Constitutions of the United States and Canada

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THE CONSTITUTIONS OF THE UNITED STATES AND CANADA.

A Comparison.

An American in Canada, a Canadian in the United States feels himself at home; the language is the same, the intonation not very different, the religion the same, business is conducted in the same way, social customs are similar and no one can detect any outward difference in the law except such a difference as can be seen between the laws of the several states or the several provinces.

And yet the courts of Canada are almost wholly relieved of a class of case which flourishes in the United States, with a tropical profusion which now and then clogs and almost threatens to smother any others—a class of case arising out of constitutional limitations.

The reason of this difference is of course historical; no people can get away from their history any more than from their geography. When the thirteen colonies determined to form themselves into a new nation, they cut the painter which bound them to the mother country, and in a measure broke away from English tradition. England had through a course of evolution framed for herself a form of government which answered her needs fairly well: the theory that the rulers, the executive servants of

1 I refer to English speaking Canada and Canadians; some parts of the province of Quebec and a few French Canadians are in different case.

2 Henry Ford is said to consider history as nonsense and its study unnecessary and harmful—perhaps that is so in manufacturing automobiles, but automobiles and laws are not quite the same.
the king, must do the bidding of the people had been established
by the revolutions of 1648 and 1688, and the rights of all classes
were reasonably well defined and protected.

Most of this working theory and practice was traditional and
customary—true there were the great stars, Magna Carta, the
habeas corpus act, the bill of rights, but most of the English
constitution was unwritten and there was none of it which could
not be destroyed by parliament.

When the new nation came to be formed on this continent, all
this was lost—it was a matter of necessity that a form of gov-
ernment should be devised, and as there were many colonies to
be parties to the scheme, it was a practical necessity that every-
thing possible should be in writing. Hence the American “con-
stitution” and the example was followed in the several states.

This brought about the little known less remembered but
extremely important difference between the meaning and con-
notation of the words “constitution,” “constitutional” in Eng-
lish and American3 usage. The constitution in America is a
document to be read by all men, litera scripta quae manet, bind-
ing in law upon all, to be interpreted by the courts.

“A written document containing so many words and letters
which authoritatively and without appeal dictates what shall
and what shall not be done.”4

In England, the “constitution” was the totality of principles
more or less vaguely and generally stated, upon which it was
thought the land should be governed. These principles were
not binding in law: the Parliament could violate, could change
or reverse them at will. So, too, in American usage anything
which is “unconstitutional” is illegal however wise and right it
may be: in England to say that anything is “unconstitutional”
is to say that it is legal but wrong and inadvisable.5

3 I use the word “American” in the usual sense of the word in the
United States: Canadians sometimes used rather to resent the monopo-
lization of the appellation American by the citizens of the United States,
but that feeling is now practically extinct. We are not nor do we wish
to be called Americans, though we are American: most of us are more
than content to be simply Canadians.

4 See my work “The Constitution of Canada.” The Dodge Lectures,
Yale University, 1917, Yale University Press, New Haven, Conn., p. 52.

5 These are of course general statements, substantially accurate but
not to be subjected to microscopical analysis as the “constitution” of the
United States and those of the several states not uncommonly are. Per-
haps I may be pardoned for transcribing here what I said in Yale:
“In the ultimate analysis the difference arises from the fact that the
fathers of this union of states knew how to write; and that having the
Canada never had a violent separation from the old land; she retained British connection as she retained the British flag. The separate provinces of which the Dominion of Canada was formed in 1867 had before that time obtained responsible government substantially as in England, i.e. the ministers of the Crown were responsible to the representatives in Parliament elected by the people. These Provinces had all retained the constitutional theories as well as the nomenclature of England.

A union of all the British North American Colonies had been long thought of and had been recommended by many; but it was not until after the middle of the 19th Century that the matter became practical politics. In 1864 two conferences were held by the delegates from most of these provinces and there was drawn up a scheme of union. One of the resolutions stated that the people of the provinces which were to unite "desire to follow the model of the British constitution so far as our circumstances will permit."

The other resolutions contained the frame work of a written constitution pro tanto; but it was not elaborate or complete; power, they had that desire to reduce their views to a written form which characterises the philosopher.

"In the mother country, the philosophic students of the problems of politics also gave written expression from time to time to their views—but these students differed from those philosophers in that they had no power to cause their writing to be adopted as a binding document. No more profound studies have ever been made in the theory of government and concerning the balance of function of its various departments than those of Englishmen—but Englishmen could give them only as speculations, they had not the power to have their theories adopted by the nation at large.

"The fathers of this nation, when they had drawn from English and other sources what they conceived to be the true principles upon which government should be carried on, went further and formulated their theories in a document framed with much skill; and they had the fortune to have that document declared binding not only upon the nation as it then existed, but also upon the nation—speaking generally—as it was to be at the end of time."

6 This evolution from a system of government not very unlike that of the thirteen colonies before the revolution of 1776-1783 was due in some measure to legislation of the Imperial Parliament, more to the instructions given to the governors by the home administration, and in the ultimate analysis, practically all to the increasing democracy of the people of the provinces themselves.

7 I do not give an account of this process of evolution—a short outline will be found in my Dodge Lectures, see note 4 above.

7 A short account of these conferences will be found in my Dodge Lectures, pp. 29 sqq.

it did not purport to exhaust the rules of government but left much to tradition and established practice.

In theory the king is supreme over the colonies: he alone has the power to make and unmake, divide and unite them—this power he exercises with his Parliament, the Imperial Parliament at Westminster. And in law that Parliament of which the king is a part may legislate for all the British world.  

Accordingly a number of colonial statesmen were sent to London to formulate an act of Parliament and obtain its passing; and the well-known “British North America Act 1867” was the result. The preamble of that act reads as follows:—

“Whereas the provinces of Canada, Nova Scotia and New Brunswick have expressed their desire to be federally united into one Dominion under the Crown of the United Kingdom of Great Britain and Ireland with a constitution similar in principle to that of the United Kingdom.”

This constitution was not to be precisely the same as that of the United Kingdom—had it been so, much of the act would have been omitted. Carrying out the principles arrived at at the conference in Quebec in 1864, specific provision was made

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9 I have more than once been asked by an American who did not understand the real independence of Canada, “What would happen if the British Parliament were to pass legislation for Canada which Canadians did not approve of?” My answer has always been “What would happen if one illiterate full blooded negro were to be elected President of the United States?” Both are perfectly legal; both unthinkable.

10 In form the British North American Act of 1867 is an exercise of power by the Imperial Parliament: in fact it is the legalizing of an agreement entered into by the colonies concerned. This is often overlooked and the form mistaken for the substance. The British North America Act was the production of colonial statesmen, the only change made or suggested by imperial statesmen being a change of the name from the “Kingdom” of Canada to the “Dominion” of Canada out of regard to the supposed sensibilities of the United States! For reasons not germane to the present purpose, I think that the change did harm to the Empire at large.


12 The “Government of Quebec” formed by the Royal Proclamation of 1763 after the conquest of Canada and enlarged by the Quebec act of 1774 was in 1791-1792 divided into two provinces, Upper Canada and Lower Canada: these two provinces were united into one called “Canada” by the Union Act of 1840, 3, 4 Vic. c. 35 (Imp.) and it was this province of Canada composed of Upper Canada or Canada West (now Ontario) and Lower Canada or Canada East (now Quebec) which desired to unite with Nova Scotia and New Brunswick in one Dominion.

Nova Scotia may be considered as beginning her provincial life in 1749. The extent of the province was not very accurately defined but it included what is now New Brunswick and considerable more territory: in 1784 New Brunswick became a separate province and in 1820 Cape Breton theretofore separate was united with Nova Scotia.

13 With a small “c”—not a “Constitution.”
in the act for many matters—accordingly we stand between Britain and the United States—we inherit the traditional rules of England and at the same time we have, authoritatively laid down in writing, much by which we are bound. The British North America Act and the amendments to it are legally binding like the constitutions of the United States and the separate states; no Canadian Parliament or provincial legislature can lawfully transgress these, and any attempt to do so would be restrained by the courts on the complaint of one injured. But at the same time a large sphere is left uncontrolled by the written law—and in that sphere, Parliament and legislature are wholly uncontrolled—they have the traditional rules, but they may legally disregard these rules—the courts there have no power, the electorate must judge of the propriety of acts in that sphere and reward or punish accordingly.\textsuperscript{14}

Moreover, a large part of the British North America Act gives rise to no litigation. The preamble contains this statement:

"It is expedient not only that the constitution of the legislative authority in the Dominion be provided for but also that the nature of the executive government therein be declared."

Much of the Act is concerned with the executive and that part does not give rise to litigation at all; the same is true of the formalities to be observed in legislating.

The portions of the act which have given rise to litigation are chiefly sections 91 and 92 which give the legislative powers

\textsuperscript{14} It is in part due to the double code of rules that some Canadians, amongst them members of the Bar, are apt to use the words "constitution," "constitutional," "unconstitutional" in the American sense—to a certain extent the influence of American usage is felt. The practice is perhaps increasing: it is sometimes found in Parliament—even so great a master of the English tongue and of constitutional law and practice as the late Sir Wilfrid Laurier has been known to offend in this regard. The accurate speaker uses the terms intra vires and ultra vires for the American "constitutional" and "unconstitutional."

In Bell v. Burlington, (1915) 34 Ont. Law Rep. 619, 9 O. W. N. 44, 182 counsel argued before a divisional court of which I was a member that his clients were not liable to pay taxes because by reason of a change in the boundaries of the municipality they had not had an opportunity to vote for the members of the town council which imposed the taxation, and "taxation without representation is unconstitutional." In giving judgment I said: "That this maxim is profoundly true may certainly be admitted, but we must carefully distinguish between the meaning of the word 'unconstitutional' in the British and in American usage." I pointed out that the maxim used the word in the former sense, and that if it were found that the taxation imposed was legally within the powers of the council it would be upheld as valid— intra vires although unconstitutional.
of the Parliament of the Dominion and of the legislatures of the provinces respectively.\textsuperscript{15} A very considerable amount of private litigation even under these sections is prevented by references by the governments of the Dominion and the provinces as to the legality of legislation or proposed legislation.

In the Dominion, a statute\textsuperscript{16} provides for a reference to the Supreme Court of Canada by the governor-in-council (i.e., the government) of important questions of law or fact touching the interpretation of the British North America Act, the powers of the Parliament of Canada, the legislatures of the provinces or the governments.

Before dealing with the sections already mentioned, it will be well to give a somewhat general outline of our system. An intelligent foreigner from reading the constitution of the United States could form a fairly accurate conception\textsuperscript{17} of the methods

\begin{itemize}
\item \textsuperscript{15} The Dominion of Canada was originally constituted of four provinces, Ontario (formerly Upper Canada or Canada West) Quebec (formerly Lower Canada or Canada East)—Nova Scotia and New Brunswick—these were the provinces whose powers were defined in the act. In 1870 the new province of Manitoba was created by the Dominion Parliament; in 1871 British Columbia was admitted as a province; in 1873, Prince Edward Island; in 1905 the new provinces of Alberta and Saskatchewan were created by the Dominion Parliament—so that now there are nine provinces in the Dominion, all with substantially the same powers. There is also the Yukon Territory as well as a vast unorganized extent of territory toward the North.

\item \textsuperscript{16} Canada Rev. Stat. 1906, cap. 139 sec. 60 which reads as follows:
(a) the interpretation of The British North America Acts, 1867 to 1886; or,
(b) the constitutionality or interpretation of any Dominion or provincial legislation; or,
(c) the appellate jurisdiction as to educational matters, by The British North America Act, 1867, or by any other Act or law vested in the Governor in Council; or,
(d) the powers of the Parliament of Canada, or of the legislatures of the provinces, or of the respective governments thereof, whether or not the particular power in question has been or is proposed to be executed; or,
(e) any other matter, whether or not in the opinion of the court ejusdem generis with the foregoing enumerations, with reference to which the Governor in Council sees fit to submit any such question; may be referred by the Governor in Council to the Supreme Court for hearing and consideration; and any question touching any of the matters aforesaid, so referred by the Governor in Council, shall be conclusively deemed to be an important question."

The right of the Dominion to pass legislation of this kind, referring to the Supreme Court the question of the validity of a statute or a proposed statute has been approved by the Supreme Court itself and by the Judicial Committee of the Privy Council. In re References by the Governor-General etc. (1910) 43 Can. S. C. R. 536; on appeal [1912] A. C. 571. Some of the provinces have similar legislation, e.g., Ontario, Rev. Stat. 1914 c. 85; Manitoba, Rev. Stat. 1913 c. 38.

\item \textsuperscript{17} There are some exceptions e.g. the electoral college was theoretically to be composed of a number of gentlemen of high standing who should
of government, etc., in the United States, but that is not the case in the government, etc., of Canada—the act must be read in the light of constitutional history and practice, and anyone ignorant of these who should take the Act at its face value and read it literally would go grievously astray.

Section 9 provides that the executive government and authority in and over Canada is to continue and be vested in the queen (now of course the king) and the appointment of a governor-general is provided for to carry on the government in the name of the queen (king). This once expressed a reality—the king was once an actual ruler and his personality was of importance—but now the sovereign does not meddle with administration or policy; his ministers responsible to the representatives of the people in parliament decide all such matters. If their course does not please the House of Commons, they are voted out of power and new ministers are put in their place.18

The Governor-General is in much the same case in Canada—he in theory carries on the government in the king's name—in fact the government is carried on by the ministers. He is elected by the people to exercise their judgment in selecting a president—and that is how the document sounds—everyone knows that the personnel of this college is of not the slightest importance but that the members are a mere conduit pipe to convey the thoroughly understood wishes of the voters. If after the election in 1916 every elector in the college believed Mr. Taft to be the best man for the presidential office not a vote would have been diverted from Wilson and Hughes even if they had been both considered utterly unfit.

The last royal veto of a bill which had passed Parliament was that of the triennial bill reducing the term of Parliament to three years by the sour but able Dutchman, William III, in 1693; the bill was passed again in 1694 and this time it received the royal assent.

William III had a greater interest in continental affairs than in English politics but from time to time he exercised his royal prerogative with vigor. Anne gave her ministers some trouble but she was easily managed through her personal friends; George I knew no English and took no interest in his insular kingdom preferring that of Hanover on the Continent; George II did not interfere to any noticeable extent; George III was a king in fact as well as in name, he made and unmade ministries, took part in elections, he ruled England with the result of the loss of America; George IV was not so conscientious as his father but almost equally troublesome—his life of selfishness and debauchery disgusted his subjects and had his successor been like him it is not unlikely the fate of the monarchy would have been sealed, but William IV the sailor king placed himself in the hands of his ministry and the ascension to the throne of the girl queen Victoria and her sensible conduct practically ended republican sentiment in Britain. Edward VII was and George V is a model of constitutionalism; and it is certain that there is no place in the throne for the meddler in politics or the open debauchee.

It is a common but true saying that the king reigns but does not rule, the president rules but does not reign.
appointed by his majesty i. e. by the imperial administration. The governor-general in council i. e. the Dominion administration appoints the lieutenant-governor of each province—that officer has the same functions and (want of) authority in the province which the governor-general has in the Dominion.

It will be seen, then, that the governor-general and lieutenant governors have no kind of analogy with the president of the United States—wholly different persons in Canada stand in that relation, i. e., the prime ministers.

The Dominion has two houses of Parliament, the Senate (the members of which are nominated by the government and sit for life) and the House of Commons (the members of which are elected by the people). There are two political parties and the party lines are drawn very strictly: each has its chosen leader and the leader of the party which is dominant in the House of Commons is the prime minister. The prime minister selects his colleagues all of whom must be members of Parliament and they collectively form the administration or government, and are responsible for administration and legislation. The same remarks apply in the provinces.

There is much closer analogy between the prime minister and the president than between the governor and the president.

19 But care is taken that no one is appointed not approved of by the Canadian Administration.
20 That is in normal times—the war has made strange bed-fellows—there is at this time a union government composed of conservatives and liberals in nearly equal numbers, and there is also a liberal party, composed of those who followed the late Sir Wilfrid Laurier in his opposition to conscription and a few others. Normally, however, there are the two parties, conservative and liberal; third parties make their appearance from time to time, like the "grangers," the "equal rights party," etc., but so far they have not prospered. At the present time a new third party has emerged in Ontario, the "united farmers"; time will show how successful it will be. Then the returned soldiers may form a party or may possibly act like the G. A. R., in swelling one or other of the existing parties.
21 While the prime minister must like all other ministers of the crown be a member of Parliament, it is not necessary that he should be in the House of Commons; he may be a Senator as were Sir John J. C. Abbott, (Premier, June, 1891-December, 1892) and Sir Mackenzie Bowell (Premier, December, 1894-April, 1896); the other six prime ministers, Sir John Alexander Macdonald (July 11th, 1867-November 7, 1873, and October 17, 1878-June, 1891), Honorable Alexander Mackenzie (November °7, 1873-October 17, 1878), Sir John S. D. Thompson, (December, 1892-April, 1896), Sir Charles Tupper, Bart., (April, 1896-July, 1896), Sir Wilfrid Laurier (July, 1896-October, 1911) and Sir Robert Laird Borden, (October, 1911, still in office) all belonged to the popular House.
But the term of office is not fixed: so soon as the prime minister loses the confidence of the popular House, he must give way to another—unless he can obtain the approval of the elector. If defeated in a test vote in the House, he may call a new election—if the majority of those returned to the House support him, he remains in office, if not, he must retire and the leader of the opposite party comes in. 22

All the members of the administration being in one or other of the Houses of Parliament, they explain and defend their conduct in office and the measures advanced by the government.

The Senate is of little importance compared with the House of Commons: it has no part in determining what political party shall hold the reins of power: it checks, alters and sometimes defeats proposed legislation but otherwise is of little significance. 23

In all but two of the provinces, there is only one House, and that is wholly elective. 24

AMENDMENTS

There is no power given to the Dominion to amend its own "constitution." The reason for this is historical. Lower Canada, now Quebec, was and is largely populated by French-speak-

22 Sometimes a new prime minister takes the place of the old by an arrangement in the party itself, e.g. Sir John J. C. Abbott became prime minister in 1891 on the death of Sir John A. Macdonald. He retired in 1894 in favour of Sir John S. D. Thompson; on Sir John Thompson's death in 1896, he was succeeded by Sir Mackenzie Bowell, who retired in 1896 in favour of Sir Charles Tupper. Sir Charles failed to carry the country on the general election of 1896 and had to retire, being succeeded by Sir Wilfrid Laurier of the other party "the leader of the opposition."

Sir John Macdonald was in office 19 years; Sir Charles Tupper 3 months.

In Ontario, Sir Oliver Mowat was prime minister for nearly 24 years: Hon. Edward Blake for 10 months.

23 The extraordinary difference in the relative power and importance of the Senate of the United States and the Senate of Canada calls for a separate treatise by itself. I do not here enter into the enquiry as to the causes of this difference.

24 The two provinces with two houses are Quebec and Nova Scotia; Ontario came into Federation with only one House (1867); so did British Columbia (1871); New Brunswick abolished her "upper house" or Legislative Council by the Act of 1891 effective in 1892; Prince Edward Island did the same in 1893; Manitoba formed as a province with two Houses got rid of her Legislative Council in 1876; Saskatchewan and Alberta were created with but one House. "No province with only one chamber has ever desired two; while at least one of those with two (i.e., Nova Scotia) has groaned under the imposition. Nor has there been found crudity or want of thought more in the unicameral than in the bicameral Provinces." "The constitution of Canada, etc.," p. 103.
ing, Roman Catholic people of French descent: the other three provinces by English-speaking, generally Protestant and of English, Scottish or Irish descent. The French Canadian from the very beginning has been tenacious of his language and religion and not less so of his law and institutions. The law of French Canada is based upon the coutume de Paris and ultimately upon the civil law of Rome, that of English-speaking Canada upon the common law of England. From the time of the conquest, the French Canadian was jealous of English interference, of English influence, and was ever on his guard against English meddling with his affairs.

The British North America Act, being the production of French Canadians and English-speaking Canadians, represented their agreement with each other—an agreement which left French Canada to manage her own affairs: and the French Canadians would never have agreed to a provision authorizing a change in the agreement without their consent: they knew of course, that they were largely outnumbered by the English-speaking who were not always sympathetic with the French view. Accordingly there is no provision for amending the constitution of the Dominion.

What is done when it is desired to amend the constitution is simple—an address to the king passes both Houses of Parliament asking for an Act in the form presented—that is sent to Westminster and an Act is passed as of course.26

There being no need to consult French sensibilities in the provinces other than Quebec and the French being overwhelmingly powerful in Quebec itself, there was no need of protecting the provinces from constitutional amendment and consequently the provinces are given the power to amend their constitutions "except as regards the office of the lieutenant-governor." This exception would not on its face appear to lead to litigation: but a very important decision is based upon it.

26 The act being a compact, no such address is transmitted unless the Houses of Parliament are unanimous (or practically so); no amendment of the act asked for has been refused or even debated, no amendment has ever been made unless it was asked for by Canada—it is our business and that of no one else, English or otherwise.

It is from paying attention to the form and not to the substance that certain critics have made strictures on my account of affairs Canadian—strictures which would be called silly were they not due to ignorance. Amendments to our constitution are in fact made by ourselves; we seek Imperial legislation to give them legal validity.
In 1916, the Legislature of Manitoba passed an act authorizing any number of electors not less than eight per centum of the voters at the previous general election to petition the legislature for the passage of any proposed law: the speaker was on being satisfied of the sufficiency of the signatures to lay the proposed law before the House and if the House refused or omitted to pass it, it was to be submitted to a vote of the electors: if it secured a majority of the votes, it became law. There was also a provision for referring a law to a vote with similar results. The validity of this legislation was referred under the authority of a provincial act similar to the Dominion statute above mentioned to the Manitoba court of king's bench—the chief justice gave a pro forma judgment affirming the validity of the act but the court of appeal reversed this decision by a unanimous judgment. An appeal was taken to the Judicial Committee of the Privy Council at Westminster and that board affirmed the decision of the Manitoba court of appeal. Their lordships of the privy council thought “that the language of the Act cannot be construed otherwise than as intended seriously to affect the position of the lieutenant-governor as an integral part of the legislature and to detract from rights which are important in the legal theory of that position”—the legal theory being that the lieutenant-governor directly represents the sovereign in the province and that when he “gives to or withholds his assent from a bill . . . it is in contemplation of law the sovereign that so gives or withholds assent.”

It is to be noticed that this decision is based upon the express exception of the act. It has long been held that both the Dominion and the provincial legislative bodies are supreme in the classes of cases given to their jurisdiction—they have original jurisdiction, they are not simply delegates of the Imperial Parliament, but may themselves delegate their powers or any part

28 See note 16, supra.

of them. The learning on the power of a state legislature to
delegate its powers is fairly well collected in Cooley's Constitutional Limitations and I do not pursue the enquiry.

The power given to the provinces to amend their constitution has had results which seem strange and even alarming to an American e.g. the legislatures of New Brunswick, Prince Edward Island and Manitoba abolished the second chamber, that of Ontario elected for four years extended their term to six, that of Alberta has made twelve of its members, members of the succeeding House without nomination or election, the Dominion has taken away the right to vote from those of enemy birth naturalized before 1902.

While the Parliament or legislature can extend its own life, the government of the Dominion or province can have an election at any time.

The Ontario Legislature acted as did the Imperial Parliament elected for three years under (1694) 6 W. & M. c. 2, which in 1716 extended its own life to seven years by the act 1, Geo. I, St. 2, c. 38, the well-known Septennial Act upon the "constitutionality" of which much was said on both sides.

During the war, the Imperial Parliament has several times extended its own life.

The statement is general and not strictly accurate. The statute may be looked at for particulars. See the War Time Elections Act, 7-8 Geo. V, c. 39, and my discussion of it in "The Constitutional Review," Vol. 2, April and July 1918, pp. 71 sqq. 157 sqq. The right to deprive any class of citizens of a vote was expressly affirmed in the Judicial Committee of the Privy Council in Cunningham v. Tomey Homma [1903] A. C. 151 and Parliament approved the principle: "The rights of British subjects in Canada are rights given under the law of Canada; the law of Canada must be dictated by the needs of the hour for the safety of Canada," inter arma silent leges, and as Sir Wilfrid Laurier said: "If the Germans win the war nothing else on God's earth matters." The celebrated fifteenth amendment furnishes the American rule.
Of course in the United States, the time of elections and the life of the legislature are fixed by the constitutions and cannot be changed: while disfranchisement exists only as a punishment for crime or as a consequence thereof.

NEW PROVINCES

The British North America Act did not contain an express power to create new provinces. Nevertheless in 1869-70 the Dominion Parliament provided for the formation of a new province, Manitoba, out of part of the newly acquired Hudson Bay Territory: it was not quite clear that this legislation was valid and an address was presented from both Houses of Parliament to her majesty and an act was obtained confirming the Canadian legislation and giving the power expressly to create new provinces. Article IV, section 3 of the constitution of the United States provides for new states, etc.

DISALLOWANCE OF LEGISLATION

While the Dominion has plenary power to legislate upon the classes of subjects allotted to it, it is not to be forgotten that it is a part of the far-flung British Empire: the Dominion Parliament may be supposed to have Canada only in view, and its legislation might by possibility imperil or injuriously affect the interests, even the peace and security of the Empire at large. Accordingly when a bill is passed by both Houses of Parliament and presented to the governor general for signature, he has the power instead of assenting to it at once in the name of the king, to withhold that assent or reserve it for the signification of the king's pleasure, i.e. for the opinion of the home ministry. There has been no instance of assent being withheld—if it should be a crisis would arise—or has any bill been reserved. But even if assented to (which is the invariable practice) the king through

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37 Of course these are the merest common places; Black, Constitutional Law, 3rd ed. pp. 672 sqq. and cases there cited may be referred to. See the 14th constl. amendment.

38 The original acts are 32, 33 Vic. c. 3, (Can.) and 33 Vic. c. 3 (Can.), the address is referred to in 206 Hansard (3rd series) p. 1171, the Imperial Act is (1871) 34 Vic. c. 28 (Imp.). It was under this legislation that the Provinces of Alberta and Saskatchewan were formed by the Dominion in 1905 by (1905) 4, 5, Edw. VII, cc. 3 and 42 (Dom.). The power to create new states and the method pursued are fully set out in Black, Constitutional Law, 3rd ed., 281, sqq. See the constitution, art. IV, sec. 3.
the home administration may within two years of its receipt disallow it—this has been done with only one bill and that rather at the instance of the Canadian administration.  

So, too, provincial legislation may be disallowed by the Dominion administration within one year: the practice of the Dominion government has not been uniform but of recent years the power of disallowance has not been exercised except where the legislation is ultra vires the province. That the legal power exists in every case is, however, undoubted, and the exercise of the power has at least twice been the battle ground of the political parties, and may be again—when it will be for the electorate to judge whether the power was rightly exercised in the interests of Canada.

Of course, there is nothing like this in the United States: the states are wholly separate and independent: and they cannot be controlled in their legislation by the central government.

**DIVISION OF SUBJECTS OF LEGISLATION**

Sections 91 and 92 of the British North America Act enumerate the classes of subjects of legislation allotted to the central government. They are as follows:

39 In May, 1873, a bill authorizing the examination of witnesses on oath before Parliamentary Committees in certain cases received the assent of the governor-general; the Canadian minister of justice expressed doubts of its legality and the Law Officers at Westminster advised that the Bill was ultra vires the Dominion, i.e., "unconstitutional" in the American sense and it was disallowed on that ground.

40 Rather to the embarrassment of the United States in some well-known cases California seems to have been particularly recalcitrant.

The course pursued if the home administration considers an act of the Canadian Parliament objectionable is to communicate with the Canadian Government explaining fully the objectionable features. After the matter has been considered, the Canadian Parliament at its next session heals the defects. There are to be no more quarrels between the home government and colonial parliaments, one Bunker Hill was enough.

41 Sections 91 and 92 read as follows:

"91. It shall be lawful for the Queen, by and with the advice and consent of the Senate and House of Commons, to make laws for the peace, order, and good government of Canada, in relation to all matters not coming within the classes of subjects by this act assigned exclusively to the Legislatures of the Provinces; and for greater certainty, but not so as to restrict the generality of the foregoing terms of this section, it is hereby declared that (notwithstanding anything in this Act) the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated; that is to say: 1. The Public Debt or Property; 2. The regulation of Trade and Commerce; 3. The raising of money by any mode or system of Taxation; 4. The borrowing of money on the public credit; 5. Postal Service; 6. The Census and Statistics; 7. Militia, Military and Naval Service and Defence; 8. The fixing of and providing for the salaries and allowances of civil and other officers of the Government of Canada; 9. Beacons, Buoys,
Dominion and the provinces respectively—the Dominion being allotted “all matters not coming within the classes of subjects by this act assigned exclusively to the legislatures of the provinces.” So that the unenumerated matters go to the Dominion.


EXCLUSIVE POWERS OF PROVINCIAL LEGISLATURES.

“92. In each province the legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated, that is to say: 1. The Amendment from time to time, notwithstanding anything in this Act, of the Constitution of the Province, except as regards the office of Lieutenant Governor; 2. Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes; 3. The borrowing of money on the sole credit of the Province; 4. The establishment and tenure of Provincial offices and the appointment and payment of Provincial officers; 5. The management and sale of the Public Lands belonging to the Province and of the timber and wood thereon; 6. The establishment, maintenance, and management of public and reformatory prisons in and for the Province; 7. The establishment, maintenance, and management of hospitals, asylums, charities, and eleemosynary institutions in and for the Province, other than marine hospitals; 8. Shop, saloon, tavern, auctioneer, and other licences in order to the raising of a revenue for Provincial, local, or municipal purposes; 10. Local works and undertakings other than such as are of the following classes: a. Lines of steam or other ships, railways, canals, telegraphs, and other works and undertakings connecting the Province with any other or others of the Provinces or extending beyond the limits of the Province; b. Lines of steam ships between the Province and any British or foreign country; c. Such works as, although wholly situate within the Province, are before or after their execution declared by the Parliament of Canada to be for the general advantage of Canada or for the advantage of two or more of the Provinces; 11. The incorporation of companies with Provincial objects; 12. The solemnization of marriage in the Province; 13. Property and civil rights in the Province; 14. The administration of justice in the Province, including the constitution, maintenance, and organization of Provincial Courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in those Courts; 15. The imposition of punishment by fine, penalty, or imprisonment for enforcing any law of the Province made in relation to any matter coming within any of the classes of subjects enumerated in this section; 16. Generally all matters of a merely local or private nature in the Province.”
In the United States anything not expressly or impliedly given to the central authority remains in the states, by the tenth constitutional amendment.

It cannot be too carefully borne in mind that the powers of the Dominion and provinces are within the limits prescribed by the act as plenary and ample as the Imperial Parliament possessed and could bestow.\(^4\)

The legislative power is to be exercised not directly by the people but by Parliament and legislature, in other words, there is to be representative government. This in itself would have been sufficient to decide the initiative and referendum case from Manitoba already referred to, and the principle was in fact much relied on especially in the Manitoba court. That the people were considered to be represented by those whom they had elected to represent them was well illustrated at the time the British North America Act was under consideration in the Imperial Parliament. The legislature of Nova Scotia had approved the scheme of union but a strong agitation sprang up headed by very influential leaders, and a very numerously signed petition was sent from the province to Westminster against the proposed act. It was, however considered that the attitude of the province must be gathered from the action of the legislature rather than from that of the people or some of them and the petition was wholly ineffective.\(^4\)

As has already been indicated this does not prevent the legislative bodies from giving large powers to boards, councils, etc. For more than a century we have had some kind of municipal system, for three quarters of a century a somewhat extensive one—the province divided into cities, towns, villages, counties, townships, each of these municipalities has its council elected by the people and having very large powers of legislation in matters closely affecting the inhabitants of the municipality. So, too, boards of commissioners have been formed which validly enacted regulations in the nature of by-laws of a local character for the good government of taverns, the sale of liquor, etc.\(^4\)

\(^4\) See the discussions in 185 Hansard (3rd Series).
As was to be expected it was sometimes found impossible to draw a clear line of demarcation in the act between the subjects allotted to Dominion and those allotted to province: an examination of the sections will at once make manifest that many subjects are from one point of view in one class, from another in another. This has been the cause of considerable litigation—I shall mention a few instances only.

By section 91(26) the Dominion legislates on "Marriage and divorce;" by section 92(12), the province on "The Solemnization of marriage within the province." Under the former, the Dominion in 1882 repealed all laws prohibiting marriage with a deceased wife's sister, under the latter the Province of Ontario in 1907 authorized the high court to adjudge that a valid marriage had not been entered into if a party under 18 had not obtained the consent required by the Marriage Act.

For many years much irritation was felt in Protestant circles at the practice of the Quebec courts declaring to be illegal, marriages in that province (usually between Catholic and Protestant) which were not in accordance with the ecclesiastical and canon law of the Church of Rome. Legislation was proposed in the Dominion Parliament to correct this practice and protect the innocent spouse; but before passing the bill it was thought wise to ask the Supreme Court of Canada whether such a statute could be validly enacted. The Supreme Court held that the proposed bill was ultra vires the Dominion, and this was sustained in the Judicial Committee.

Section 91(8) gives the Dominion power over "the fixing of and providing for the salaries and allowances of civil and other officers of the Government of Canada," and it was long thought that the provinces could not give power to municipalities to tax Dominion-paid salaries, notwithstanding section 92(8) where-
by the province is given power over "municipal institutions in the province." But this view of the law received its deathblow in the Supreme Court of Canada in 1908 and now judges and civil servants of the Dominion generally are taxable like ordinary mortals.48

Section 91(15) gives the Dominion "banking, etc.:" but nevertheless the province under section 92(2) "direct taxation within the province in order to the raising of a revenue for provincial purposes" can tax banks doing business in the province.49 By reason of the restriction to "direct taxation" however, the province cannot impose a tax of ten cents on each exhibit produced in court,50 or impose a fee of twelve dollars in stamps upon filing a jury notice51 or compel an insurance company to put a stamp on every policy, renewal and receipt. All taxation which might from some point of view be considered indirect does not, however, fall within the prohibition—brewers and distillers may be compelled to pay a license fee, medical men to pay a fee on being registered, mortgagees to stamp mortgages, the registrar to pay to the county a proportion of the fees received for registering deeds, etc., although they contend with more or less

48 The former view was based upon such cases as Leprohon v. City of Ottawa, (1877-8) 40 Up. Can. Q. B., 478, 2 Ont. Ap. Rep. 522; Exp. William, (1898) 34 New Bruns. 530; Desjardins v. Cité de Quebec, (1900) 18 Que. Sup. Ct. 434; Exp. Burke, (1896) 34 New Bruns. 200; all these were over-ruled by Abbott v. City of St. John, (1908) 40 Can. S. C. R. 597, 38 New Bruns. 421. In my own court we recently held that the salary of a judge is taxable by the city in which he lives, reversing the judgment of the county court. City of Toronto v. Morson, (1917) 40 Ont. Law Rep. 227.


50 Attorney-General of Quebec v. Reed, (1883) 10 A. C. 141, 54 L. J., P. C. 12, 52 L. T. 393, 33 W. R. 618. The prothonotary of the superior court at Montreal refused to file a promissory note (upon which Reed, the plaintiff, based his action) without the ten cent stamp required by the legislation of the Province of Quebec, 43, 44, Vic. c. 9 (Que.); the plaintiff took out a rule to compel him to do so. The attorney-general of the province intervened to support the prothonotary. Mr. Justice MacKay held that the legislation was ultra vires; the court of queen's bench in appeal (Monk, Ramsey, Tessier and Cross, J. J.; Dorion, C. J. dissenting) reversed this decision but it in its turn was reversed by the supreme court of Canada whose reversal was sustained by the Judicial Committee of the Privy Council. Loranger v. Reed, (1882) 26 Low. Can. Jurist 331, Reed v. Mosseau, (1883) 8 Can. S. C. R. 408; Attorney-General for Quebec v. Reed, (1884) 10 A. C. 141, 54 L. J., P. C. 12, 52 L. T. 393, 33 W. R. 618, 3 Cartwright Const. Cas. 190.

51 Plummer Wagon Co. v. Wilson, (1886) 3 Man. Rep. 68. But there is no interference with the long established fees in Ontario for such purposes. The insurance case is Attorney-General for Quebec v. Queen Insurance Company, (1878) 3 A. C. 1090, 38 L. T. 897.
justice that they may be able to shift the burden to the shoulders of others.\textsuperscript{52}

There is no such limitation to the power of taxation given to the Dominion by section 91(3) "the raising of money by any mode or system of taxation."

The provisions of the constitution of the United States as to taxation are of course well known to every American lawyer—the question of direct and indirect taxation has come up more than once.\textsuperscript{53} There is no such provision as to direct taxation by either Dominion or province as is contained in the constitution, article 1, section 9, that it must be "in proportion to the census or enumeration."

Nor is there any prohibition against a tax or duty on articles exported.\textsuperscript{54}

The Dominion authorizes the governor in council by proclamation to impose an export duty on nickel or copper matte or ore, crude or partially manufactured, lead, silver, pig lead, etc.\textsuperscript{55}

Our province of Ontario has gone even further and absolutely forbids the export of logs, etc., cut on public lands altogether, requiring their manufacture in Canada into boards, deals, pulp, paper, etc., and the Dominion forbids the exportation of wild turkey, quail, etc., under penalty of fine and seizure of the game.\textsuperscript{56}

\begin{footnotesize}
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\item \textsuperscript{53} Some of these cases can be and have been supported on the strength of section 92 (9) "shop, saloon, tavern . . . and other licenses in order to the raising of a revenue for provincial, local or municipal purposes."
\item \textsuperscript{54} Constitution of the United States, art. 1, sec. 2, "representatives and direct taxes shall be apportioned . . ." Sec. 8 "The Congress shall have power to levy and collect taxes, duties, imports and excises . . ." Sec. 9, "No capitation or other direct tax, shall be laid unless in proportion to the census or enumeration . . ." In Springer v. United States (1880) 102 U. S. 586, 26 L. Ed. 253, it was considered that "direct taxes" within the meaning of the constitution are only capitation taxes and taxes on real estate, but the meaning was extended in Pollock v. Farmers' Loan & Trust Co., (1894) 157 U. S. 429, 39 L. Ed. 759, 15 S. C. R. 673, s. c. (1895) 158 U. S. 601, 39 L. Ed. 1108, 15 S. C. R. 912 (rehearing by the full court) to include taxes on the rent or income of real estate, and also taxes on personal property or on the income of personal property. Such direct taxes to be valid must be apportioned as provided for in art. 1, secs. 2, 9.
\item \textsuperscript{55} See Can. Rev. Stat. 1914 c. 29.
\item \textsuperscript{56} See Ont. Rev. Stat. 1906 c. 50.
\end{itemize}
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Returning from this digression, section 92(10), a, excludes from provincial jurisdiction "... railways ... extending beyond the limits of the province" and therefore that subject is for the Dominion and no province or municipality under provincial authorization can validly legislate affecting the construction or operation of a railroad of this character; but that does not prevent section 92(13) being fully effective. The province or a provincial municipality could not compel a railway company to erect proper fences on their railway on penalty of being responsible for all cattle killed on the line or compel the company to make its ditches of any prescribed construction but it can compel the keeping of the ditches open and the removal of obstructions which would cause inundation of the adjoining lands and the workmen's compensation for injuries act of the province applies for the protection of workmen on the railway.

There are indeed instances where there is almost or quite insuperable difficulty in separating the jurisdictions so that they actually overlap or interlace—in such cases neither legislation is ipso facto, ultra vires, either will be intra vires unless and until interfered with by the other, and where there are legislation by both Dominion and province, the provincial legislation must give way.

Leaving this branch of the subject—it is next to be observed that our legislators are not prohibited from passing ex post facto laws as is the case in the United States.

Nor is there any prohibition like that in the constitution forbidding the states to pass any "law impairing the obligation of contracts." When "contract" was interpreted as including a charter to a university, the decision in the Dartmouth College Case was inevitable—the old Province of Upper Canada and that of Canada destroyed the Charter of King's College, Toronto, and changed its whole character—took away the rights of

60 U. S. constitution art 1. secs. 9, 10.
61 Ibid., art. 1, sec. 10.
the Church of England and made a new University of Toronto wholly nonsectarian. New Brunswick acted in much the same way with its provincial university and there can be no doubt of the power still existing.

PROPERTY AND CIVIL RIGHTS

Much of the above and much of the difference between the law of the United States and ours derive from the power given to the provinces by section 92(13) over "property and civil rights in the province." In the absence of such limitations as are contained in the constitution of the United States, such as has been mentioned and the last clause of the fifth constitutional amendment directing "nor shall private property be taken for public use without just compensation," our provincial legislatures have the undoubted power to take private property for public use or even for any use whatever public or private and without compensation.

The leading case is one in which on the assumption that a certain mining company had not done the work required to entitle them to a certain mining location, the minister had granted it to another company and the legislature passed an act vesting the location in this company. I held assuming that the first named company had acquired the right to location, the legislature had the power to take it away and give it to another: and that view of the law was sustained by all the courts.  

Mill privilege owners are given the right to expropriate land above and below their mill to increase their water power: in most if not all cases, compensation is directed to be paid but

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63 Florence v. Cobalt, (1908) 18 Ont. Law Rep. 275. I used these words: "If it be that the plaintiff acquired any rights . . . the legislature had the power to take them away. The prohibition 'Thou shalt not steal' has no legal force upon the sovereign body."

I would not have it understood that the action of the government and legislature was dishonest. The government satisfied itself by careful enquiry and satisfied the legislature that the plaintiff company was asserting a wrongful claim; although I decided the case on the hypothesis that the plaintiff had acquired a right to the property, I did not decide that it had. The prime minister in the house when the case was under appeal declared that if the appeal court should decide that the plaintiff company had any right, it would be amply compensated by the province for its loss. The court of appeal and the Judicial Committee both decided that the plaintiff company had no right whatever. If any government should be guilty of dishonesty, it could not succeed at the next election, even if it should be able to carry the House; we are reasonably honest as peoples go.
such a direction is in no way essential to the validity of the statute.

Then the provisions of a trust deed or a will can be changed by a provincial legislature.\textsuperscript{64}

A provincial legislature can and a state legislature cannot put a retro-active interpretation upon the words of its own statute different from that already given to the words by a court of competent jurisdiction.\textsuperscript{65}

Our legislatures may go still further and prohibit an action in the courts altogether; they may direct the courts to stay their hand in any action already brought or to be brought.\textsuperscript{66}

That a provincial legislature can confiscate private property within the province is wholly beyond question; but its jurisdiction in that regard is not extra territorial. In 1909 Alberta guaranteed certain bonds of a railway company, the money to be raised by the sale of the bonds to be deposited in a bank in the province and paid out to the company from time to time as the road was built. The bonds were sold in England, the company defaulted in the interest, the road was not completed, but some $6,000,000 of the proceeds of the bonds lay in the Royal Bank at Edmonton, Alberta, to the credit of a special account of the

\textsuperscript{64} The leading case is the Goodhue Will Case, re Goodhue, (1872) 19 Gr. Ch. (Ont.) 366; 1 Cartwright Const. Cases 360. Goodhue had left a will which directed the residuary estate to accumulate during the life of his widow—the children of any child who should die in her lifetime to take the parent's share at her death. The children of Goodhue executed a deed providing that each should have his share at once, and the legislature validated this deed. The court held that this legislation was intra vires as being on "property and civil rights." There is a rule of the legislature that before such a private bill is passed, it is to be submitted to two justices of the supreme court who report as to its legal effect and its advisability, but this is a domestic rule and its observance is in no way essential to the validity of the legislation. Such legislation takes place almost every year, sometimes to disentangle or explain a complicated, inconsistent will or settlement, sometimes for the advantage of beneficiaries in relieving them of burdensome and unreasonable restrictions, sometimes for public reasons. It is a jurisdiction that should be and is exercised with extreme care; but there is no "constitutional limitation" preventing its exercise in any case.


\textsuperscript{66} In Smith v. London, (1909) 20 Ont. Law Rep. at p. 142, I said: "The legislature has said that this action shall be stayed. My duty is loyally to obey the order of the legislature and it is stayed accordingly."

For the American practice see such cases as State v. Adams, (1869) 44 Mo. 570.

Then we have a number of indemnity statutes which prevent actions being brought at all.
treasurer of the province and the company. A new government coming in, the legislature passed an Act declaring, inter alia, that the $6,000,000 and interest was the property of the province free and clear of any claim by the company. The bank refused to pay the money. The trial court and the supreme court of Alberta held the legislation valid but this decision was reversed in the Judicial Committee of the Privy Council on the ground that the purchasers of the bonds were to be paid at Montreal outside the province of Alberta, that their civil right to be paid had its locus there and that the legislation interfered with rights outside the province.67

This is a convenient place to say a word of the jury: as is well known the seventh constitutional amendment gives the right to a trial by jury in suits at common law where the value in controversy exceeds twenty dollars.

In our province beginning with 1868 there has been a progressive movement against compulsory jury trials in civil cases so that at present there are only a few classes of cases (such as libel, slander, etc.) in which a jury trial is as of right; in all other cases the judge may strike out the jury and try the case himself.68

I do not think it is necessary further to pursue this subject; it may be said that to determine whether any legislation is or is not intra vires, we should examine the list of subjects of legislation allotted to the legislating body, and if the legislation is upon any of these subjects it is valid.

It has been said:

"In matters within its jurisdiction, the legislature has the same powers as Parliament, and 'the power . . . of Parliament is so transcendent and absolute, that it cannot be confined, either for causes or persons within any bounds . . . It has sovereign and uncontrollable authority in the making, confirming, enlarging, restraining, abrogating, repealing, reviving and expounding of laws concerning matters of all possible denominations:' Blackstone's Commentaries, Book 1, p. 160. Within the jurisdiction given to the legislature of the province no power can interfere with the Legislature, except, of course, the Dominion authorities, whose interference may occasion disallowance.


68 See address delivered before the Judicial Section of the American Bar Association at Boston, September 3, 1919.
“In short, the Legislature within its jurisdiction can do everything that is not naturally impossible, and is restrained by no rule human or divine.”

But there is one thing a legislature cannot do—it cannot tie its own hands or the hands of a future legislature—it cannot by anticipation control the actions of a future legislature or its own—it cannot legally bind itself to any course of action.

Perhaps sufficient has been said to show differences in the American system and ours, but after all is it not an illustration of the saying:

“It is not so much the form of a constitution as the spirit in which government is carried on, not so much the law as the men who administer it, which count?

“In your land as in mine the government and legislators respond pretty well to public sentiment—a little more quickly a little more slowly—both lands get the government they deserve. At odd times the courts will with you check for a while useful legislation, but it gets enacted at last some way or another. A lawyer trained in the interpretation of constitutions—the 'Philadelphia lawyer' of proverbial note—can see much difference between 'tweedledum and tweedledee.' And a method can always be found without giving the court or the constitution too cruel a jolt for giving the people what they really demand and insist upon.”

In Canada nobody is at all afraid that his property will be taken from him; it never is, in the ordinary case. Our people are honest as peoples go, and would not for a moment support a government which did actually steal—a new government would be voted into power and the wrong righted, but we will not submit to have our great public works delayed by cranks or the litigious. An American feels himself at home at once in Canada, a Canadian crossing the border does not feel that he is entering a foreign or a strange land—neither can notice any difference in the law any more than in the language or in the habits of the people. Once he escapes the custom-house either feels himself a native—unless he is a fool either by nature or through misplaced or spurious patriotism.

Indeed, we are in all but the accident of political allegiance, one people. True the Union Jack and Old Glory have the col-

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The legislature had enacted that the section should be “forever stayed.” I refused to stay the action perpetually but made the order that no proceedings should be taken in the action unless and until the legislation should in some way be got rid of.
ours red, white and blue differently arranged—but they are the same red, white and blue.

Of precious blood its red is dyed,
The white is honor's sign;
Through weal or ruth its blue is truth,
Its might the power divine.

As we are of the same blood, our aims are the same, justice to all under the law, good will to all men, peace and righteousness. With these aims in common we are working and shall work out our destiny side by side and in much the same way, an example and a blessing to humanity.\footnote{I make no apology for once more repeating what I said to the Iowa Bar Association in June, 1912, already repeated at Yale in 1917.}

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