepts from the common law or other legislation or even repeal, amend, or revive terms of other acts by referring to them only. The device appeared early in the legislative history of the British colonies in North America.⁷ In the very first parliament of Upper Canada,⁸ by the first act of its first session, the “laws of England” as of that date were adopted to govern “property and civil rights,” thus establishing a precedent later followed when each of the four western Canadian provinces were carved from territory where the common law had not been introduced “by the silent operation of constitutional principles.”¹⁰ Naturally, refer-

⁵See Statute of Westminster II, ch. 11 (1285), which adopted terms of Statute of Marlborough, ch. 23 (1267).
⁶Anonymous Cases, (1310) Y.B. Hilary Term, 4 Edw. II, 3, 4. (26 Sel. Soc. 3).
⁷See account of adoption of the “Lawes of Virginia” in Minute of the Order which provided for the first establishment of a court in the English colony of Nova Scotia: (1920) 56 Can. L. J., 281, 282-283.
⁹By Upper Canada, Statutes 32 Geo. III, ch. 1, it was enacted that “from and after the passing of this Act, in all matters of controversy relative to property and civil rights, resort should be had to the laws of England as the rule for the decision of the same.” As to criminal law, see Upper Canada, Statutes 40 Geo. III, ch. 1.
ence legislation involving less epochal matters became a matter of course.

State constitutions of the United States adopted the “suitable” legal institutions and law of the pre-existing colonies, territories, and states by reference, and it was not an uncommon course of legislation in the states, at an early date, to adopt the law of England by like method. It has been held that the general maritime law, with modifications adjusting it to conditions and needs on this side of the Atlantic, was impliedly adopted as part of the federal law of the United States by sec. 2, article III of the constitution. Also in many instances Congress has incorporated or adopted into federal laws acts or parts of acts from the session laws of the states and state legislatures have similarly taken provisions from federal and sister states’ laws.

A referential statute, accurately so-called, operates in either of two ways: first, and most commonly, the new act adopts precepts, in whole or in part, from other law; or second, the act provides that it shall be incorporated into all acts of a certain kind that may be passed in the future. Common examples of


Some references are express, others implied. See e.g. People v. Mayor and Aldermen of New York, (1840) 25 Wend. (N.Y.) 9, 33; Cass v. Dillon, (1853) 2 Ohio St. 607; Lorman v. Benson, (1860) 8 Mich. 18; Coburn v. Harvey, (1864) 18 Wis. 156; State v. Bilansky, (1859) 3 Minn. 246 (Gil. 169). This last case has additional historical interest in holding that benefit of clergy was not part of the common law of the territory of Wisconsin, and hence not adopted by the reference in sec. 12 of the organic act of Minnesota.


E.g. the so-called consolidation acts. For an early application of this type, see Attorney General v. Great Eastern Ry., (1872) L. R. 7 Ch. 475, 41 L. J. Ch. 505 (Railway Clauses Consolidation Act). Wording that is
the latter are the general interpretation acts.\(^7\) (As statutes which use the former method are by far the more numerous and troublesome, all discussion hereafter will concern them unless otherwise is expressly indicated). Further, as to method, a referential act with the adoptive effect just described may either (a) apply to a new set of circumstances law originally passed for the purpose of dealing with another set of circumstances, or, less often, (b) apply to some matter a code originally passed for the purpose of being applied from time to time in a certain sphere as occasion requires.\(^8\) However, each of these modes as compared to the other has merely incidental peculiarities; and they will be adverted to later.

A person who seeks the law within the covers of the statute book must first of all discover whether the provision under his immediate perusal is self-contained, and, if it is not, in what direction and how far afield he must go to supply its deficiencies. To do this he must interpret. If, despite textual interpretation, he finds a hiatus in legislative expression, he will look for the legislative intention as to how to fill that hiatus. Before resorting to some contextual aid such as, for example, application of the in pari materia canon, he will investigate whether there is an incorporation of terms by reference. If he finds an express reference, his first step is easy; and for that reason a draftsman should be careful to make an intended express reference clear. A typical example of the result of a failure to do so was dealt with by Chief Justice Coleridge in *Mather v. Brown*\(^9\) where he held that a section of the Municipal Corporations Act, 1835,\(^2\) was neither extended to nor incorporated with the Municipal Elections Act 1875, by the following reference:

"This Act shall, as far as consistent with the tenor thereof, be construed as one with the Act 5 & 6 Will. 4, ch. 76 (Municipal Corporations Act) and the acts amending the same. . . ."\(^{21}\)

characteristic of such acts appears in *The Lands Clauses Consolidation Act*, 1845 (8 & 9 Vict. ch. 18) which provides by sec. 1 "that this Act shall apply to every undertaking authorized by an Act which shall hereafter be passed, and which shall authorize the purchase or taking of lands for such undertaking, and this Act shall be incorporated with such Act. . . ." For a discussion of this act see *In re Wood's Estate*, (1886) 31 Ch. D. 607, 55 L. J. Ch. 488.

\(^7\)See Canadian Uniform Interpretation Act, Part II, sec. 2.
\(^9\)(1876) 1 C. P. D. 596, 45 L. J. Q. B. 547.
\(^2\)05-6 Wm. IV, ch. 76.
\(^3\)8-39 Vict. ch. 40, sec. 13. An example of a back-handed form of words which was construed to have effected an incorporation by reference
There may be an implied reference. Cases involving the question of incorporation of terms by implication or necessary intendment, although not plentiful, have usually been vexatious. One of the most interesting arose recently in Wisconsin. In *Gilson Bros. Co. v. Worden-Allen Co.*\(^{22}\) the question was whether the plaintiff was a beneficiary of a contractor's bond and hence could claim as a party in interest under an act of 1931\(^{23}\) which required such bonds to be secured in public works contracts. The act provided that the bond should cover labor and materials, but was silent concerning the extent of the class of persons protected, and contained no words of express reference whatever. It was held that as the legislature did not attempt to give anyone a mechanic's lien on a public building, but instead devised the plan of placing a bond, to be given by the principal contractor where it would serve to save from loss persons who were so related to the work that they would have been protected by the mechanic's lien act had they been dealing with a contractor who was building for an individual, the 1931 act by necessary implication incorporated therein the classification of parties in interest contained in the mechanic's lien statute *ipsissimis verbis*. The plaintiff did not fall within that classification.\(^{24}\)

England supplies an example of a finding that an implied incorporation by reference was effected despite what appeared to be an express negation contained in the referring statute itself. The Metropolitan Board of Works, by an act passed in 1877,\(^{25}\) was authorized to acquire specified land for street improvement, and sec. 33 thereof provided the machinery and regulated the procedure by which such land was to be acquired and sold or let. Later, by an amending act, passed in 1892,\(^{26}\) the board

\[^{22}\text{22(1936) 220 Wis. 347, 265 N. W. 217.}\]
\[^{23}\text{Wisconsin, Laws 1931, Ch. 438; Wisconsin, Statutes, sec. 289.16.}\]
\[^{25}\text{Metropolitan Street Improvements Act, (40-41 Vict. ch. 235).}\]
\[^{26}\text{45-46 Vict. ch. 222.}\]
was required to erect artisans’ dwellings on three of the lots. Section 3 of the amending act declared:

“From and after the passing of this Act the provisions contained in section 33 of the Act of 1877 shall cease to be in force with respect to the lands shewn on the Gray’s Inn Road plan, [the land on which the dwellings were to be built] and authorized to be taken by the Act of 1877, and in relation thereto the Act of 1877 shall be read as though the said section were not contained therein.”

In *Wigram v. Fryer* Mr. Justice North held that because the amending act had failed to provide the Board with the essential machinery to enable it to erect the required dwellings, the provisions of sec. 33 of the principal act of 1877 were, despite the language of sec. 3, referentially adopted pro tanto by necessary implication. Well might the judge remark,

“It is a very lamentable way of legislating, that one should be driven to get at the meaning of these Acts by removing difficulties (as far as can be done) by construction, rather than that the intention of the legislature should be clearly expressed upon the face of the Act.”

**EXTENT AND EFFECT OF A REFERENCE**

If the seeker of the law of the statute finds that there is a reference, either express or implied, he next must solve the problem of its extent in the sense simply of quantity, that is how many of the terms of the law to which reference is made does the referential act gain?

If the reference is express and specific, that is, one which refers to one or more named provisions of another act or to one or more named acts and applies it or them to the subject of the adopting statute, he will have little trouble. But general references are pregnant with litigation. In them the very looseness of the referring language is a command invitation to the courts to partake in the legislative process—and they have responded with a rule of reason: “In the construction of general

---

27(1887) 36 Ch. D. 87, 56 L. J. Ch. 1098.
references in acts of Parliament, such reference must be made only as will stand with reason and right.”

A typical general reference is illustrated and the judicial modus operandi in applying this standard is neatly revealed by an Alabama case. There the question was whether the clerk of the city court of Mobile had power to issue an original attachment. By statute there had been conferred upon that court “all the powers, [with one exception not here relevant], of the several circuit courts of the state.” The clerks of those courts had been, by a previous statute, expressly empowered to issue an original attachment. The court called reason to their aid as follows:

“An original attachment is not an ordinary process, and does not issue out of a court, and does not pertain to the exercise of the ordinary powers and jurisdiction of a court. It is an extraordinary process, and can only be issued by the persons or officers upon whom the statute confers special authority to issue it. The power exercised in issuing it is *in its nature judicial*... and is not such as pertains to the clerk of a court merely as a clerk, and such as he exercises in the issue of process which issues out of the court and pertains to the exercise of the jurisdiction of the court.”

The conclusion was that the reference clause conferred upon the clerk of the city court, a ministerial officer, the general powers of the clerks of the circuit courts, but not the power to issue an original attachment, a power special and in its nature judicial.

Perhaps it is not out of place to observe just here that tasks

---

30Lord Denman C. J. in *The Queen v. Badcock*, (1845) 6 Q. B. 787, 797, citing 2 Inst. 287. In *Jones v. Dexter*, (1859) 8 Ala. 276, 285, the same doctrine is expressed in varied language: “... where the provisions of a statute are adopted by *general reference* it will receive a more liberal construction than if originally passed with reference to the particular subject.” See also *Panama R. R. v. Johnson*, (1924) 264 U. S. 375, 391-392, 44 Sup. Ct. 391, 68 L. Ed. 748; *Hutto v. Walker County*, (1913) 185 Ala. 505, 64 So. 313.


32Alabama, Acts 1851-2, No. 66.

33Citing *United States v. Ferriera*, (1851) 13 How. (U.S.) 40, 14 L. Ed. 42.


35For similar effect see *The King v. Justices of Surry*, (1788) 2 Durn. & E. 504. See also Du Pont v. Mills, (Del. 1937) 196 Atl. 168 holding that “in the same manner as other elections” referred only to procedure and not to qualifications of voters; and *Adams v. State*, (Neb. 1940) 294 N. W. 396, holding that the general reference in: “If any bailee of any money, bank bill or note, goods or chattels shall convert the same to his or her own use with an intent to steal the same, he shall be deemed guilty of larceny in the same manner as if the original taking had been felonious; and on conviction thereof shall be punished accordingly,” incorporated only the penalty provisions of the larceny statute.
of this kind thrust upon the courts by using general references do not appear to be materially lightened by the clause sometimes inserted to the effect that the adopted law "shall apply save so far as expressly varied or excepted" by the referring act." Neither are they lightened by a direction that the law referred to shall be applied "only in so far as the same are applicable," since after all that is but an express mandate to employ the rule of reason. Employment of this direction has, indeed, been held to authorize judicial legislation to the degree necessary to save a referential act from being so uncertain as to be an insufficient expression of the legislative will.

Sometimes the identity of the provisions included within a general reference is impossible to discover. Then, the extent of the reference being wholly indeterminable, the referring act is void for uncertainty; there is a casus omissus. This obviously occurs and is easily established when no law of the sort named in the reference exists. Also it happens when a statute provides that its subject shall be governed by the law concerning some other subject, and that law is unidentifiable, as in the New Mexican case where the reference was to "the laws of this state as to method and manner of appropriation and use of underground waters" and different laws containing contradictory rules were applicable to underground waters according to whether or not they were artesian.

Extent of a reference in time, that is in respect of adoption

36See Minnesota, Laws, 1939, ch. 369, sec. 2.
37See Minnesota, Laws, 1939, ch. 12, sec. 23.
38E.g. see Panama R. R. v. Johnson, (1924) 264 U. S. 375, 389, 44 Sup. Ct. 391, 68 L. Ed. 748, holding that rules of the Federal Employers Liability Act were incorporated into the maritime laws, 38 Stat. at L. 1185, ch. 183, sec. 20, as amended by sec. 33 of Act of June 5, 1920, 41 Stat. at L. 1007, ch. 250, which provided that "... all statutes of the United States modifying or extending the common law right or remedy in cases of personal injuries to railway employees shall apply." See also Attorney-General v. Great Eastern Ry., (1872) 7 Ch. D. 475, 41 L. J. Ch. 505; State ex rel. Bancroft v. Frear, (1910) 144 Wis. 79, 128 N. W. 1068; Gillesby v. Board of County Commissioners, (1910) 17 Idaho 586, 107 Pac. 71.
39See Savage v. Wallace, (1910) 165 Ala. 572, 51 So. 605. In Scottish Union & National Ins. Co. v. Phoenix Title & Trust Co., (1925) 28 Ariz. 22, 235 Pac. 137 where statute of Arizona adopted by reference the "New York standard" insurance policy without further identification. It was held that since the court could take judicial notice of what that form was the reference was not void for want of certainty.
REFERENTIAL LEGISLATION

of change in the adopted measure made subsequent to the reference, methodically should be considered here. Historically, however, the pertinent law had its beginning as a logical inference from the rule governing the primary effect of a reference upon the status of an adopted precept. It is desirable, therefore, to consider that law in its setting as a secondary result of that primary effect.

The courts are unanimous concerning the primary legal effect of a statutory reference. Whenever an act of the legislature brings into itself by reference pre-existing common law precepts or the terms of another act, the precepts and terms to which reference is made are to be considered and treated as if they were incorporated into and made a part of the referring act just as completely as though they had been explicitly written therein. The adopted provisions as such derive their vitality solely from the referential statute.

From this primary doctrine flow certain secondary results. The first is that a two step process is introduced to the interpretation and construction of the adopted language. It must first be read in the sense which it bore in the original act from which it was taken, and next in the light of its new environ-


43Pennock v. Dialogue, (1829) 2 Pet. (U.S.) 1, 18, 7 L. Ed. 327; Commonwealth v. Hartnett, (1855) 3 Gray (Mass.) 450; Tyler v. Tyler, (1857) 19 Ill. 151; Giguerre v. E. B. and A. C. Whiting Co., (1935) 107 Vt. 151, 177 Atl. 313; Medow v. Riggert, (1937) 132 Neb. 429, 272 N. W. 238; Huffman v. Buckingham Transp. Co. of Colorado, (C.C.A. 10th Cir. 1938) 98 F. (2d) 916; Carr's Inc. v. Industrial Commission, (Wis. 1940) 292 N. W. 1. Cf. dictum in United States ex rel. Demarois v. Farrell, (C.C.A. 8th Cir. 1937) 87 F. (2d) 957, 962, that "Even if it [federal probation law] were copied from a state statute, it does not follow that the construction placed upon the state statute by the highest court of the state
The second of these secondary results has concerned the effect of modifications of the adopted law, made subsequent to the adoption, upon the referential statute, that is to say, the extent of a reference in time. Here a study of the cases in which the now established rules were evolved reveals in striking fashion the genius of the courts for compromising between the dictates of logic and practical expediency. The earlier decisions in both England and the United States hold without qualification that the repeal of the incorporated law leaves the referring one in force, unless it also is repealed expressly or by necessary implication, and that the reference does not carry with it changes afterwards made in the former. Taking as premise the primary effect of a reference, the logic of such a rule is obviously unassailable. Moreover, as Mr. Justice Thompson pointed out in *Kendall v. United States*, "... no other rule would furnish any certainty as to what was the law, and would be adopting prospectively all changes that might be made in the law." This is apparently still the unqualified common law rule in England.

In Mayor of Portsmouth *v.* Smith, (1885) 10 App. Cas. 364, 371, 54 L. J. Q. B. 473, Lord Blackburn said: "Where a single section of an act of parliament is introduced into another act, I think it must be read in the sense which it bore in the original act from which it was taken, and that consequently it is perfectly legitimate to refer to all the rest of that act in order to ascertain what the section meant, though those other sections are not incorporated in the new Act." See also Attorney-General *v.* Smyth & Fenton, [1905] 2 Ir. R. 553. Judicial interpretations not made prior to adoption, and legislative interpretations made before adoption, when the reference is to the laws of another legislature, will be disregarded. Deugau *v.* Kramer, [1938] 4 D. L. R. 353, [1938] 3 W. W. R. 269.

**Note:** The text continues with numerous references to legal cases and statutes, illustrating the application of the principle of referential statutes in subsequent legislation.
Ontario, and Nova Scotia.

But, despite their initial declaration of firm loyalty to a rule coined of logic and dedicated to certainty, it was not long before the "American" courts, while in the throes of construction, resorted to the "Intention of the Legislature," that Aladdin's lamp which has so often enabled Anglo-American courts to conjure much from little or nothing. The result was a distinction between two types of reference: Where one statute adopts the whole or a part of another statute by a particular or descriptive reference to the statute or provisions adopted, such deemed to be incorporated in it, at all events if it is possible for the subsequent act to function effectually without the addition.


In 1916 Australia added: "Where in any act reference is made to any other act, and that other act is subsequently amended, then unless the contrary intention appears the reference shall, from the date of the amendment, be deemed to be to that Act as so amended." Now Acts of Interpretation Act 1901-1935, sec. 10A.

Kilgour v. London St. Ry., (1914) 30 O. L. R. 603, 19 D. L. R. 827. (See this case also for effect given to a statutory reversal of a common law rule.)

McKenzie v. Jackson, (1898) 31 N. S. R. 70.


A "descriptive" reference is sometimes difficult to distinguish from a "general" one, as will be shown in discussion in the text infra. Typical descriptive references are: "Company within the meaning of the Companies Acts," "Any alien . . . convicted of an offence under . . . this act, shall . . . be kept in custody and deported in accordance with the provisions of the Immigration Act relating to enquiry, detention and deportation. (Opium and Narcotic Drugs Act, Canada, Rev. Stat. 1927, ch. 144, sec. 24.) See the reference considered in Damron v. Rankin, (Tex. Civ. App. 1931) 34 S. W. (2d) 360. In Hutto v. Walker County, (1913) 185 Ala. 505, 508, 64 So. 313, the reference was as follows: "All provisions of the election law pertaining to the contest of an election of constable shall be observed as to the contest hereunder . . . ." On p. 509 the court said that incorporation by reference "does not require the specific adoption of the existing statutes sui nominibus," and held that this was a descriptive refer-
adoption takes the statute as it exists at the time of adoption and
does not include subsequent additions, modifications, or repeals
of the statute so taken unless it does so expressly or by necessary
implication. But where the reference is, not to any particular
statute or part of a statute, but to the law generally which governs
a specified subject, the reference will be regarded as including, not
only the law on that subject in force at the date of the referential
act, but also that law as it exists from time to time thereafter.

The distinction just stated appears to have been drawn first
in a Florida case, Jones v. Dexter, in 1859. An act of 1828
adopted in general terms as the rule for the distribution of per-
sonalty on intestacy “the provisions of the law regulating descents.”
At that time descents of realty were covered by an act of 1822,
but in 1829 it was superseded. The 1829 act was substantially
borrowed from Kentucky, which in turn had derived it from
Virginia. Both states had enacted it after a referential act had
applied the law of descents to personality, and in both the reference
had been held not to extend to it. On perusing the Virginia and
Kentucky decisions, the Florida court found a distinction be-
tween the wording of the reference clauses pronounced upon
therein and that of the one before it. Said the court:

“In the construction of our statute of 1828, we are wholly re-
lieved from the pressure which bore upon the Virginia and Ken-
tucky courts, growing out of the particular phraseology of their
adopting acts. Our statute makes no reference to any particular
act, by its title or otherwise, but uses the broader and more com-
ience which, like a specific or particular one, adopted the described law as it
existed at the time of adoption only, and thus did not include a later amend-
ment.

52 Culver v. People, (1896) 161 Ill. 89, 43 N. E. 812; Nampa & Meri-
dian Irrigation Dist. v. Barker, (1924) 38 Idaho 529, 223 Pac. 529; People v.
Whipple, (1874) 47 Cal. 592; Ventura County v. Clay, (1896) 112 Cal. 65,
44 Pac. 488; State v. Caseday, (1911) 58 Or. 429, 115 Pac. 287; Gilson
Brothers Co. v. Worden-Allen Co., (1936) 220 Wis. 347, 265 N. W. 217;
Devery v. Webb, (1937) 58 Idaho 118, 70 P. (2d) 377; Noble v. Noble,
(Or. 1940) 103 P. (2d) 293, 298.

53 I.e. at the time each exigency arises to which the law is required to be
applied. See rules stated in Knapp v. City of Brooklyn, (1884) 97 N. Y. 520;
Culver v. People, (1896) 161 Ill. 89, 43 N. E. 812; Hutto v. Walker County,
(1913) 185 Ala. 505, 64 So. 313; Johnson v. Laffoon, (1934) 287 Ky. 156,
77 S. W. (2d) 345; Postal Tel. Cable Co. v. Southern Ry., (N.D. N.C.
1898) 89 Fed. 190. There is no distinction between references to substantive
and procedural precepts in this respect. See Guenthoer’s Estate, (1912) 235
Pa. St. 67, 74, 83 Atl. 617.

54 (1859) 3 Fta. 276.

55 Tomlinson v. Dilliard, (1801) 3 Call (Va.) 105; Dilliard v. Tomlin-
(Ky.) 331. The reference in each of the acts considered in these cases was
to the adopted act by its exact title.
prehensive term 'law'—'the law governing descents.' The term 'law' is more general than the term 'act', and is of much more extensive signification, and especially so in its application when the latter is limited and qualified by the designation of its title. . . . It would be monstrous indeed to hold, that because the provisions of a statute, especially enacted with reference to a particular subject, had been, by mere adoption in general terms, applied to a subject of an essentially different nature, those provisions still continued in force in relation to that other subject, notwithstanding the original act should have been expressly repealed. The bare announcement of the proposition furnishes its own condemnation. It is illogical and wholly incompatible with any idea of sound reason. We are not unaware that there are instances where a repeal of the original act operates no further than to affect the original subject . . .; but this is not of that class of cases.\(^{56}\)

It followed that the act of 1829 furnished the rule of descent for personalty.

By such logic was a distinction born, a logic sound enough on its immediate premises but hardly compatible with the primary legal effect of a reference. Certainly it is well worth quoting at length, for two reasons: first, because many courts outside of Florida were quick to crystallize this distinction, (expedient though it was merely to construing a relatively obscure statute of that state), into a dogmatic rule; and second, because reasoned judicial applications of the distinction have been rarer than radium. Indeed, practically every judge who has since made use of it "seems to have shrunk from the discussion thereof, and reposed himself upon the sanctity of former decisions."\(^{57}\)

In stating the rule which originated in Jones v. Dexter the present writer in the text just before stating the case has used the language and its arrangement most common to judicial opinions and text books. From that language the essential distinction involved might well appear to be between whether or not the adopted precept was statutory or common law. But the distinction plainly does not lie there; it actually operates only when the precept to which reference is made happens to be in legislative form. When the precept is a part of the unwritten

\(^{56}\)Jones v. Dexter, (1859) 8 Fla. 276, 282-283. Italics by the court.

\(^{57}\)A likely explanation is that the doubtful origin of the rule has been outweighed by its convenience as a device for reaching desired results. In La Cite de Montreal v. Poulin, (1904) 25 Q. L. R. (S.C.) 364, this rule was advanced by counsel in argument, citing United States authority, but the court held that it had been displaced by a declaratory statute applicable to the case before the court, which statute had expressly said that amendments to the specifically adopted act made after its adoption were to be included in the referring one.
law, a reference to it for adoptive purposes is always general. But when it is statutory, the reference may be either specific or general, depending upon the form of words used as construed in the light of the precept to which the reference is made.

Especially difficult to construe in this regard in advance of litigation are descriptive references. How determine in a given case between description and generality? Thus in *Chelan County v. Navarre* the reference in question was contained in a general statute relating to condemnation proceedings. It provided that

"In case a jury is waived, as in civil cases in courts of record, in the manner prescribed by law, the compensation to be paid for the property sought to be appropriated shall be ascertained and determined by the court or the judge thereof, and the proceedings shall be the same as in trials of an issue of fact by the court."

When this reference was made in 1891 waiver of juries in ordinary civil actions was governed by a single general statute which allowed no constructive waiver, but it was amended in 1903 to provide for that species of waiver. In holding that the 1903 act enabled a constructive waiver to be found in condemnation proceedings begun in 1904, the court said:

"Here the adopting statute does not refer to any particular act, but to the general statute on the subject of waiving a jury trial, hence the existing law governs the subject, and not the law in force at the time the condemnation statute was enacted."

The character of this reference appears to be plain. But compare *People v. Crossley*, where it was held that the following reference in an act to authorize the organization of high school districts was to a specific statute, and not to the law generally on the particular subject, schools:

"For the purpose of supporting a high school, the township or territory for the benefit of which a high school is established under the provisions of this act, shall be regarded as a school district, and the board of education thereof shall, in all respects, have the powers and discharge the duties of boards of education elected under the general school law."

Here, just as in *Chelan County v. Navarre*, when the reference was made the law adopted was contained in a general statute, but
it happened here that the title of that general statute was "General School Law," a phrase that coincided exactly with the wording of the reference. If the draftsman of that reference thought about the matter, the odds should probably be even that he intended it to be general rather than specific, and would likely have been surprised to learn that he had opened the way for the court to decide the question to accord with a restrictive rather than an expansive mood. Somewhat difficult to reconcile with this would be a case holding that a reference to an act by its popular name is general.61

Similarly it is somewhat difficult to find guidance by which to draw the line between a general and specific reference in the frequently cited, but apparently rarely read, Michigan case, Darmstaetter v. Moloney.62 There the following reference was held to adopt "under general words of reference a specific regulation in a

61Brabner-Smith, Incorporation by Reference and Delegation of Power—Validity of "Reference" Legislation, (1937) 5 Geo. Wash. L. Rev. 198, 204, implies that a court might so hold.

The Interpretation Act, Manitoba, Rev. Stat. 1913, ch. 105, sec. 25, which is designed to assist in making descriptive references specific, reads: "Where, in any act, reference is made to an act by any name or designation other than that of the chapter and year of enactment, it shall be understood that the reference is intended to be to the act which by its terms, or the terms of some other act, is to be or may be cited by that name or designation, or, if there be none, to the act bearing such name or designation at the head or beginning thereof, and, where there is more than one such act, then to that one thereof in the Revised Statutes, 1913, unless the reference be in an act later than the Revised Statutes 1913, and there be a later act than the corresponding one in the Revised Statutes 1913, which, it is provided as aforesaid, may be cited by, or which bears a name or designation the same as, that so mentioned, in which case or in case there is no such Act in the Revised Statutes 1913, the reference shall be deemed to the latest act of the Legislature of Manitoba which it is provided, as aforesaid, may be so cited, or which bears as aforesaid such name or designation, or if there be no such act of such legislature, then to the latest act of the Parliament of Canada which it is so provided, as aforesaid, may be so cited, or which so bears, as aforesaid, such name or designation." (Obviously a good idea, this provision should have been re-drafted with clarity of expression in mind. But in 1939 the Manitoba Interpretation Act was revised, following substantially the draft bill prepared by the Canadian Conf. of Comms. on Uniformity of Leg., Manitoba, Statutes 1939, ch. 34, now Manitoba Rev. Stat. 1940, ch. 108; and for the old sec. 25 was substituted sec. 21(1) of the new act: "In any act, regulation or document, an act of the province or of Canada may be cited by reference to its title or its short title, if any, either with or without reference to the chapter of the Revised Statutes or of the statutes for the year of Our Lord or of the regnal year in which the act was passed." In a recent letter to the author the legislative counsel of Manitoba says: "Section 25 has been partially reproduced in section 21. . . . In view of your comments on old section 25 I am not entirely satisfied that our present act is quite complete.")

separate general law” and hence not to include a later amendment to the law so adopted:

“The assessor and aldermen . . . of the respective wards of the city of Detroit, shall be and are hereby vested with the powers and duties of supervisors, as provided by the laws of this state . . . .”\(^63\)

How can this be justified without stressing unduly the word “laws” as compared with “law,” an emphasis nowhere expressly indicated in the court’s opinion?\(^64\)

Perhaps the apparent contradictions between the cases which purport to apply the so-called rule of \textit{Jones v. Dexter} are reconcilable on the basis of a silent application of an all pervading doctrine of statutory construction: that a court may transmute any so-called rule of construction into a mere canon to be discarded in the face of the court’s notion of what was or should have been the instant “legislative intent.” The \textit{Jones v. Dexter} rule has been expressly eliminated in that fashion on several occasions.\(^65\)

Obviously the wise draftsman will avoid the rule of \textit{Jones v. Dexter} by explicitly stating whether or not a reference is confined to the then existing precept or is to include any future change or substitution. Thus in a general reference an Illinois act provides that park taxes shall be collected “in such manner as is now or may hereafter be provided by law for the collection of state and county taxes.” To a specific reference may be added “as the same may be amended from time to time.”\(^66\)

\(^{63}\)Michigan, Acts 1857, No. 55, ch. 9, sec. 3. Italics by the writer.

\(^{64}\)For another example of such construction, see Hutto v. Walker County, (1913) 185 Ala. 505, 64 So. 313. Such construction would make specific, for example, the following reference in 2 Mason’s Minn. Stat. 1927, sec. 3463: “Any association may also invest its funds . . . in any securities permitted by the laws of this state for the investment of the assets of life insurance companies.”

For an ingenious use of a descriptive reference by the court to fix the time at which a referring act became law, see Ross v. Chambers, (1938) 214 Ind. 223, 14 N. E. (2d) 1012.

\(^{65}\)E.g., in the Matter of Estate of Fratheim, (1923) 156 Minn. 366, 369, 194 N. W. 766.

\(^{66}\)The Illinois law is the act of May 2, 1873 for improvement of parks and boulevards (Illinois, Rev. Stat. 1874, p. 744) sec. 2. Cf. construction in Culver v. People, (1896) 161 Ill. 89, 43 N. E. 812. See also Oklahoma, Stat. 1921 sec. 6123, as applied in Dabney v. Hooker, (1926) 121 Okla. 193, 249 Pac. 380. The care that should be taken in drafting these provisions is illustrated by a decision that references adopting expressly “existing general law” and the “general law now in force” on a subject meant the law in force when the referring act was later applied and not the law in force at the time that act was passed. As the rule that a statute is to be taken as always speaking rendered the above quoted phrases ambiguous, the court resorted to contextual interpretation. Newman v. City of North Yakima, (1893) 7 Wash. 220, 34 Pac. 921. See also Guenthoer’s Estate, (1912) 235 Pa. St. 67, 83 Atl. 617. But cf. Schlaudecker v. Marshall, (1872) 72 Pa. St. 200, where “power . . . now has” was held to mean at the time the referring
EVILS AND A VIRTUE. HEREIN OF STATE PROHIBITIONS

The apparent simplicity and labor saving value of this method of legislating led naturally to its widespread adoption, and in the days before legislation became the growing point of the law its use gave rise to little difficulty. But as statutes became more numerous and complex and the tempo of the legislative process accelerated, evils soon developed. The description of the first of them fifty years ago by Mr. Justice Mathew in Knill v. Towse has with passage of time gained in point:

"Sometimes whole Acts of Parliament, sometimes groups of clauses of Acts of Parliament, entirely or partially, sometimes portions of clauses are incorporated into later Acts, so that the interpreter has to keep under his eye, or, if he can, bear in his mind, large masses of bygone and not always consistent legislation in order to gather the meaning of recent legislation. There is very often the further provision that these earlier statutes are incorporated only so far as they are not inconsistent with the statute into which they are incorporated; so that you have first to ascertain the meaning of a statute by reference to other statutes, and then to ascertain whether the earlier Acts qualify only or absolutely contradict the later ones, a task sometimes of great difficulty, always of great labour—a difficulty and labour generally speaking wholly unnecessary."67

The second evil was the unfair advantage which use of the device enabled unscrupulous legislators to take of their fellows and the public.

"This practice afforded a means of imposing upon unwary members of the legislative bodies, and of procuring the passage of amendments which would never have been passed had their effect been fully understood."68

Third, apart altogether from the opportunity for fraud, the unfortunate result was inevitably to multiply the instances in which legislation was enacted improvidently, "without that intelligent consideration and understanding of the matter involved which is so essential to the procurement of wise and wholesome legislation."69
In an attempt to curb these evils, thirty-three of the United States have adopted prohibitory constitutional provisions. They are of three types. The first type, in force in twenty-one states, says that “no act shall be revised, revived or amended, by reference to its title only.” Probably by a very liberal construction, in the light of all three evils which they were intended to cure, these constitutional provisions could have been held to prohibit referential legislation altogether. But the courts realized that to construe them so broadly would be both impractical and unreasonable, for, they said, if you will turn through a copy of the session laws for any session, you will find much original legislation which is complete in itself but refers to other statutes to define the scope of its application; and to hold this legislation unconstitutional would result in chaos.

“To require legislation to be so complete that no reference would be necessary to any other legislation to determine the meaning of the particular legislation would . . . hamper legislation almost to the extent of prohibiting it.”

As a consequence, by placing emphasis upon correction of the two evils of referential legislation referred to last above, as being the purpose of the constitutional prohibitions, and by also construing in the light of relative results, most courts have held them to forbid enacting only statutes which are either incomplete in them-

---

71 They vary in form, but all are to same effect. They include: Arizona, constitution, art. IV, sec. 14; California, constitution, art. IV, sec. 24; Florida, constitution, art. III, sec. 16; Georgia, constitution, art. III, sec. 7 (17); Idaho, constitution, art. III, sec. 18; Illinois, constitution, art. III, sec. 13; Indiana, constitution, art. IV, sec. 21; Kansas, constitution, art. III, sec. 16; Louisiana, constitution, art. 32; Maryland, constitution, art. 3, sec. 29; Michigan, constitution, art. V, sec. 21; Mississippi, constitution, art. IV, sec. 61; Missouri, constitution, art. IV, sec. 33; Nebraska, constitution, art. III, sec. 11; Nevada, constitution, art. IV, sec. 17; Ohio, constitution, art. II, sec. 16; Oregon, constitution, art. IV, sec. 22; Texas, constitution, art. III, sec. 36; Virginia, constitution, art. III, sec. 52; Washington, constitution, art. II, sec. 37; West Virginia, constitution, art. VI, sec. 30. (Not included is Tennessee, constitution, art. II, sec. 17, which merely requires recital of “the title or substance of the law” referred to.

72 See dissenting opinion, Farris v. Wright, (1923) 158 Ark. 519, 524-525, 250 S. W. 889. This case is a good illustration of the line of demarcation between an amendment by reference, which offends the first and second types of constitutional provision, and an inclusion of terms by reference, which does not. The following enactment was upheld because it did not merely confer a new remedy or method of procedure for enforcing a pre-existing substantive right, i.e. was not amendatory, but itself created a new substantive right, i.e. was original and referential: “The estate of curtesy is hereby abolished, and hereafter, upon the death of a married woman, her surviving husband shall have in her estate the same interest that the wife has in the estate of the husband upon his death under the laws of this state.”
selves or which by reference expressly revise, amend, extend, or revive prior acts, and not to forbid incorporation in an independent new act the terms of an old one.\footnote{These provisions do not apply to implied amendments, People v. Mahaney, (1865) 13 Mich. 481; or to independent acts which in effect but not expressly amend by addition, Timm v. Harrison, (1884) 109 Ill. 593.}

This position is not difficult to defend, since, although they too are susceptible to being used for evil purposes and to cloak a draftsman’s laziness or ignorance or both, incorporating references have certain compensating virtues to be later mentioned which may justify their use; virtues which in case of amendments and repeals by reference have less redemptive value.

Ten states have provisions of a \textit{second} type as follows: “No law shall be revised or amended, or the provisions thereof extended by reference to its title only.”\footnote{By guessing that the language forbidding extension was inserted because the provisions of the first type “... as construed by the courts were not deemed sufficient to carry out the broad purpose of such restriction, and to prevent the mischief existing and anticipated ...”\footnote{from referential legislation, some courts have held that they prevent altogether incorporation of substantive terms but not of provisions that set out mere methods of procedure.} Although prima facie the construction as regards substantive terms appears to be close to literal, when the primary effect of an incorporation by reference is remembered it is seen to be a very liberal interpretation indeed. In truth it is a distortion, when as in the actual cases the new act incorporates a former one by reference because it then does not extend the incorporated act as such. The cases that hold that the effect of the \textit{second} type in the usual case, that of adoption of “terms” by reference in no way differs from that of the \textit{first} seem to be logically and verbally correct; that is, that they do prohibit extending already existing statutes by reference, but do not prevent extending in that manner the referring statute itself.\footnote{These provisions do not apply to implied amendments, People v. Mahaney, (1865) 13 Mich. 481; or to independent acts which in effect but not expressly amend by addition, Timm v. Harrison, (1884) 109 Ill. 593.}} By guessing that the language forbidding extension was inserted because the provisions of the first type “... as construed by the courts were not deemed sufficient to carry out the broad purpose of such restriction, and to prevent the mischief existing and anticipated ...”\footnote{from referential legislation, some courts have held that they prevent altogether incorporation of substantive terms but not of provisions that set out mere methods of procedure.} Although prima facie the construction as regards substantive terms appears to be close to literal, when the primary effect of an incorporation by reference is remembered it is seen to be a very liberal interpretation indeed. In truth it is a distortion, when as in the actual cases the new act incorporates a former one by reference because it then does not extend the incorporated act as such. The cases that hold that the effect of the \textit{second} type in the usual case, that of adoption of “terms” by reference in no way differs from that of the \textit{first} seem to be logically and verbally correct; that is, that they do prohibit extending already existing statutes by reference, but do not prevent extending in that manner the referring statute itself.\footnote{See Savage v. Wallace, (1910) 165 Ala. 572, 51 So. 605; Lyman v. Ramey, (1922) 195 Key. 223, 242 S. W. 21, emphasizing that the first and

\footnote{Alabama, constitution, art. IV, sec. 45; Arkansas, constitution, art. V, sec. 23; Colorado, constitution, art. V, sec. 24; Kentucky, constitution, sec. 51; Montana, constitution, art. V, sec. 25; New Mexico, constitution, art. IV, sec. 18; North Dakota, constitution, art. II, sec. 64; Oklahoma, constitution, art. V, sec. 57; Pennsylvania, constitution, art. III, sec. 6; Wyoming, constitution, art. III, sec. 26.}
For what is extension of already existing statutes but amendment of them?

In addition to the states which have constitutional prohibitions of the sorts just discussed, there are two in which the provisions comprise a third type by providing that in enacting a new statute, if all or any part of an existing statute is adopted, it shall be inserted in full in the new act. Plainly these prohibitions are aimed at the practice of inserting by mere reference the provisions of other laws into even an original law as it is being enacted. But in both states the courts, on the ground of practical expediency have refused to give them literal effect. Instead, while they have held that a referential incorporation of substantive provisions is forbidden, they have decided that a new act, if substantively complete in itself, may adopt rules of construction or modes of procedure for carrying out its objects or applying its standards by reference to other statutes, if the reference is certain and the content and effect of the material second types of provisions were intended "to prevent the same type of abuse." In Quinlan v. Houston & Tex. Cent. Ry., (1896) 89 Tex. 356, 34 S. W. 738, where the referring act in terms "extended" the old act, the court treated it as being incorporated into the referring one to avoid violation of a constitutional provision of the first type.

New York constitution, art. III, sec. 17; New Jersey, constitution, art. IV, sec. 7 (4). (North Dakota, constitution, art. II, sec. 64 has been said to be of this type in State v. Armstrong, (1925) 31 N. M. 220, 249, 243 Pac. 333, but is ambiguous and apparently has not been construed by the North Dakota court. It follows: "No bill shall be passed which shall be revised or amended, nor the provisions thereof extended or incorporated in any other bill by reference to its title only, but so much thereof as is revised, amended or extended or so incorporated shall be re-enacted and published at length.")


People ex rel. Commrs. v. Banks, (1876) 67 N. Y. 568; Curtin v. Barton, (1893) 139 N. Y. 505, 34 N. E. 1093. To say, as the court did in the Banks Case at p. 575, that "by such a reference the general [procedural] statute is not incorporated into or made a part of the [referring] special statute," is so much subterfuge. See also Campbell v. Board of Pharmacy, (1883) 45 N. J. L. 241, 244-245, aff'd (1885) 47 N. J. L. 347, and cf. State v. McNeal, (1886) 48 N. J. L. 407, 5 Atl. 805.

In Matter of Becker v. Eisner, (1938) 277 N. Y. 143, 13 N. E. (2d) 747, a general reference appeared in the following form: "All laws applicable or which may be applicable." On p. 150 the court said: "This reference to "all laws" . . . is entirely too vague, and to permit it to pass as proper legislation would in effect nullify the constitution. . . . For this case the petitioner seeks only reference to article 33-A of the Education Law, but the act is not so limited—all laws—what laws? Nobody knows and nobody can tell with any certainty, although we may guess that none will turn up except article 33-A as applicable to the Board of Education. There is the provision 'all laws applicable'—too vague to be good."
adopted is within the assumable knowledge of the legislature at the time the new law is enacted.\(^{82}\)

Although salutary enough, all of this has been done in the name of the legitimated offspring of legislative intent, a judicially fabricated constitutional purpose or policy.\(^{83}\) Perusal of the record of judicial experience in applying these constitutional prohibitions of legislation by reference leads one to concur with a judge's declaration in a New York case that

"A provision of the fundamental law which attempts to regulate the form in which the legislative will is to be expressed in the enactment of laws is difficult of a just and reasonable application in all cases, and is at best of very doubtful utility..."\(^{84}\)

It will have been apparent that the courts have never given these state constitutional restrictions upon referential legislation rigid effect because they believe that to do so would work great if not intolerable inconvenience for the legislatures and would render the statutes unnecessarily voluminous. A single virtue of incorporation by reference, that it tends to avoid encumbering the statute book with "useless repetition and unnecessary verbiage,"\(^{85}\) has to them justified its preservation as a legislative device.

**Federal Constitutional Restraints**

In federally united countries such as the United States, Canada and Australia, referential legislation raises additional problems. Both practical and theoretical characteristics of federalism contribute to them, comprising *first* the mutual tendency of the associated local governments to adopt laws from each other and that of the local and central governments to do likewise, especially in the field of economic and social legislation, and *second* the phenomena of separate sovereignty of the federated units and division of governmental power between them on the one hand and the central government on the other.


\(^{83}\)In Taylor v. Taylor, (1865) 10 Minn. 107, 121 (Gil. 81, 93) Wilson C. J., said: "The rules applicable in the construction of constitutions are not different in this respect from those that govern in the construction of statutes. ... In seeking the intention of the legislature, there are certain rules that have been accumulated by experience. ..." See also People ex rel. Commrs. v. Banks, (1876) 67 N. Y. 568, 575-576; People ex rel. N. Y. Elec. Lines Co. v. Squire, (1888) 107 N. Y. 593, 602, 14 N. E. 820, for this approach to the particular sort of constitutional provision here being considered.

\(^{84}\)In People ex rel. Everson v. Lorillard, (1892) 135 N. Y. 285, 288, 31 N. E. 1011.

\(^{85}\)See Binghampton Bridge, (1865) 3 Wall. (U.S.) 51, 18 L. Ed. 137.
Where not restrained by some constitutional limitation there is nothing to prevent any legislature, federal or local, from adopting precepts from the laws of any associated legislature by reference. In the United States the difficulties arise from certain provisions in state constitutions and from a generally accepted theory of the nature of legislative power. The chief difficulty of a peculiarly federal nature relates to delegability of legislative power. Whatever its true doctrinal foundation, one of the most firmly established principles of United States constitutional law is that, subject to certain limited exceptions, legislative power can-

---

86. They have been just discussed in the text of this article. It is obvious that the first type as generally construed cannot prevent adoption of precepts from the laws of other states or of Congress. Such provisions refer only to revision or amendment of some law already passed by the referring legislature itself: In re Burke, (1923) 190 Cal. 326, 212 Pac. 193 (stating that the constitutional provision “refers only to the revision or amendment of some law already enacted by our state legislature”); People v. Frankovich, (1923) 64 Cal. App. 184, 221 Pac. 671. Contra, Commonwealth v. Dougherty, (1909) 39 Pa. Super. 338, purportedly distinguished but in effect overruled by Commonwealth v. Alderman, (1923) 275 Pa. St. 483, 119 Atl. 551. As observed supra in the text, the courts are thus far divided on whether the second type has any different effect than the first concerning referential adoption of a state’s own prior laws. In the case of previous acts of Congress and of other states, there is even stronger ground logically for concluding that adoption by reference is not thereby forbidden: to wit, the fact that the legislatures concerned are respectively in different sovereignties. The legislature of Minnesota cannot incorporate its statute into, so as to extend, an act of Congress or of another state. The supreme court of New Mexico has, however, by single-eyed devotion to the so-called “mischief” rule (the rule in Heydon’s Case, (1584) 3 Co. 7a), absurdly concluded that an adoption into a statute of that state of certain provisions of the National Prohibition Act by a specific reference was a violation of the state’s constitutional proscription against extension by reference. State v. Armstrong, (1925) 31 N. M. 220, 243 Pac. 333 (on re-hearing). See also Commonwealth v. Dougherty, (1909) 39 Pa. Super. 338. The third type has been held by the courts of both New York (Darweger v. Staats, (1935) 267 N. Y. 290, 196 N. E. 61) and New Jersey to forbid adoption of precepts from federal and other extra-state law by reference. “The adoption,” exclaimed the vice-chancellor of New Jersey, “... of the laws of another state or of the nation as a part of our own act was improper; it cannot be introduced into our legislation by reference. We may adopt the spirit, but we can’t make the law by injecting into our statutes a reference to the United States Code or Minnesota law and calling it our law;” Wilentz v. Sears, Roebuck & Co., (1934) 12 N. J. Misc. 531, 533-534, 172 Atl. 903. In both the New York and New Jersey cases just cited the references were also held to involve wrongful delegation of legislative power, but there was no confusion of the two problems as has sometimes occurred, e.g. State v. Larson, (1932) 10 N. J. Misc. 384, 160 Atl. 556. This angle of Darweger v. Staats and Wilentz v. Sears, Roebuck & Co. was apparently overlooked in Brabner-Smith, Incorporation by Reference and Delegation of Power—Validity of “Reference” Legislation, (1936) 5 Geo. Wash. L. Rev. 198, 222, where it is stated that every state constitutional provision fails to “prevent reference to a law of another jurisdiction.”

not be delegated. Although no express constitutional provisions forbid such delegation, the courts have developed the proscription as a corollary of the doctrine of separation of powers. Obviously this question can arise concerning referential legislation only when the referring legislature adopts precepts from a body of law not of its own making.

Just when does a reference confront the delegation problem and how do the courts approach a solution? Legislative power is exercised by enactment of laws, and "The enactment of a law involves both the determination of what the rule shall be and that such rule shall have the force of law." When, therefore, a legislature adopts a precept merely in the existing form in which another law-making body has already passed it there is clearly no delegation at all. This was decided in Santee Mills v. Query, where the South Carolina legislature adoptively referred to the provisions of the United States Income Tax Act of 1921 and Acts amendatory thereto "... which have been passed and approved prior to the time of approval of this Act." On the other hand, if future laws, rules or regulations are included in the adoption there is with equal clarity a delegation. An extreme example of an express reference of that kind was the Nebraska statute which provided that

"Assent is hereby given to the provisions of an Act of Congress ... now pending ..." and "... 'the good faith of the state of Nebraska is hereby pledged to provide funds sufficient to carry out the provisions of said Act of Congress as hereinafter provided.'"
Less extreme, but equally delegations, are the references that expressly include the adopted measure and its future amendments. So also are those that simply include the adopted measure "and amendments thereto" when at the time of the reference no such amendments yet exist; but not necessarily if amendments have previously been made, since in the latter case the court is free by construction to avoid unconstitutionality by saying that only the ones previously made were intended to be included.65

When a referring act fails to state expressly in any manner the scope of the adoption in regard to futurity, resort must be had to interpretation and thus to the so-called rule in Jones v. Dexter. It will be recalled that under that rule the particularity or generality of the reference determines whether the reference is intended to include the adopted precept only as it exists at the time of the reference or also as it may be amended from time to time thereafter.96 Remembered also will be the fact that this rule, like any other "rule" of statutory construction, is susceptible to being dubbed a "mere canon of construction" and jettisoned in the name of legislative intent.

There have been several cases in which the references were to future legislation of Congress or another state, where the line between delegation and non-delegation was not as easily discernible as in the Nebraska statute described above. Decisions in these cases turn upon the same criteria that determine the question of delegation of legislative power generally.97 Professor Rottschaefer states:

"The general rule . . . , is that it [a state legislature] may not confer on the authorities of another state, or of the United States, the power to determine what shall be the rule in force in the state, or condition changes in its rule on changes in rules enacted by other states or the United States."98

65E.g., In re Burke, (1923) 190 Cal. 326, 212 Pac. 193; State v. Webber, (1926) 125 Me. 319, 133 Atl. 738.
96In applying that rule if the result would be an invalid delegation there should be a presumption that no adoption of future amendments was intended. State v. Webber, (1926) 125 Me. 319, 133 Atl. 738; Santee Mills v. Query, (1922) 122 S. C. 158, 115 S. E. 202.
But it is not a delegation when the legislature merely conditions the operation and duration of a statute on the action of the legislature of another state or of Congress.

The line drawn in the cases, taken as a whole, making this distinction between wrongful delegation and a proper conditional enactment is up to now shadowy and non-definitive. In all of them, however, emphasis is placed on whether the reference to the external standard is or is not merely to an extrinsic fact which in no way substitutes the legislative discretion of the other legislature as to what is to be the law for that of the one making the reference. If it is there is no delegation. For example, a Minnesota act which provided that it should remain in effect only so long as a federal statute remained in effect was on this basis definitely sustainable. But it is difficult to follow the court which on the same ground upheld an act of New York which measured fees payable by a foreign insurance company doing business there by corresponding fees which might be charged New York companies from time to time under the law of the state of its origin.

In recent years there has been a type of statute before Canadian provincial courts in which several of the problems already herein discussed have been intrinsic. The Saskatchewan


Livestock and Livestock Products Act, 1930,\textsuperscript{101} section 2 read as follows:

If and in so far as any provision of an Act of the Parliament of Canada intitled the Live Stock and Live Stock Products Act, and the amendments thereof and the regulations thereunder here-tofore enacted or made, is within the legislative authority of the province and outside that of the Dominion of Canada, such provision shall have the force of law in Saskatchewan, and, unless otherwise enacted by the Legislature of Saskatchewan, shall be and remain in full force and effect therein to all intents and purposes whatsoever, until the same is repealed by the Dominion Parliament or revoked by the Governor-General in Council, as the case may be.\textsuperscript{102}

In Rex v. Zaslavsky,\textsuperscript{103} the Court of Appeal for Saskatchewan was unanimously of the opinion that the federal act to which the reference was made in the above act was ultra vires the Canadian Parliament in so far as it attempted to control and regulate sales which began and ended within the province, since section 92 (13) of the British North America Act, 1867, confides legislative jurisdiction over property and civil rights in the province exclusively to the provincial legislature. The court divided, however, on whether the reference in sec. 2 of the provincial act constituted a valid incorporation of terms from the federal act or an unconstitutional attempt to confer an exclusively provincial power on the Dominion Parliament. The majority stated its reasons for construing the provision to be the latter in somewhat summary fashion:\textsuperscript{104}

When the provincial Legislature says that Federal legislation and regulations made thereunder which are ultra vires of Parliament shall have the force of law in Saskatchewan there is no suggestion of legislation by incorporation or reference. It is simply, in my opinion, an attempt ex post facto to give jurisdiction to Parliament which it does not possess. Further if it had been the intention of the Legislature to incorporate the provisions of the Federal Act and regulations by reference, why and by what power could those provisions and regulations so incorporated have been subject to repeal by the Dominion Parliament? In both instances there has been an attempt to enlarge the jurisdiction of

\begin{itemize}
\item \textsuperscript{102}Italics by the writer.
\item \textsuperscript{103}[1935] 2 W. W. R. 34, [1935] 3 D. L. R. 788 (Sask.) (The British North America Act is the Canadian federal constitution.)
\end{itemize}
Parliament or to surrender jurisdiction belonging exclusively to the province. . . . It might further be pointed out that by a well-established rule of construction 'where a statute is incorporated by reference into a second statute the repeal of the first statute by a third does not affect the second, . . . 106 This rule would apply a fortiori to legislation by one legislative body incorporating the enactments of another legislative body by reference.108

Although the construction thus placed upon the language of sec. 2 of the Saskatchewan statute by the majority of the court was possible, there are several grounds for contending that it was improbable and unwarranted. As far as the law reports show there was no extrinsic evidence of the legislature's actual intent before the court. Any intent ascribed to that body was thus properly, it is supposed, to be discovered within the statute itself by use of established techniques.107 When relevant techniques are applied some fairly reliable guide posts are discernible in this instance. In the first place the form of words is a typical incorporation by reference expressly negativing delegation108 and, as Mr. Justice Martin pointed out in his dissenting opinion, has plain meaning. Second, there is a well-settled presumption, with which courts usually approach points of statutory interpretation upon which constitutionality turns, that the legislature acted with a full knowledge of the constitutional scope of its competence109 and "contemplated such matters only as were within its power."110 And third, this presumption is far from being rebutted by the makeweight argument in the majority opinion to the effect that (a) because the provincial legislature expressly stipulated that its

---

107See dissenting opinion, Rex v. Zaslavsky, [1935] 2 W. W. R. 34, 44, [1935] 3 D. L. R. 788, where Martin J. A. said: "It may well be that the method adopted by the Legislature in enacting that The Live Stock and Live Stock Products Act of the Dominion and the regulations made thereunder in so far as they are outside the jurisdiction of the Dominion and within the jurisdiction of the province 'shall have the force of law in Saskatchewan,' is objectionable because the enactment does not set out what portions of the Act and what portions of the regulations fall within the category referred to; and it may well be that it would lead to greater certainty if the provincial statute were more explicit and set out in detail the sections of the Dominion Act and the regulations which are to be the law of the province; but I know of no authority which would warrant the court in refusing to give effect to the legislation for this reason. The language used in the enactment makes very plain the intention of the Legislature and effect must be given to that intention."
109See first two phrases italicized in text of statute quoted above.
The act would operate only until the federal measure referred to was repealed by Parliament and (b) because there is a rule that a term incorporated by reference is not repealed by a later repeal of the law from which it was adopted, the necessary conclusion was that the Saskatchewan lawmaker intended not to incorporate the terms of the federal act but to delegate to Parliament an exclusively provincial power. That was hardly a strong argument. Both in the United States, as shown above, and in the British Commonwealth, it has long been elementary that a reference to an extrinsic fact of essentially the same sort as that involved in this instance, action by another governmental body, is a proper method of conditioning the operation of a statute, and delegates no legislative power. That has been law ever since the decision of the Judicial Committee of the Privy Council in *The Queen v. Burrah* in 1878, at the least. It is respectfully suggested that the desertion of relevant presumptions in the majority interpretation in *Rex v. Zaslavsky* perhaps indicates a lack of judicial sympathy with the purpose for which the legislation under review was passed. The dissenting opinion is much easier to justify as an interpretation as distinguished from a repeal by “judicial legislation.”

The problem of delegation of legislative power thrusts itself into a consideration of a statute of the kind now being discussed, regardless of whether it is construed as an attempted abdication of provincial power to the federal Parliament or as merely an incorporation by reference, since if an incorporation expressly or impliedly adopts the other legislature’s future precepts as its own, there is, as has been seen, a delegation. Such a delegation would be wrongful in the United States under the maxim delegatus non potest delegare. Would it be bad in Canada under that or any other doctrine? A commentator on *Rex v. Zaslavsky* has said, in part:

Even assuming that the Saskatchewan legislation in question amounts to a delegation of the purest kind it is by no means certain that any constitutional impropriety is involved. Provincial legislative powers are “not in any sense to be exercised by dele-

---


112 (1878) 3 App. Cas. 889. This is one point at least on which decisions of “American” courts can be given weight in the Dominion. Cf. Haines, *Judicial Review of Legislation in Canada*, (1915) 28 Harv. L. Rev. 565, 586.


REFERENTIAL LEGISLATION

The maxim delegatus non potest delegare consequently has no application. “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.”

After referring to several cases in all of which the courts have upheld delegation to bodies of the legislatures’ “own creation,” he remarked:

“To the writer the problem confronting the courts in these cases cannot be distinguished from that presented to the Saskatchewan Court of Appeal. It is submitted that the question is not altered by saying that the board or commission is the creature of the legislature. Can we not regard Parliament as the creature of the provincial legislature ad hoc?”

With deference, the answer to the learned commentator’s question probably is “No.” It is true that the Canadian constitution differs from that of the United States by not containing an expression of the separation of powers dogma from which to infer the maxim forbidding delegation. Also, it has been held in Hodge v. The Queen that the provincial legislatures have their powers devolved from the Imperial Parliament, not delegated,


113The same commentator in (1936) 14 Can. Bar Rev. 353, 357 cited Lord’s Day Alliance of Canada v. Attorney-General for Manitoba, [1925] A. C. 384 as authority for the proposition that the Dominion Parliament can delegate to a provincial legislature power to repeal a federal act. Careful reading, however, shows, that the case merely upheld a provincial act enactment of which had been by a Dominion act made the condition subsequent of the operation of the latter act within the province. The provincial legislature had competence to pass its act, as it concerned the “civil rights” aspect of Sunday observance. The court made itself clear that it did not approve any idea that the Dominion Parliament could by delegation “give the force of law to legislation passed by a provincial legislature professing to do what a province under its own powers of legislation cannot do,” viz. legislate on a subject within exclusive federal competence. See [1925] A. C. 384, 393-394, 94 L. J. P. C. 84.

and therefore would not be limited by that maxim if it did have a place in the Canadian scene. And as Professor John Willis has recently demonstrated in the course of his excellent article, on administrative law and the British North America Act, the latest pronouncement of the Judicial Committee, in Shannon v. Lower Mainland Dairy Products Board has dispelled any doubt that a provincial legislature can, under the doctrine of supremacy of Parliament, make a complete delegation, to the extent of abdication, to its own subordinate body. It may thus be admitted that the non-delegation doctrine per se does not prevent delegations of legislative power by a provincial government to another provincial legislature or to Parliament by regarding such body as "the creature of the provincial legislature ad hoc." But these delegations will encounter serious obstacles both in unwritten yet fundamental limitations which exist in the very nature of federalism and in the written constitution, the British North America Act, itself.

In reason there is a vast difference between a legislature conferring law-making power upon a subordinate body created by itself "within its appointed sphere" and which is within its ultimate if not for the moment immediate control and transferring that power to a coordinate independent legislature, creation of which is completely outside of its power and over which it has no control whatever. As between provincial legislatures the latter would mean permitting abdication of the exclusive right and avoidance of the exclusive duty of formulating the local policy to be pursued within the territory of the province. In other words, the provincial legislature would be permitted to shirk the primary task for which it was created, as a constituent of a federal union, that of functioning as the exclusive representative legislature within the province concerning specified subjects. That would be carrying delegation beyond all limit suggested by the facts and the opinion in both Hodge v. The Queen and the Shannon Case.

It is true of course that a province has exclusive power under the British North America Act to amend its own constitution by statute. But it is probably restricted to changing the formal framework and mechanics of its government and unable

122 British North America Act 1867, sec. 92 (1).
REFERENTIAL LEGISLATION

to alter fundamental functional principles, such as representative government and the measure of provincial autonomy in a federated state. Moreover, the decision in *Hodge v. The Queen* neither rested upon nor in any way enlarged the power of a provincial legislature to change its own constitution. As Viscount Haldane has put it (in the course of his opinion in *In re Initiative and Referendum Act* after holding on another ground that a provincial legislature cannot change its constitution functionally so as to enable law-making power to be exercised directly by the electorate instead of by the representative legislature):

"Section 92 of the Act of 1867 entrusts the legislative power in a Province to its Legislature, and to that Legislature only. No doubt . . . a Provincial Legislature in Canada could, while preserving its own capacity intact, seek the assistance of subordinate agencies, as . . . done in *Hodge v. The Queen* . . .; but it does not follow that it can create and endow with its own capacity a new legislative power not created by the Act to which it owes its own existence."

This remark would apply a fortiori to an attempt by one provincial legislature to create ad hoc as a new legislative power the legislature of a sister province and endow it with the former's own capacity.

When, as was held in *Rex v. Zaslavsky*, the provincial legislature attempts to delegate a legislative power which the British North America Act has expressly distributed to it exclusively, it encounters an even higher hurdle: it runs counter to the very essence of federalism—embodiment within the organic act of union of a division of governmental powers between the central and local governments. It follows that once the majority of the court construed the Saskatchewan act as they did its unconstitutionality followed inevitably as a legislative attempt by delegation to redistribute the subject matters of legislation as between provincial and federal competence. In other words, it was in result an attempt by the Saskatchewan legislature to amend sections 91 and 92 of the British North America Act. The significance of Lord Atkin's phraseology in the *Shannon Case* should not

---

be overlooked: "Within its appointed sphere" the provincial legislature is as supreme as any other parliament. It should be unnecessary to remark that "its appointed sphere" does not include either warping the unwritten principles of the federal scheme or amending the written text of the federal constitution. The soundness of Lord Watson's unreported dictum in C.P.R. v. Parish of Notre Dame de Bonsecours cannot be gainsaid:

"The Dominion cannot give jurisdiction or leave jurisdiction within the province. The provincial parliament cannot give legislative jurisdiction to the Dominion Parliament. If they have it, either one or the other of them, they have it by virtue of the Act of 1867. I think we must get rid of the idea that either one or other can enlarge the jurisdiction of the other or surrender jurisdiction."

Of course, if Canada were a unitary state like the Union of South Africa with all of the legislative power vested in the union government and the provincial legislatures existing merely as its subordinates, the Dominion Parliament would be able to delegate to them legislative power on any subject.

From what has just been said it must be concluded that when a statute of a Canadian provincial legislature or of the Dominion Parliament exercising an exclusive power contains a reference which either expressly or impliedly adopts the future laws, rules or regulations of the other or, also, in the case of the former, of another provincial legislature, the reference is invalid. The Canadian law on this question thus appears to reach approximately the same position as that of the United States despite an entirely different point of departure.

Italics by the writer.


Obviously sec. 92, subsec. 1, [of the B. N. A. Act] was never intended to give provincial legislatures power to alter the line of demarcation as laid down in sections 91, 92 and 93. The fixing of that line was undoubtedly part of the constitution of Canada as a whole, not part of the constitution of a province by itself." Stuart J., in Rex v. Ulmer ex rel. Brooks, (1922) 19 Alta. L. R. 12, 23, [1923] 1 W. W. R. 1, [1923] 1 D. L. R. 304.


Cf. as to comparative development concerning delegation of legislative power to administrative bodies, Willis, Administrative Law and British North America Act, (1939) 53 Harv. L. Rev. 251, 252-261. See Section 4, Manitoba Summary Convictions Act, Manitoba, Rev. Stat. 1913
Although the Australian federal constitution\textsuperscript{134} seemingly embraces the separation of powers doctrine—by in terms vesting, or treating as vested, the legislative power in parliament, the executive power in the King, and the judicial power in certain courts—that doctrine has been held to be modified by that of supremacy of parliament and by practical considerations so that it applies only to a limited extent.\textsuperscript{135} There is no suggestion of separation of powers in state constitutions.\textsuperscript{136} Consequently \textit{Hodge v. The Queen} has without difficulty been held to be law in both Commonwealth\textsuperscript{137} and states.\textsuperscript{138}

It is thus apparent that the question of the existence and extent of constitutional limitations upon constituent legislatures when referentially adopting statutory provisions from each other must be approached from the same point of departure in Australia as in Canada.

Probably the answer to that question is also the same in both countries. The Australian legislatures, federal and state, may make the operation of their measures conditional upon the discretionary action of a coordinate governmental body.\textsuperscript{139} But it has been held that neither the Commonwealth nor a state legislature can by delegation confer upon its own respective executive power to legislate with respect to a subject matter which is within the other's exclusive jurisdiction under the distributive provisions of the federal constitution.\textsuperscript{140} From this it certainly

\textit{ch. 189, which is in part clearly an unconstitutional reference. Cf. United Church of Canada Act, Nova Scotia, Statutes, 1924, ch. 122, sec. 2 (b), which would be invalid if interpreted to adopt a federal act yet to be passed instead of an existing document.}

\textsuperscript{134}The Commonwealth of Australia, Constitution Act, 63-64 Vict. ch. 12, secs. 1, 61 and 71.


\textsuperscript{140}Cooper v. Commissioner of Income Tax, (1907) 4 C. L. R. (Aus.) 1304. In Victorian Stevedoring & Gen. Contracting Pty. Ltd. v. Dignan, (1931) 46 C. L. R. (Aus.) 73, 121 Evatt J. said: "On final analysis . . . the Parliament of the Commonwealth is not competent to 'abdicate' its powers of legislation. This is not because parliament is bound to perform any or all of its legislative powers or functions, for it may elect not to do so; and not because the doctrine of separation of powers prevents parlia-
follows that Commonwealth and state cannot by reference adopt future legislation from each other in violation of those provisions.

CONCLUSION

In conclusion, in view of this survey how should the question "is referential legislation worth while" be answered? Some critics have vehemently replied, "never," and have described the device as the deadly sin in draftsmanship. Halsbury's advice on drafting takes a slightly more moderate position:

"Referential legislation, while improper where those whose duty it is to approve it and those who are bound by it must look beyond the four corners of a statute in order to comprehend it, is proper when the object of reference is to incorporate certain general acts, or parts of general acts, made for and adapted to incorporation." Many now approve of the references which Halsbury calls "proper." But those which are characterized unqualifiedly "improper" ment from granting authority to other bodies to make laws or by-laws and thereby exercise legislative power, for it does so in almost every statute; but because each and every one of the laws passed by parliament must answer the description of a law upon one or more of the subject matters stated in the constitution. A law by which parliament gave all its law-making authority to another body would be bad merely because it would fail to pass the test last mentioned." See also Evatt, Judiciary and Administrative Law in Australia, (1937) 15 Can. Bar Rev. 247, 256.

141 W. M. Graham-Harrison has observed that this extreme attitude flows from a mistaken idea that any statute can be self-contained: Criticisms of the Statute Book, (1935) J. Soc. Pub. Teach. Law 25-27. Cf. Minnesota Revisor of Statutes' Manual, Report of Revisor to Senate and House of Representatives, 1941, 62, rule (2): "Referential legislation should be avoided. Legislators should not have to look beyond the four corners of a bill in order to comprehend its meaning."


144 Adding in note, "Thus, when powers of acquiring land are to be taken the machinery of the Lands Clauses Acts (as defined in the Interpretation Act, 1880 (52-53 Vict. ch. 63), sec. 23) is usefully embodied with them."


Minnesota Revisor of Statutes' Manual, Report of Revisor to Senate and House of Representatives, 1941, 62, rule (3) is as follows: "Reference should not be made to wholly separate acts unless the acts referred to are general acts, made for and adopted to incorporation by reference. The incorporated general act should not be deviated from or modified. The referential legislation to be avoided consists in referring, in one act, to provisions of another act, which do not readily lend themselves to incorporation, and
REFERENTIAL LEGISLATION

would seem in the light of the various factors examined in this article, to have received rather cavalier treatment by the author of that commentary. Here as elsewhere careful examination reveals the need of discrimination, and correct statement is relative: that the admitted disadvantages of having to derive terms of a statute from outside may sometimes be outweighed by other considerations and even largely obviated when safeguards are used.

Now to summarize the factors this study has divulged to be necessarily taken into account by the framer of a statute when making up his mind whether to use a reference in his given case and to indicate desirable limits and safeguards for use.\^146

Greatest advantage gained by incorporating terms by reference is that the new bill may be shortened with two practical benefits, reduction in volume of the statute books, and application of established precepts of proven worth to a new situation with a minimum of legislative tinkering.\^147 Balanced against these benefits, mere inconvenience of looking "beyond the four corners" of the new bill and act should mean little, and as a screen for fraud the device can as a practical matter largely be discounted. However, since any incorporation of terms by reference inevitably renders them indeterminate as to the referring act, great care should be taken to insure that they are readily and surely determinable.\^148 Hence, very serious consideration should be require to be referentially modified before they can be made to harmonize with the incorporating act." This was plainly taken from unrealistic and inadequate text book treatments of the problem.

\^146Recall that "referential legislation," strictly and as discussed in this article, does not include amendment and repeal of existing acts merely by reference to them in a new act. Such blind amendments and repeals breed almost nothing but evil, and, as has been seen, have been effectively prohibited in thirty-three of the United States. See unanimous condemnation of such "Chinese puzzle" method of amendment and repeal in evidence before Select Committee of the House of Commons 1875, cmd. 208, and discussion by W. M. Graham-Harrison, (1935) J. Soc. Pub. Teach. L. 29. See safeguard in this respect in Rule 4b, Rules of Minnesota House of Representatives, 1941.

\^147When giving evidence before the Select Committee, 1875 Cmd. 208, Sir George Jessel said: "If you bring in a Bill with an enormous number of clauses it is difficult to get the bill through committee, and the draftsman is compelled therefore, with a view to passing the Bill to make it a short Bill. Making it a short Bill involves simply as much reference as possible to former enactments. Members [take] the opportunity of endeavoring to improve the existing law. . . ." See also Chalmers, An Experiment in Codification, (1886) 2 Law Q. Rev. 125, 133; Craies, Statute Law (4th ed. 1936) 26.

\^148See typical complaint of practicing lawyer in this respect in Legislation by Reference, [1932] Scots L. T. 1. Special care should be taken in this regard with administrative provisions since the effectiveness of legislation depends so largely upon them.
given to the degree to which a proposed referential adoption will render the terms of the new measure difficult to discover, unworkable, or unintelligible.

A competent draftsman will first of all if the proposed reference is to adopt an act or portion of an act examine the whole of that act, its textual environment, construction, history and administrative application, to make sure that the adoption will neither heap up a series of statutes, be unsuitable, nor achieve unintended results. Having satisfied himself that serious dangers of that sort are avoidable, he will employ at least the following safeguards: (a) Make the reference express and clear.49 (b) Use only specific reference when adopting statutory precepts with exact citation, never mere description. There is a saying that the strength of a statute lies in its general phrases. But Ernst Freund showed that to be a half truth, that in some statutes general phrases constitute weakness.50 The foregoing analysis has demonstrated that in most statutes general references usually do so. (c) Be explicit concerning the extent of the reference in quantity,51 and never affirmatively provide that the statutory provision referred to shall apply "so far as applicable" or "so far as practicable."52 (d) When necessary to adapt the adopted precepts to the subject matter of the referential act, do so expressly in the new bill; do not leave the task to the courts and administrative officials. In case of administrative provisions special care in this respect should be taken with both rules and standards.53 (e) As to extent of the reference in time, displace application of the English rule or of the rule in Jones v. Dexter or, if desirable, of that in a general interpretation act by expressly stating in so many words whether changes made in the incorporated law after the date of the adoption are or are not to be included in the reference.54 (f) In countries with written or partly written constitutions if the reference is to precepts from a body of law not of the legislature's own making, try to avoid constitutional difficulties by expressly declaring that an adoption by reference,

49The problem of implied references can be avoided by taking care to avoid any casus omissus in the new act.
50Freund, Indefinite Terms in Statutes, (1921) 30 Yale L. J. 437, Legislative Regulation (1932) ch. VIII.
53To same effect see Carr, Legislation by Reference and the Technique of Amendment, (1946) 22 J. Comp. Leg. (3d ser.) 12, 16-18.
54See supra notes 66 and 47.
REFERENTIAL LEGISLATION

not a delegation, is being made and that the reference includes only the precepts "which have been passed prior to the passage of this act."\(^{155}\)

Although in any case its use means careful and time-consuming search by someone, most properly by the draftsman, whether referential legislation is worth while cannot be determined in the abstract. After all, in each particular case it is a question of good judgment and skill on the part of the draftsman.\(^{156}\)

\(^{155}\) Cf. in this respect the references in the following Manitoba acts: (a) Pensions for the Blind Act, Manitoba, Statutes 1935, ch. 33, sec. 2 (a), "The Lieutenant-Governor-in-Council may authorize the payment of pensions to blind persons under the conditions specified in any act of the Dominion relating thereto or regulations made thereunder." (b) Industrial Disputes Investigation Act 1907, chapter 20 of the Statutes of the Parliament of Canada 1907, and all amendments thereto up to and including the said chapter 14 of 1925, shall apply to every individual dispute of the nature defined which is within or subject to the exclusive legislative jurisdiction of this province.\(^{156}\)

\(^{156}\) When making the above suggestions the author had in mind that Chalmers, who drafted the English Bills of Exchange and Partnership Act, once remarked that lawyers usually regard projects for improving drafting of statutes "with the same pious shrinking as that with which an orthodox doctor would regard a medical prescription written in English instead of in dog Latin." Since publication of this article in the Canadian Bar Review a lawyer correspondent has commented to the author: "I have no faith that draftsmen will adopt your sensible advice. It seems to me that, short of an earthquake, nothing will induce a lawyer to use the English language in preference to 'legal English,' or to use his common sense,—otherwise we should long ago have got rid of artificial and meaningless monstrosities like the ordinary mortgage deed and the ordinary deed of trust in a bond issue, and draftsmen would come to see the necessity of making special provision in every statute for such inevitable problems as retrospective effect, contracting out, extent of protection conferred on administrative officers, etc., etc." However, the author's experience seems to justify less pessimism concerning his fellow disciples of Saint Ives. See review by Sir Cecil Carr in (1940) 22 J. Comp. Leg. (3d ser.) 191, of this article as published in the Canadian Bar Review for interesting commentary based on his experience as a parliamentary draftsman.