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THE “BOWLES ACT” – CORNERSTONE OF THE FISCAL CONSTITUTION

JOSEPH JACONELLI*

I. INTRODUCTION

The purpose of this article is to examine an episode in modern British constitutional history and the lasting mark that it has left on the machinery of financial government. The episode and its sequel, notwithstanding their importance, have received little attention other than the few lines that are routinely assigned to them in textbooks of taxation or constitutional law. When the present day budgetary procedure took shape in the nineteenth century, these books recount, it was the practice that taxes were levied on the basis of resolutions passed by the House of Commons pending the enactment of the annual Finance Act. In 1912, in *Bowles v. Bank of England*¹, this practice was pronounced illegal on the ground that nothing less than an Act of Parliament could provide the basis upon which taxation could lawfully be imposed on the subject. Before the Finance Act for the particular financial year reached the statute book, therefore, the Bank had no legal authority to deduct income tax at source from payments due to the plaintiff. The government responded by passing the Provisional Collection of Taxes Act (hereinafter “PCTA”) 1913. Known for some time thereafter as the “Bowles Act”, it rendered the established practice lawful within strictly demarcated limits. The statutory scheme has been a fundamental feature of the fiscal constitution ever since, the original legislation being re-enacted in revised form in the PCTA 1968.

The pre-First World War period was already an extremely turbulent one for the constitution. Quite apart from the controversies raging over Home Rule for Ireland and women’s suffrage, the rejection of the “People’s Budget” by the House of Lords in November 1909 had precipitated a crisis concerning the distribution of power as between the two Houses of Parliament. Starting in the financial arena, the crisis quickly came to engulf the whole question of what safeguard mechanisms in general should be possessed by the House of Lords. The

* Law School, University of Manchester. I am grateful to John Avery Jones, Stuart Ball, Rodney Brazier, John Tiley and Graham Virgo for their comments on earlier drafts. The usual disclaimers apply.

¹ [1913] 1 Ch. 57. Unusually, the plaintiff subsequently published the full text of the documents in the case prefaced with an introduction written by himself: T. Gibson Bowles, *Bowles v. The Bank of England: The proceedings in court (from the shorthand writer’s notes) and official court documents* (London 1914) (hereinafter “*Court Records*”).

matter was dramatically concluded on 10 August 1911, when at the climax of an extremely bitter debate the Lords reluctantly agreed to the curtailment of their legal powers in passing the Parliament Bill in the form that had been settled by the House of Commons². With the enactment of the Parliament Act 1911 the Liberal government led by Herbert Asquith would surely have been looking forward to a period of unchallengeable fiscal supremacy. However, scarcely had one dispute been concluded when Mr Bowles turned up to threaten the public finances by challenging the very basis upon which taxes were collected.

II. THE MAN AND THE LITIGATION

Who was the plaintiff? Thomas Gibson Bowles (1841–1922) was no stranger to parliamentary proceedings, having sat as a Conservative MP for fourteen years and then as a Liberal member for the period between the two general elections of 1910. A colourful character, he overcame the then stigma of illegitimacy to make his mark in several fields, including journalism (as founder of the magazine *Vanity Fair*) and maritime affairs. His various achievements are recounted in a short biography the title of which, *The Irrepressible Victorian*³, gives some indication of the character of the man.

It is Bowles' action against the Bank of England that is cited in the books. But there is also an earlier case, *Bowles v. Att.-Gen.*⁴, which is rather less well known. The background to that case was that in September 1911 the Inland Revenue sent Bowles a return to be completed in order to assess his liability to pay super-tax.⁵ Bowles' complaint was that the authorities had no legal power to require completion of the return since the Finance Act for that year had not yet been passed (it was not passed until 16 December). The case was dismissed by Parker J. on a narrow point of interpretation of the Customs and Inland Revenue Act 1890. Super-tax, he ruled, was in essence a form of income tax that was levied on incomes in excess of a certain amount. As such it fell within the scope of section 30 of the 1890 Act, which provided a standing machinery whereby returns could be required to be completed in advance of the enactment of the Finance Act

² A well-known work on the crisis is R. Jenkins, *Mr Balfour's Poodle* (2nd ed., London 1968). J. Jaconelli, "The Parliament Bill 1910–1911: The Mechanics of Constitutional Protection" (1991) 10 *Parliamentary History* 277 provides an account from the perspective of the rival drafts of the measure that became the Parliament Act 1911 and the phrasing of the main provisions.

³ L.E. Naylor, *The Irrepressible Victorian: The Story of Thomas Gibson Bowles, Journalist, Parliamentarian and Founder Editor of the original Vanity Fair* (London 1965).

A noteworthy point that goes unrecorded in this book is that Bowles was the grandfather of the Mitford sisters (the most famous of whom were Nancy, Diana, Unity and Jessica), his daughter Sydney being their mother. Hence the brief account of the Bowles litigation in J. Guinness, *The House of Mitford* (London 1984), pp. 204–210.

⁴ [1912] 1 Ch. 123.

⁵ A tax that was imposed for the first time by the Finance (1909–10) Act 1910.

for any particular year.⁶ The judgment nevertheless contained a clear warning to the authorities:

... it must not be understood that I am expressing any opinion as to how far the Special Commissioners have power, before the tax for any financial year is actually imposed, to go beyond the preliminary work such as the demand for returns necessary for its assessment. If, for example, they assess and demand payment of the super-tax before it be actually imposed, different considerations might and probably would arise.⁷

Bowles took the hint and returned to the offensive in the following tax year. In May 1912 he purchased a quantity of Irish Land Stock, which was duly transferred into his name in the records of the Bank of England, and promptly moved to restrain the Bank from deducting tax from the first half-yearly dividend due to him on 1 July.⁸ Bowles, who argued his case in person⁹, was confronted with a formidable legal team.¹⁰ The judge once again was Parker J., who adjourned the hearing so as to allow the Crown, the interests of which were critically affected by the dispute, to make submissions to the court. Both the law officers, Sir Rufus Isaacs and Sir John Simon, appeared before the court in response.

Meanwhile the sequence of events in Parliament was following the usual course of the fiscal calendar. On 2 April, just before the start of the tax year on 6 April, the House of Commons Committee for Ways and Means passed a resolution approving a certain rate of income tax for the year 1912–13. The resolution was adopted in turn by the House of Commons itself on 24 June. These formed the only possible basis for the deduction of income tax from the dividend payable on 1st July since the Finance Act 1912 did not complete all its stages until 7 August. Faced with this difficulty, the Attorney-General did not deny the need for statutory authority to impose taxation. While appearing to concede that a mere resolution did not suffice for this purpose, he sought to derive the authorisation from section 30 of the Customs and Inland Revenue Act 1890, the provision at the centre of the ruling in

⁶ The terms of s. 30 were: “In order to ensure the collection in due time of any duties of income tax which may be granted for any year commencing on the sixth day of April, all such provisions contained in any Act relating to income tax as were in force on the preceding day shall have full force and effect ...”

⁷ [1912] 1 Ch. 123, 137.

⁸ There occurred a preliminary stage in the trial of the action, before Swinfen Eady J. on 26 June when Bowles unsuccessfully applied for an *ex parte* injunction against the Bank. Brief details of this stage are given only in the *Tax Cases* report of *Bowles v. Bank of England* (1911–1915) 6 T.C. 136, 139. Full details are given in *Court Records*, pp. 7–10.

⁹ As the law reports indicate, however, he did have the assistance of a firm of solicitors.

¹⁰ The Bank of England was represented by Freshfields (now Freshfields Bruckhaus Deringer), a firm which long acted as solicitors to the Bank. On the special relationship see J. Slinn, *A History of Freshfields* (London 1984). It is apparent from the text of the two affidavits reproduced in *Court Records*, pp. 5–7, that in the course of the litigation the Bank received the personal attention of Dr. Edwin Freshfield, the senior partner of the firm at the time.

Bowles v. Att.-Gen. Any suggestion that section 30 could perform this role was roundly dismissed by the court. In particular, to construe it as authorising the assessment and collection of tax at the rate for the preceding fiscal year would fly in the face of the constitutional convention that income tax was imposed on an annual basis only.¹¹

This sufficed to award *Bowles* judgment against the Bank. That the authority of an Act of Parliament was required for the imposition of taxation was undoubtedly correct, despite the unclear guidance on the point afforded by Australian case law that had been decided in the context of customs duties.¹² The ruling amounted to no more than the application in a particular context of the general principle that the individual may not be coerced by officialdom in the absence of legal authority to do so. However, mention should be made of an additional argument adduced by Parker J. in support of his ruling. The same outcome, he said, was required by Article 4 of the Bill of Rights 1689:

That levying money for or to the use of the Crown by pretence of prerogative without grant of Parliament for longer time or in other manner than the same is or shall be granted is illegal.

His Lordship stated that by this provision “it was finally settled that there could be no taxation in this country except under authority of an Act of Parliament.”¹³ Yet there is nothing in the wording of Article 4 which would require Parliament to express its wishes in matters of taxation by means of a statute in contrast to a resolution of the House of Commons. There is scarcely anything in the provision’s antecedents to the same effect.¹⁴ Further, it is extremely unlikely that a document that was concerned with the fundamental issue of the balance of power as between the Monarch and Parliament, and which established the supremacy of the latter, would be concerned about the exact form in which Parliament expressed its wishes.

¹¹ [1913] 1 Ch. 57, 87–88. As such, it provides a neglected instance of a well established point: that legal material can be interpreted in the light of a background non-legal norm, a constitutional convention. The status of the convention is examined at greater length in section VI, below.

¹² The ruling in *Stevenson v. The Queen* (1865) 2 Wyatt, Webb, and à Beckett 143 anticipated the outcome in *Bowles v. Bank of England*. The Supreme Court of Victoria stated unequivocally: “We have no doubt that these resolutions are not equal to an Act of Parliament, and that nothing but an Act of Parliament can have the effect of imposing taxation” (at pp. 148–149). In stark contrast is the ruling from New South Wales in *Ex parte Wallace & Co.* (1892) 13 N.S.W.L.R. 1: the practice, well established in Australia as much as in England, of levying taxes on the authority (in the first place, at least) of a resolution of the legislature was based on “sound reason and good sense” (at p. 9) and necessary to protect the public revenues.

¹³ [1913] 1 Ch. 57, 84.

¹⁴ For the background to Article 4 see L.G. Schworer, *The Declaration of Rights, 1689* (Baltimore 1981), pp. 66–69. The Petition of Right 1628, the most significant pre-1689 document, contains conflicting indications. The recital refers to “consent in Parliament”, viz “your subjects have inherited this freedom that they should not be compelled to contribute to any taxe tallage ayde or other like charge not sett by comon consent in Parliament”. However, the petition itself asks of the King “that no man hereafter be compelled to make or yeild any guilt loane benevolence taxe or such like charge without comon consent by Acte of Parliament.”

No account of the two cases brought by Thomas Bowles would be complete without some consideration of his motives in doing so. From one perspective the proceedings against the Bank of England possessed a distinctly academic aspect. Irrespective of the outcome he would still be assessed in due course on his total income for the tax year 1912–13, including the dividends paid to him from the Irish Land Stock. The question, however, was whether that would suffice to cure defects in the legality of the process by which tax was deducted at source prior to the Finance Act becoming law. David Lloyd George, the Chancellor of the Exchequer at the time, did not appear to think that it would since he claimed that Bowles' reason for suing the Bank of England was simply a wish to avoid tax – a motive that was vigorously denied by Bowles himself.¹⁵

A very different explanation of the proceedings was subsequently put forward by Professor Elie Halévy, the distinguished French historian of nineteenth century Britain. He doubtless seized on the point that a case that was of little (if any) financial advantage to the plaintiff would wreak havoc on the public revenues and concluded that the proceedings were a ploy by the Conservative Party. Having been defeated in the matter of the powers of the House of Lords, the Conservatives were anxious to find another means of undermining the government's expenditure plans. This was to be achieved by obstructing the flow of tax revenues that would go towards financing social reform.¹⁶ As an explanation, however, this seems implausible. Certainly, the proceedings brought by Thomas Bowles were, in effect, a representative action. Any suitably placed taxpayer was in a position to initiate a legal challenge to the procedure by which taxes were collected. Once the action succeeded the ruling of the court would have repercussions for the liability to pay tax of all similarly placed individuals. However, it is extremely unlikely that the Conservatives would have selected for the position of "lead" plaintiff in the case such a notorious maverick as Bowles. Besides, he had last contested a parliamentary seat in the Liberal cause, thereby indicating that his attachment to certain policies (in particular, Free Trade) was stronger than his loyalty to any political party.¹⁷

¹⁵ The imputation was made in passing by Lloyd George. In replying to a question in the House of Commons he said that the government had made it quite clear that "Mr. Gibson Bowles could not escape having to pay his Income Tax by having caused to be set aside the practice of deduction without statutory authority": HC Deb. vol. 56 cols. 23–24 (28 July 1913). It is, of course, quite likely that Lloyd George was making a crude political point rather than expressing a considered opinion on the legal position.

See note 18 below, for Bowles' own account of his reasons.

¹⁶ E. Halévy, *A History of the English People in the Nineteenth Century – vol. 6: The Rule of Democracy 1905–1914* (London 1961), p. 349n.

¹⁷ From the outset Bowles had made it clear that he would not render unquestioning obedience to the whips. *The Irrepressible Victorian*, p. 149, lists several occasions during his time as a Conservative MP when he voted with the Liberals. Even when he changed parties it seems that he was the only

There appears to be no reason to doubt the explanation that Bowles himself gave for bringing proceedings in the High Court. It was a means of exerting pressure on a government that was becoming increasingly neglectful of its duties in failing to secure the passage of the Finance Bill until late in the parliamentary session. The explanation gained its most public airing in a letter that Bowles wrote to *The Times* in reply to Lloyd George's allegation that he had been actuated merely by considerations of financial gain.¹⁸

An appraisal of Bowles' account of his reasons must start with some general points about the procedure for imposing and collecting taxes. Then, as now, the fiscal year ran from 6 April to 5 April of the following calendar year. Authority to collect certain taxes was conferred by Parliament for a single tax year at a time only – a constitutional rule that will be considered at greater length below.¹⁹ This resulted in the necessity of a Finance Act being passed at least once a year so that the power to raise the taxes in question should not be interrupted. For some purposes the point of time in the tax year when the Finance Act completes all its legislative stages is unimportant. The individual is taxed on his income for the whole of that year. It does not matter whether the taxable money accrued to him before or after the Finance Act receives the royal assent. This is axiomatic – so clearly so that it was only as late as 1943, in *Eastwood v. Inland Revenue Commissioners*,²⁰ that there was deemed to be any point in raising the issue. In that case it was argued by the taxpayer that the relevant provision of the Finance Act did not catch payments of income made before the Act was passed. The fallacy in this submission was explained by Lord Greene M.R.:

It invariably happens that the Finance Act for a particular year does not pass into law until the then current financial year has to some extent elapsed, but the time unit with which the Act deals for the purposes of assessment is the financial year, and it deals normally with the taxable income in respect of the then current financial year. That does not mean that it is retrospective. It is merely the unit of time in respect of which taxation is imposed.²¹

Liberal candidate in the general election of December 1910 who did not enthusiastically support the Parliament Bill. See N. Blewett, *The Peers, the Parties and the People: The General Elections of 1910* (London 1972), p. 470 (n. 82), quoting from his election address to the effect that the principles behind the Parliament Bill were "in some respects manifestly imperfect, in some respects incompatible with the Parliamentary system of the country."

¹⁸ *The Times* 31 July 1913, p. 6: "What I resisted, and defeated, in *Bowles v. Bank of England* was Mr. Lloyd George's desire to escape from having to pass the annual law imposing the [income tax] till the eve of Christmas, and his desire to levy the tax during a period of over eight months without any warrant of law whatever".

For a somewhat lengthier exposition of the same reason see the introduction to *Court Records*, especially pp. vii–xii.

¹⁹ See section VI.

²⁰ [1943] 1 K.B. 314.

²¹ *Ibid.*, at p. 318.

In the light of this explanation it might be thought that no difficulty would be caused by delay in passing the Finance Act until well into the fiscal year, since the taxpayer will eventually be charged to tax on the basis of his income for the whole of that period. The problem, in regard to direct taxes at any rate, is caused by the existence of machinery to deduct tax at source. When the deduction takes place it is often the case that legislative authority to tax has not yet been provided. This, of course, formed the essence of the background to *Bowles v. Bank of England*. Even if Finance Acts were routinely made retrospective in scope to the beginning of the fiscal year, it would not resolve the essential difficulty in such a case that, at the time of collection of tax, there would be an absence of legal power to do so.

The government's deferral of proceedings on the Finance Bill until late in the parliamentary session meant that for a significant part of the year there was not so much as a House of Commons resolution, still less an Act of Parliament, in place to authorise the collection of those taxes that were imposed on an annual basis. It is an irony of *Bowles v. Bank of England* that a law suit that was brought with the aim of forcing the government to prioritise the completion of financial business earlier in the session should end up exposing the deficiencies of resolutions as a means of taxing the individual. Bowles' quarrel with the government was on the issue of timetabling, not on the use of resolutions as compared with statute.²² In any event, how well grounded was Bowles' complaint? It is the "People's Budget" that here marks the watershed divide. The Finance Acts for 1907 and 1908 each completed all their stages by early August. It was the oddly named Finance (1909–10) Act 1910 that was subject to inordinate delay, being enacted on 29 April 1910 exactly one year after Lloyd George's Budget speech that had originally introduced it. This, however, was due to the extraordinary circumstances of the rejection of the Budget by the House of Lords and so could scarcely be blamed on the government. Less excusable was the delay in the following years, the Finance Acts for 1910 and 1911 becoming law on 28 November and 16 December respectively.²³ Thereafter the completion dates reverted to late July – mid August, largely (no doubt) in response to Mr Bowles' action against the Bank of England. In short, only three Finance Acts were subject to considerable delay, the government being responsible on only two of these occasions.

²² It should be emphasised that then, as in the rest of the twentieth century, the presentation of the Budget tended to be early enough. The problem as perceived by Bowles was the slow pace thereafter on the Finance Bill. The Budget dates throughout the century are conveniently collected in D. Butler and G. Butler, *Twentieth-century British Political Facts 1900–2000* (8th ed., Basingstoke 2000), p. 428.

²³ The respective Budget dates were 30 June and 16 May.

III. A GLANCE INTO THE ABYSS

The potential consequences for the public finances of Bowles succeeding in his claim against the Bank of England were extremely serious. He himself pointed out in argument – and it does not appear to have been contradicted – that some four-fifths of the revenue generated through income tax was deducted at source (about £32,500,000 in the financial year 1912–13).²⁴ Since, in any tax year, a considerable amount would be deducted in this way before the Finance Act became law – how much would clearly depend on how late in the year the measure would complete all its stages – it would mean that that proportion of the revenues would have been collected illegally. Taxpayers would thenceforth be able to insist on income being paid to them without deduction of tax pending the passing of the Finance Act. More serious still, they might be able to sue – within the constraints imposed by the then applicable limitation period and the then law of restitution – for the recovery of sums unlawfully deducted in previous years.

The first concerns about the consequences of victory for Bowles were voiced in Parliament even while the case was being argued in the High Court. On 1 July 1912 Lloyd George was asked what steps were being taken to speed up the passage of the Finance Bill and thereby safeguard the public revenues. In a brief written answer he appeared to endorse the legality of the established practice while adding that further comment was precluded by the matter being *sub judice*.²⁵ Behind the public façade, however, the Chancellor was concerned at the prospect of the government losing the case. So much so that, at the end of the same month, he took the first step towards putting the impugned budgetary procedure on a firm statutory footing. As a preliminary stage to introducing a clause in the Finance Bill, which was then before the House of Commons, he moved a resolution in the Committee of Ways and Means the terms of which foreshadowed the scheme of the Provisional Collection of Taxes Bill of the following year. In the event the motion was withdrawn after some perfunctory discussion in the face of complaints by MPs that they had been given insufficient notice of something that was considered to be a major constitutional change.²⁶ It was now clear that, in the probable event of judgment being awarded to Mr Bowles, there was little prospect of a successful appeal to the higher courts. The threat to the collection of taxes would have to be met by legislation.

With the pronouncement of judgment on 4 November there were renewed questions in Parliament about the litigation. Both the

²⁴ [1913] 1 Ch. 57, 68. How Bowles arrived at these figures is explained in *Court Records*, at p. viii.

²⁵ HC Deb. vol. 40 cols. 908–909 (1 July 1912).

²⁶ The discussion is at HC Deb. vol. 41 cols. 1521–1539 (26 July 1912).

Attorney-General and the Chancellor of the Exchequer were asked to give the date on which the former was said to have advised that there was no real prospect of successfully contesting the case brought by Bowles.²⁷ No longer able to take refuge in the *sub judice* rule, they both declined to answer on the basis (it would seem) of the convention that opinions given by the law officers are confidential. In a subsequent intervention the Prime Minister was reminded of the difficulties in the wake of the litigation faced by persons (such as bankers and trustees) who deducted tax at source from payments made by them.²⁸ That point went on to form one of the themes in an adjournment debate pressed on the government a few weeks before proceedings finally started on the Provisional Collection of Taxes Bill on 7 April 1913.²⁹

The Bill proved to be a severe and unexpectedly early test of the extent of the powers that the House of Commons had reserved to itself only two years earlier in the Parliament Act 1911. When it arrived in the House of Lords it did so endorsed with the certificate of the Speaker of the House of Commons that it was a Money Bill within the meaning of section 1(2) of the 1911 Act.³⁰ The fact that it did so was facilitated by the wide drafting of section 1(2), which encompassed a range of activities on both the revenue and expenditure sides of the central government finances. Particularly relevant to the classification of the Provisional Collection of Taxes Bill was the item, “regulation of taxation”. Also included (for good measure) at the end of the list of items was the phrase: “... or subordinate matters incidental to those subjects or any of them.”

Conceivably, the definition of Money Bills could have been confined to bills which *imposed* taxation, in contrast to those that *dealt with* the imposition of taxation.³¹ In that event the 1913 measure would not have qualified. The wording of section 1(2) should also be compared with the definition of Money Bills contained in the draft Parliament Bill which was discarded after having held the stage earlier in the crisis over the powers of the House of Lords. That measure, which had been drafted on the initiative of Lloyd George, had emerged when there still remained some prospects for success of the inter-party conference convened in 1910 in an attempt to resolve the deadlock.³² In one respect the relevant provision, Clause 2(2), was narrower than section 1(2), in that it contained the additional qualification that the bill in question

²⁷ HC Deb. vol. 44 col. 32 (18 November 1912), and cols. 97–98 (19 November 1912).

²⁸ HC Deb. vol. 50 col. 410 (13 March 1913).

²⁹ *Ibid.*, cols. 993–1008 (18 March 1913). The adjournment was moved by a Unionist MP, Felix Cassel, who went on to take a prominent part in the debates on the Bill.

³⁰ HL Deb. vol. 14 col. 234 (21 April 1913).

³¹ This is a distinction that is drawn in Australia as a consequence of s. 55 of the Constitution: “Laws imposing taxation shall deal only with the imposition of taxation...” See *Re Dymond* (1959) 101 C.L.R. 11.

³² For an account of its background see Jaconelli, *op. cit.*, p. 281.

had “originated in the House of Commons in Committee of Ways and Means.”³³ In other respects it appeared to be co-extensive with section 1(2), especially in appending after the item “taxation” the words, “including the machinery necessary or expedient for the purpose of giving proper effect to taxation.”

The width of the definition of the term “Money Bill” was of the highest importance since a measure that did not qualify under this heading would be governed by the provisions in the Parliament Act 1911 for ordinary legislation. This would have meant that the Provisional Collection of Taxes Bill, instead of being liable to be delayed by the House of Lords for no more than one month, would need to have been passed in three consecutive parliamentary sessions. An obdurate House of Lords, therefore, could have been obstructive until 1915 (though the outbreak of the First World War would surely have led the Lords to abandon its opposition in the later stages of the process).

The 1913 Act also provides an instructive example of the difficulty of classifying types of bills. The division of bills into three categories – money bills, ordinary bills, and constitutional bills – was common in the lengthy discussions over the years before the Parliament Act 1911, with its somewhat simpler structure, was finally enacted.³⁴ The implication was that the three categories would be mutually exclusive. While bills classified as ordinary would be the norm, the other two types would be subject to special procedures – expedited in the case of money bills, but subject to additional hurdles and safeguards in the case of constitutional bills. The Provisional Collection of Taxes Bill illustrates a point that had gone unrecognised at the time, that a measure was capable of straddling two categories. As already noted, it was classified as a Money Bill by the Speaker of the Commons. Had the Parliament Act demarcated a category of constitutional bills, it would undoubtedly have qualified under that heading also. Certainly, throughout the parliamentary debates on the measure it was described as embodying a change in the law of major constitutional significance.

A narrow definition of Money Bills in the Parliament Act, or the creation there of a category of constitutional bills combined with confusion as to the procedure applicable to measures of a combined constitutional and financial nature, could have been exploited to hold up the passage of the Provisional Collection of Taxes Bill. That, in combination with an aggressive stance by taxpayers taking advantage of the lack of a proper legal basis for the collection of taxes, would have had

³³ That this element was deemed an optional addition, is, perhaps, indicated by the fact that it stands in square brackets in the extant copy: AC 10/2/83 of the papers of Austen Chamberlain, located in Birmingham University Library. The measure that became the PCTA 1913 would not have satisfied this requirement.

³⁴ See Jaconelli, *op. cit.*, pp. 279–280.

extremely serious repercussions for the government of the country. If this combination of possibilities appears far-fetched, it should be recalled that passions were running very high at the time over Home Rule for Ireland and there were those who would have interfered with another routine annual item of legislation, the Army Act, to obstruct the implementation of Home Rule.³⁵

IV. TAXATION BY RESOLUTION REGULARISED

The consideration of the Provisional Collection of Taxes Bill was preceded by a debate on an enabling resolution,³⁶ and it was here that many of the points that were raised in the deliberations on the Bill itself were given their first airing. Thenceforth the successive stages followed rapidly until the granting of royal assent on 25 April. The following account will be confined to the cardinal and problematic features of the 1913 measure and its replacement, the PCTA 1968.

In introducing the preliminary resolution Lloyd George stated the purpose of the legislation as being to embody in legal form a customary procedure that had been followed for many years.³⁷ The elements of the procedure remained the same but the transformation into law required greater precision, especially in the matter of time limits. The central idea was that an initial resolution of the Committee of Ways and Means of the House of Commons should possess statutory force for a strictly limited period (four months under the original PCTA). The details of the time limits will be considered below. Suffice it for present purposes to note that their existence would serve to refute the point that, once taxation by resolution was legitimated by statute, the government would have no incentive to prioritise the Finance Bill in each session's legislative programme. As it was, the Bill would have to complete all its stages before the time limit ran out so that it could take over once the resolution lost its force.

A bipartisan approach to the reform quickly emerged. There were several reasons. Governments of both complexions had been guilty of illegally raising taxes for at least part of the financial year. Indeed, as Lloyd George pointed out, the reform was of greater significance to the Conservatives than it was to the Liberals since "the sort of taxation which [they are] pledged to is taxation of a character which would undoubtedly be more affected by this than any taxes I am pledged to"³⁸ – a scarcely veiled hint at the Conservatives' preference for indirect over direct taxation. The country was fortunate, too, in the character of the

³⁵ See M. Laffan, *The Partition of Ireland 1911–1925* (Dundalk 1983), pp. 39–40.

³⁶ For the text of the resolution see HC Deb. vol. 51 col. 835 (7 April 1913).

³⁷ *Ibid.*, col. 836.

³⁸ HC Deb. vol. 41 col. 1532 (26 July 1912).

leading Conservative spokesman, Austen Chamberlain. Both by temperament and as a past (and future) Chancellor of the Exchequer, he was inclined towards constructive criticism of the new measure.³⁹ Indeed, the lines of conflict were not so much between Conservatives and Liberals as between those who were anxious to expedite the tax-collecting process and those who feared for the consequent loss of control over matters of finance by the House of Commons. The apprehensions of the latter group were vividly expressed by Mr Hayes Fisher:

It will be possible ... for any Chancellor of the Exchequer, without practically any notice whatever to the House of Commons and still less to the country, by a single Resolution, passed in Committee of Ways and Means, not even reported to the House of Commons, discussed perhaps in the small hours of the morning under gag and guillotine, to impose some new taxation of a very novel kind and possibly, if the opinion of the country were asked, of a very unpopular kind.⁴⁰

That the PCTA 1913 was an extraordinary measure was undeniable. As will be seen, however, some of these objections lost their force in the light of amendments made on its way to the statute book.

A. Proceeding by Resolution

In case it should be thought that there was something sinister in the practice of imposing taxation in the first place simply by way of resolution, Parker J. emphasised that the procedure was “adopted with a view to the protection of the subject against the hasty imposition of taxes” but added that “it would be strange to find [resolutions] relied on as justifying the Crown in levying a tax before such tax is actually imposed by Act of Parliament”.⁴¹ What is unusual, for a bicameral legislature, is that the resolution of one House alone sufficed.⁴² This long-established practice, legitimated by the PCTA 1913, was founded on the primacy of the House of Commons in matters of taxation that dated back to the seventeenth century.

The departure from the standard legislative method of the procedure by way of resolution is emphasised by the statutory requirement

³⁹ He had been Chancellor for just over two years in 1903–1905, and was to occupy the post again for a similar period just after the First World War. See A. Chamberlain, *Politics from the Inside: An Epistolary Chronicle 1906–1914* (London 1936), p. 545 (an entry dated 7 April 1913): “All my sympathy from past Treasury training and from present Tariff Reform proclivities is on the Chancellor’s side, but I don’t like helping him and the Party won’t like my doing it.” See also at p. 502 for a statement to similar effect.

⁴⁰ HC Deb. vol. 51 col. 858 (7 April 1913).

⁴¹ *Bowles v. Bank of England* [1913] 1 Ch. 57, 85.

⁴² Resolutions of both Houses are required elsewhere: for the making of remedial orders by ministers under the Human Rights Act 1998, schedule 2, para 2 (a); and for approving draft Orders in Council to give effect to a Boundary Commission report under the Parliamentary Constituencies Act 1986, s. 4(3).

that each resolution should contain the statement “that it is expedient in the public interest” that it should possess statutory effect within the terms of the Act.⁴³ The vote on successive resolutions, the text of each incanting this formula, is a feature of Budget day immediately the Chancellor reaches the end of his speech. The vote on the final resolution – “that it is expedient to amend the law with respect to the National Debt and the public revenue and to make further provision in connection with finance”- signals the start of the debate about the Budget as a whole.

B. Time Limits

With the formalisation of procedure in statute, time limits gained a significance that they had not previously possessed. Under the PCTA 1913 a resolution of the Committee of Way and Means was required to be approved within ten working days by the House of Commons itself. Thereafter the Finance Bill had to secure its second reading within the next 20 days on which the House sat.⁴⁴ Validity was thereby conferred on the resolution as a tax raising instrument for the stipulated period (originally a simple period of four months).⁴⁵ This meant that the Finance Bill had to reach the statute book by the end of that period so that there could be a seamless transition from resolution to statute. It was made clear in the 1913 statute, and repeated in 1968, that any gap between the two could not be filled by the simple expedient of passing another resolution to the same effect.⁴⁶ By a fortunate coincidence compliance with the four month deadline had recently been facilitated by the reduction in the Parliament Act two years earlier of the powers of the House of Lords to delay Money Bills to no more than one month from the time of arrival of such a Bill in that House.⁴⁷ It is also to be noted that a deadline expressed in terms of the running of so many months, in contrast to one fixed to a definite date in the year, would not necessarily meet Bowles’ objection to the increasingly tardy proceedings on the Finance Bill. In this respect the tentative step towards reform taken by Lloyd George in July 1912 was better. His enabling resolution, being drafted in general terms, did not specify when the Finance Bill

⁴³ PCTA 1913, s. 1(1); PCTA 1968, s. 1(2)(b). An early intimation of this provision is to be found in the amendment moved by Mr Steel-Maitland that would have added: “where a Special Resolution is passed by the House of Commons that it is expedient, in order to safeguard the interests of the public revenue, to give temporary effect to any Resolution of this House for imposing taxation” HC Deb. vol. 51 col. 922 (7 April 1913).

The crucial amendment, that was promptly accepted by the government, was moved by Mr Cassel in the belief that it was “much better that the Resolution should deal with the public interest generally, and not merely with the interests of the public revenue”: *ibid.*, at col. 1771 (14 April 1913).

⁴⁴ PCTA 1913, s.1(1)(a).

⁴⁵ PCTA 1913, s. 1(2).

⁴⁶ PCTA 1913, s. 1(1)(e); PCTA 1968, s. 1(8).

⁴⁷ Parliament Act 1911, s. 1(1).

would be required to have completed all its stages. The date that he had in mind, he nevertheless admitted, was 31 August of each year.⁴⁸

The PCTA 1968 was necessitated, if for no other reason, by the abolition in the 1966–67 session of a central element of the scheme enacted in 1913, the Committee of Ways and Means.⁴⁹ Changes made both then and subsequently have resulted in the four month period being a “default” provision since stipulated expiry dates are now laid down in regard to resolutions that are passed in particular months. To take by way of example the usual position nowadays of a March Budget, 5 August is the vital date for the completion of all stages on the Finance Bill.⁵⁰

It is further provided in the PCTAs that if Parliament is dissolved or prorogued a resolution will lose its force.⁵¹ It should be emphasised that this is quite distinct from the time limit (whether of four months or by reference to a particular date in the calendar). To take a dissolution of Parliament as the more disruptive of the two cases, the existence of the time limit would not in itself undermine the validity of the Budget resolutions. Even in a situation where the House of Lords were to use to the full its delaying power of one month, this would still leave ample time for the consideration of the Finance Bill in the Commons without running foul of the four month limit. This is true even of the early part of the twentieth century, when the gap between the dissolution of the old Parliament and the assembly of the new one was markedly longer than it has been in more recent times.⁵² That the force of the Budget resolutions is terminated even by the proroguing (let alone the dissolution) of Parliament calls for some comment.⁵³ It is submitted that the

⁴⁸ In any case, the time limits soon made their presence felt. On 7 July 1914 Asquith introduced a guillotine resolution to curtail discussion of the Finance Bill then before the House. The reason was the constraints of time now imposed by the PCTA. Andrew Bonar Law, replying for the Opposition, stated his belief that it was the first time that a guillotine motion had been applied to a Finance Bill: see HC Deb. vol. 64 col. 933 (7 July 1914). On the extraordinary nature of the use of the guillotine in these circumstances, see *The Budget Guillotine* (dated 4 July 1914) in the papers of Bonar Law in the Parliamentary Archives: BL 38/C/17. The detailed timetable calculations that were now rendered necessary by the PCTA 1913 are illustrated by the following documents, also in the Bonar Law papers: *Parliamentary Time & The Budget* (dated 24 June 1914) BL 38/C/14; and *The Budget and the Provisional Collection of Taxes Act* (undated) BL38/C/19.

⁴⁹ The consequent deletion of the stage involving that Committee was a change more of form than of substance since it was a Committee of the Whole House. In many respects, however, it was a consolidating measure.

⁵⁰ Inevitably the criticism is made that the periods are not long enough to allow sufficient parliamentary control over taxation. The report, *Making Tax Law*, of the Tax Law Review Committee (chairman: Sir Alan Budd) (Institute for Fiscal Studies, London: 2003) proposed that the deadline of 5 August be changed to 5 October and that the default period of four months be changed to six months. See paras. 4.5 and 4.9.

⁵¹ PCTA 1913, s.1(1)(b); PCTA 1968, s.1(5)(c).

⁵² There is a table that conveniently sets out the dates in R. Blackburn, “The summoning and meeting of new Parliaments in the United Kingdom” (1989) 9 *Legal Studies* 165, 172.

⁵³ It is worth noting that the Irish Republic’s own PCTA 1927 (largely modelled on the British precedent) was amended by the Finance Act 1992, s. 250, with the result that where the Dáil is dissolved within four months of the date of the resolution the period of dissolution is to be disregarded for the purposes of compliance with some of the time limits in the Act.

rule is a statutory enactment, in the particular context of proceedings on the Finance Bill only, of the constitutional convention that all the stages on a public bill are to be completed within a single parliamentary session.

The consequence of the rule is that, when a general election is imminent, the Prime Minister must advise the Queen on a date for the dissolution of Parliament which allows for the completion of all the stages of the Finance Bill which either is before Parliament at the time or needs shortly to be introduced in order to maintain continuity in the levying of major taxes. Otherwise the agreement of the Opposition should be secured to expedite the speedy passage of a Finance Act, which in the circumstances must be short and uncontroversial. This was the background to the Finance Act 1983,⁵⁴ for example, which received the royal assent on 13 May, the very day on which Parliament was dissolved.⁵⁵ Such forward planning is sometimes not even possible since a general election is precipitated by a government's loss of a vote of no confidence. This happened in 1979, the administration of James Callaghan losing a confidence motion on 28 March at a time when a date, 3 April, had already been set for the presentation of the Budget. A "holding" Finance Bill was agreed between the Chancellor, Denis Healey, and the Shadow Chancellor, Geoffrey Howe. Amounting to a mere three clauses, it was enacted on 4 April, to be followed by the new Conservative government's Finance (No. 2) Act 1979.⁵⁶

C. The consequences of failure

Disruption to the collection of taxes on the basis of Budget resolutions can occur in several ways. As already indicated, there may be a failure to comply with the applicable time limit or Parliament may be dissolved or prorogued. Alternatively, the provisions in the Finance Bill that correspond in content to a Budget resolution may be rejected during their parliamentary passage.⁵⁷ What are the consequences of failure in either form?

No guidance is given in either PCTA. Clearly, a resolution will lose its legal force forthwith. But does it lose all force, even from the date on which it was passed? The only work to address the question states that the deadline of four months or (as the case may be) 5 August must be met "... otherwise the collection of taxes on the basis of the resolutions becomes *retroactively* invalid"⁵⁸ (Emphasis added). No supporting

⁵⁴ See G. Howe, *Conflict of Loyalty* (London 1994), p. 289.

⁵⁵ On the Conservatives being returned to power it was quickly supplemented by the enactment of the Finance (No. 2) Act 1983.

⁵⁶ See Howe, *op. cit.*, p. 115.

⁵⁷ PCTA 1913, s.1(1)(b); PCTA 1968, s.1(5)(a).

⁵⁸ S.A. de Smith and R. Brazier, *Constitutional and Administrative Law*, 8th ed., (London 1998), p. 284.

reason is offered. It could be argued, as a matter of general principle, that failure to meet the time limit should result in resolutions losing their efficacy only after 5 August or after the expiry of four months. This would possess the advantage of less disruption to the public revenues by comparison with a situation where moneys that turned out to have been illegally exacted would have to be returned to the taxpayers. It is worth noting that the special regime for the provisional collection of stamp duty states quite clearly: “The ending of the period for which a resolution has statutory effect under the provisions of this section shall not affect the validity of anything done during that period.”⁵⁹

The matter is essentially one of interpreting a phrase – “A resolution shall cease to have statutory effect...” – that is used at several places in the PCTA 1968.⁶⁰ An argument could be made that, despite the uniform use of the formula, a difference should be drawn between situations where the time limits of the PCTA are transgressed (or Parliament dissolved or prorogued) and situations where the corresponding parts of the Finance Bill are rejected by Parliament. In the former resolutions should lose their force only as regards the future, whereas in the latter they should be regarded as having been invalid from the very outset. However, it should be noted that, in the cognate area of delegated legislation, Parliament has been anxious to prevent the emergence of the complex problems likely to result from the temporary validity, and defeasibility, of such legislation. It has been so even in circumstances where the delegated legislation in question is rejected on its merits. The passing of a negative resolution or the failure to pass an affirmative resolution leaves unaffected the validity of action that has been taken under the authority of the instrument.⁶¹

The longest period between the date of the Budget resolutions and the passing of the Finance Act occurred in the extraordinary circumstances of the defeat of the “People’s Budget” by the House of Lords. Even in those pre-PCTA days the government seemed to be aware that there were limits to its power to levy taxes on the authority of resolutions. It seems to have been accepted that the rejection of the Finance Bill had had the effect of nullifying the Commons resolutions that gave authority for the collection of the new taxes in addition to income tax and tea duty. John Simon, moreover, advised that the resolutions’ authority would expire with the end of the parliamentary session.⁶²

⁵⁹ Finance Act 1973, s. 50(4). For further discussion of this regime, see note 80, below.

⁶⁰ PCTA 1968, ss. 1(4) and 1(5).

⁶¹ Statutory Instruments Act 1946, s. 5(1).

⁶² This is recorded by Courtenay Ilbert, a former parliamentary draftsman and clerk of the House of Commons at the time, who was among those who advised the Cabinet on how to proceed in the event of rejection of the Budget. See his diary in the Parliamentary Archives, entry for 26 October 1909.

Both propositions turned out to have been only partly correct. As *Bowles v. Bank of England* was shortly to make clear, Budget resolutions did not provide a basis – even from the outset – for the lawful collection of taxes. However they did anticipate provisions inserted in the PCTAs that the proroguing of Parliament or the rejection there of the relevant clauses in the Finance Bill would terminate their efficacy.

Finally, could failure to observe the relevant deadline affect the validity, not so much of tax collecting under the aegis of the resolutions, but rather of the ensuing Finance Act itself? The question raises an unusual slant on the theme of parliamentary sovereignty. Assume, for example, that a Finance Bill gains the royal assent on 5 September in a year when the Budget resolutions were passed in February or March (hence requiring completion of all its stages by 5 August). Several consequences follow. For the period 5 August – 5 September at least, the resolutions will have been ineffective as a basis upon which taxes may be collected. But from 5 September onwards the relevant provisions of the Finance Act will take over from the lapsed resolutions. So much is clear, or so it would seem. However, on general principle a later Act repeals by implication the sections of an earlier statute with which it is inconsistent. There appears therefore to be a basis for the argument that the Finance Act, by transgressing the time limit of 5 August, has impliedly repealed the provision of the PCTA – section 1(3)(aa) – which lays down that limit. The result, in that event, would be uninterrupted continuity in the power to collect taxes. Several points, however, could be made in reply. First, there is nothing in the operative provisions of the Finance Act that would conflict with section 1(3)(aa) – nothing, that is, except that every Act of Parliament sets out just after the title the date on which it was granted the royal assent. It is arguable whether this insertion would qualify for the purpose of establishing an inconsistency with the terms of the PCTA. Secondly, it is now established that there cannot be repeal by implication of the terms of a statute of “constitutional” status⁶³ – a status undoubtedly held by the PCTAs. Thirdly, far from there being an implied repeal, the time limit provisions of the PCTA could be viewed as a type of entrenchment as to manner and form. They stipulate procedures to be followed by Parliament for the enactment of later statutes: that is, that the second reading be secured within so many days of the original resolution, and that all the legislative stages be completed within a further period. If the characterisation of them as a form of procedural entrenchment is correct, it follows from the

⁶³ *Thoburn v. Sunderland City Council* [2003] Q.B. 151.

“new view” of parliamentary sovereignty that there must be compliance with their terms.⁶⁴

D. Dovetailing resolution with statute

The PCTAs are very unusual in providing for one legal instrument to be succeeded by another in a chain of validity. The clean transition is facilitated by the section of the PCTA which states that a resolution loses effect as soon as the Finance Act comes into operation “renewing” or “varying” the tax in question.⁶⁵ For the period during which a Budget resolution provides the basis for the collecting of taxes it is stipulated that the resolution possesses “statutory effect as if contained in an Act of Parliament.”⁶⁶ This set of words is a variation on a standard formula – “as if enacted in this Act” – which has traditionally been deployed in order to exclude judicial review. The formula attracted adverse comment from those who wrote on administrative law in the early decades of the twentieth century. The use of a similar phrase in the PCTA 1913 escaped their strictures, most probably because the act that was sought to be shielded from judicial control, in contrast to one of delegation of law-making power to a government department, was one of delegation within Parliament itself and for a limited period only each year.⁶⁷

The fact that the Budget resolutions furnish the sole basis for collecting revenue for part of the year raises the question of how their terms are to be interpreted in the event of ambiguity. Does the fiction embodied in the PCTAs that they are to be treated for that period as if they were statutes mean that they should attract the same principles of interpretation as statutes themselves? In the light of the terse nature of the resolutions it will be appreciated that they potentially contain greater problems of interpretation than the detailed provisions of the Finance Acts. The issue was raised, though in the rather different context of the interpretation of the Fair Wages Resolutions of the House of Commons, in *Racal Communications Ltd. v. The Pay Board*.⁶⁸ The same principles, it was decided, should govern the interpretation of resolutions and statutes alike.⁶⁹

⁶⁴ A leading statement of the “new” view of parliamentary sovereignty is R.F.V. Heuston, *Essays in Constitutional Law* (2nd ed. London 1964), ch. 1.

⁶⁵ PCTA 1968, s.1(5)(b). Superfluously, it also includes “abolishing” the tax.

⁶⁶ PCTA 1913, s.1(1); PCTA 1968, s.1 (2).

⁶⁷ The PCTA 1913 is not mentioned in either Lord Hewart, *The New Despotism* (London 1929) or J. Willis, *The Parliamentary Powers of English Government Departments* (Cambridge, Massachusetts 1933).

⁶⁸ [1974] 3 All E.R. 263.

⁶⁹ As the judge observed with regret, he was prevented from having recourse to the parliamentary debates, in particular the statements made by ministers in introducing the resolutions: see *ibid.*, at p. 267b – c. Since then a series of cases, commencing with the landmark judgment of the House of Lords in *Pepper (Inspector of Taxes) v. Hart* [1993] A.C. 593, has permitted the use of *Hansard* in order to resolve difficulties in the interpretation of statutes. Presumably there will have been a

In practical terms the fact that resolution will have been in force for a period of time could have the effect of pre-empting any real discussion, during the debates on the Finance Bill, as to whether taxation should have been levied in the precise amounts and on the terms contained in the resolution. Such fears were expressed in 1913 by Sir Alfred Cripps:

... for three months – the Chancellor of the Exchequer says for a further time – ... taxation is actually being levied as though there were already statutory power to do so. Is it likely, when payments are made without statutory authority over a period of three or four months, that this House can effectively discuss as the end of that time whether a particular tax ought to be levied or not?⁷⁰

In other words, the content of the Budget resolution might come to be treated as a fiscal *fait accompli*, incapable in practice of being amended by the legislation which supersedes it. Political reality has turned out differently. Governments change their mind in the transitional period from Budget resolution to Finance Bill. Sometimes they are forced to think again, whether by their own backbenchers or by the opposition parties.

E. The taxes covered

There was considerable controversy on the question of which taxes were to be regulated by the new statutory procedure. The terms of the resolution that preceded the introduction of the Provisional Collection of Taxes Bill explicitly covered all taxes, both new and old.⁷¹ Amendments to the bill were soon moved in an attempt to remove new taxes from the scope of the measure.⁷² The rationale of the change was simple. A pre-existing tax would have received the approval of Parliament already, perhaps over a number of successive years. It was therefore acceptable that it should be renewed merely on the basis of a resolution of the Commons as compared with a tax that was novel in character. A number of objections, both in practice and principle, were voiced against the limitation. It might not prove possible to distinguish clearly between a new tax and an old one. One set of duties on a commodity, for example, might be replaced by another set. Would the commodity be the subject now of a new tax, or of an old one in a

corresponding enlargement of the range of material that may be used for the interpretation of resolutions.

⁷⁰ HC Deb. vol. 51 col. 870 (7 April 1913).

⁷¹ See note 36, above. The opening words of the resolution were: "... a Resolution passed by the Committee of Ways and Means of this House for the imposition of any new tax, or for the variation of any existing tax, or for the renewal for a further period of any tax which is of a temporary character...."

⁷² See the debate on the amendment moved by Mr. Murray Macdonald: HC Deb. vol. 51 col. 1709ff. (14 April 1913).

different guise? And, as already noted, in *Bowles v. Att.-Gen.* the court was confronted with the question of whether super-tax was in essence a new tax or simply one aspect of income tax. Irrespective of the definitional issue, the move to exclude new taxes was opposed as a matter of principle since it was those which were more likely to be introduced in time of emergency when speedy enactment was essential.

In its final form the PCTA 1913 was limited to income tax and customs and excise duties.⁷³ These general categories, it should be noted, were limited in potential scope by section 1(1) so as to exclude new taxes:

Where a resolution is passed ... providing for the variation of any existing tax, or for the renewal for a further period of any tax in force or imposed during the previous financial year

This meant that it did not suffice to fall within the scope of the PCTA that a levy was a customs or excise duty in generic terms. The Act did not apply in situations where a duty had not previously been imposed on a particular commodity. The limitation was to make itself felt within only a few years in the form in which the new duties introduced by war-time Chancellor, Reginald McKenna, were enacted. The so-called “McKenna duties” were required to be brought in by specific legislation, the Finance (New Duties) Act 1916.⁷⁴ In this regard a pronouncement made by Austen Chamberlain in 1913 proved to be prophetic. Despite his support in general terms for the Provisional Collection of Taxes Bill, Chamberlain was dismayed by the decision to limit its scope to established taxes – so much so that he announced his decision, for that reason alone, to vote against its third reading. As he explained:

... there is no answer to my argument that if you can afford to wait for the collection of your new taxes till the Budget is passed you can equally afford to wait for the old ones – especially as ... new taxes will only be imposed when there is pressing need for money to fill a deficit, or, most likely of all, to carry on a war. And yet this, which is the case of greatest difficulty and urgency, is by [Lloyd] George’s ‘concession’ expressly excluded from the benefits of the Bill.⁷⁵

Be that as it may, the decision taken in 1913, and reaffirmed in the PCTA 1968, has led to a situation whereby adjustments have to be made from time to time to the list of taxes covered by the legislation.

⁷³ PCTA 1913, s. 3. Customs duties had received a passing mention at the end of Parker J.’s judgment in *Bowles v. Bank of England* [1913] 1 Ch. 57, 91. “I have not considered the case of Customs, as to which there may be some distinction.”

⁷⁴ See B. Mallet and C. O. George, *British Budgets: Second Series 1913–14 to 1920–21* (London 1929), pp. 108–109.

⁷⁵ Chamberlain, *op. cit.*, p. 551 (an entry for 15 April 1913).

The restatement in 1968 saw the addition of purchase tax to the list,⁷⁶ Since then *ad hoc* adjustments have been made from time to time, usually by way of addition to the list,⁷⁷ occasionally by subtracting from it.⁷⁸ The net result is that, at present, the taxes originally covered in 1913 have been supplemented by nine further taxes.⁷⁹ In one case, that of stamp duty, Parliament has been led by the special needs of the tax to enact an entirely free-standing scheme that is modelled on the PCTAs.⁸⁰

V. PROBLEMS OF RESTITUTION

Mention was made in section III of the potentially grave problems of the restitution of illegally collected taxes that could well have ensued from Bowles' successful law suit. Such problems could still arise notwithstanding the enactment in the two PCTAs of the previously illicit procedure.

It would be useful, at the outset, to recall some fundamental rules of financial procedure. It is for the Crown – in modern times, the elected government – to ask for revenue in the first instance. It is then for Parliament (in effect, the House of Commons) to grant or deny the request. The Commons may choose to reject or reduce a tax proposal (or estimate), but it may not increase it. When, at the beginning of the process, the Budget resolutions are put to the House at the conclusion of the Chancellor's speech, MPs might divide the House on particular motions. If the cardinal resolutions were to be lost, this might well have to be treated as an issue of confidence in the government. Even when a resolution survives such an attack, weeks or months later the corresponding provision in the Finance Bill might be subject to a successful amendment aimed at reducing the rate of tax fixed in the resolution. The result will be overpayment of tax in the period between the date of the resolution and that on which the Finance Act comes into force. The taxing authorities will have been unjustly enriched at the expense of the general citizen, thereby giving rise to a restitutionary

⁷⁶ PCTA 1968, s. 1(1).

⁷⁷ For example, petroleum revenue tax was added by the Oil Taxation Act 1975, s. 11. It was subsequently provided that references to that tax in the PCTA 1968, s. 1, should be read as including advance petroleum revenue tax: Finance Act 1982, s. 139(5).

⁷⁸ See the Finance Act 1993, s. 205(2)(b), which removed car tax.

⁷⁹ In addition to income tax and customs and excise duties, the nine are: corporation tax, value added tax, climate change levy, insurance premium tax, landfill tax, aggregates levy, petroleum revenue tax, stamp duty reserve tax, and stamp duty land tax.

⁸⁰ Finance Act 1973, s. 50. The reason is that stamp duty must be levied in a fixed amount on the execution of a document. There would be particular difficulties in regard to instruments that are documents of title if the amount of tax could be provisionally determined only under the PCTA and might have to be retrospectively adjusted, since such documents depend for their legal efficacy on being properly stamped. Indeed, as long ago as the debates on the Provisional Collection of Taxes Bill Mr Steel-Maitland anticipated that stamp duty would cause problems if it were ever to be included in the framework of the legislation. See HC Deb. vol. 51 col. 923 (7 April 1913).

claim.⁸¹ Restitutionary issues consequent on the reduction of rates of taxation from Budget resolution to Finance Act are unlikely to emerge in situations of one-party government supported by a working parliamentary majority. In search of examples it is necessary to study periods of unstable majorities. This was the position in the later stages of the Labour administration of 1974–79, characterised as it was by the support of Liberal MPs for part of that period (the so called “Lib-Lab pact”).⁸² Early in the pact the Chancellor of the Exchequer, Denis Healey, had moved an increase in duty on petrol of 5½ p. The Liberals, representing for the most part rural constituencies with poor public transport, were opposed to the increase. It fell to Joel Barnett, the Chief Secretary to the Treasury, to explain to the Liberals the consequences of their helping to defeat the equivalent provision in the Finance Bill:

... I emphasised the administrative chaos that would result from a defeat. We had been collecting the extra 5½ p duty from Budget Day. If we were defeated, we would be legally liable to repay the duty to garages, and they in turn were liable to repay their customers. It will be readily appreciated that such an exercise would not be easy...⁸³

It was presumably with these types of situation in mind that both the PCTAs were equipped with restitution provisions. Those of the 1968 Act are sections 1(6) and 1(7). The former deals with the position where the resolution ceases to have statutory effect altogether (by reason of Parliament being dissolved or prorogued, the rejection of the relevant provisions of the Finance Bill, or failure to secure a second reading for the Bill within the stipulated 30 days). The latter regulates the position where “a resolution is modified by the [Finance] Act”: that is, where the Act reduces the tax level from that laid down in the resolution. In either event the amount paid (or overpaid, as the case may be) by the taxpayer “shall be repaid or made good.” The insertion of sections 1(6)–(7) and its equivalents in the 1913 Act⁸⁴ was entirely appropriate, otherwise the terms of the PCTAs that the Budget resolutions possess “statutory effect as if contained in an Act of Parliament” might have impeded any

⁸¹ For a treatment of the restitution issues where taxation has been improperly exacted see G. Virgo, “The law of taxation and unjust enrichment”, chapter 6 of J. Avery Jones, P. Harris and D. Oliver (eds) *Comparative Perspectives on Revenue Law: Essays in Honour of John Tiley* (Cambridge 2008).

⁸² For short, general accounts see A. Michie and S. Hoggart, *The Pact: The Inside Story of the Lib-Lab Government, 1977–8* (London 1978), and D. Steel, *A House Divided: The Lib-Lab Pact and the Future of British Politics* (London 1980).

⁸³ J. Barnett, *Inside the Treasury* (London 1982), p. 118. For another occasion when the government pleaded administrative difficulties as a reason for not reducing an interim tax rate, see the response of Edmund Dell, the Paymaster-General, to a proposed amendment to the Finance Bill which was then before the House of Commons: “There is a serious practical objection to [the] proposal. If this amendment were passed, we would need to refund the difference between 15 per cent. and 25 per cent. since 18 December. I do not know how that would be done.” HC Deb. vol. 887 col. 1196 (3 March 1975).

⁸⁴ PCTA 1913, s.1(1)(c)–(d).

attempt by taxpayers to secure reimbursement. This stands in marked contrast to the pre-1913 situation, where there was no legal basis (even a temporary one) for the collection of taxes prior to the enactment of the Finance Act and where, as a consequence, restitution claims brought by taxpayers would have been in that regard relatively straightforward.

In recent years there has been a quickening of interest in the application of the general principles of the law of unjust enrichment to the specific instance of the payment of unauthorised taxes. This is due in part to the emergence of some leading cases on the subject, in particular the ruling of the House of Lords in *Woolwich Equitable Building Society v. Inland Revenue Commissioners*.⁸⁵ Problematic situations have arisen from various factors: mistakes of fact, or mistakes of law, or (as in the *Woolwich* case itself) a payment made in response to an ultra vires demand. While interest in some disputes will be confined by the peculiar circumstances of particular individuals, the outcome of others will have repercussions for significant groups of taxpayers and for the overall yield of tax revenues. Finally, proceedings for the recovery of money are regulated in the case of some taxes by statute,⁸⁶ and in the case of others by the common law.⁸⁷

In the light of this brief survey it is possible to appreciate that the restitution issues raised by the PCTAs do not fit easily into the established categories of the subject. Tax payments made pursuant to a Budget resolution that subsequently loses its validity are not made by mistake, whether of law or fact. A detailed study by the Law Commission of unauthorised receipt of money by public authorities⁸⁸ makes no mention of sections 1(6) and 1(7) of the PCTA 1968. The nearest approach is in a sentence which acknowledges that there are situations where “due to a subsequent judicial or legislative change the payer may be said not to have acted under a mistake at all”.⁸⁹ The two provisions are noticeably terse, amounting to no more than an indication of the taxpayer’s entitlement to be refunded. In particular, they fall well short of the detail contained in the above-mentioned statutory regimes for the recovery of unauthorised taxes.⁹⁰ This raises the important question of whether defences to restitutionary claims are

⁸⁵ [1993] A.C. 70.

⁸⁶ See the Value Added Tax Act 1994, s. 80 (as amended), and the Taxes Management Act 1970, s. 33.

⁸⁷ See *Monro v. Revenue and Customs Commissioners* [2008] EWCA Civ 306, [2008] 3 W.L.R. 734. It was held there that, where Parliament had created a right or remedy in statute for the recovery of tax payments, there was a strong presumption that proceedings at common law were thereby ousted.

⁸⁸ *Restitution: Mistakes of Law and Ultra Vires Public Authority Receipts and Payments* (Law Commission Report No. 227: Cm 2731, 1994).

⁸⁹ *Ibid.*, para. 11.3.

⁹⁰ See note 86, above.

excluded totally or whether they are to be implied within the terms of sections 1(6) and 1(7).

On the assumption that the latter approach is adopted, it would be appropriate to consider a possible defence to restitution claims that is especially relevant to the subject-matter of the present article. It has been suggested that the courts should be entitled to reject claims where “severe disruption to public finance” would ensue from awarding judgment in a case to the plaintiff. The proposal was dismissed by the Law Commission for several reasons, in particular that it would prove almost impossible to define the scope of the defence with sufficient precision.⁹¹ The point was not developed, but it is clear that the Law Commission had in mind at least one complicating factor: the number of individuals who would stand to benefit indirectly from a successful lawsuit brought by a solitary taxpayer. In addition, one could speculate, would such a defence be harder to establish in times of abundant public revenues as compared with those of falling tax revenues and cuts in public spending? Clearly, if ever there was a situation where the defence (if available) could have been pleaded successfully, it was *Bowles v. Bank of England* itself with the severe threat that victory for Bowles posed to the whole enterprise of collecting tax at source.

VI. THE ANNUAL TAX CYCLE

Now that the principal issues raised by the PCTAs have been considered it is necessary to examine in more detail a constitutional convention that is inextricably connected with the functioning of the legislation.

It has already been mentioned that the authority to raise some major sources of revenue – at present, income tax and corporation tax – is conferred by Parliament for no more than one year at a time.⁹² As is well known, income tax was originally introduced as a temporary measure to finance the Napoleonic Wars. It is now temporary in a rather different sense, in the need for it to be renewed from year to year.⁹³ Corporation tax is of a very different vintage, having been introduced by the Finance Act 1965.⁹⁴ The limited duration of the two renders

⁹¹ See note 88, above, para. 11.6.

⁹² It should be noted, however, that what is defined as a “temporary tax” may lawfully be collected, subject to certain conditions, for one month after the tax expires: PCTA 1913, s. 2(1); and PCTA 1968, s. 2. An additional element of flexibility is provided by the fact that the starting point for the force of a Budget resolution can be either the date on which it is passed or the date on which it is expressed to take effect: PCTA 1913, s. 1(2); PCTA 1968, s. 1(3)(b).

⁹³ See now the Income Tax Act 2007, s. 4(1): “Income tax is charged for a year only if an Act so provides.” It is suggested that this oddly phrased provision be viewed as one of those rare examples of a constitutional convention being transformed into law.

⁹⁴ Some idea of the relative importance of income tax and corporation tax can be gained from recent Treasury statistics. In the tax year 2007–08, out of a total tax and customs revenue of £451.1 billion, they yielded receipts of £147.4 billion and £46.3 billion respectively (allowance being made

necessary at least one Finance Act per year and, pending the completion of all its stages, arrangements for their provisional collection. It is to be noted, however, that there is no strict correspondence between those taxes that are authorised on an annual basis only and those that are regulated by the PCTA 1968. The latter, as already noted, extends well beyond the two instances of income tax and corporation tax.

The practice that Parliament grants the power to collect a significant proportion of the tax revenues for no more than one year at a time meets all the requirements of a constitutional convention. It goes entirely unnoticed, however, in the accounts given in the textbooks of the conventions of the constitution notwithstanding its claims to be of greater importance than many of the examples routinely mentioned in the books. What are the possible explanations for this strange omission? It may be simply a manifestation of the general neglect of the financial side of the constitution. Or perhaps it is difficult to identify a possible “sanction” that would underpin the observance of the convention. Or the inclusion of a clause in the Finance Act limiting the duration of some of its provisions – a “sunset clause” in the American terminology – might be viewed as a matter pertaining to law, not constitutional convention. Such a view, however, would be mistaken. It is perfectly intelligible to say, as here, that there exists a constitutional *convention* as to the period of time for which particular *laws* will be permitted to remain in force.⁹⁵

Quite apart from the temporary exigencies of financing particular wars, it was long the practice to grant Supply to the Crown for a limited period at a time and in return for the redress of grievances. In this way the Monarch was driven to summoning successive Parliaments for the reason, if for no other, that they would grant their permission that was essential to the raising of taxation. In this respect, as in so many others, the elected government of the day has slipped into the position formerly occupied by the Monarch.⁹⁶ Yet a practice which was adopted

for income tax credits and corporation tax credits). Only the yields for national insurance contributions (£100.4 billion) and for value added tax (£80.6 billion) remotely approached these figures. See *Budget 2009 HC 407* (ordered to be printed 22 April 2009), p. 231.

⁹⁵ It must be conceded, in any case, that the typical “sunset” provision tends to be obliquely phrased.

For an example taken at random, see the terms of the Finance Act 1994, s. 75(1):

“Income tax shall be charged for the year 1994–95, and for that year –

- (a) the lower rate shall be 20 per cent.,
- (b) the basic rate shall be 25 per cent.,....”

See also s. 85:

“Corporation tax shall be charged for the financial year 1994 at the rate of 33 per cent.”

⁹⁶ Note the unusual preamble inserted in Finance Acts:

“Most Gracious Sovereign,

We, Your Majesty’s most dutiful and loyal subjects, the Commons of the United Kingdom in Parliament assembled, towards raising the necessary supplies to defray Your Majesty’s public expenses, and making an addition to the public revenue, have freely and voluntarily resolved to give and grant unto Your Majesty the several duties hereinafter mentioned; and do therefore most humbly beseech Your Majesty that it may be enacted, and be it enacted”

against the background of the struggles between Parliament and the Crown is continued today for entirely different reasons. For the American states, for example, notwithstanding their very different historical and institutional background, the choice lies in practice between annual and biennial budgetary cycles. Indeed, the majority of states have moved in recent times towards the former system.⁹⁷ Each has advantages and disadvantages though, of course, what is accounted an advantage from one point of view might be deemed disadvantageous from another. Biennial budgeting facilitates longer-term planning and reduces political transaction costs since the enabling legislation is required to be passed every other year only. Yet the same transaction costs might be welcomed as establishing a constitutional safeguard. The more frequent the need for legislative authorisation of taxes, the greater the risk that the process of renewal might be disrupted by untoward events but also the more frequent the opportunities for driving a government from office by striking at its financial base.

It is worth noting in this connection that Dicey placed the annual exercise of tax raising, if only by implication, at the core of his submission that the breach of constitutional convention will lead ultimately to a breach of the law itself. If a government were to flout the convention that it must resign forthwith on suffering a defeat in a vote of confidence, his account runs, it would be driven from power by reason of its inability to secure the enactment of the Finance Act and the Appropriation Act. The result would be that its collecting of tax revenue and its expenditure would both be illegal. That these items of legislation are annual was not integral to Dicey's thesis.⁹⁸ The more frequent the need for their renewal, however, the sooner would financial paralysis of the government machine take hold and the sooner the safeguard envisaged by Dicey would come into effect.

VII. WHERE ARE THEY NOW?

This completes our account of the "Bowles Act" and the related constitutional rules. At this point in time, a few years short of its centenary, some general observations may be in order. The Act itself has gone from strength to strength, now encompassing many more taxes beyond the initial list of income tax and customs and excise duties. However, in one regard – that of customs duties – the practical importance of the

⁹⁷ See the general survey in P.S. Kearns, "The Determinants of State Budget Periodicity: An Empirical Analysis" (1993) 13 *Public Budgeting and Finance* 40.

⁹⁸ To quote Dicey's own words: "*Sooner or later* the moment would come for passing ...the Appropriation Act" (Emphasis added): A.V. Dicey, *Introduction to the Study of the Law of the Constitution* with introduction by E.C.S. Wade, 10th ed., (London 1959), p. 450.

Act has been severely diminished. Within twenty years of its introduction the setting of tariff rates was made the province of delegated legislation.⁹⁹ More far-reaching still were the consequences of the accession of the United Kingdom to the European Union with the consequent loss of jurisdiction to set customs duties. As for Mr Bowles himself, flushed with his victory against the Bank of England he was minded to challenge in the courts what he perceived to be another financial impropriety: the introduction in 1911 of the payment of salaries to MPs without statutory authority.¹⁰⁰ In the event the challenge was never brought. It was surely achievement enough that, a mere former backbench MP, he was responsible for the enactment of a piece of legislation that shows every prospect of being a permanent feature of the British financial system.

⁹⁹ By virtue of the Import Duties Act 1932.

¹⁰⁰ See *The Irrepressible Victorian*, at p. 178. It appears that Bowles had secured the financial backing of the Rothschild family for the purpose of bringing this further action. See the entry for 17 November 1912 (a mere 13 days after judgment was given in *Bowles v. Bank of England*) in J. Vincent (ed.), *The Crawford Papers 1892–1940* (Manchester 1984), p. 286.