CANADIAN CONSTITUTIONAL STUDIES

Canadian Constitutional Studies

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The Marfleet Lectures
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THE MARFLEET LECTURESHIP

In November, 1910, Mrs. Lydia A. Marfleet of Prophetstown, Illinois, gave the sum of $5,000 to found a lectureship in the University of Toronto to be called in memory of her late husband the Pearson Kirkman Marfleet Lectureship.

As the late Pearson Kirkman Marfleet, an American citizen, devoted constant thought to the public welfare of his own country, and also watched the growth of the Dominion of Canada with profound interest, the Governors of the University have undertaken that such person or persons as may from time to time be appointed shall, as far as possible, be chosen with regard to their special ability to set forth some phase of the national movements of each or both countries.

The first course of lectures under this foundation was delivered in February, 1915, by the Honourable William Howard Taft, Ex-President of the United States. The second course was delivered in October 1921 by the Right Honourable Sir Robert L. Borden, G.C.M.G., formerly Premier of the Dominion of Canada.

PREFACE

The following lectures were delivered in the University of Toronto, in October, 1921, under the Marfleet Foundation. They were designed as an introduction to the study of the constitutional development of Canada from 1760 to the present time; and they include a short sketch of the system of government which prevailed during the French régime from 1608 to 1760, as well as a glance at problems confronting democracy in the immediate future. The incidents of constitutional growth that I have endeavoured to describe are of absorbing interest and immense importance. They cover a period of nearly two centuries, and the attempt to compress them within these narrow limits necessitated many omissions. I am fully conscious that other imperfections, such as lack of proportion, will doubtless be observed in the result of my labours. It is hoped that the lectures, however imperfect, may prove of some assistance to those who desire to make themselves acquainted, in a general way, with the beginnings and gradual development of our present system of government.

To many friends I am indebted for assistance in the preparation of the lectures: to the Hon. N. W. Rowell, K.C., who read the manuscript of the first two lectures and made useful suggestions; to Dr. Adam Shortt, Professor George M. Wrong,

and Dr. A. G. Doughty, C.M.G., of the Board of Historical Publications, and Major Gustave Lanctot, of the Canadian Archives, for valuable memoranda and suggestions; to Mr. E. L. Newcombe, K.C., C.M.G., Deputy Minister of Justice, and Mr. W. S. Edwards, K.C., Assistant Deputy Minister of Justice, for important notes on the legal questions discussed; and to Mr. L. C. Christie, Legal Adviser of the Department of External Affairs, and Mr. C. H. A. Armstrong, of the Prime Minister's Office, for valuable notes and memoranda. Mr. Armstrong throughout the preparation of the lectures has rendered very important assistance, and he has also read the proofs.

R. L. B.

OTTAWA,
October 14, 1921.

CONTENTS

FIRST LECTURE

CONSTITUTIONAL DEVELOPMENT FROM THE CESSION TO CONFEDERATION

EXPERIMENTATION in the task of governing organized communities has proceeded for many centuries of recorded history. Any attempt to trace its development in theory or in practice would be far beyond the limits of these lectures. It would be idle to claim for any experiment complete or final success. Especially is this true with regard to the relations between the organized communities designated as states or nations. In many instances authority sufficient to maintain peace and order between individual citizens of such a community was established even in the earliest periods. That disputes between states are still determined in the last analysis by the brutal and terrible arbitrament of war is a sad and humiliating confession of mankind's incapacity for self-government in its highest sense. There is, perhaps, the dawn of hope that at last we may stand at the hallowed threshold of a truer and nobler era.

The British Commonwealth embraces five self-governing nations, each of which possesses a political and social organization commonly described by the much-abused term "democracy."

This term has a relative meaning according to the time, the people, and the conditions to which it is applied. The view-point of the observer is also to be taken into account; he may regard one or another of these five democracies as being in a condition of progress, stagnation, or reaction, according to his ideals.

The communities embraced within the Britannic system extend over one-quarter of the world's land surface and include more than one-quarter of its population. They illustrate practically every stage of social, economic, and political development. The governance of this vast system involves almost every method of administration known to history.[1] At once solemn and inspiring is the responsibility imposed by an inheritance so majestic, a task so compelling, a trusteeship so sacred.

The reasonable essentials of government in a modern democracy may be regarded as embracing order, security, equality before the law, opportunity, and liberty. The King's (that is the People's) peace must be kept. The right to labour and to enjoy the fruits of labour in the form of property must be assured. All men must be equal before the law. Opportunity for the many must be established by the denial of special privilege to the few. Conscience must be respected; and finally there must be such individual liberty as is consistent with the maintenance of these principles. This definition gives merely a rough outline, but

under its various heads may fairly be grouped the chief ideals of those who believe, as I do, that democracy with all its imperfections (and they are many) gives to the great masses of the people higher hope, fuller liberty, and more abundant opportunity than any system hitherto devised by the wit of mankind.

We may reasonably claim that in this Dominion these essentials have been as fully realized as in any nation. I do not suggest that existing conditions cannot be improved. The permanence of injustice and inequality is no more possible than it is desirable. If the present civilization is to endure there must be definite and steady progress to a still higher conception and realization of the common welfare. Those who succeed us may look back with pity and sorrow upon the disparities, deformities, inequities, and waste of the existing social order, which their clearer perception, higher capacity, and truer ideals shall have long since redressed.

Tracing in rough outline the development of Canada from the status of a Crown Colony to that of a self-governing nation, I shall confine myself in this lecture to the events that fill the pages of our history from the cession of Canada to Confederation.

The French population which passed under British rule in 1760 comprised about 70,000 souls.

The Colony had behind it a history of a century and a half, having been founded in 1608. It had been governed by an autocratic King through his ministers, and the policy which controlled its affairs was directed from Versailles. Canada was regarded as a French province beyond the seas, and it was governed as such. There are indications that the conditions of the Colony rendered somewhat difficult, at times, the exercise of the King's power, which was absolute in theory but not always fully effective in practice. At the head of the Colony stood a Governor, to whom, as personal representative of the King, were entrusted the general policy of the country, the direction of its military affairs, and its relations with the Indian tribes. The Bishop, as head of the Church, was supreme in all matters affecting religion. Acting under the authority of the King, not of the Governor, the Intendant was responsible for the administration of justice, for finance, for the direction of local policy, and generally for local administration. There was a Superior Council with certain administrative powers which were more formal than real. No representative body possessing any actual or even formal authority was in existence. Public meetings could not be lawfully held without the permission of the Governor; occasionally they were held without such authority. The French feudal system of land tenure prevailed, although the seigniors were invested with certain responsi-

bilities and duties in advancing the settlement of the land. French civil and criminal laws were in force, and the administration of justice was fairly just and efficient. The main constituents of the population were the seignior, the priest, the habitant, and the voyageur or merchant.[2] Murray described the peasantry as a strong healthy race, plain in their dress, virtuous in their morals, temperate in their living, very ignorant, and extremely tenacious of their religion.[3]

From the capitulation until the Treaty of Paris in 1763, the Colony was governed by British military commanders, who exercised complete authority. Justice was administered in courts which they instituted, and which necessarily continued to apply French law.[4]

By the terms of the capitulation of Quebec (September 18, 1759), the free exercise of the Roman Catholic religion was granted, and in the capitulation of Montreal (September 8, 1760) it was stipulated that its free exercise should subsist entire (*subsistera en son entier*).

The Treaty of Paris (February 10, 1763) contained but one stipulation relating to the Canadians: "His Britannic Majesty, on his side, agrees to grant the liberty of the Catholic religion to the inhabitants of Canada; he will, in consequence, give the most precise and most effectual orders, that his new Roman Catholic subjects may profess the worship of their religion according to the rites

of the Romish church, as far as the laws of Great Britain permit." [5] The Treaty was followed by a Royal Proclamation on October 7, 1763, which established the limits of the new Province of Quebec.[6] The Proclamation provided that, as soon as circumstances should admit, General Assemblies should be summoned, with power to enact laws for the public welfare and good government of the Colony, and that in the meantime, until such Assemblies were called, the people were to enjoy "the Benefit of the Laws of our Realm of England." [7] For this purpose the Governor with the advice of the Council was authorized to erect and constitute Courts of Judicature for hearing and determining civil and criminal cases "according to Law and Equity, and as near as may be agreeable to the Laws of England," with an appeal to the Privy Council.[8] A few weeks later, on November 28, 1763, Murray was appointed Governor of the country. He was directed to appoint a Council as his Instructions should prescribe, and to summon a General Assembly of the freeholders of the province. It was an important item of his Commission that members of the Council and of the Assembly were to take the oath provided by statute (25 Car. II, cap. 2) against "Popish Recusants." In his Instructions, which were not issued until December, proposals for the government of the Colony were more fully disclosed. He was instructed to "nominate and establish a

Council" composed of the Lieutenant-Governors of Montreal and Three Rivers, the Chief Justice and the Solicitor General, with eight other persons to be appointed by him.[9] With the advice of the Council the Governor was to make necessary rules and regulations "for the Peace, Order and good Government" of the province, but so as not to affect life or liberty or to impose duties or taxes.[10] Clause 28 set forth "Our Will and Pleasure that you do in all things regarding the said Inhabitants, conform with great Exactness to the Stipulations of the said Treaty"[11] in respect of the exercise of the Roman Catholic religion; but Clause 29 provided that the inhabitants should subscribe the declaration accepting the Protestant succession to the Crown, under pain of exclusion from the country.[12] By Clause 32 Murray was forbidden to "admit of any Ecclesiastical Jurisdiction of the See of Rome." [13]

With these documents before him Murray published the Ordinance of September, 1764, establishing Law Courts. A Superior Court was created for the trial of criminal and civil cases "agreeable to the Laws of England and to the Ordinances of this Province;" [14] and for the benefit of the new subjects he established a Court of Common Pleas, where cases were to be decided according to equity, but with due regard for the laws of England. In this Court French laws and customs were to be admitted in cases which originated before October,

1764, and French lawyers were allowed to practise. In all trials French and British subjects were eligible as jurors. Appeals could be taken to the Privy Council.[15] The Ordinance created great confusion at first, as the French subjects were unfamiliar with English laws, and the few English lawyers in the country could not speak French. "Canadian lawyers utterly ignorant of the English law pleaded in French before English Judges, who knew nothing of the French law." [16]

Meantime the difficulties of the situation had been increased by the advent of a small minority of British origin who believed themselves entitled to control the administration of public affairs in the Colony. The Grand Jury at Quebec affirmed its right to be consulted as a representative body in the making of laws and the expenditure of public funds.[17] Murray's description of the British minority is far from flattering and may have been exaggerated by his warmth of temper.[18]

It seems clear that the British Government desired to be fair, and, according to the standards of the age, even generous in its treatment of the French population. The task, however, required fuller knowledge and profounder insight than were available. Both Murray and Carleton (who succeeded him) understood the conditions and the needs more thoroughly than the authorities under whose direction they acted. The French habitants were wholly unacquainted with, and utterly un-

trained in, any system of representative institutions or self-government; they had been governed under a despotic system, attended with a trade monopoly for certain privileged persons, and an administration not wholly free from corruption.

In April, 1766, Murray was recalled, although he was not formally superseded until the autumn of 1768. He had been especially considerate in his treatment of the French-Canadian population, and he had strongly impressed them with a sense of his justice and fairness. He was succeeded by Sir Guy Carleton (afterwards Lord Dorchester) who, on his arrival in 1766, was confronted by the same difficulties that his predecessor had encountered. The system under which the Colony was governed had produced extreme discontent among both the French population and the British minority. In the French population this discontent was more manifest among the seigniors and the priesthood than among the habitants. Slow progress was made in applying desirable remedies, and finally, in 1770, Carleton crossed the ocean to present the case in person to the British Government. As a result the Act of Parliament of 1774, known as the Quebec Act, was passed. It extended the boundaries of Quebec so as to include the territory later known as Upper and Lower Canada; provision was made for the "free exercise of the religion of the Church of Rome" with authority for the clergy to

collect their tithes;[19] Roman Catholics were not obliged to take the oath of abjuration, but a modified oath of allegiance. Thus all positions were open to them,[20] and the Roman Catholics in Canada enjoyed privileges not then open to people professing the same faith in England.

After the American Revolution the influx of the United Empire Loyalists added not only a new element but increased difficulties to a situation already sufficiently complicated and critical. They had made enormous sacrifices in abandoning their homes and to a great extent their fortunes for loyalty to the Empire. In their political ideas they were probably more advanced than the people of Great Britain, and it was natural that they should chafe under the system of government established by the Quebec Act. On the other hand, the representative institutions that the loyalists valued had little meaning to the French-Canadians, who regarded them rather as oppressive innovations devised for the purpose of taxation. Carleton was sufficiently occupied with military affairs during the American Revolution. After the conclusion of peace he visited England for two years, and having been raised to the peerage as Baron Dorchester he was appointed Governor General in 1786. He applied himself to the situation with ability and energy. In the end, the Constitutional Act (Canada Act) of 1791 was passed, and took effect in December of that year. Its chief

points were the division of the territory into two provinces, the establishment in each province of a nominated Legislative Council and an elected House of Assembly with power to make laws. There was an ill-considered and fruitless provision designed to introduce the hereditary principle and to constitute the Legislative Council in whole or in part of hereditary legislators; a small property qualification was established for the electorate; freedom for the Roman Catholic religion was granted, and a portion of Crown lands was set aside for the support of a Protestant clergy. In the practical operation of the Act, the Governor really controlled the machinery of government; there were Crown revenues, and military grants from the Home Government, which made him virtually independent of the Assembly. On the one hand, the Governor carried on the administration through officers who were not responsible to the Assembly; on the other hand, no laws could be made without the Assembly's consent.

"The Executive was financially and, worse still, constitutionally independent, and the House of Assembly, in seeking vaguely to cure a disease which it had not in reality diagnosed, frequently overstepped its sphere, with the result that it was dissolved time after time." [21]

It may be that British statesmen learned the wrong lesson from the American Revolution. They attempted a control over the two Canadas stricter than was previously known, and created a government of cliques under the direction of the Governor.

In no inconsiderable measure the administration was carried on under the immediate direction of the Colonial Office. A bureaucracy not familiar at first hand with conditions in the Colony and often unsympathetic with the aspirations of its inhabitants could hardly avoid narrow views and mischievous policies. The permanent official who directs from a distance requires rare qualities of sympathy, vision, and imagination. Naturally in Lower Canada the difficulties created by differences in temperament and training of the two races were very great. Although, at first, few of the French-Canadians either comprehended or appreciated the gift of representative institutions, they soon learned to utilize them to good purpose in what they conceived to be their interests. Conflict was inevitable between the representative Assembly and the irresponsible Executive. Bitter passion was aroused and fierce controversy raged in both provinces. There was complete deadlock from time to time. These disastrous conditions led to the outbreaks of 1837. The constitution of Lower Canada was suspended, and Lord Durham's mission began.

Before proceeding to examine the results of that memorable mission, it is desirable to consider the development of democratic institutions in Great Britain from 1760 to 1837.

It seems clear that the representative method of government is not wholly or, indeed, primarily

of British origin.[22] The responsibility of the King (that is the Executive) to the people, the derivation of his authority from the people, and the principle of constitutional limitations upon his authority were acknowledged at least six hundred years ago. In the first of his two lectures on the "History of Freedom," which are a mere fragment of the greater work that probably he alone could have accomplished, Lord Acton quotes three notable declarations of constitutional right. The first is a resolution of the Scottish Parliament, early in the fourteenth century, repudiating the Pope's advocacy of the claim of the English King against the House of Bruce. Speaking of Robert Bruce, they said:

"Divine Providence, the laws and customs of the country, which we will defend till death, and the choice of the people, have made him our king. If he should ever betray his principles and consent that we should be subjects of the English king, then we shall treat him as an enemy, as the subverter of our rights and his own, and shall elect another in his place. We care not for glory or for wealth, but for that liberty which no true man will give up but with his life." [23]

The second is from the works of St. Thomas Aquinas, written about the time that Simon de Montfort summoned the Commons (A.D. 1264):

"A king who is unfaithful to his duty forfeits his claim to obedience. It is not rebellion to depose him, for he is himself a rebel whom the nation has a right to put down. But it is better to abridge his power, that he may be unable to abuse it. For this purpose, the whole nation ought to have a share in governing itself; the Constitution ought to combine a limited and elective monarchy with an aristocracy of merit and such an admixture of democracy as shall admit all classes to office by popular election. No government

has a right to levy taxes beyond the limit determined by the people. All political authority is derived from popular suffrage, and all laws must be made by the people or their representatives. There is no security for us as long as we depend on the will of another man." [24]

The third is an utterance of Marsilius of Padua (*circa* A.D. 1234), whom Lord Acton describes as the ablest writer of the Ghibelline party:

"Laws derive their authority from the nation, and are invalid without its assent. As the whole is greater than any part, it is wrong that any part should legislate for the whole; and as men are equal, it is wrong that one should be bound by laws made by another. But in obeying laws to which all men have agreed, all men in reality govern themselves. The monarch, who is instituted by the legislature to execute its will, ought to be armed with a force sufficient to coerce individuals, but not sufficient to control the majority of the people. He is responsible to the nation, and subject to the law; and the nation that appoints him, and assigns him his duties, has to see that he obeys the Constitution, and has to dismiss him if he breaks it. The rights of citizens are independent of the faith they profess; and no man may be punished for his religion." [25]

Lord Acton truly declares that in regard to the sovereignty of the nation, representative government, the superiority of the legislature over the executive, and liberty of conscience, this writer had a remarkably firm grasp of the principles that were to sway the modern world.

In the reign of George III, England had enjoyed representative institutions for more than five centuries, but democratic government, as we now understand it, had not come into being. The representation was that of an oligarchy, not of the people at large. To the House of Commons elected by this oligarchy, ministers were in some sense

responsible. In Canada there was representation of a wide electorate, but the administration was not directly responsible to, or controlled by, the people's representatives. Thus, in the first half of the nineteenth century, Canada was working towards a form of government which was not attained in Great Britain until after 1832. For the Canadian, responsibility of the executive to the legislature was the goal; for the Briton, real representation of the people. In the British political and social order during the reigns of the Georges, the spirit and influence of feudalism persisted in no small measure, although its form had almost wholly passed away. The essentials of democratic government were not realized, and the country was in fact governed by the King, the nobles, and the great landowners. Rotten boroughs were controlled by great families at whose dictation designated members were returned to Parliament. "The whole political power of England was virtually concentrated in 1831 in the hands of two or three hundred individuals, who returned a majority of the House of Commons and sat in large numbers in the House of Lords." [26] The King, directly, and with little attempt at secrecy, intrigued among the Lords to defeat measures introduced by his ministers. He competed with Peers for control of the Commons, upon whom the influence of bribery and court intrigue was freely used; ministers were regarded as servants of the King rather than of the people; in many

instances they so regarded themselves. Open assumption of arbitrary power by odious and violent measures had cost one Stuart his head, and another his crown. Its virtual assumption by George III cost him little, but the nation much. In the Commons there was no real conception of parliamentary government as we now understand it. That the continued existence of an administration depended upon the support of a majority of the representative chamber was not fully accepted or generally realized; ministers were the King's servants. The nineteenth century was well advanced before the House of Commons effectively and successfully asserted its control of government.[27] William IV, in 1834, was supposed to have dismissed the Whig ministry. He called Sir Robert Peel to office; but the constitution had reached a new stage of development. The majority of the House was against the King's choice, and the King found that he was obliged to retire from the business of governing.[28]

Disraeli, in his earlier political writings (1833-1841), laid down in emphatic terms the view that the House of Commons was not, and was not intended to be, representative of the people; he declared that it represented a privileged or favoured section or order of the people, who, like the Peers of England, enjoyed "for the advantage of the nation in general certain powers of a very eminent and exalted character." [29]

It should be remembered that the birth-pangs of democratic government were hardly less severe in Great Britain than in Canada. Following the rejection of the Reform Bill in 1831 there were disturbances which verged on civil war; the monarchy was threatened; riots broke out in different parts of the country, and authority, both civil and military, seemed paralysed.[30] We may also fairly conclude that, during the first half of the nineteenth century, constitutional development in the Mother Country was hardly less notable and important than in the Colony. In Great Britain the King, in Canada the Governor, practically ceased to govern. Executive control passed to the people's representatives. In Great Britain as in Canada there were, however, successive stages of progress toward the system which now prevails in both countries. By a series of enactments in each country the franchise has been so extended that the electorate includes practically the entire adult population. But the Georgian tradition of the Crown's control over public affairs had its influence in Great Britain for many years. In 1839 the Sovereign asserted her right to refuse the advice of an incoming Prime Minister as to the official organization of the Royal household. Two years later public opinion compelled a withdrawal from that position. The influence of the Crown, especially in foreign affairs, was manifest in Great Britain throughout the reign of Queen Victoria,

especially in 1851, when Lord Palmerston was forced to retire from the Foreign Office, and in 1877, when there were strained relations with Russia.[31]

I return to Lord Durham's mission. Fortunately for the future of the Empire, he was well in touch with advanced political thought of the day. His wide vision, his political training and experience, and his immense capacity to grasp and realize unfamiliar conditions enabled him to render a memorable service to the Empire. That he made serious mistakes both in practice and in theory cannot be denied; but he truly laid the foundations of a reasonable and practical colonial policy. An exhaustive analysis of his report is unnecessary for my purpose. It contains passages which are not wholly consistent with one another, and which have been inconsistently interpreted; but it may justly be regarded as the charter of constitutional government in our country. I should place beside it, and rank with it, the four notable letters of Joseph Howe to Lord John Russell (1839), which are unsurpassed in cogency and eloquence of expression, in thorough grasp of the problems involved, and in clear comprehension of the remedies required for their solution. They constitute enduring evidence of his statesmanship, vision, and patriotism.[32]

After pointing out that representative institutions had been established in the North American

Colonies, Lord Durham set forth his most important conclusion in these words:

"The Crown must . . . submit to the necessary consequences of representative institutions; and if it has to carry on the government in unison with a representative body, it must consent to carry it on by means of those in whom that representative body has confidence." [33]

Having said so much, he proceeded to qualify it by proposing to except from the control of the Provincial Legislature certain matters which in his judgment affected the relations of the Colonies with the Mother Country:

"The matters, which so concern us, are very few. The constitution of the form of government,—the regulation of foreign relations, and of trade with the mother country, the other British Colonies, and foreign nations,—and the disposal of the public lands, are the only points on which the Mother Country requires a control." [34]

The important limitations as to trade and public lands were swept away within a few years after the report was made. That a man of Lord Durham's vision could not foresee the lamentable consequences of such limitations is remarkable. The regulation of trade and the control of public lands were obviously matters of domestic concern. If such functions of government were exercised by permanent officials at the Colonial Office, the outcry against unwisdom of policy or inefficiency of administration, directed as it would be against the Home Government, would have weakened and might eventually have destroyed the ties which united Canada to the Mother Country. On the

other hand, if those functions were exercised, however unwisely, by the people of the Colonies through their own representatives, the responsibility and remedy for unwise policy or inefficient or corrupt administration would rest with the people themselves. Other important recommendations contained in the report were as follows: the two provinces should be reunited as one province under one Legislature; the necessary Bill for that purpose should provide for voluntary admission of other North American provinces; the principle of representation by population should be followed; the judges were to be placed in the same position with respect to tenure of office and salary as in England; and no money votes were to be proposed except with the consent of the Crown, that is to say, by responsible ministers.

Lord Durham's expectation that the French would be absorbed by the English element proved to be an idle dream; this he might have learned from the lessons of history. Nine centuries have not been sufficient to amalgamate into one type the races that successive currents of immigration and conquest brought together in the British Islands. Differences of religious belief and of language increased the improbability of achieving in Canada what Lord Durham anticipated. In the national life of the Mother Country we may discern the Saxon's steadfast spirit and love of liberty, his patience, his courage, and his deter-

mination; the Celt's imagination and eloquence; the Norman's adventurous, ambitious spirit, his instinct for leadership and his genius for administration. So, in Canada, the French race, maintaining its distinctive qualities, has brought to the service of our country much that is valuable. In some measure the qualities of each race may serve to aid the possible deficiencies of the other. Moreover there is a distinct and not remote kinship; in each race there is the strain of the Celt, while the Saxon and Scandinavian elements of the British correspond very closely with the Frankish and Norman elements of the French race. In the development of constitutional government in Canada, Canadians of French descent have taken their full part; their comprehension and practical realization of the principles upon which the government of a modern democracy is based have not been surpassed by Canadians of British origin. Indeed, it is a curious fact, and worthy to be noted, that the practical operation of democratic government has been comprehended and realized more fully and thoroughly by the French of Canada than by the people of their ancestral country. In political theory the French are thoroughly logical (much more so than the British); but in the application of the theory they lack the practical instinct which is distinctive of British constitutional development. This is by no means the only test by which one can measure the standard

of their civilization; perhaps on the whole, the civilization of France is more highly developed than any other. As Lord Acton has said, "the two kinds of civilization, social and political, are wholly unconnected with each other. Either may subsist in high perfection alone." [35]

Between 1839 and 1854, five Governors General exercised authority in Canada: Charles Poulett Thomson (later Lord Sydenham), Sir Charles Bagot, Sir Charles (afterwards Lord) Metcalfe, Lord Cathcart and the Earl of Elgin. During this period the principles of Lord Durham were being gradually put into practice and extended. The programme outlined by Lord John Russell as Colonial Secretary, in his instructions to Sydenham, involved the legislative union of the two Provinces with just regard to the claims of each in arranging the terms of union; the maintenance of the three estates of the provincial legislature; the independence of the Judges through the establishment of a permanent civil list; such freedom of action to the Executive Government as would be found necessary for the public good; and the establishment of a system of local government by representative bodies in the cities and rural districts.[36] This programme did not adopt the principle that the Executive should be responsible to the representatives of the people in the legislature. In his despatch of October 14, 1839,[37] the Colonial Secretary expressly declared that it should not be

adopted. In some of the reasons he assigned for this position it is not difficult to find an unanswerable argument against the views he propounded.

On April 14, 1837, Lord John Russell, speaking as Secretary of State for the Colonies in the House of Commons, had said:

"The case, as it is brought before the House, is this. The House of Assembly of Lower Canada have asked for an elective Legislative Council, and for an Executive Council which shall be responsible to them, and not to the Government or Crown of Great Britain. We consider that these demands are inconsistent with the relations between a Colony and the Mother Country, and that it would be better to say, at once, 'let the two countries separate' than for us to pretend to govern the Colony afterwards." [38]

The resolution which he was supporting contained the following paragraph:

"Resolved, That, while it is expedient to improve the composition of the Executive Council in Lower Canada, it is unadvisable to subject it to the responsibility demanded by the House of Assembly of that province."

I contrast with this the words of Sir Henry Campbell Bannerman, spoken seventy years afterwards on May 10, 1907: [39]

"Let us see what is that most significant event of the past year which has rung through the world and astounded the world. It is the establishment of complete self-government in the Transvaal, and the constitution of a freely elected Government, at the head of which is a man who perhaps was the ablest and most successful soldier of those who led the Boer people in the determined war against us a year or two ago. I believe in my soul and conscience that in the whole history of our country there has never been a finer example of true British policy or a grander achievement." [40]

Lord Stanley, who succeeded Lord John Russell at the Colonial Office in 1841, was a man of brilliant

ability, of exceedingly firm opinions, and of reactionary tendencies so far as the governance of the Colonies was concerned. His temperament, training, and traditions made him incapable of comprehending that centralization would destroy, while autonomy would establish, a real unity of the Empire. To limit as far as possible the reforms advocated by Durham was his natural inclination. Speaking later (May 30, 1844) in the House of Commons, he set forth with some elaboration the prevailing theory of British statesmen respecting responsible government as applied to Canada. The affairs of the Colony were to be carried on with the advice of ministers responsible to the Assembly; but in the last analysis the ministers were to be controlled, and their views might properly be overruled, by a Governor exercising wide political powers and responsible to the Colonial Office. Control of patronage by ministers in Great Britain was an admirable system; but in Canada it was an abuse and must lead to disastrous results. Therefore, the Governor was at liberty to make appointments without consulting his ministers and without their knowledge or consent, if he conceived that course to be in the public interest. Canada was unfortunate in possessing no House of Lords and no great landed aristocracy, upon whom, as Lord Stanley conceived, the good government and welfare of the United Kingdom largely depended. He confidently affirmed that without such influences

the enjoyment by Canada of actual responsible government would convert that Colony into a virtual republic. Moreover, the principle of responsible government, as understood by the Canadian ministers who had tendered their resignations, was quite inconsistent with Lord Stanley's theory of Colonial dependence. In short, the Colonial Office in any case of real difficulty could govern Canada more wisely and effectively than could any Canadian ministry. Lord Stanley was unfamiliar with the actual conditions of the country and of its population; he did not realize the danger of continued refusal to accept the principle in question; and he regarded the Colonial Office as the controlling authority in the administration of the Colony's affairs. The speech, though insular in its spirit, was nevertheless plausible in its argument and eloquent in its expression; no debating point was missed. That it made an irresistible appeal to an audience of imperfect comprehension and limited vision was evidenced by the sustained applause which greeted the brilliant orator at its conclusion.

Both in 1837 and in 1844 the views expressed by Lord John Russell and by Lord Stanley did not pass unchallenged in the British Parliament. On the other hand, it must not be imagined that these views were confined to that side of the Atlantic. Similar opinions were expressed with vigour, and even vehemence, by a group in Canada, some of whom, under successive Governors, had enjoyed not

only political dominance but long continued tenure of the chief administrative offices. In the report of a committee of the Legislative Council of Upper Canada, which was unanimously adopted by that body, Lord Durham's report had been criticized with marked ability: responsibility of the Executive to the representatives of the people was entirely inappropriate and inapplicable to colonial conditions; it would put an end to colonial dependence and virtually make the Colony a sovereign power; the Colony ought not to be subjected to the dissensions of party but should be governed by the Imperial Cabinet through persons of ability and prominence selected by the Governor and acting under his direction without responsibility to the Legislature.[41] To the same effect was a protest from Nova Scotia. Thus the voices of reaction in Great Britain and of officialdom in Canada united in harmonious chorus. It is impossible to doubt the perfect sincerity of the Russell-Stanley school and of some of their Canadian supporters; but the views of prominent placemen in Canada and Nova Scotia were probably influenced (perhaps unconsciously) by considerations of self-interest.

The Union came into force in February, 1841, elections were held in March, and the Legislature met in June. No less than six political groups were represented in the Assembly; but three of them included more than three-quarters of its membership.[42] The new Assembly was strongly determined

to assert the principle of responsible government. There was but an imperfect and even vague conception of the full meaning which we now attach to that expression, and of the conditions necessary for the successful application of the principle in the practical administration of public affairs. But one essential was fully understood and was urged with vehement insistence: that the Governor in administering the affairs of the Colony should be guided only by the advice of ministers who possessed the confidence of the elected branch of the Legislature. Sydenham declined to accept this principle in the first instance. Indeed, his instructions forbade it; Lord John Russell had reminded him of the "decisively pronounced judgment" of both Houses of Parliament on April 28, and May 9, 1837. The new Governor had a most difficult part, and he played it with conspicuous tact and discretion. He reached the conclusion, evidently after the most careful consideration, that he must undertake the double rôle of Governor and Prime Minister. Apparently, in his capacity as Governor he was to be responsible to the Crown, through the Colonial Office, in upholding all Imperial interests; in his capacity as Prime Minister he was to be responsible to the Legislature in respect of provincial administration.[43] The success which he gained was due to his wide experience, his remarkable ability, and his extraordinary capacity for political management. In the hands of a less capable man

the attempt would have encountered immediate disaster. He died at the close of the first session and before failure had attended his efforts. Probably he realized that his system was but a temporary phase, and if he had lived he would perhaps have carried out what Lord Elgin afterwards consummated. That his service to Canada was notable cannot be questioned. In the face of numerous difficulties he brought the Union Act into effective operation; he initiated a general municipal system in Lower Canada; he placed the banking system upon a sounder basis; and he successfully reorganized the executive departments. Under his guidance the leading statesmen of the Colony acquired a useful knowledge of the practical meaning of responsible government. Finally he accepted the principle of executive responsibility in the amendment moved by Mr. Harrison at his instance in the session of 1841.[44]

Sir Charles Bagot, who succeeded Lord Sydenham, seems to have been controlled at first by instructions from Lord Stanley, who was seriously impressed with the inability of the colonists to govern themselves in accordance with their own interests, which he was disposed to measure by the standards of the Colonial Office. Bagot's régime lasted only one year. He appreciated the difficulties and dangers of the situation much more fully than Stanley, but his suggestions as to compromise were met by Stanley's rejoinder that it might be

better to let the Colonies go altogether.[45] Eventually, from the very force of circumstances, and through a comprehension that could come only to one closely in touch with actual conditions, Bagot practically disregarded Stanley's instructions and formed a government which commanded a majority in the Assembly.[46] Finally on October 28, 1842, he told the Colonial Secretary quite frankly that whether responsible government was openly acknowledged or only tacitly acquiesced in, it virtually existed.[47]

His successor, Sir Charles (afterwards Lord) Metcalfe, was a distinguished civil servant who enjoyed a high reputation from his administration in India, where he had spent thirty-seven years. He came to Canada from Jamaica, where he had achieved considerable success in administering the affairs of that Colony. According to one of his biographers, he was an advanced Liberal, or even Radical, in the politics of the United Kingdom.[48] But his training and experience were of a character that quite unfitted him for the task with which he was confronted in Canada. With the theory or practice of colonial government he was entirely unfamiliar, and his instincts led him to accept literally, and without much regard for conditions surrounding him, the narrow views which then afflicted British statesmen. He was obsessed with their idea that effective responsibility of the Executive to the people's representatives meant

early separation. Ministers were free to offer their advice, but he was equally free to reject it; otherwise, as he conceived, he would surrender the prerogative of the Crown, and be merely a tool in the hands of a Council.[49] As compared with Sydenham and Bagot, he was distinctly reactionary in Canada, whatever he may have been in England. His ministers having resigned on his refusal to be bound by their advice respecting appointments to office, he summoned new advisers, and upon dissolution of the Legislature threw his whole strength and influence into the electoral contest. Decrying party government as unsuited to colonial conditions, he was forced to take refuge in party support. He had the satisfaction of securing a narrow majority; but the disorders which his policy aroused were of the most serious character.[50]

Metcalfe retired at the end of 1845, and Earl Cathcart held office during the short interval that intervened between Metcalfe's departure and the arrival of Lord Elgin at the beginning of 1847. To Lord Elgin is due the establishment of constitutional and democratic government in Canada on foundations that have proved enduring. He was the son-in-law of Lord Durham, whose ideals he carried out, and, indeed, extended beyond their scope, as Lord Durham understood it. The years between Durham's departure and Elgin's arrival had produced no final results, and Elgin had to assume and carry out the task of executing Durham's report.

He was endowed with sufficient vision and common sense to realize that if the colonists had but a limited capacity for self-government, the Colonial Office had a still more limited capacity for governing them.

Before proceeding to Canada Lord Elgin had been made aware of a despatch from the Colonial Secretary (Earl Grey) to Sir John Harvey, Lieutenant Governor of Nova Scotia, which contained the following passage:

"It cannot be too distinctly acknowledged that it is neither possible nor desirable to carry on the government of any of the British provinces in North America in opposition to the opinion of the inhabitants." [51]

Speaking (as Lord Howick) in the House of Commons on March 8, 1837, Earl Grey had said:

"I, for one, am not prepared to say, that any mode of carrying on the government on sound principles under a popular constitution can be devised, under which a permanent resistance to the popular branch of the legislature can be maintained. I believe that the very notion of this is an absurdity in itself." [52]

Throughout his administration Lord Elgin received from Earl Grey wise and sympathetic support in the policy carried out in Canada.

When Lord Elgin arrived in January 1847, he found a Government which possessed a very narrow majority in the Assembly. Among the ministers there were several men of marked ability, but the Government as a whole was not distinguished by resource or resolution. Lord Elgin's first attempt, made with the consent of his ministers, was to

bring into the Government a more adequate representation of the French population. His negotiations for this purpose were conducted with great skill and discretion and, although unsuccessful at the moment, they produced an excellent effect. He gradually won the confidence of all parties in his justice and impartiality, and in his sincere intention to administer the Government through advisers possessing the confidence of the people's representatives.[53] In the autumn of 1847 his ministers proposed dissolution, which took place at the end of that year. The prospect of carrying on the government by means of another administration was not unwelcome. "My ministers have always been struggling for existence. Catching at straws —living from hand to mouth. Anything like a large or generous policy has been altogether out of their reach. I know not what the future may bring forth; but I confess that I regard with hope rather than apprehension the prospect of coming in contact with a more powerful party, and with men of more decided views." [54] The ministry sustained a decisive defeat at the elections which took place early in 1848. Lord Elgin gave them the option of meeting Parliament without delay or of resigning at once.[55] They accepted the former alternative and were beaten in the election of the Speaker and in the division on the Address. Their resignation was tendered and accepted on Saturday, March 4, and on the following Tuesday the

Governor sent for Messrs. Baldwin and Lafontaine, the leaders of the Opposition in the Assembly, and entrusted to them the task of forming an administration, which they accepted. For the first time the principle of executive responsibility to the Assembly was fully recognized, and the first stage of democratic self-government as we now understand it had been reached. Lord Grey expressed his complete approval of the Governor General's course. Slowly, and sometimes with difficulty, the lesson had been learned by other British statesmen. Russell, then Prime Minister, had abandoned his theories of 1837.

Lord Elgin's wisdom and foresight are frequently illustrated in his correspondence with the Colonial Secretary. On January 22, 1848, he wrote: "The less you meddle in Canadian appointments, even by the issue of Royal warrants, the better.—You cannot effectually control them. By seeming to endeavour to do so you rouse that jealousy of Imperial interference which has heretofore produced such mischievous effects in Canada. I would allow the responsibility of appointing to office to rest upon the Provincial Ministry and to weigh upon them as heavily as possible. An intelligent Governor and a watchful opposition will generally succeed in preventing abuses from growing too rank." Although sometimes impatient at the inconsistent and unreasonable attitude of French political leaders, he always advocated a

just and even generous policy with regard to the legitimate aspirations of the French population. In his estimate of the future relations between the two races in Canada he displayed a wider vision and a truer foresight than Lord Durham.[56]

Events in the other British possessions followed practically the same course. In Nova Scotia representative institutions were established in 1757, after correspondence between Governor Lawrence and the Lords of Trade.[57] The first Assembly met on October 2, 1758. Cape Breton was added to Nova Scotia in 1763. It had previously been administered by a Governor and Council, and had had no representative Assembly. In 1765 it was erected into a distinct county, with the right to return two county members to the Assembly. In 1784 the Province of Nova Scotia was divided, and New Brunswick was established as a separate Province with representative institutions. In both Provinces the Executive Council who acted as advisers of the Governor in the administration of public affairs also exercised functions as a Legislative Council or Provincial Upper Chamber. Responsibility of the Executive to the Assembly was not admitted. Continual disputes between the Assembly and the Council were the inevitable result, and the elective chamber maintained its position with no little firmness and persistence. The struggle for responsible government was waged actively and aggressively in all the Maritime Provinces, but

there was little sympathy with the disorder and rebellion that broke out in the upper Provinces. A distinct Legislative Council was established in Nova Scotia in 1838. In that province there were reactionary Governors after Lord Durham's report, and they had to bear the full brunt of Howe's bold and unceasing attacks. Two of them he virtually drove from the Province; and in 1848, upon the succession of Sir John Harvey to Lord Falkland, the principle of executive responsibility to the Assembly was finally recognized. In New Brunswick the Executive and Legislative Councils had been separated in 1832, and responsible government came into effect in 1848. Prince Edward Island, established as a separate Province in 1769, received representative institutions in 1773, and responsible government in 1851.

It will be noted that this great constitutional change in the various Provinces was not based upon any statutory provision, but was consummated by the adoption of a recognized convention. The formal constitutional enactments remained unchanged, but upon them was imposed a new controlling principle.

"The State that Englishmen knew was a singularly unicellular State, and at a critical time they were not too well equipped with tried and traditional thoughts which would meet the case of Ireland or some communities, commonwealths, corporations in America which seemed to have wills—and hardly fictitious wills—of their own, and which became States and United States. . . . The modern and multicellular British State—often and perhaps harmlessly

called an Empire—may prosper without a theory, but does not suggest and, were we serious in our talk of sovereignty, would hardly tolerate, a theory that is simple enough and insular enough and yet withal imperially Roman enough, to deny an essentially state-like character to those 'self-governing colonies,' communities, commonwealths, which are knit and welded into a large sovereign whole." [58]

So wrote F. W. Maitland more than twenty years ago. In its main aspects the theory of the most powerful intellects among British statesmen three-quarters of a century ago was unmistakeably "unicellular." The irresistible trend of events swept aside this theory before it had wrought irreparable mischief; and later generations have realized that the strength of our wider British Commonwealth rests upon that free development of self-governing nations which Russell, Stanley, and other eminent statesmen regarded as fatal to the unity and integrity of the Empire.

Between the retirement of Lord Elgin and the establishment of Confederation, one outstanding incident emphasized the increasing fullness of Canadian autonomy. On August 13, 1859, the Duke of Newcastle, Secretary of State for the Colonies, transmitted to the Governor General for the consideration of the Canadian Ministry a memorial of the Chamber of Commerce of Sheffield protesting against protective duties imposed by a Canadian statute of that year. The Secretary of State, while declaring that he would advise Her Majesty to assent to the measure (which had been

reserved for assent by the Governor General, Sir Edmund Head), undertook to lecture the Canadian Government, and incidentally the Canadian Legislature, upon the unwisdom of its fiscal policy. The reply to this despatch enclosed a report of the Minister of Finance, Sir A. T. Galt, concurred in by the Cabinet; it has been quoted many times, but it cannot be omitted from any survey of constitutional landmarks. The important passages are as follows:

"From expressions used by His Grace in reference to the sanction of the Provincial Customs Act, it would appear that he had even entertained the suggestion of its disallowance; and though happily Her Majesty has not been so advised, yet the question having been thus raised, and the consequences of such a step, if ever adopted, being of the most serious character, it becomes the duty of the Provincial Government distinctly to state what they consider to be the position and rights of the Canadian Legislature.

"Respect to the Imperial Government must always dictate the desire to satisfy them that the policy of this country is neither hastily nor unwisely formed; and that due regard is had to the interests of the Mother Country as well as of the province. But the Government of Canada acting for its Legislature and people cannot, through those feelings of deference which they owe to the Imperial authorities, in any way waive or diminish the right of the people of Canada to decide for themselves both as to the mode and extent to which taxation shall be imposed. The Provincial Ministry are at all times ready to afford explanations in regard to the acts of the Legislature to which they are party; but subject to their duty and allegiance to Her Majesty, their responsibility in all general questions of policy must be to the Provincial Parliament, by whose confidence they administer the affairs of the country; and in the imposition of taxation, it is so plainly necessary that the administration and the people should be in accord, that the former cannot admit responsibility or require approval beyond that of the local

Legislature. Self-government would be utterly annihilated if the views of the Imperial Government were to be preferred to those of the people of Canada. It is therefore the duty of the present Government distinctly to affirm the right of the Canadian Legislature to adjust the taxation of the people in the way they deem best, even if it should unfortunately happen to meet the disapproval of the Imperial Ministry. Her Majesty cannot be advised to disallow such acts, unless her advisers are prepared to assume the administration of the affairs of the Colony irrespective of the views of its inhabitants." [59]

There was some further discussion, but Galt's constitutional position remained unchallenged. His reply ranks among our great state papers, and it set at rest forever any doubt as to Canada's control of her fiscal system.

The union of the four original Provinces which came into effect on July 1, 1867, was an event of momentous consequence to the British Empire, and not without its significance to the world, in which that Empire plays so great a part.[60] It paved the way to a truer conception of the conditions and relations upon which the permanence of the Empire might be securely founded; it eventually led British statesmen to the wider outlook already attained beyond the seas; it was an essential step to secure for the Dominions their present voice and influence in the Empire's affairs; and it crowned the endeavour of a century during which the initiative in constitutional development had been taken by colonial statesmen.

Mr. Goldwin Smith has declared that the real parent of Confederation was deadlock.[61] He al-

ludes, of course, to the almost unsurmountable difficulties which prevented any reasonable stability of government in the old Province of Canada for many years immediately before 1867. In the four years from 1854 to 1858, there were no less than six different administrations.[62] Between 1841 and 1867, eighteen different ministries were formed.[63] During that period no government held office for more than three years and nine months. But the view advanced by Goldwin Smith has not equal force so far as Nova Scotia and New Brunswick were concerned. In 1864, Sir Charles Tupper, then Premier of Nova Scotia, had carried in the Legislature of that Province a resolution favouring a legislative union of the Maritime Provinces. He explained, in speaking to the resolution, that he regarded his proposal as a step towards a wider union.

Such union had been the dream of Canadian statesmen for many years. Sir George Cartier, George Brown, John Sandfield Macdonald, D'Arcy McGee, John Ross, and Sir John Macdonald himself had been its earnest advocates; but, perhaps more than any other, Sir A. T. Galt had led the way with practical suggestions. In July, 1858, he moved a resolution in the Legislature of Canada, affirming the desirability of a federal union of Nova Scotia, New Brunswick, Newfoundland, and Prince Edward Island with Canada and the Western territories. When the Cartier-Macdonald adminis-

tration was formed in 1858, Galt became Inspector General upon condition that the Government would accept his confederation policy. A committee of the Executive Council (Cartier, Ross, and Galt) was appointed to confer with the British Government on this and other questions. Their official communication to Sir Edward Bulwer-Lytton was accompanied by a confidential letter prepared by Galt and signed by the members of the committee. It is remarkable, as his biographer has pointed out, that the scheme of union as proposed by him, and especially the division of powers between the Dominion and Provincial authorities, was in nearly every important respect followed in the Quebec resolutions and in the British North America Act.[64]

Political animosity and party strife were intense and bitter in Upper and Lower Canada as well as in Nova Scotia and New Brunswick. Let us remember with pride and gratitude that on this and other notable occasions patriotism and duty raised the hearts of men above party and above self. Especially is a tribute of honour and respect due to the memory of John A. Macdonald and George Brown, men of strong personality and of intense feeling. Both politically and personally, they were bitterly opposed to each other; without their powerful co-operation the project of union could not have been realized. Even after Confederation there was extreme difficulty in forming an administration, and it should not be forgotten that Tupper

and D'Arcy McGee renounced just ambitions and acknowledged claims to consideration, in order that a Government with some assurance of permanence might be established in 1867.

The second Taché-Macdonald administration was formed on March 20, 1864, and sustained an adverse vote in the Assembly on June 14. Within three years four administrations had gone down to defeat, and two general elections had not resulted in the establishment of stable government. On the morning of June 15, Brown, in a spirit of unselfish patriotism, made advances to supporters of the administration; and as a result of negotiations that were fully disclosed by Sir John Macdonald to the Assembly on June 22, a Coalition Government was formed which included Brown, Mowat, and McDougall. Brown had desired a larger representation of his supporters, but Macdonald declined this on the ground that the acceptance of such a proposal would alienate necessary support. As it was, the coalition was by no means popular, and McDougall, who had entered the Cabinet with Brown, met defeat at a by-election in North Ontario despite Macdonald's strong appeal to the electors on his behalf. Brown was personally unwilling to enter the Government, and it should be remembered to his credit that he used his powerful influence to bring about a reluctant acceptance by his following of proposals which Macdonald and his colleagues were unwilling and probably unable to modify.

Delegates from the three Maritime Provinces met in Charlottetown on September 1, 1864, to discuss proposals for a Maritime Union. A delegation from the new Coalition Government proceeded to Charlottetown and placed before the Maritime delegates their scheme for a larger union. As a result the Quebec Conference assembled on October 10, and continued in session until October 28. Upon the resolutions passed at that Conference the British North America Act of 1867 was based. In 1866 delegates from the United Province of Canada and from Nova Scotia and New Brunswick met in London, and their deliberations resulted in the Act as it eventually passed the Parliament of the United Kingdom.

In the letters of Sir John Macdonald and Sir A. T. Galt we have a curious picture of the attitude of British statesmen of the day; their indifference, their lack of vision, and their apparent relief at the prospect that the northern half of the North American continent would pass out of the orbit of the British Empire, are astonishing and even bewildering. Macdonald has left it on record that "the Union was treated by them much as if the British North America Act were a private Bill uniting two or three English parishes." [65] Galt in a letter to his wife, dated January 14, 1867, said: "I cannot shut my eyes to the fact that they want to get rid of us. . . . Day by day I am more oppressed with the sense of responsibility of main-

taining a connection undesired here and which exposes us to such peril at home . . . even Macdonald is rapidly feeling as I do." [66] Such was the impression created by British statesmen upon men whose whole desire and purpose was to maintain the unity of the Empire, and to create on this continent a great nation within the ambit of the Britannic system. In later years, and especially since the beginning of the present century, a truer conception has been vouchsafed to statesmen of the Mother Country. Their spirit of indifference or repulsion half a century ago had a certain corrective in the unfriendly attitude of American statesmen of the same period, which was due to misunderstanding and irritation arising out of the events of the Civil War, and which undoubtedly had its effect upon Canadian public opinion of the day. It is a singular reflection that in this respect the policy of American rather than that of British statesmen aided in the maintenance of Canada's connection with Britain. Fortunately the spirit in both the United Kingdom and the United States has wholly changed; and to-day Canada gladly serves as a herald of good will and co-operation between the two great Commonwealths.

In this brief summary of constitutional events extending over a period of more than one hundred years, we have seen Canada emerge from military dictatorship to the position of a Crown Colony, and thence to the status of a dependency enjoying

representative institutions. We have followed briefly the struggles and disorders which resulted in the attainment of responsible government, without full comprehension of the conventions and principles upon which its successful operation depended. Afterward came the difficult years in which the lessons of responsible government were learned by experience. Differences of race, language, temperament, and ideal created groups which made stable government impracticable, and strengthened the influences that led to Confederation. But during all this period Canada became more and more endowed with the attributes of complete self-government, until, in 1867, the four original Provinces fronting the Atlantic and reaching toward the Pacific stood before the world as a united Dominion. Already there was the germ of a national spirit, and Canada slowly awakened to the greatness of her destiny.

SECOND LECTURE

CONSTITUTIONAL DEVELOPMENT FROM CONFEDERATION TO THE WORLD WAR[1]

IT IS not my purpose nor is there occasion to dwell at any length upon the provisions of the British North America Act. In the preamble it is recited that Canada, Nova Scotia, and New Brunswick had expressed their desire to be federally united into one Dominion under the Crown, "with a Constitution similar in principle to that of the United Kingdom." This would seem to set at rest any question as to executive responsibility, but, in more than one instance, the Colonial Office proved that its vision was still obscured by old traditions.

The provisions of any constitutional Act are necessarily of so general a character that judicial interpretation is required. Thus no inconsiderable influence upon our Constitution has been exercised by the body of judicial decisions which has grown up in the examination and construction of its provisions by the Courts. Like all written constitutions it has been subject to development through usage and convention. Lord Bryce has pointed out the considerable effect of such influence in the United States: "The American Constitution

has changed, is changing, and by the law of its existence must continue to change in its substance and practical working, even when its words remain the same. "Time and habit", said Washington, "are at least as necessary to fix the true character of Governments as of other human institutions": and while "habit fixes some things, time remoulds others." [2]

In considering constitutional relations between Canada and other parts of the Empire, we observe that the British North America Act sets forth with no little particularity the distribution, between the Dominion and the Provincial Governments, of sovereign powers in domestic affairs. Such powers in their entirety seem to be limited only by the reservation of disallowance to the British Government, and by previous unrepealed enactments of the British Parliament applicable to the Dominions. As no formal attempt was made to define the constitutional relations between the British and Canadian Governments, those relations were free to develop by the same slow and sure steps which had built up the system of government now obtaining in the United Kingdom. Unfettered by a written constitution in the ordinary acceptation of the term, that system has been moulded and is controlled by custom and convention to a remarkable extent. In the words of Lord Bryce, "the always changing Constitution becomes interpenetrated by custom." [3] Anson puts it in much the same way:

"If in our Constitution we find that law and custom diverge, we must note first what is the law, and then how it has been overgrown by custom." [4] Lowell employs another happy phrase: "The conventions are superimposed upon the law, and modify political relations without in the least affecting legal ones." [5] In an interesting contribution to the history and study of relations between the nations of the British Commonwealth, Mr. H. Duncan Hall points out the vast scope of changes that may be effected through new conventions of the Constitution.[6]

In tracing constitutional development, it is useful to consider it in relation to the executive, the legislative, and the international functions of the instruments of government. This arrangement of the subject, if not strictly logical, will be found convenient. But before entering upon this phase it is important to examine the advance in methods of consultation and co-operation between the Governments of the British Commonwealth.

Twenty years after the Union the first Colonial Conference was held in 1887. The intention to hold it was referred to in the Queen's speech on the prorogation of Parliament. It was purely consultative; and, while many questions of common concern were discussed, probably the main purpose of the British Government was to find some method of

more effective co-operation in defence. At that time there was no conception of relations with the Colonies other than as subordinates, and apparenty there was no suggestion that they were to be consulted or even informed as to foreign relations. The representatives of Canada were not members of the Canadian Government, and the Conference was not between Governments as such.

The Conference of 1894 was summoned by the Canadian Government, and was held at Ottawa. Its genesis was the proposal for a conference between Canada and Australia respecting cable communication, but it developed into a gathering at which not only the Australian Colonies, but New Zealand and the Cape of Good Hope were represented. Lord Jersey held a watching brief on behalf of the British Government. Sir Mackenzie Bowell, Canadian Minister of Trade and Commerce, was appointed President.

The third Conference was held in London in 1897, on the occasion of the Diamond Jubilee of Queen Victoria. Only Prime Ministers had been summoned to the Jubilee, and, consequently, only Prime Ministers attended the Conference. The opinion was expressed that periodical conferences between representatives of the Dominions and of the United Kingdom were desirable, and a resolution to that effect was passed.

The fourth Conference was held in 1902, on the occasion of King Edward's Coronation; subjects

were indicated in the invitation to the delegates, and Ministers from the Dominions attended to assist the Prime Ministers. A formal resolution was passed favouring the holding of such conferences at intervals not exceeding four years, at which "questions of common interest could be discussed and considered, as between the Colonial Secretary and the Prime Ministers of the self-governing Colonies." The consultations were not to be with the British Government but with one of its departments, to which the Dominions were supposed in some measure to be attached.

In 1905, Mr. Lyttelton, then Colonial Secretary, addressed a despatch to the Dominions in which he proposed that the Colonial Conference should be transformed into an Imperial Council. Great Britain was to be represented by the Colonial Secretary; and the other members of the Council were to be the Prime Ministers of the Dominions or representatives appointed for that purpose by their Governments. India was to be represented whenever her interests might require it. It was also proposed to establish in London a permanent Commission or Secretariat of the Imperial Council, for the purpose of maintaining continuity between the periodical meetings. All of the Dominions except Canada approved of the proposal. The Canadian Government expressed the view that "the term Council indicates a more formal assembly possessing an advisory and deliberative character

and in conjunction with the word 'Imperial' suggesting a permanent constitution, which, endowed with a continuous life, might eventually come to be regarded as an encroachment upon the full measure of autonomous, administrative and legislative power enjoyed by all the self-governing Colonies." However, they agreed that the designation might be changed from "Colonial Conference" to "Imperial Conference." When the Conference assembled in 1907, the British Government withdrew its proposal for an Imperial Council, and the constitution of future conferences was settled in a resolution that marked a new departure.[7] Future conferences were to be held between the Government of the United Kingdom and the Governments of the self-governing Dominions; the Prime Minister of the United Kingdom was to be President *ex-officio*, and the Prime Ministers of the Dominions and the Colonial Secretary were to be *ex-officio* members. Firm insistence by Canada and Australia upon conferences between Governments and not between the Colonial Office and the Dominions met with success, as was inevitable. The resolution was a notable step in constitutional development.[8]

The Conference of 1911 was summoned under the arrangements approved in 1907. In 1915, the Conference was postponed by reason of the war. It was summoned again in 1917 and in 1918; reference will be made later to important developments which the war brought about in those years; and

resolutions other than those relating to the constitution of the conferences will be alluded to, as far as may be necessary, in connection with subjects to which they are relevant.

In the discussion of executive competence it is important to examine the status and functions of the Governor General. Before 1848 he was regarded as an Imperial officer responsible primarily to the British Government through the Colonial Office. With the progress of responsible government, there came a necessary change in his relation to the administration of public affairs.

In Canada this relation is the same in all essential respects as that of the King in Great Britain. The administration of public affairs is conducted by Ministers responsible to Parliament, and the Governor General acts by their advice.[9] By convention, his appointment is subject to the approval of the government of the day, and his functions as an Imperial officer are formal rather than real: his office as representative of the Crown exhibits the constitutional unity of the Empire. The development which has led to this result has been gradual but certain, and it has necessitated at times a firm stand by Canadian statesmen.

Among the many great public services of the late Hon. Edward Blake, a distinguished graduate of this University, for many years its Chancellor,

was his success in procuring a most important modification of the Governor General's Instructions. In 1876, a despatch from the Colonial Secretary (Lord Carnarvon) explained a proposal to issue permanent Letters Patent and Instructions, to which the Commissions to be issued to successive Governors General would refer. Under the previous practice a special Commission and Instructions had been issued on each appointment. The form of permanent Instructions proposed was of an extraordinary character and apparently a reversion to the Crown Colony type.[10] There were clauses providing that the Governor General should preside at meetings of Council; that he might dissent from the opinion of the major part, or of the whole thereof, in executing his "powers and authorities"; and that he should consult the Council except when in his judgment Her Majesty's service would sustain prejudice by such consultation, or when the matters were very urgent or unimportant. In capital cases the Governor was to receive the advice of Ministers, but he was to extend or withhold pardon and reprieve according to his own deliberate judgment, whether the members of Council concurred or not.[11] It was apparent that the wisdom of the Colonial Office had not increased with years. Mr. Blake, then Minister of Justice, visited England in 1876, and secured an entirely new form of Instructions, which was issued in 1878, and in which the only provision that the Governor

General might act except on the advice of Ministers related to the exercise of the pardoning power, viz.: that in any case in which a pardon or reprieve might directly affect the interests of the Empire, or of any country or place beyond the jurisdiction of the Dominion Government, the Governor General should take those interests especially into his own personal consideration in conjunction with the advice of the Ministers.[12]

It was an important feature of the British North America Act that the power to disallow Provincial Acts, or to refuse assent to those reserved by a Lieutenant Governor, was vested in the Canadian, and not in the British Government.[13] There was more than one reactionary attempt by the Colonial Office to usurp this authority.[14] In 1869, the Governor General (Sir John Young) informed the Colonial Secretary of his view that it should be exercised upon the advice of the Privy Council of the Dominion, and he requested specific instructions. In reply, Lord Granville emphasized the duty of the Governor General as an Imperial officer, and directed him to exercise his own judgment, even against the advice of Ministers, in case a Provincial enactment was in his opinion "gravely unconstitutional or *ultra vires* or objectionable on grounds of Imperial policy." If, however, Ministers advised disallowance of any Provincial Act, as illegal or unconstitutional, he should follow that advice. Subsequently in 1873,

the Colonial Secretary (Lord Kimberley), thus instructed the Governor General as to certain Acts of the New Brunswick Legislature: "This is a matter in which you must act on your own individual discretion, and on which you cannot be guided by the advice of your responsible Ministers." In 1875, the Canadian Government, by Minute of Council, took direct issue on this question, and affirmed that the Governor General in such cases must act upon the advice of Ministers. Lord Carnarvon, who had succeeded as Colonial Secretary, was not inclined to accept this view; and in December, 1875, Mr. Blake, then Minister of Justice, in an elaborate report, approved by Minute of Council, again asserted the Canadian position. Further communications from Lord Carnarvon were met by Mr. Blake with equal firmness.[15] The Canadian position was maintained, and the view advanced by the Colonial Office may be regarded as having been definitely abandoned.

In discussing legislative competence it is not my purpose to attempt any examination of the numerous questions which have arisen upon the construction of the British North America Act in its distribution of legislative authority between the Dominion and Provincial Governments; but there are other aspects in which the subject must be considered. The Act provides that the Governor

General may assent to any bill, or that he may reserve it for the signification of the Queen's pleasure; that in case he assents to a bill, the Queen in Council may within two years disallow the Act, and such disallowance shall annul the Act from the date of signification thereof by the Governor General; and that any bill reserved for the signification of the Queen's pleasure shall not have force unless within two years the assent of the Queen in Council is signified.

It appears that but one Act of the Dominion Parliament has been disallowed. It was passed in 1873, and empowered any committee of the Senate or House of Commons to examine witnesses upon oath when so authorized by resolution. There was confusion of opinion as to the competency of Parliament to enact it. The law officers of the United Kingdom eventually advised that the Act was *ultra vires*, and it was accordingly disallowed for that reason and not upon considerations of policy.[16] Disallowance of either Dominion or Provincial legislation on this ground is practically obsolete. Such questions are properly for the Courts. Several Acts, however, have been reserved, and some of them have not gone into operation as they did not receive the assent of the Queen in Council. For example, an Act of 1868, reducing the salary of the Governor General from £10,000 to £6,500, was so reserved, and failed to receive the assent of the Queen in Council.

Probably this course was taken with the consent, if not at the instance, of the Canadian Government. The power of disallowance has not been exercised by the British Government for more than fifty years, and while it still has a legal existence, it may be regarded as constitutionally dead. Similarly the power of reservation has been little used in recent practice, as a suspending clause is usually inserted in any measure, the provisions of which require negotiation with the British Government or further consideration or action by the Dominion Government before they may properly become operative.[17]

An important question arose in 1889 with respect to legislative competence in regard to copyright. The Dominion Act of 1889, which with minor modifications in form, but not in principle, found place as Part II of the Copyright Act, Revised Statutes, 1906, Chapter 70, contained a provision that it should not go into force until proclaimed by the Governor in Council. The concurrence of the Government of the United Kingdom was considered necessary, because the Act dealt with a subject on which Imperial legislation extending to all the British Dominions had been enacted before Confederation.[18] Sir John Thompson's report to Council, dated August 3, 1889, pointed out that the copyright system then in force under Imperial and Canadian legislation had been found most unsuitable to Canada.[19] In examining the long and

somewhat irritating correspondence which ensued between the Canadian Government and the Government of the United Kingdom, one observes in the attitude of the Copyright Association and of the British Society of Authors the old theory of colonial subordination. This is not surprising, as their representative seems to have been less intelligent than aggressive. Sir John Thompson encountered a remarkable and unfortunate lack of vision and comprehension on the part not only of the Colonial Office but of the entire British Government. Under the inspiration of interested organizations in Great Britain, they evinced a spirit very similar to that which had induced the protest against Canadian fiscal legislation. British ministers from 1889 to 1894 seemed either incapable of appreciating or unwilling to accept constitutional realities reluctantly recognized by their predecessors in 1859. Against the constitutional right of Canada they set up the legal power of the British Parliament, and their attitude was distinctly reactionary. After Sir John Thompson's death domestic controversy on political questions of absorbing interest caused the copyright question to lapse into the background. Mr. Keith,[20] in his discussion of it, concludes that the legal power was in the British Parliament, but that the constitutional right was undoubtedly with Canada. "His [Sir John Thompson's] constitutional claim could not possibly have been resisted for a moment, if seriously examined.

To insist that Canada should conform her copyright legislation to that of the United Kingdom, merely to please the publishers in the latter, was constitutionally a monstrous doctrine, nor can it be wondered that the Minister described the state of the law as odious and unjust." [21] A few years later the British publishers and authors realized that their attitude might eventually prove detrimental to their own interests. Upon further consideration of the question at a conference held in London in 1910 (under the arrangement for subsidiary conferences, arrived at in 1907), it was finally determined that, with respect to copyright, the Dominions must be free to legislate as they saw fit. Accordingly the Imperial Copyright Act of 1911 repeals the enactments against which Thompson protested, and does not itself extend to any Dominion unless declared by the legislature thereof to be in force therein; and such legislature may at any time repeal any enactments relating to copyright passed by the Imperial Parliament, including the Act of 1911, so far as operative within that Dominion. Thus the principle for which Thompson contended so long and so forcibly was eventually recognized and established, as, in the very nature of things, it was bound to be.[22]

The power to legislate respecting naturalization has been attended with less controversy. Previous to 1914 there was provision in the United Kingdom and in each Dominion for the naturaliza-

tion of aliens; but such naturalization, when obtained in a Dominion, had no effect outside the country in which it was granted. Thus a person naturalized in a Dominion was in the United Kingdom an alien. The subject was discussed at the Imperial Conference in 1907, and again in 1911. Much negotiation took place subsequently between the Government of the United Kingdom and the Governments of the Dominions. In the end an arrangement was reached, and in 1914 an Act was passed by the Parliament of the United Kingdom, providing for the issue by the Secretary of State of a certificate of naturalization to an alien on proof of five years' residence and the fulfilment of certain conditions as to character and other requisites. To preserve the autonomous authority of each Dominion, it was declared that these provisions are not to have force within any Dominion unless adopted by its legislature. They were so adopted in Canada in 1914. The naturalization thus granted takes effect in all parts of the Empire that have adopted the Act. Under its terms, local naturalization has the same effect as heretofore but the Canadian statute providing therefor has been repealed.

With regard to merchant shipping, however, there has been much confusion and no little controversy concerning the legislative powers of Dominion Parliaments. The British Act of 1854 was revised and consolidated in 1894. In the meantime

certain enactments of the Canadian Parliament had been validated by Imperial legislation, such validation being regarded as necessary in so far as the Canadian legislation was inconsistent with the Act of 1854. Apparently this situation was not taken into account when the Parliament of the United Kingdom passed the Act of 1894, which repealed the Act of 1854 and all amendments thereto. The subject was discussed at the Imperial Conference of 1911, and Mr. Brodeur, then Canadian Minister of Marine and Fisheries, pointed out the difficulties. Sir Joseph Ward had moved a formal resolution demanding that wider legislative powers should be entrusted to the self-governing Dominions with respect to British and foreign shipping. Sir Wilfrid Laurier took the ground that by the British North America Act Canada had received plenary power to legislate in such matters. In the end Canada and New Zealand voted for the resolution and the other four parties at the Conference abstained. The questions raised are by no means free from difficulty, and it is apparent that further confusion and controversy will ensue and continue unless the whole question is considered from every point of view, and a definite agreement reached as to the conditions and limitations governing the exercise of legislative power by the United Kingdom and by each of the Dominions with regard to the subject.

The incidents relating to the exercise of legisla-

tive authority in connection with military and naval defence will be considered in a subsequent lecture. For the present it is sufficient to say that during the period in question the legislative competence of the Canadian Parliament in this respect was fully recognized.

The Canadian people accomplished Confederation by means of a statute enacted at their instance by the Parliament of the United Kingdom. Necessary amendments have been effected by subsequent Acts passed by that Parliament upon joint resolution of the Senate and Commons of Canada, and no such amendment has been refused. Thus the legal powers of the Parliament of the United Kingdom have been utilized as a convenient means of effecting constitutional amendments. Doubtless the Canadian Parliament would hesitate to pass any such resolution if its effect could properly be regarded as a violation of the original compact between the Provinces. In any such case it would be proper, and indeed necessary, to obtain the consent of every Province affected by the proposed amendment.

With the material growth and constitutional development of the oversea nations the Parliament of the United Kingdom has ceased to be an Imperial Parliament in any real sense so far as the Dominions are concerned. Its legal power is subject to the limitations of constitutional right. Theoretically it has power to impose direct taxation or compul-

sory military service upon the people of any Dominion; constitutionally and practically it possesses no such right or authority. The exercise of any power contrary to established or developing conventions would have legal sanction, but would not be respected, and in the end could not be enforced. In practice the position is becoming tolerably clear; in theory there remains a singular anomaly. Apprehensions may be quieted if we remember that under our system of government many such anomalies may be observed. The King's veto is legally existent but constitutionally dead. Effective administration of public affairs would be impossible if any instrument of government should continually exercise its legal powers to the legal limit.

In considering international relationships we find an impressive development with respect to the negotiation of commercial and other treaties specially affecting Canadian interests. The present status was reached in successive stages of a long journey. In 1870 (March 16), Mr. Huntington, in the Canadian Commons, moved a resolution declaring, *inter alia*, that great advantage would result from placing the Government of the Dominion in direct communication with the several states that might be willing to negotiate commercial arrangements. On March 21, Sir A. T.

Galt moved an amendment, which in this respect was substantially the same as the original resolution. After considerable debate an amended resolution was adopted declaring that any attempt to enter into a treaty with a foreign power without the strong and direct support of the Mother Country as the principal party must fail. Events of later years have by no means borne out this view.

With much misgiving, and not a little reluctance, Sir John Macdonald in 1871 became one of the British commissioners at the conference that resulted in the Treaty of Washington. Many questions were involved, some of the widest Imperial concern, others having direct relation to Canada alone. The British commissioners were Lord de Grey, Sir Stafford Northcote, Lord Tenterden, and Mr. (later Sir) Montague Bernard. The inner history of the conference, as detailed by Sir John Macdonald, is not pleasant reading.[23] He was much concerned at the apparent disposition of the British commissioners to make concessions at the expense of Canada in order to bring about a more advantageous settlement of the difficulties in which the Government of the United Kingdom had become involved. The Treaty of 1818, relating to the Inshore Fisheries of Canada, had been carried into effect by an Imperial Statute (59 Geo. III, cap. 38). When Macdonald stoutly maintained Canadian interests, Lord Tenterden

suggested that this statute might be repealed and Canada left helpless. According to Macdonald's report,[24] the British commissioners seemed to have only one thing in their minds: "to go home to England with a treaty in their pockets settling everything, at no matter what cost to Canada." At one time he contemplated withdrawing from the Commission, but refrained by reason of the grave results that would follow.[25] He found it difficult, if not impossible, to make the Americans understand that the Government of the United Kingdom had "no dispensing power as a paramount authority which would override any action of the Canadians. When Lord de Grey tells them that England is not a despotic power, and cannot control the Canadian Parliament when it acts within its legitimate jurisdiction, they pooh-pooh it altogether."[26] Sir John seemed to have been perplexed throughout as to his duty: on the one hand he was Prime Minister of Canada; on the other, he was a British commissioner, and thus supposed to act under instructions from the British Government. In the course of his insistent struggle with the British commissioners, he appealed to the Home Government on one important point, and on April 5, he wrote: "The Home Government has backed me in a satisfactory manner, and given me rather a victory over my colleagues." [27]

In 1874, the Hon. George Brown, at the instance of the Canadian Government, was officially associ-

ated with Sir Edward Thornton, British Ambassador at Washington, for the purpose of negotiating a treaty of commerce between Canada and the United States.

Late in 1878, Sir A. T. Galt was commissioned to undertake negotiations with Spain, and afterwards with France, for better commercial relations. Lord Salisbury was careful to say that they must be conducted by the British Ambassador in each instance.

In 1878, the Canadian Government desired to appoint Sir A. T. Galt High Commissioner for Canada in London and applied to the British Government to have him appointed a Commissioner when treaties were being negotiated in which Canada was interested. The Secretary of State for the Colonies (Sir Michael Hicks-Beach) made the following cavalier reply:

"I have to inform you that it is not thought desirable to appoint a Canadian Commissioner to take part in the negotiation of any treaty, but if your Government desire to send a person enjoying their confidence to advise with Her Majesty's Government, or with the British Ambassador, on any questions that may arise during the negotiations, Her Majesty's Government will be happy to give attention to his representations." [23]

This short-sighted view soon passed into the desuetude to which equally narrow opinions of earlier days have been consigned.

Sir Charles Tupper, who succeeded Sir A. T. Galt as High Commissioner, contributed in great measure to this result. As Canadian representative

at the international congress for the protection of submarine cables in 1883, he took a very independent position.[29]

In 1884, he obtained fuller recognition of Canada's status in negotiating treaties with foreign countries. This right was recognized in a letter from the Foreign Office, dated July 26, 1884, containing the following extract:

"If the Spanish Government are favourably disposed, the full power for these negotiations will be given to Sir Robert Morier and Sir Charles Tupper jointly. The actual negotiations would probably be conducted by Sir Charles Tupper, but the convention, if concluded, must be signed by both plenipotentiaries." [30]

Mr. Bayard, Secretary of State of the United States, in correspondence with Sir Charles Tupper in 1887, spoke of the difficulties which had arisen over the treaty of 1818, and used the following language:

"In the very short interview afforded by your visit I referred to the embarrassment arising out of the gradual practical emancipation of Canada from the control of the Mother Country and the consequent assumption by that community of attributes of autonomous and separate sovereignty, not, however, distinct from the Empire of Great Britain. The awkwardness of this imperfectly developed sovereignty is felt most strongly by the United States, which cannot have formal relations with Canada, except directly as a Colonial dependency of the British Crown, and nothing could better illustrate the embarrassment arising from this amorphous condition of things than the volumes of correspondence published severally this year relating to the fisheries by the United States, Great Britain and the Government of the Dominion. The time lost in this circumlocution, although often regrettable, was the least part of the difficulty, and the indirectness of appeal and reply was the most serious feature, ending, as it did, very unsatisfactorily."

He expressed the expectation that Sir Charles Tupper would be appointed plenipotentiary of Great Britain in the negotiations with the United States, and deplored the delay occasioned by the roundabout manner in which the correspondence on the fisheries had been conducted.[31] In reply, Sir Charles Tupper agreed that direct personal communication would save valuable time, and render each side better able to comprehend the needs and the position of the other. Mr. Chamberlain, Sir Lionel Sackville-West, and Sir Charles Tupper were appointed plenipotentiaries, and in 1888 they succeeded in negotiating a treaty respecting the Atlantic Fisheries which the United States Senate declined to ratify. Sir Charles Tupper took a leading part in the negotiations.

In 1891, the Parliament of Canada by address of both Houses [32] prayed Her Majesty to take such steps as would be necessary to denounce and terminate the provisions in the treaties with the German Zollverein and the Kingdom of Belgium, the effect of which was to prevent the British Colonies from granting lower rates of customs duties on goods the produce of the United Kingdom than those imposed on similar goods the produce of Belgium and Germany. It was declared that the treaties were incompatible with powers vested in the Parliament of Canada, and that their continuance tended to produce complications and embarrassments, as the self-governing Colonies

possessed the constitutional right to define their respective fiscal relations to all foreign nations, to the Mother Country, and to each other. In reply, the Colonial Secretary (Lord Knutsford) pointed out certain difficulties which, in his opinion, would ensue from the proposed action, and no step was taken.

In 1892, Sir Charles Hibbert Tupper, in co-operation with the British Ambassador at Washington, conducted the negotiations which resulted in the Behring Sea Treaty. He also acted as the British agent in the subsequent arbitration at Paris in 1893.

A commercial convention between Canada and France was negotiated by Sir Charles Tupper in 1892-1893. The British Ambassador at Paris (Lord Dufferin) was formally associated with him for the purpose, but the actual negotiations were conducted by Sir Charles.

At the Colonial Conference of 1894, the following resolutions were passed:

"That provision should be made by Imperial legislation enabling the dependencies of the Empire to enter into agreements of commercial reciprocity, including power of making differential tariffs, with Great Britain or with one another.

"That any provisions in existing treaties between Great Britain and any foreign power which prevent the self-governing dependencies of the Empire from entering into agreements of commercial reciprocity with each other or with Great Britain should be removed." [33]

This led to an important despatch (June 28, 1895) from the Colonial Secretary (Lord Ripon)

to Canada and the Australian Colonies. He expressed the view that the power of negotiating treaties without reference to the British Government would give the Colonies an international status as separate and sovereign states, and would result in breaking up the Empire. Therefore, such negotiations must be conducted by His Majesty's representatives at the Court of the foreign power, but such representatives should have the assistance of a Colonial representative, either as a second plenipotentiary or in a subordinate capacity. He declared, *inter alia*, that any tariff concessions by a Colony to a foreign country must be extended to Great Britain and the rest of the Empire.

In 1897, the tariff introduced by Mr. Fielding provided for preferential treatment of the products of the United Kingdom. There was much debate as to the effect of such provisions, but finally the law officers of the Crown in Great Britain gave a formal opinion that the effect of the treaties with Germany and Belgium was to grant to those countries the same preferences as those provided in the new Canadian tariff for the products of the United Kingdom. By reason of many treaties containing the "most favoured nation" clause, it followed that the preference thus granted to Germany and to Belgium must also be accorded to nearly every nation in the world.

At the Colonial Conference of 1897, the following resolution was passed:

"That the Premiers of the self-governing Colonies unanimously recommend the denunciation, at the earliest convenient time, of any treaties which now hamper the commercial relations between Great Britain and her Colonies." [34]

The British Government accordingly gave notice to Germany and Belgium that the treaties would be denounced at the expiration of one year. The notice of denunciation declared that treaties containing such provisions were not in the interest of the Empire as a whole. Thus the treaties came to an end at the expiration of the year, but in the meantime an informal arrangement was effected between Great Britain and Germany by which the provisions of the treaty, notwithstanding its denunciation, should continue to apply to all the Empire, with the exception of Canada.[35] This arrangement seemed wholly inconsistent with the ground advanced for the denunciation.[36]

In 1898, as a result of negotiations between the Government of Canada and the Government of the United States, a joint High Commission was appointed to negotiate with the United States a treaty or treaties covering certain questions, some of which had special relation to Canadian interests. In addition to Lord Herschel, who represented the British Government, there were three Canadian commissioners: Sir Wilfrid Laurier, Sir Richard Cartwright, and Sir Louis Davies. The negotiations proved abortive. In 1903 the Alaskan boundary treaty was negotiated under the direction

of the Canadian authorities, although the British Ambassador at Washington acted as plenipotentiary. In the subsequent arbitration, Sir Clifford Sifton, then Minister of the Interior, was appointed British agent. Mr. Fielding and Mr. Brodeur in 1907 negotiated a commercial convention between Canada and France, and in 1909 a supplementary convention.

The treaty of 1909 (promulgated February 2, 1912) relating to boundary waters and questions arising between the United States and Canada, was signed by Mr. Root on behalf of the United States and by Mr. (now Lord) Bryce as British Ambassador at Washington. Mr. Root also conducted the negotiation of this highly important treaty on behalf of the United States; while the negotiation on behalf of Canada was carried on by Sir George Gibbons (in co-operation with Mr. Bryce) under the direct supervision of Sir Wilfrid Laurier as Prime Minister. I doubt whether there has been in either country a full appreciation of the notable advance which the treaty effected in providing for the friendly determination of boundary questions. It created a tribunal of six commissioners, three appointed by the President of the United States, and three by the King on the recommendation of the Governor in Council. In addition to the provisions relating to boundary waters, it is declared, by Article 9, that any other questions or matters of difference involving the rights, obliga-

tions, or interests of either country, or of the inhabitants thereof, along the common frontier, shall be referred to the Commission for examination and report whenever either Government shall request such reference. The report in such case is not to have the character of an arbitral award, and in certain cases separate reports may be made by each section of the Commission to its own Government. Article 10 contains still wider provisions, which, however, can only be invoked on the part of the United States with the consent of the Senate, and on the part of Canada with the consent of the Governor in Council. It is a remarkable but most useful provision of this treaty that any interference with or wrongful diversion of waters on either side of the boundary, resulting in any injury on the other side of the boundary, shall give rise to the same rights and entitle the injured parties to the same legal remedies as if such injury took place in the country where such interference or diversion may occur. During the past nine years the Commission has had under consideration many questions of the highest importance, and in every case its decisions were probably more satisfactory, and certainly more expeditious, than could have been reached by ordinary diplomatic action.

In 1910 direct negotiations were successfully conducted by Canadian representatives with the United States Government in order to obtain for Canada the minimum rates under the Payne tariff.

Sir Joseph Pope, Under Secretary of State for External Affairs, negotiated with the Government of the United States in 1911 a convention respecting pelagic sealing.

The tariff negotiations at Washington in 1911 illustrated two points. In the Governor General's speech at the commencement of the session, reference was made to the desirability of more equitable tariff arrangements between the United States and Canada. Then followed this significant passage:

"Following the negotiations which took place some months ago between the President of the United States and my Government, the results of which were at the time communicated to Parliament, a further conference between representatives of the two countries has been held at Ottawa." [37]

It was a negotiation between the Government of Canada and the Government of the United States. Lord Bryce, then British Ambassador at Washington, seems to have taken no part therein, except to give the conventional introduction of the Canadian representatives to the Government of the United States; the negotiations were entirely conducted by the two Canadian Ministers. The principle laid down in the 13th paragraph of the Colonial Secretary's despatch of June 28, 1895, was not strictly adhered to.[38] Mr. Fielding announced that the favourable treatment accorded to products of the United States would be extended to the products of the Empire and to certain nations entitled thereto by treaty. But the favour-

able treatment accorded by the United States to Canadian products was not to extend to the rest of the Empire. In the debate which took place in the British House of Commons on February 8 and 9, 1911, this was recognized by Mr. Asquith in the following words:

"It is quite true that owing to the reductions which this agreement provides for, certain commodities going from Canada will enter into the United States upon lower terms than corresponding commodities imported from this country. Mr. Bryce pointed that out to the Canadian negotiators in the course of the negotiations." [39]

Mr. Keith expresses the opinion that while plenipotentiaries of the Dominions to represent them at international conventions may properly be appointed, each appointment should be upon the advice of the Imperial Government although upon the nomination of the Dominion Government; otherwise he considers that the Crown would cease to be an element of unity. He proceeds as follows:

"Moreover, the observance of these forms would avoid the disadvantages which now arise from attempts at separate treaty-making, such as that of the Canadian Ministers in 1911, whose action, had it been ratified by the Parliament of Canada, would have undoubtedly tended to diminish the unity of the Empire, and perhaps ultimately to destroy that unity altogether." [40]

Mr. Keith writes under the impression (probably unfounded) that the British Ambassador assisted in the Reciprocity negotiations.[41] From that standpoint the criticism of method does not seem to be justified. In several previous instances the same course had been followed in the negotiation of commercial treaties.

While Lord Bryce was Ambassador at Washington many treaties touching Canadian interests were negotiated through him by the Canadian Government. In addition to those otherwise mentioned there were the International Boundary Treaty of 1908, the Convention for Protection of Food Fishes in the same year, the Treaty respecting the Conveyance of Persons in Custody and respecting Wrecking and Salvage, and the treaty respecting the boundary in Passamaquoddy Bay. Canadian interests were also affected by the Pecuniary Claims Treaty.[42]

At the Imperial Conference of 1911, Sir Wilfred Laurier moved the following resolution:

"That His Majesty's Government be requested to open negotiations with the several Foreign Governments having treaties which apply to the Overseas Dominions with a view to securing liberty for any of those Dominions which may so desire to withdraw from the operation of the treaty without impairing the treaty in respect of the rest of the Empire." [43]

The discussion was adjourned, and upon its resumption he answered effectively the criticism that the proposal would destroy the principle of commercial unity within the Empire, pointing out that for many years Great Britain in negotiating commercial treaties had reserved to the Dominions the right to accede or refrain from acceding thereto.[44] His proposal, which was unanimously accepted, followed naturally the action taken upon the initiative of the Canadian Government at the Conference of 1897 to denounce the German and Belgian treaties.

At the Conference of 1911, it was also resolved that the Dominions should be consulted respecting the instructions to British delegates at future meetings of the Hague Conference, and that when time, opportunity, and the subject matter permitted, similar procedure should, as far as possible, be followed when preparing instructions for the negotiation of other international agreements affecting the Dominions. The qualification greatly minimized the value of the resolution, and surprise has been expressed that it should have been accepted by the Dominions.[45]

On September 15, 1914, a very important treaty was signed between the British Empire and the United States. It declares that all disputes between the high contracting parties, other than disputes the settlement of which is already provided for, shall, when diplomatic methods of adjustment have failed, be referred for investigation and report to a permanent International Commission, and that war shall not be declared or hostilities begun during such investigation or before the Commission shall have reported. The five members of the Commission are appointed as follows: each government chooses one member from its own country, and one member from some third country; the fifth member is chosen by agreement of the two governments. In case the British interests affected are mainly those of some one or more of the self-governing Dominions, the member chosen from the British

Empire may be selected from the Dominion principally interested. Before this treaty was signed, and during its negotiation, the self-governing Dominions were consulted as to its terms, which received their approval.

Questions having arisen between Canada and the United States with regard to the fisheries on both the Pacific and Atlantic coasts, Sir Douglas Hazen, formerly Canadian Minister of Marine and Fisheries, and the Hon. William C. Redfield, Secretary of Commerce of the United States, were appointed Commissioners by their respective Governments in December 1918, to make a joint inquiry. Two permanent officials of each Government were also members of the Commission. As one of the results of the inquiry, a treaty recommended by the two Commissioners, and having for its object the preservation of the Pacific Coast fisheries, was signed by Sir Douglas Hazen and Sir Auckland Geddes on behalf of Canada. It has not been ratified by the United States, and thus the necessary legislation to enforce it has not been enacted.

Other developments during the war with respect to the negotiation of treaties will be considered in the concluding lecture.

The foreign policy of the British Government has been largely directed, not by the Cabinet as a whole, but by the Prime Minister and the Foreign Secretary. It does not appear that their colleagues

were consulted except upon questions of great moment. Probably a Foreign Minister would have been shocked at the suggestion of intervention or influence from the Dominions. Although questions touching foreign relations had occasionally come under discussion at the Conferences from 1887 to 1911, there is no reason to suppose that the Dominion representatives had been taken into the confidence of the British Government with respect to general policy or commitments. In the negotiation of commercial treaties, in the framing of tariffs, and in the control of immigration, each Dominion had formulated and carried out its own policy. It is manifest, as Mr. Jebb[46] and Mr. Hall[47] have well pointed out, that there is an intimate connection between these questions and foreign relations. In questions of "high policy" so called, it is not apparent that the Dominions had been informed or consulted, except in one notable instance, when Mr. Chamberlain, in 1899, took informal but effective steps to ascertain the attitude of some of the Dominions with regard to impending difficulties in South Africa.

At the Conference of 1911, Mr. Asquith speaking as Prime Minister and President of the Conference, laid emphasis upon the local autonomy, "absolute, unfettered, complete," of the Dominions. With this he coupled "loyalty to a common head, co-operation spontaneous and unforced for common interests and purposes."[48] He decried cen-

tralization in the governance of the Empire, declaring that "just in proportion as centralization was seen to be increasingly absurd, so had disintegration been felt to be increasingly impossible." At the same Conference a discussion was initiated by Sir Joseph Ward upon the expediency of establishing an Imperial Council of State, with representatives from all the self-governing parts of the Empire, advisory to the Imperial Government on all questions affecting the interests of the Dominions.[49] As was pointed out by Sir Wilfrid Laurier, Sir Joseph Ward's speech was not at all germane to the resolution that he proposed.[50] No member of the Conference supported the proposals put forward by Sir Joseph in his speech, and none of them seemed to favour his resolution, which he failed to support by argument. General Botha frankly recognized the difficulties involved, but declared his faith in their ultimate solution. "Decentralization and liberty," he said, "have done wonders; let us be very careful before we, in the slightest manner, depart from that policy. It is co-operation and always better co-operation between the various parts of the Empire which we want, and that is what we must always strive for."[51] The proposals outlined in the speech of Sir Joseph Ward gave to Mr. Asquith the opportunity of making a famous pronouncement.[52] He had little difficulty in disposing of Sir Joseph Ward's proposals; but he went so far as to affirm that, in

respect of such grave matters as the conduct of foreign policy, the conclusion of treaties, the declaration of war, and indeed all relations with foreign powers, the authority of the Imperial Government could not be shared, and must be exercised by that Government subject only to its responsibility to the Imperial Parliament. In this aspect he based an argument on "our present system of responsible Government." Apparently he did not take into account other Parliaments, responsible to the people of overseas nations whose interests were directly affected by the authority which in his judgment could not be shared. This declaration of Mr. Asquith may be placed side by side with that of Lord John Russell in 1837. One declared that the principle of executive responsibility to the people's representatives could not be tolerated in the Colonies; the other affirmed that in respect of foreign relations the principle of responsible government was of so limited application as to debar the Dominions from any voice in such questions however vital to their interests. The policy propounded in either instance would tend, if not lead, towards disruption. The Dominions enjoy the protection of the common flag of the Empire, a protection of inestimable value. As the Empire cannot go to war in sections, a declaration of war involves the Dominions. The extent of participation rests always with the Dominion Parliaments, but it must, at least, involve the

protection of their territories and as far as possible of their seaborne commerce. In view of that inevitable participation, how is it possible for the Empire to endure if the Dominions are to be without voice as to relations or commitments that may involve them in war?

During the Conference the Dominion Ministers were summoned to a meeting of the Imperial Defence Committee. That body, in its then form, had been established in 1904, and technically it consisted of the Prime Minister of the United Kingdom and such persons as he might summon to its meetings. In practice the ministers responsible for the Treasury, the Admiralty, and the Foreign, Colonial, Indian, and War Offices, together with certain technical advisers were always summoned. The responsibilities of each of these ministers are intimately connected with the wide problem of Imperial defence. While the Committee was only a consultative or advisory body, it brought into close co-operation the important departments of the British Government. One of its sub-committees, known as the Overseas Defence Committee, had special responsibilities in connection with problems of defence beyond the United Kingdom.

It appears from the concluding speeches at the Conference, that in the Imperial Defence Committee the Prime Ministers of the Dominions had been taken fully into the confidence of the British

Government with regard to foreign relations at that time. In Mr. Asquith's eloquent phrase the "arcana imperii" had been laid bare to them "without any kind of reservation or qualification." But his meaning was less inspiring than the eloquence of his phrases if his message to the Dominions amounted to no more than this: "Centralization is absurd except in foreign affairs, but there it is absolutely essential. We must maintain the principle of responsible government, but in those affairs its application must be restricted to the United Kingdom; you may gaze at the 'arcana imperii' but in their control you shall have no share."

In 1912, after a change of administration in Canada, the Prime Minister of the Dominion and four of his colleagues attended meetings of the Committee of Imperial Defence. Among those upon whose judgment surest reliance could be placed there was grave apprehension as to the purposes of Germany. The proceedings of the Committee were of course confidential, but, as a result, steps were taken in Canada to co-ordinate the activities of those departments of government upon which responsibility would fall in the event of war. A Committee was constituted, active steps were taken, and the work done was of immense advantage when hostilities commenced.

On July 22, 1912, the British Prime Minister, speaking in the House of Commons, made a state-

ment which somewhat modified the position that he had taken at the Conference of 1911:

"Side by side with this growing participation in the active burdens of the Empire on the part of our Dominions, there rests with us undoubtedly the duty of making such response as we can to their obviously reasonable appeal that they should be entitled to be heard in the determination of the policy and the direction of Imperial affairs." [53]

In the half century which elapsed between Confederation and the World War, constitutional development was notable both in character and extent. At the beginning the Governor General in his quality of Imperial officer exercised no inconsiderable influence over certain public affairs; at the close his functions in that character had practically ceased. Appointed with the consent of the Canadian Government, he had become in effect a nominated President, invested with practically the same powers and duties in this country as those appertaining to the King in the British Isles. New and convenient methods of consultation had been established through periodical conferences, in which at first the Dominions were regarded as subordinate dependencies attached to a department of the British Government, but in which they eventually took their places as sister nations upon equal terms with the United Kingdom. The Dominions were originally included in commercial treaties without much regard for their

wishes or interests. Eventually no such treaty bound them except by the expressed consent of their Governments. At first Canada was told somewhat brusquely that no Canadian commissioner could take part in the negotiation of a treaty affecting his country; in the end Canada freely negotiated her own commercial treaties by her own commissioners, without control, or interference except of a formal character. Canadians acting as British agents represented the interests of Canada and the whole Empire in the Behring Sea and Alaskan Boundary arbitrations. Naturalization granted in Canada became effective in the United Kingdom. Notwithstanding unfortunate and formidable forces of reaction, the right of the Dominion to full control of its copyright laws was acknowledged. It was gradually realized that legal power is over-ridden by constitutional right. The power to disallow Canadian statutes fell into desuetude. Canada's right to a voice in foreign policy involving her interests as a great Dominion of the Empire began to be recognized. Her complete control over her policy in respect of military and naval defence was acknowledged. By these sure steps, Canada was steadily mounting to the stately portal of nationhood.

Thus stood the relations of Canada to the Empire in the fateful month of August, 1914. There had arisen a truer comprehension of the ties uniting the oversea nations and the motherland.

At last it began to be realized that upon complete liberty and full autonomy a unity and strength capable of resisting the severest shock could be established. When the day of trial came, the response of the Dominions vindicated forever the principle that they had consistently upheld.

THIRD LECTURE

CONSTITUTIONAL DEVELOPMENT DURING THE WORLD WAR AND AFTERWARDS [1]

FOR many years before the outbreak of war the German Government, through its diplomatic and consular service and by other means, had made a special study of the British Empire in almost every important aspect, with particular attention to the extent and development of natural resources, industrial progress, military and naval power, and last, but not least, political organization. However thoroughly the Germans may have grasped other conditions, it is clear that they thoroughly failed to comprehend the constitutional relations between the British self-governing nations; nor did they in the least realize either the spirit or the resources of the overseas Dominions. They believed that the political fabric of the Empire would crumble under the shock of war's impact; it stood firm as the everlasting hills. Their military authorities were convinced that in any European theatre the military power of the Dominions might be regarded as negligible. During the four years of war which preceded the armistice there came into the battle line more than a million men of unsurpassed courage, discipline, and effec-

tiveness, to prove the falsity of the estimate; and one Dominion (Canada) had produced in enormous quantities, from her own resources, and by means of her own industrial development, munitions of war essential for the triumph of the allied cause.[2]

The war brought prominently into the foreground many considerations touching military and naval defence. As early as 1862 a Canadian Ministry had asserted, on behalf of the Canadian Legislature, the constitutional principle established in England by the Bill of Rights, that the raising and maintenance of Canadian military forces was subject to the unfettered control of the legislative representatives of the Canadian people.[3] However, before Confederation, and for some years afterwards, considerable British forces were maintained in Canada at the expense of the British Government, and large sums had been expended by that Government in fortifications and naval bases. These forces were gradually withdrawn as Canada began to assume increasing responsibility for the defence of her own territory. In 1871 there was an interesting debate in the Canadian Parliament relative to the retention of Imperial forces in Canada, and the points at which they should be stationed.[4] During the Boer War, Canada took over temporarily the defence of Halifax, where the only remaining British garrison was stationed;

and, in 1905, the offer of the Dominion to undertake, in future, the defence of both Halifax and Esquimalt, was accepted, the Imperial forces being entirely withdrawn. Upon the outbreak of war in 1914, the chief constitutional question that arose related to the sufficiency of Dominion legislation for the control and discipline of Canadian forces overseas. The authority of a Dominion to enact legislation effective beyond its limits had been judicially challenged, and even denied. By Section 69 of the Militia Act the Governor in Council is authorized to place the militia on active service beyond Canada for the defence thereof, whenever advisable by reason of emergency. The officers and men enlisted during the war became members of militia units, and were thus subject to this provision. Under Canadian legislation (Militia Act, Section 4) the Army Act, the King's Regulations, and all other relevant laws not inconsistent with Canadian enactments and regulations, have force and effect for the governance of the militia as if enacted by the Parliament of Canada. The Army Act, thus made applicable, provides (Section 177) that where a force of militia is raised in a Colony, any law of the Colony may extend to the officers, non-commissioned officers, and men belonging to such force, whether within or without the limits of the Colony. Thus any question as to extraterritorial jurisdiction presented no difficulty. But at a later date there was an important constitutional development in

relation to the overseas control and administration of Canadian military forces. By Order in Council passed under the War Measures Act, the Canadian Government, in October, 1916, established in London a Ministry of Overseas Military Forces with a resident Minister. This Department was charged with the administration of military affairs overseas, as well as with the expenditure connected therewith, and the negotiations and arrangements incident to that branch of the service. The first Division, which crossed the Atlantic in the autumn of 1914, was developing into a great army with a complex organization whose activities began to extend into every sphere of military action. Eventually, the Overseas Ministry became an overseas Canadian War Office, with an adequate staff and a systematic arrangement of necessary departments and branches. After the promotion of General Sir Julian (now Lord) Byng to Army Command, the Canadian Corps came under the command of a Canadian General. Military operations in the field were under the final direction of British General Headquarters. Apart from these, the Canadian forces were administered as a thoroughly autonomous body, under the primary direction of the Overseas Ministry, with ultimate responsibility to the Canadian Government and Parliament. As the Commander of the Canadian Corps was responsible to a separate Government, the Canadian Corps had an entirely different status from that

of the ordinary British Corps or Army. To maintain effective relations with the British organization, a Canadian section was established at British General Headquarters in France. The relations between the Overseas Ministry and the British War Office, as well as those between the Canadian section and British Headquarters, were never strained or difficult. Good sense and a cordial understanding enabled the system to be worked out with perfect success on the basis of Canada's complete autonomy in the administration of her military forces.

Naval defence was the subject of discussion at many of the Colonial and Imperial Conferences. In 1909 considerable apprehension arose by reason of the increasing strength of the German navy, which eventually led to the concentration of British naval forces in home waters. The Canadian House of Commons passed a unanimous resolution designed to promote the speedy organization of a Canadian naval service.[5] This was followed by a message from the Prime Minister of the United Kingdom to the Prime Ministers of the Dominions, inviting them to attend a Defence Conference in July of that year. The Conference was held, and certain conclusions were reached. As a result the Canadian Naval Service Act was passed in 1910. It made provision for a Canadian Naval Service; and by Section 23 it provided that in case of an emergency the Governor in Council might place

at the disposal of His Majesty, for general service in the Royal Navy, any ships or vessels of the Naval Service, and the officers and seamen serving therein. In 1911, an important agreement was concluded between the Government of the United Kingdom and the Governments of Canada and Australia, of which the salient features are as follows:

1. The naval services and forces of these Dominions were to be exclusively under the control of their respective Governments.
2. Their training and discipline were to be uniform with those of the naval forces of the United Kingdom, and officers and men were to be interchangeable.
3. The Canadian and Australian Governments were to have their own naval stations, the limits of which were defined in the agreement. Canada was to have both an Atlantic and a Pacific station.
4. In the event of Dominion ships being despatched outside of their respective stations the British Admiralty was to be notified, and in case such ships were sent to a foreign port necessary arrangements were to be made through the British Foreign Office.
5. Where British and Dominion ships operated together the senior officer was to take command, subject to certain conditions.
6. Provision was made by which Dominion ships could take part in fleet exercises or in any other joint training.
7. In time of war when the naval service of the Dominion or any part thereof had been placed at the disposal of the Imperial Government by the Dominion authorities,[6] the ships were to form part of the British fleet, and to remain under the control of the British Admiralty during the continuance of the war.

When war broke out little had been accomplished in the creation of a Canadian Naval Service, and

the Dominion confined its efforts almost entirely to military aid.[7]

A proposal for centralized control of all the naval forces of the Empire was put forward by the Admiralty in 1918. It was based upon the following resolution, passed by the Imperial War Conference on March 30, 1917:

"That the Admiralty be requested to work out immediately after the conclusion of the war what they consider the most effective scheme of Naval Defence for the Empire for the consideration of the several Governments summoned to this Conference, with such recommendations as the Admiralty consider necessary in that respect for the Empire's future security."

Detailed reasons were set forth by the Admiralty in favour of a single navy under the control of an Imperial naval authority both in peace and war. Upon such Imperial naval authority the Dominions were to be represented, and there were to be local Naval Boards in each Dominion. The proposal involved a number of details, upon which it is not necessary to dwell. Considering the proposal impracticable, the Dominion ministers found themselves unable to accept it.[8]

The result of discussions in the Imperial and subsidiary conferences on naval defence has been more valuable in the constitutional than in the practical aspect. Whether in peace or war the freedom of the seas is essential to the unity and security of the Empire; it is also essential to the prosperity and development of Canada so far as her products must seek markets abroad. Incidents of

the late war should give Canadians an object lesson in this regard; but, not unnaturally, there is difficulty in gaining the true perspective. For this purpose a comprehension of our probable expenditure as a separate nation would be useful. The present situation may be summarized as follows: each Government or Parliament determines for itself upon the advice of its Naval Department, and subject to the limitations of public opinion, the extent of its naval programme. In the United Kingdom that programme must be measured by the extent of world-wide responsibilities. Until the Dominions participate more fully and effectively in directing foreign policy it is improbable that this wider consideration will appeal strongly to their people.

By reason of important developments during the war, the discussion of control over immigration has been reserved for this lecture. It has been the subject of many legislative enactments in Canada, and the Dominion has at all times vigorously asserted its right to such control. On some occasions there have been attempts by Provincial Legislatures to exercise, either directly or indirectly, a like jurisdiction; and several Acts of the Province of British Columbia were disallowed between 1896 and 1911, on the ground that they violated treaty obligations to Japan. The strong feeling against

unrestricted Chinese immigration in the early years of Confederation led to enactments, still in force, that impose severe restrictions on persons of Chinese origin entering Canada. Among other restrictions, a head tax of $500 has been enforced for many years; and Chinese immigrants are also subject to restrictions imposed by the general immigration Acts. In consequence of a great increase in Japanese emigration to British Columbia, Mr. Lemieux, then Postmaster General and Minister of Labour, visited Japan in 1908. Apparently he did not make great progress until he had secured the support of the British Ambassador; but eventually an understanding was reached, under which the Japanese Government undertook to restrict emigration from Japan to Canada within certain limits. It is believed that the understanding thus reached has been faithfully observed by the Japanese Government.

The enactments now in force are largely based upon the Statute of 1910, which applied not only to immigrants from foreign countries but to those from the United Kingdom or other British Dominions. It established a long list of prohibited classes, which has been enlarged by subsequent legislation. Very wide powers are conferred upon the Governor in Council to extend such prohibitions from time to time, whenever it may be deemed necessary or expedient. This authority has been exercised on many occasions, notably by prohibiting the en-

trance of any immigrant who has come to Canada otherwise than by continuous journey, and by forbidding the entrance of artisans or labourers at designated ports in British Columbia.

Restriction of immigration from other parts of the Empire, and especially from India, has repeatedly given rise to both irritation and misunderstanding. The question is essentially one of economic concern, and does not depend so largely as has been imagined upon differences of race and social usage. At the Imperial Conference of 1897 Mr. Chamberlain raised a discussion on the subject. It was again discussed at the Imperial Conference of 1911, the topic having been introduced by Lord Crewe, then Secretary of State for India. Taking as his text a memorandum circulated among the members of the Conference, he frankly admitted the right of the self-governing Dominions to decide for themselves whom they would admit as citizens, but he pointed out that Indian agitators made mischievous use of restrictions against immigration from that country. Sir Wilfrid Laurier, while agreeing with Sir Joseph Ward[9] that each Dominion was most anxious to avoid anything which would impair the loyal spirit of the native population of India, or which would place difficulties in the way of the British Government, made it clear that the immigration of Asiatic people accustomed to a lower standard of living brought about competition with our own labour and disturbances of economic

conditions. Neither he nor any other member of the Conference proposed any satisfactory solution, and the discussion remained without result except possibly a better understanding of the difficulties. In 1917, the question was brought up at the Imperial War Conference. There was a preliminary informal discussion between representatives of India and of the Dominions, in which the Indian case was put with much force, frankness, and moderation by Sir Satyendra (now Lord) Sinha to the Dominion ministers, who answered him in the same spirit. As a result of the discussion the principle of reciprocity of treatment between India and the Dominions was adopted as a working basis by resolution of the Conference. A memorandum filed by the Indian representative was recommended to the favourable consideration of the Governments concerned. In the same year, the Prime Minister of Canada submitted this resolution to the Canadian Parliament and, paying a tribute to the splendid loyalty of the Indian population throughout the war, he commended the proposal as eminently fair. There was no criticism of the proposal, although Sir Wilfrid Laurier apparently did not regard it as sufficiently definite.

At the Imperial War Conference of 1918, after a further informal discussion, a resolution was passed defining and elaborating the principle already accepted. The complete power of the Dominions was declared in the following terms:

"It is an inherent function of the Government of the several communities of the British Commonwealth, including India, that each should enjoy complete control of the composition of its own population by means of restriction on immigration from any of the other communities." [10]

Provision was made for temporary visits and for reciprocal treatment; and it was declared that Indians already permanently domiciled in the Dominions should be allowed to bring in their wives and minor children on certain conditions. In Canada this policy was carried out by an Order in Council (March 26, 1919) which repeats, *ipsissimis verbis*, the important portions of the resolution in question.

In 1912 the Imperial Government had given assurance to the Government of Canada that, pending a final solution of the question of voice and influence in foreign relations, a Dominion minister resident in London would be regularly summoned to all meetings of the Committee of Imperial Defence, and would be regarded as one of its permanent members; there was a further assurance that no important step in foreign policy would be undertaken without consultation with such representatives.

At the Imperial War Conference of 1918, the question of more direct channels of communication between Dominion Governments and the Government of the United Kingdom was raised by the

Dominion Prime Ministers, and a resolution moved by Mr. Hughes was passed in amended form as follows:

"1. That this Conference is of the opinion that the development which has taken place in the relations between the United Kingdom and the Dominions necessitates such a change in administrative arrangements and in the Channels of Communication between their Governments as will bring them more directly in touch with each other.

"2. That the Imperial War Cabinet be invited to give immediate consideration to the creation of suitable machinery for this purpose." [11]

The subject was then taken up in the Imperial War Cabinet, and as a result the following resolution received its unanimous approval:

I. 1. "The Prime Ministers of the Dominions, as members of the Imperial War Cabinet, have the right of direct communication with the Prime Minister of the United Kingdom, and *vice versa*.

2. "Such communications should be confined to questions of Cabinet importance. The Prime Ministers themselves are the judges of such questions.

3. "Telegraphic communications between the Prime Ministers should, as a rule, be conducted through the Colonial Office machinery, but this will not exclude the adoption of more direct means of communication in exceptional circumstances."

II. "In order to secure continuity in the work of the Imperial War Cabinet and a permanent means of consultation during the war on the more important questions of common interest, the Prime Minister of each Dominion has the right to nominate a Cabinet Minister, either as a resident or visitor in London, to represent him at meetings of the Imperial War Cabinet to be held regularly between the plenary Sessions." [12]

In Canada the first part of the resolution did not carry matters much beyond the point they had

already reached. Whenever necessary during the war it had been the practice for the Prime Minister of the Dominion to send a direct message to the Prime Minister of the United Kingdom. In form the communication was from the Governor General to the Colonial Secretary embodying the exact text of the message. Replies were communicated through the same channel. The necessity of continuous consultation in important matters of common Imperial concern has been recognized by the constitutional resolution of 1917, to which further reference will be made.

Throughout the war there was a resident Canadian Minister in London, either as Acting High Commissioner, or as Minister of Overseas Military Forces. In recent years the High Commissioner of Canada has discharged in many respects the duties and responsibilities of a diplomatic agent, keeping in close touch with the Colonial Office and with other important departments of the British Government.

In 1915, after the outbreak of war, the Prime Minister of Canada attended a meeting of the British Cabinet.[13] But in 1917, a very important step in advance was taken. The almost unlimited flexibility of the British Constitution in meeting new needs by new methods, and the remarkable powers vested in the Prime Minister through the gradual development of constitutional conventions, enabled Mr. Lloyd George to call into operation

what was known as the Imperial War Cabinet. In its constitution, purpose, and scope, the imagination, comprehension, and foresight of the British Prime Minister were discernible. It included the five members of the British War Cabinet and the Prime Ministers of the self-governing Dominions.[14] Thus ministers from all the self-governing nations of the Empire met around a common council board. The expression "Cabinet" has been criticized; that word has no precise legal meaning, and its constitutional significance has changed and developed from time to time. It was used as a convenient designation of this conference of ministers acting in co-operation and responsible to their respective Parliaments. Each minister or group of ministers represented a Government, and the conference might fairly be termed a Cabinet of Governments. It was but three-quarters of a century since British ministers, supported by an overwhelming majority of their Parliament, had declared that responsible government could never be granted to the Colonies and that separation would be preferable. Less than half a century had passed since the most commanding figures in the statesmanship of Britain anticipated and even hoped for the disruption of the Empire. Of what consequence was half a continent in comparison with an English county? Now a million fighting men from free self-governing nations were in the Empire's battle line, and Dominion statesmen took

their equal places at the Empire's council table in the supreme test of its destiny.

The Imperial War Cabinet met almost daily, but its work was also advanced by means of committees. In 1917 consideration was given to the conditions upon which peace might be made after the war had been brought to a successful conclusion, and two committees were appointed to inquire and report. Each of the Dominions was represented on these committees. In consequence of a discussion initiated on behalf of Canada, a committee was appointed in June, 1918, to consider and report upon important and even vital questions in connection with the war. The committee consisted of the Prime Minister of Great Britain and the Prime Ministers of the Dominions, including General Smuts as representative of the Prime Minister of South Africa. The Secretary of State for War, with the Chief of the Imperial General Staff, was to attend the committee if his presence was required. After several meetings, and an exhaustive inquiry, the committee in the latter part of August prepared an elaborate report setting forth its conclusions, which, however, were superseded by the rapid march of events on the western front and the unexpected collapse of the enemy's resistance.

During 1917 and 1918, the Imperial War Conference also proceeded with its deliberations. Its most important discussion in 1917 was concerned

with the question of future constitutional relations, and resulted in the following resolution:

"The Imperial War Conference are of opinion that the readjustment of the constitutional relations of the component parts of the Empire is too important and intricate a subject to be dealt with during the war, and that it should form the subject of a special Imperial Conference to be summoned as soon as possible after the cessation of hostilities.

"They deem it their duty, however, to place on record their view that any such readjustment, while thoroughly preserving all existing powers of self-government and complete control of domestic affairs, should be based upon a full recognition of the Dominions as autonomous nations of an Imperial Commonwealth, and of India as an important portion of the same, should recognize the right of the Dominions and India to an adequate voice in foreign policy and in foreign relations, and should provide effective arrangements for continuous consultation in all important matters of common Imperial concern, and for such necessary concerted action, founded on consultation, as the several Governments may determine." [15]

Before this resolution was proposed in the Conference, its terms had been carefully considered by the Dominion Ministers, and, after a conclusion was reached, it had been submitted to the British Government. Having been accepted without hesitation by Mr. Lloyd George and his colleagues, it was passed unanimously by the Conference. This resolution establishes the basis of future co-operation; it gives clear recognition to equality of nationhood between the Dominions and the Mother Country; and it marks one of the most important, and possibly one of the final stages in the evolution of constitutional relations within the British Commonwealth.

A summary of the transactions at the Conference of 1921 has recently been made public. The 14th Resolution has reference to constitutional relations, but it can hardly be said that its pronouncement is progressive or even illuminating. After citing the constitutional resolution of 1917, the resolution of 1921 proceeds as follows:

(*a*) "Continuous consultation, to which the Prime Ministers attach no less importance than the Imperial War Conference of 1917, can only be secured by a substantial improvement in the communications between the component parts of the Empire. Having regard to the constitutional developments since 1917, no advantage is to be gained by holding a constitutional Conference."

(*b*) "The Prime Ministers of the United Kingdom and the Dominions and the Representatives of India should aim at meeting annually, or at such longer intervals as may prove feasible."

(*c*) "The existing practice of direct communication between the Prime Ministers of the United Kingdom and the Dominions, as well as the right of the latter to nominate Cabinet Ministers to represent them in consultation with the Prime Minister of the United Kingdom, are maintained."

Clause (c) is merely a reiteration, while clause (b) recommends a greater frequency of meetings, which, while highly important, is probably impracticable. It is rather difficult to attach any effective meaning to the first sentence of clause (a). The second sentence is not absolutely clear, but it seems to imply that constitutional development since 1917 makes further consideration of the subject unnecessary. Much remains to be done before a constitutional conference can be held with advantage, and there was good reason for delay, but not for this conclusion. In May, 1921, the

Canadian Prime Minister declared that the relations between the constituent parts of the Empire must be based upon a conception of complete freedom and equality in national status.[16] Further he observed that the practical need would be met by clearly understood and definitely accepted declarations of principle with improvements in so much of the form and content of the existing mechanism as may be found to be obsolete. This declaration sets forth a reasonable view of present conditions and of necessary development. More than two years ago, Lord Milner, speaking before representatives of the overseas Dominions, emphasized the same view in these words:

"The only possibility of a continuance of the British Empire is on a basis of absolute out-and-out equal partnership between the United Kingdom and the Dominions. I say that without any kind of reservation whatsoever. It is very easy to say that; but undoubtedly the working out of it in practice without bringing about the severance of relations between us and the Dominions will be one of the most complicated tasks which statesmanship has ever had to face. I am not afraid of it, and yet I have to admit that the difficulties are such that our best efforts may end in failure. I hope not. At any rate, there is no other way out." [17]

Foreign countries, as Lord Milner further observed, must realize that the Dominions are in the first place members of a British league of nations, while they are also members, side by side with the United Kingdom, of the general society of nations. No one would be inclined to minimize the difficulties of which Lord Milner has spoken so gravely; on the other hand no one should doubt their

ultimate satisfactory solution. The constitutional resolution of 1917 laid down certain principles which may reasonably be regarded as essential to the future unity of the Empire. If the self-governing Dominions may not have *adequate* voice and influence in the direction of the Empire's foreign policy, it is not improbable that some of them will eventually have distinctive foreign policies of their own; and that may mean separation. But the resolution of 1917 will be barren of further results unless a way is found to work out its principles in practice. It can hardly be claimed that any development since 1917 has accomplished this. In the Foreign Office men of the highest distinction and ability have found their careers; from that Office have gone forth Ambassadors and Ministers to posts of great responsibility; it has behind it the splendid traditions of many centuries during which there was no oversea nation to claim unaccustomed rights. It was not unnatural that in such an atmosphere the spirit of Lord Stanley should linger or the attitude of Mr. Asquith be reflected. But the spirit of to-day, while not unconscious of the profound difficulties to which the earnest words of Lord Milner call our attention, will realize that the resolution of 1917 was based upon vital considerations which cannot lightly be disregarded. While it is true that the Dominions were represented at Paris, that they took their place at the Peace Conference, and that they became signatories of the

Peace Treaty, I have yet to learn that since the conclusion of peace their right to "an adequate voice in foreign policy and in foreign relations" has been recognized in any effective or practical way. This result does not seem to justify complacency or inaction. It is perfectly competent for the nations of the British Commonwealth to declare their constitutional relations, and to have them accepted by foreign powers. Until this is done there will be not only difficulty and uncertainty, but danger of reaction. Even within the Empire those relations are imperfectly realized, and abroad their implications are misunderstood, if not resented. Having regard to the resolution of 1917, and to the status gained by the Dominions in the war, it is essential that this condition should not continue.

In the early stages of the war there had been announcements in the Parliaments of the Empire that the Dominions would be fully consulted concerning the terms of peace. The sessions of the Imperial War Cabinet in 1917 and 1918 afforded in a certain measure the means for carrying out this undertaking. On October 29, 1918, the question of representation of the Dominions in the peace negotiations was raised by Canada in a despatch from the Prime Minister of Canada to the Prime Minister of the United Kingdom.[18] After the

arrival of the Canadian ministers in London (November, 1918) the question was taken up formally. The discussion, which continued until their departure for Paris, early in January, 1919, raised a most interesting and important question. It was debated informally at conferences between British and Dominion ministers, and in the formal meetings of the Imperial War Cabinet. At first it was assumed that only five places could be secured for the British Empire at the peace table. The panel system, under which the representation of the British Empire at the sessions of the Peace Conference would be selected from day to day as the nature of the subject demanded, was not regarded as satisfactory in itself. Finally, Canada proposed that in the general representation of the British Dominions the panel system might be utilized when necessary, but that there should be distinctive representation for each Dominion, similar to that accorded to the smaller Allied Powers. Eventually the Imperial War Cabinet accepted this principle, and it was also accepted at the preliminary conference in London between representatives of the British Empire, France, and Italy. Throughout the discussion the proposals of the Dominion ministers received full sympathy and support from Mr. Lloyd George and his colleagues.

When the question of procedure, including that of representation, came before the Peace Conference at Paris on January 12, the proposal for distinctive

representation of the British Dominions aroused strong opposition. Again it was discussed in the British Empire delegation,[19] and the representatives of the Dominions, standing firmly upon the principle recognized in London, declined to accept any inferior status. In the result their insistence prevailed; and through the combination of the panel system with their own distinctive representation, the Dominions secured a peculiarly effective position. The conditions of peace were worked out through a series of committees or commissions, whose reports and resolutions were eventually consolidated into the treaty of peace. In the meetings of the British Empire delegation, of which the Dominion representatives were members, the report of each commission was thoroughly discussed before final acceptance. On many of the commissions Dominion ministers had important places, and they took no inconsiderable part in the proceedings of the Conference.

A further development relates to the signature and ratification of the various treaties concluded at the Conference. In view of the new position secured, and of the part played by the Dominion representatives at the peace table, it was considered that the treaty should be signed by Dominion plenipotentiaries, and should be submitted for approval to the Dominion Parliaments. Accordingly the Prime Minister of Canada proposed that the assent of the King as High Contracting Party to

the various Treaties should, in respect of the Dominions, be expressed by the signature of Dominion plenipotentiaries, and that the preamble and other formal parts of the treaties should be drafted accordingly. This proposal, having been adopted in the form of a memorandum by all the Dominion Prime Ministers, at a meeting summoned by the Prime Minister of Canada, was put forward and accepted.[20] It involved the issuance by the King as High Contracting Party, of "Full Powers" to the Dominion delegates; and in order that those issued to the Canadian plenipotentiaries might be based upon formal action of the Canadian Government, an Order in Council conferring authority for that purpose was passed on April 10, 1919.[21] The new status of the Dominion is manifested again in the constitution of the League of Nations. Having gained at the Peace Conference the position of "Powers with special interests," the Dominions took the ground that they should be similarly accepted in the future international relationships contemplated by the League. The League of Nations Commission, while inclined to admit this position in principle, did not at the outset accept all its implications. In the first draft of the Covenant of the League provision was made for Dominion membership, but it was obscure as to the character of Dominion representation.[22] However, the document was admittedly tentative, and the Dominion case was pressed.

In its final form, as amended and incorporated in the Treaty of Peace with Germany, the Covenant fully recognizes the status of the Dominions. As signatories of the Treaty they became members of the League; and their position as to membership and representation in the Assembly is in all respects the same as that of other signatory members.[23] As to representation on the Council, and with special reference to Article 4, the Prime Minister of Canada obtained from President Wilson and Messrs. Clemenceau and Lloyd George, a signed declaration "that upon the true construction of the first and second paragraphs of that Article, representatives of the self-governing Dominions of the British Empire may be selected or named as members of the Council."

Some difficulty arose as to the constitution of the International Labour Organization, which formed part of the Treaty of Peace. In the end the view advanced and insisted upon by the Dominions prevailed.[24]

On the battlefields of Europe and at the council table of the nations, the British Commonwealth entered upon a new stage of its existence and development. The principle established by the constitutional resolution of 1917 was carried to a logical conclusion at the Peace Conference. There were anomalies at Paris; but the Britannic system of government, and for that matter international law itself, are full of anomalies. The important con-

sideration is the outstanding fact that the Dominions secured a recognized status in the family of nations. It was not without strong insistence that the principle affirmed in the Imperial War Conference of 1917, and acted upon in the Imperial War Cabinet of 1918, was accepted by the Peace Conference. Other nations had learned during the war to realize the strength of the ties that unite the British Dominions, but they could not be expected quickly to comprehend their nature. The principle of equal nationhood and complete autonomy has been established. It remains to determine the system and method by which that principle shall receive vitality and force in the practical administration of the Empire's affairs.[25]

During the war a question of some importance arose respecting an exercise of executive authority. The Government of the United Kingdom advanced the view that it had authority to requisition ships owned and registered in Canada. This view was controverted by the Canadian authorities, who took firm ground that in such case the executive power was constitutionally vested in the Government of Canada. The Canadian view was expressed in a Minute of Council, dated January 30, 1917, from which the following is extracted:

"The question to be determined is not one of legal power but of constitutional right. This distinction is well recognized in the Conventions which control the exercise of legislative power. For

example, the Parliament of the United Kingdom has the legal power but not the constitutional right to legislate directly in respect of Canadian affairs and in doing so to repeal *pro tanto* the British North America Acts. It is submitted that the exercise of His Majesty's prerogative with respect to Canada must be governed by the like considerations. It is the Parliament of Canada alone which constitutionally can determine and prescribe the burdens to be borne by this Dominion or by any of its citizens for the purposes of this or any other war. Similarly when the prerogative of the Crown is to be exercised, the minister has no doubt that in respect of all matters which involve a contribution by citizens domiciled in this country, this prerogative must be exercised upon the advice of Your Excellency's Ministers and not upon the advice of the Government of the United Kingdom. . . . If a ship be registered and the owners be domiciled and reside within Canada, the compulsory displacing of the ownership or control of the ship in favour of the Crown for any public purpose should, independently of the actual location at the time of the ship itself, be likewise a matter for the consideration and sanction of the Government of Canada through the means with which the Government is constitutionally endowed."

The Minute of Council further declared that in any case when the requisitioning of a ship was considered necessary for war purposes, representations from the British Government would receive prompt and sympathetic consideration from the Government of Canada. It cannot be doubted that the principle thus affirmed was constitutionally sound, and that the prerogative of the Crown in such a case must be exercised by the Governor General upon the advice of his ministers.

The question of diplomatic representation was raised soon after Confederation. Mr. Blake, in 1882, Sir Richard Cartwright, in 1889, and Mr.

Mills, in 1892, moved resolutions, and made notable speeches in which the importance of Canadian diplomatic representation at Washington was fully discussed in the Canadian Commons. They emphasized the view that a Canadian diplomatic representative would be an envoy of the Queen, and entitled to respect and consideration as such; that he would act in co-operation with the British Ambassador at Washington; that he would be in direct communication with the Government of Canada, to whom he would be responsible; and that the growing importance of Canada's relations with the United States made such an appointment desirable. Leading men on both sides of the House participated in the discussion, and many interesting speeches were made. Sir Wilfrid Laurier favoured the proposal, and advanced the view that it was merely a stage in a natural evolution toward complete citizenship. In 1892 Mr. D'Alton McCarthy moved a resolution advocating the appointment of a representative of Canada who would be attached to the staff of Her Majesty's Minister at Washington, and who would be specially charged to watch, guard, and represent the interests of Canada. On this motion an important discussion also took place. An amendment moved by Sir Charles Hibbert Tupper urged the necessity of consultation with the British Government before any final action was taken. This amendment was declared carried on division. In December, 1909, Sir Wilfrid

Laurier, speaking upon a somewhat similar resolution, which was withdrawn, paid a well deserved tribute to Mr. (now Lord) Bryce, then British Ambassador at Washington, and expressed the view that under then existing circumstances the proposal was inexpedient and unnecessary. He observed, however, that the time might come when it would be advantageous to have a Canadian diplomatic representative at Washington.

By reason of war conditions it was found necessary at the beginning of 1918 to establish a Canadian War Mission at Washington, which was in effect, although not in form, a diplomatic mission. It was created under the War Measures Act by Order in Council which authorized the Mission to represent the Canadian Government and its various departments in negotiations with administrative departments of the United States, and with British or Allied War Missions operating in that country.

During the war the subject of diplomatic representation was taken up by the Prime Minister of Canada with the Prime Minister of the United Kingdom and with the Foreign and Colonial Secretaries. The arrangement finally arrived at was announced to the Canadian Parliament (May 10, 1920) in the following terms:

"As a result of recent discussions an arrangement has been concluded between the British and Canadian Governments to provide more complete representation at Washington of Canadian

interests than hitherto existed. Accordingly, it has been agreed that His Majesty, on advice of his Canadian ministers, shall appoint a Minister Plenipotentiary who will have charge of Canadian affairs and will at all times be the ordinary channel of communication with the United States Government in matters of purely Canadian concern, acting upon instructions from, and reporting direct to, the Canadian Government. In the absence of the Ambassador, the Canadian Minister will take charge of the whole embassy and of the representation of Imperial as well as Canadian interests. He will be accredited by His Majesty to the President with the necessary powers for the purpose.

"This new arrangement will not denote any departure either on the part of the British Government or of the Canadian Government from the principle of the diplomatic unity of the British Empire.

"The need for this important step has been fully realized by both governments for some time. For a good many years there has been direct communication between Washington and Ottawa, but the constantly increasing importance of Canadian interests in the United States has made it apparent that Canada should be represented there in some distinctive manner, for this would doubtless tend to expedite negotiations, and naturally first-hand acquaintance with Canadian conditions would promote good understanding. In view of the peculiarly close relations that have always existed between the people of Canada and those of the United States, it is confidently expected as well that this new step will have the very desirable result of maintaining and strengthening the friendly relations and co-operation between the British Empire and the United States." [26]

This proposal led to several debates in the Canadian House of Commons, of which the latest and most important took place on April 21, 1921. In support of the proposal reliance was placed upon the grounds advanced in the earlier debates already alluded to; and it was urged that objections put forward in those debates had been removed by

the arrangement now proposed, which gave an important and definite status to the Canadian representative. It was pointed out that a very large part of the affairs engaging the attention of the British Embassy at Washington related to the needs and conditions of this country, with which a Canadian Minister would be specially familiar. The advantage of constant conference and association with members of the American Government, the opportunity for explaining and comprehending divergent points of view, and the advance in Canada's constitutional status during the war and at the Peace Conference were relied upon. It was urged that Canadian Ministers negotiating treaties with the United States had occupied for the time being a diplomatic status, and that much advantage and no detriment had resulted. If such representation, though temporary in its character, was sound in principle as well as advantageous, objection to its permanency could not be sustained. The principle was actually in operation, as the members of the Canadian section of the International Joint Commission were appointed by the Crown on the recommendation of the Canadian Government. That Commission, comprising two sections, one Canadian, the other American, dealt with many questions formerly referred to diplomatic representatives.

Against the proposal was raised the time-worn objection that it would imperil our relations with

the Mother Country; Russell's and Stanley's theories were dressed in a new garb. Reliance was placed on the supposed unwisdom and danger of authorizing a Canadian Minister to discharge the functions of the British Ambassador during the absence of the latter; the appointment of a Canadian Minister was declared to be unnecessary, and it was said that no such appointment could be properly made, according to international usage, except by a sovereign power. To the latter argument came the reply that His Majesty, being King of Canada as well as of all other portions of the Empire, had the undoubted right to appoint a Minister specially to represent this country in its diplomatic relations with the United States; and that this view had been fully accepted in constituting the International Joint Commission.[27]

For many years Consuls General at Ottawa or Montreal, and especially the Consuls General of the United States, of Japan, of Italy, and of Germany, have discharged certain functions of a diplomatic or semi-diplomatic character. This novel feature of international usage was discussed by Sir Wifrid Laurier in the House of Commons on December 7, 1910.[28] He observed that all this had been done without authority, and was not in accordance with the rules ordinarily applied among civilized nations; but he considered that it had become "a necessity because of the development of the larger Colonies of the British Empire, which

have become practically nations." He thought Canada should have an understanding with the Government of the United Kingdom that "the Consuls should be allowed semi-diplomatic recognition amongst us." The practice has continued since 1910, when Sir Wilfrid Laurier spoke, and has been found both convenient and advantageous. For example, in 1913 direct negotiations took place between the Prime Minister of Canada and the Consul General of Japan as to the conditions under which Canada would accede to the treaty between Great Britain and Japan of April 3, 1911.[29] In the discussion of the Bill introduced for that purpose, the Prime Minister announced an understanding, that, in case it should become law, the Government of Japan would declare its intention to maintain the limitation and control that it had previously exercised in regulating emigration from Japan to Canada. After the passage of the Act this declaration was communicated directly to the Canadian Government in a letter from the Consul General to the Prime Minister in the following terms:

"The undersigned, His Imperial Japanese Majesty's Consul General at Ottawa, duly authorized by his Government, has the honour to declare that the Imperial Japanese Government are fully prepared to maintain and intend to maintain with equal effectiveness the limitation and control which they have since 1908 exercised in the regulation of emigration from Japan to Canada." [30]

From time to time there have been judicial decisions which either denied or doubted the extra-

territorial effect of statutes enacted by Dominion Parliaments. The subject is discussed by Mr. Keith.[31] In the Canadian Parliament, during the session of 1920, a resolution was proposed by the Government, to the effect that the British North America Act should be amended by providing that any enactment of the Parliament of Canada otherwise within its authority shall operate extraterritorially according to its intention to the same extent as if enacted by the Parliament of the United Kingdom. In moving the resolution, which received the unanimous assent of Parliament, the Minister of Justice explained that its purpose was to give an interpretation to the provisions of the British North America Act which would settle what was then a disputable or unsettled question. It was not intended to encroach on the jurisdiction of the Parliament of the United Kingdom, but to make certain that any laws enacted by the Canadian Parliament would be enforceable in Canada against Canadian citizens who might violate those laws outside the territorial limits of the Dominion. He instanced, as an illustration, the necessity of enforcing regulations to govern Canadian aerial navigation. Since the passage of the resolution there has been communication with the Imperial Government. Any such legislation will probably be made applicable, not to Canada alone, but to all the self-governing Dominions.

In the session of 1921 the Canadian Parliament passed an important measure to define Canadian nationals and to provide for the renunciation of Canadian nationality. The definition of a Canadian national was in the following terms:

(*a*) "Any British subject who is a Canadian citizen within the meaning of The Immigration Act, chapter twenty-seven of the statutes of 1910, as heretofore amended;

(*b*) the wife of any such citizen;

(*c*) any person born out of Canada, whose father was a Canadian national at the time of that person's birth, or with regard to persons born before the passing of this Act, any person whose father at the time of such birth possessed all the qualifications of a Canadian national, as defined in this Act." [32]

It was explained by the Minister of Justice that the measure was made necessary by the status of Canada under the Peace Treaty, and especially under the Covenant of the League of Nations. For example, each member of the League has the right to nominate two of its nationals for election as members of the Permanent Court of International Justice. In the words of the Minister of Justice the recognition that each member of the League has nationals of its own made it necessary to define Canadian nationals. The Act does not in the least modify the status of such persons as British subjects; it merely declares that among British subjects certain persons shall have a definite and distinct status as Canadian nationals. As the measure was undoubtedly necessary for the purpose mentioned, it received the unanimous approval of Parliament.

Hitherto I have spoken only of the past; it is strewn with unfulfilled prophecies and anticipations, which must give pause to any one who proposes to speak of the future. What shall be the path of democracy in the years to come; what shall be our place in the British Commonwealth; what shall be our relations to the great neighbouring democracy, and generally to the world-wide society of nations? The conditions are too complex and the issue is too uncertain to justify any confident anticipation.

We may sometimes forget that the system of social organization and government which is termed democracy, and which has attained its most advanced development among the English-speaking nations and in one or two other states, has held the stage but for a moment in the long drama of human affairs. Its permanence as a form of organized civilization is highly probable, but it is by no means assured. Other types of social organization, after enduring for centuries, have disappeared, undermined by inherent excesses and weaknesses, or overthrown by the onset of external barbarism. Democracy is a great and worthy experiment. Even if it should fail the world will be the better for what it has accomplished and attempted. To invest a people with the franchise of self-government, carried out through a system in which the entire adult population is represented in the legislative body, is the highest conception of

government hitherto attained. But how shall democracy be assured of the moral fibre, the intelligence, the self-control, the active interest, the spirit of service, and the capacity of developing effective leadership that are essential to ensure its permanency? Many difficulties have been surmounted, but there are still dangerous passes to be traversed through the mountains that loom up before us. It is easy to rail at the imperfections of the party system through which democratic government is carried on, or to expose the injustice and inequality which it may engender; criticism is so easy that it has become almost commonplace. The tyranny of the majority may be not less oppressive than that of a despot. Men whose service would be most valuable to their country may be excluded from office through long continuance of their party in opposition. When there is no real difference of principle the struggle in parliament and before the electorate degenerates into a battle between the "ins" and the "outs." Legislation may be influenced by the desire to secure popular support, and not by the real interests of the country. Independence of thought may be discouraged, politics may become degraded, and upright men may be prevented from allying themselves with either party. Public office may be used as a reward for party service, civic and municipal affairs may be unworthily affected by party issues with which they have no concern. In communities where

parties are very highly organized, the "machine," as it is called, may control nominations, popular will may not find adequate expression, and electors of high intelligence may be reduced to a choice of two evils, both of which they abhor. But all these are imperfections rather of human nature than of the system. And no one has invented any practical substitute for the party system; the group system merely intensifies its anomalies and defects. In point of efficiency, it must be admitted that parliamentary government carried on by the party or group system is clumsy in method; and its prestige has not been heightened in recent years. If one might compare the State to a great corporation, we find its elected directors (the legislative body) in session during many months of the year. An Executive Committee (the Cabinet) is composed of men who retain their position so long as they have the confidence of the directors. They preside over great administrative departments which should receive their constant and undivided attention; but during the months of session they must engage incessantly in a debating struggle with a strong minority of directors who seek to oust them from their positions. During the other months of the year they must occupy themselves for no inconsiderable period in explaining their policy and commending their administration to the shareholders (the people), in order that they may be sustained at the next election of directors (general election).

The burdens imposed upon ministers are excessive, and they often come to their posts with no adequate administrative training or experience. In their selection ability must sometimes give place to domicile, race, or creed. Great corporations would find it difficult, perhaps impossible, to conduct their affairs successfully under such conditions; and it is not surprising that comparisons unfavourable to public administration are occasionally made. The safeguards of the system afford some compensating advantages. Direct and constant supervision by Parliament is essential to stimulate ministerial and official activity, and to restrain any tendency toward corruption or other disregard of the public interest. It is important both for the people and for the ministers that they should be brought into close and intimate touch as thoroughly and as often as possible. The electorate must be taught to realize individual responsibility, and that the franchise not only confers a privilege but imposes a duty. That duty cannot be effectively performed unless democracy is endowed with the qualities that I have mentioned. Mr. Ramsay Macdonald has made timely comment on "the difficulty which the absence of wisdom in the use of power creates."[33]

There have been two recent tendencies in some British democracies which deserve consideration. One is the menace to orderly government that arises from threat of a general strike by highly organized and powerful elements in a community.

This danger has been more manifest in Great Britain than elsewhere. The organization of labour for self-protection was made necessary by former injustice and oppression in that country. It has attained vast power, the unrestrained use of which, for political control, has been threatened if not carried out. Perhaps the relation of labour representatives in the United Kingdom to the organizations of which they are members cannot be exactly defined; but if in these organizations, or if in agrarian organizations in Canada, there is a power which may eventually direct and control the vote of the majority in Parliament, a situation may arise in which not the Government of the day, but an independent, unofficial body will exercise final judgment in public affairs. It does not seem possible that parliamentary government in its present form could continue to be effective under such conditions. A ministry so controlled would be little more than a Merovingian King, a mere puppet in the hands of a Mayor of the Palace.

Another tendency, which does not make for efficiency or stability in government, is group representation in Parliament. Before Confederation there was experience of that tendency in Canada; administrations succeeded one another with startling rapidity, and stable government became practically impossible. President Lowell of Harvard University has pointed out the effect of the group system in France. During the twenty-three years from

1873 to 1896 there were thirty-four different administrations, so that the average duration of a French Cabinet in that period was less than eight months and a half.[34] Lord Bryce mentions nine French parliamentary groups which existed in 1914, and eight at the beginning of 1920.[35] He alludes to the kaleidoscopic changes of government in France.[36] Of the party as contrasted with the group system he says: "Parties are inevitable. No free large country has been without them. No one has shown how representative government could be worked without them. . . . Where there are small groups each becomes a focus of intrigue, in which personal ambitions have scope. The groups make bargains with one another and by their combinations, perhaps secretly and suddenly formed, successive ministries may be overturned, with injury to the progress of legislation and to the continuity of national policy. Since there must be parties, the fewer and stronger they are the better." [37] In the first Parliament elected in Poland after the recent war, more than a dozen political groups were represented, and no less than thirteen parties compose the present Parliament. "They are perpetually involved in petty feuds and there is no stable majority. As a result there are frequent and, to outsiders, inexplicable changes in the personnel of the Cabinet. Constructive reforms are indefinitely delayed by the futile vicissitudes of the mere game of politics." The dangers of the

group system are intensified when groups are differentiated by occupation, race, or creed, rather than by political opinion.

With all the difficulties and dangers which have been, or which may be pointed out, democracy possesses elements of stability which no other system has hitherto afforded. In his preface to the English translation of Ostrogorski's *Democracy and the Organization of Political Parties*, Lord Bryce says that the author "has made a valuable contribution—perhaps the most valuable we have had in recent years—to what may be called the pathology of party government." [38] Ostrogorski's challenge of democracy is formidable; much of his criticism is concentrated upon the evils of control by great political organizations. His view is pessimistic, but he does admit that there is still hope. "There is no proof that democracy will come off victorious, but there is no proof either of the contrary. . . . It is therefore premature to speak, as people do, of the failure of democracy; it is still far from having said its last word, and no one can foretell what that last word may be. . . . If democracy does not succeed in filling its forms with a moral substance and adapting its modes of action thereto, it will run the risk of meeting the fate of previous political civilizations, which perished through inability to realize liberty." [39] Perhaps the pessimist expresses his hope too faintly. In the English-speaking nations qualities most needed

to sustain democracy have sometimes been strongest when the need was greatest: self-control, poise of judgment, the spirit of service and self-sacrifice, the saving grace of common sense.

The political future of our country is a legitimate subject of discussion. Canadians of great eminence and distinguished ability have entertained a sincere opinion that the ultimate goal is complete independence as a separate nation. In some instances such opinions have been modified or withdrawn; in no case should they incur reproach or contempt. But I have never wavered in the firm and constant belief that, within the British Commonwealth of Nations, Canada will find her most commanding influence, her widest usefulness, and her highest destiny. With that opinion is coupled a fixed and absolute conviction that the unity of the Empire can alone find its expression in complete autonomy and in equality of nationhood. A strong Canadian national spirit is entirely consistent with a firm purpose to maintain our country in a high place within the British Commonwealth. It is instructive and satisfactory to observe how strong a spirit of Canadianism animates those of our people who were born in the British Isles, and to whom the unity of the Empire is a vital consideration. The assumption of equal nationhood carries with it grave responsibilities. There is no alternative except complete independence, whereof the responsibilities will as-

suredly be not less onerous. In the future direction of the British Commonwealth the Dominions will undoubtedly exercise a material, and, I believe, a beneficial influence. To us in Canada it seems that the vision of Downing Street has been turned too much upon Europe and the Near East, too little upon the vast possessions comprised within our Empire. There is danger that these possessions may become unwieldy; there is urgent need that we develop what we have. Perhaps with less we might in the end accomplish more. It would not be amiss to take sober account of the Empire's responsibilities and commitments.

Of those who took part in the Peace Conference at Paris some at least returned to this continent with a sense of depression. The fierce antagonisms, the ancient hatreds, and the bitter jealousies of European nationals there assembled were not inspiring. Neither in its methods nor in its results can the highest success be claimed for the Peace Conference. The creation or recognition of numerous small states, whose populations are wholly untrained in self-government, can hardly assist in preventing war. That every race should clothe itself in the garment of self-determination is in theory wholly unwise and in practice wholly unworkable. Races are and they always will be inextricably intermingled. But even if it were otherwise, human progress is not advanced by the segregation of races, or by any influence which

tends to perpetuate racial antagonism. Lord Acton has pointed out [40] that the true ideal lies in the union of different races in one state, to the service of which each brings its own peculiar qualities. In the past such unions have been too often attended by the dominance of one race and the oppression of others. The highest hope is in their consummation under the happier and more stable conditions that justice, liberty, and autonomy will create. On this continent two nations speaking the same language constitute in effect one community in social and business aspects and relations. Each has its own laws and institutions, each is jealous of its rights and privileges, each has its own intense national spirit. At times there are strong differences, but there is no bitterness and no hatred. Therein is a vivid contrast to what may be observed in continental Europe. Yet we cannot separate ourselves from world-wide conditions. No Monroe Doctrine or self-denying ordinance can roll back the tide of events that surges through the years. Every nation has become the neighbour of every other. The people of other continents sit at our threshold.

Whatever the imperfections of the League of Nations, its purpose must command the effort of mankind if our present civilization is to endure. Wars of by-gone centuries between rival kings with professional armies were mere comedies compared with that through which we have just passed. In the war of yesterday all the forces of the nations

were arrayed, and neutrals as well as belligerents fell under its malign and devastating influence. A world war of the future would be more deadly and more terrible to a degree that we are unable as yet to realize. On what can we rest an assurance that our present civilization may not hasten to its downfall through fullness of material growth and barrenness of spiritual life? Before we venture an answer let us remember that over the destructive energies of nature man has gained a command far exceeding the control which he has acquired over his own primeval instincts and passions; consider the result if there should be unrestrained use of those forces in future war between the nations that regard themselves as most highly civilized. The world lies within the shadow of this menace. In her own armoury may be found the weapon by which civilization may perish. Is there not, then, supreme and compelling need for every effort and safeguard to preserve the peace among nations, as securely as in organized communities? Never did there rest upon any people a more vital responsibility than that which the present conditions of the world impose upon the British and American Commonwealths. In their united hands rests world peace; above their disunion hovers the shadow of world destruction. By their sense and acceptance of that responsibility these democracies will be sternly, and perhaps finally, tested. As they meet the test, so shall their worth be measured in the ultimate judgment of history.

NOTES

FIRST LECTURE

[1] "The student of government finds in the organization of the British Empire an astonishing confusion of varied systems. To govern such an Empire at all is as great an undertaking as history has ever known. In administering the affairs of your great Republic, vast and complex problems continually make themselves manifest. May I ask a moment's consideration of those involved in the governance of the British Dominions? A territory more than three times greater than that of the United States, scattered over all the continents and through all the oceans; a total population four times as great as yours; a white population little more than one-half your own, of which three-fourths reside within the relatively inconsiderable area of the British Islands; an almost infinite variety and divergence of race and creed; discordant ideals and social conditions; conflicting economic interests; five self-governing nations, two in the Northern and three in the Southern hemisphere, all rapidly developing in power and influence; a great dependency with a population of three hundred millions embracing a dozen races with bewildering differences of creed, caste, tradition, custom, and language; protectorates imposing responsibility for the development of great territories and the protection and welfare of large populations; a score of fiscal systems under which each unit of the Empire levies customs duties against the remainder; the safeguarding of territories which in some part of the world touch those of every other great power; the securing of the ocean pathways without which necessary inter-communication could not be assured; the necessity of considering all these heterogeneous and sometimes conflicting interests and conditions in determining questions touching foreign relations; a varied and seemingly confused medley of statutes, charters, orders in council, conventions, traditions, and understandings for the governance of all these widespread possessions;—consider this very imperfect summary of the conditions and problems which confront those called upon to administer the affairs of our vast Commonwealth. A hasty judgment would determine that any structure so apparently unstable must crumble at the first great shock. It shall

be to the honour of the British race as long as this war is remembered, that the principle on which is founded the governance of our Empire bound together all its far-flung Dominions and all its people of varied and divergent race, language, creed, and ideal, by ties which proved stronger in war than in peace. It is founded upon the principle of liberty, and upon the theory and practice of autonomous government, applied wherever conditions permit, and to the most generous extent that experience can possibly sanction. For this supreme reason the Empire is strong in the day of trial."—Sir Robert Borden, Address to the New England Society, New York, December 22, 1915.

[2] Shortt and Doughty, *Constitutional Documents*, 1759-1791, 2nd Ed., Pt. I, pp. 78-79.

[3] *Ibid.*, p. 79.

[4] *Ibid.*, pp. 42-46, 223.

[5] *Ibid.*, p. 115.

[6] *Ibid.*, p. 163

[7] *Ibid.*, p. 165.

[8] *Ibid.*, p. 165.

[9] *Ibid.*, p. 182.

[10] *Ibid.*, p. 185.

[11] *Ibid.*, p. 191.

[12] *Ibid.*, p. 191.

[13] *Ibid.*, p. 191.

[14] *Ibid.*, p. 205-206.

[15] *Ibid.*, pp. 206-207.

[16] Lefroy, *Const. Law of Canada*, p. 8.

[17] Shortt and Doughty, *op. cit.*, pp. 212-213, 231.

[18] "The most immoral collection of men I ever knew; of course little calculated to make the new subjects enamoured with our laws, religion and customs, far less adapted to enforce these laws and to govern."—Murray to Lord Shelburne, August 20, 1766, Canadian Archives, *Haldimand Papers*, Vol. B8, p. 2.

[19] Shortt and Doughty, *op. cit.*, p. 572.

[20] *Ibid.*, pp. 572, 573.

[21] Lefroy, *op. cit.*, pp. 20-21.

[22] The general idea of representation was of very early origin and was discussed with much elaboration and refinement by mediaeval writers. "Within the scope of the powers constitutionally assigned

to him, (the Monarch) as Head represented the whole Body. . . . The Emperor was not the Empire but only, by virtue of his rank, represented the Empire and the Community that was subject to him. . . . The powers ascribed to the Community of the People were not the private rights of a sum of individuals but the public right of a constitutionally compounded Assembly. . . . The exercise of the Popular Sovereignty or of any other right of the Community was possible only in a properly constituted Assembly, and if and when all formalities had been duly observed."—Gierke, *Political Theories of the Middle Ages*, tr. by F. W. Maitland, pp. 61-67. See also Hallam, *Middle Ages*, New Ed., 1872, Vol. II, pp. 19, 20, where it is pointed out that the Commons were represented in the General Assemblies (or Cortes) of Spain as early as 1188.

[23] Lord Acton, *Hist. of Freedom and other Essays*, p. 36.

[24] *Ibid.*, p. 36.

[25] *Ibid.*, p. 37. See also *La Grande Encyclopédie*, Vol. 23, p. 311: "ETAT. Marsile ne se sert jamais de ce mot, que nous employons ici pour nous conformer aux habitudes modernes, ni du mot nation; il dit: REGNUM, CIVITAS. L'État est une réunion d'individus volontairement unis et travaillant ensemble à un même objet, qui est le bonheur et la paix de la communauté. Les citoyens donnent à l'État un forme adaptée aux diverses régions et aux diverses époques. L'ensemble des citoyens, c'est le peuple (populus); son activité doit être répartie entre six professions ou fonctions nécessaires (partes seu officia): l'agriculture, l'industrie et le commerce, la magistrature, l'armée et le sacerdoce. Le pouvoir législatif appartient au peuple et au peuple seul, car lui seul peut statuer sur ce qui l'intéresse. Quoiqu'il soit convenable de confier la préparation et la rédaction des lois a des hommes spécialement choises à raison de leur vertu et de leur capacité, les lois ainsi préparées ne reçoivent leur autorité que de l'acceptation faite par le peuple. Pour éviter l'anarchie, le pouvoir exécutif doit être délégué à un seul (principans). Ce prince, plus puissant que chaque citoyen, mais moins puissant que tous, doit être élu par le peuple; il peut être déposé par lui."

[26] Walpole, *Life of Lord John Russell*, Vol. I, p. 171.

"For a hundred years after the Revolution Settlement the English acquiesced in the political system then established. It was an oligarchy of great landowners, qualified, however, by the still con-

siderable influence of the Crown and also by the power which the people enjoyed of asserting their wishes in the election of members for the counties and for a few large towns. The smaller boroughs, from which came a large part of the House of Commons, were mostly owned by the oligarchs, and through them the oligarchy usually got its way."—Bryce, *Modern Democracies*, Vol. I, pp. 28, 29.

[27] Low, *Governance of England*, pp. 24, 25, 28, 29. May, *Const. Hist.* (1912), Vol. III, pp. 17, 18. Bagehot, *English Const.* (1896), pp. 240, 241, 285. Anson, *Law and Custom*, (3rd Ed.), Vol. II, Pt. I, pp. 44, 48, 49. Boutmy, *English Const.*, p. 175. Blauvelt, *Cabinet Government*, pp. 284, 286, 288, 289, 291.

[28] Keith, *Imperial Unity*, p. 89, and Anson, *Law and Custom*, (3rd Ed.), Vol. II, Pt. I, pp. 38-39, point out that William IV did not dismiss Lord Melbourne; their view is based upon *Lord Melbourne's Papers*, pp. 220-226. Constitutional writers, before the publication of these papers in 1889, had asserted the contrary. The correction does not affect the important consideration, that according to public opinion, and in the judgment of constitutional writers, the King had the right to dismiss under the constitution as it had developed at that time. Moreover, Peel, when he accepted office, believed, although erroneously, that Melbourne had been dismissed by the King, and he recognized that by taking office he had made the dismissal his own act.

[29] Disraeli, *Whigs and Whiggism*, ed. by William Hutcheson, pp. 58, 62, 63, 102, 108, 148, 150, 156, 183, 185, 228.

[30] "But the oligarchic garrison which sat in the House of Lords was insensible to the influences which had moved the House of Commons. On October 7, it threw out the Bill by a majority of 199 votes to 158. Perhaps the Lords who composed the majority failed to see the full significance of the division. It brought the country to the verge of civil war. In one sense, indeed, it would be almost possible to contend that civil war actually broke out in consequence of this division. Riots occurred in London and the provinces. The Duke of Wellington's windows were broken; Lord Londonderry was attacked by the people and seriously hurt; Nottingham Castle was burned to the ground; and, before the end of October, Bristol was in possession of a mob which treated it as, forty years afterwards, Paris was treated by the Commune. More significant than these disturbances was the attitude of the great

meetings which were everywhere summoned to denounce the Lords and to support the Administration. At Birmingham in particular, the headquarters of the Political Union, a gathering which was computed to comprise 150,000 persons voted an address to the Crown, expressing alarm at the awful consequences which might ensue from the failure of Reform, and praying the King to create as many peers as might be necessary to carry the measure. The persons pledged themselves to pay no taxes if Reform were not passed."—Walpole, *Life of Lord John Russell*, Vol. I, p. 172. See also Goldwin Smith, *United Kingdom*, Vol. II, p. 347.

[31] On April 19, 1877, the Queen wrote a letter to be read by Lord Beaconsfield to the Cabinet for the purpose of influencing their decision. She protested against feebleness and vacillation, and she authorized Lord Beaconsfield to make use of her statement that she would not be a party to the humiliation of England and would lay down her Crown.—Buckle, *Life of Disraeli*, Vol. VI, p. 132. On June 27, she wrote to Lord Beaconsfield: "Why not call your followers together of the House of Commons as well as of the House of Lords; tell them that the interests of Great Britain are at stake. . . . You will have a large and powerful majority."—*Ibid.*, p. 148. This was a remarkable and doubtless a unique proposal for a party caucus, which apparently has no place in British practice, although it may have been employed by the Irish parliamentary party at times. In the same letter she expressed her horror at the views entertained by the Foreign Secretary (Lord Derby).—*Ibid.*, p. 149. See also Lytton Strachey, *Queen Victoria*, *passim*.

It is improbable that any Governor General of Canada since Confederation has attempted in any such degree to influence the policy of his ministers; it is certain that during the past quarter of a century there has been no such attempt.

[32] Egerton and Grant, *Can. Const. Development*, pp. 190-252.

[33] Lucas, *Lord Durham's Report*, Vol. II, p. 278.

[34] *Ibid.*, p. 282.

[35] Lord Acton, *op. cit.*, p. 243.

[36] Despatch, Sept. 7, 1839, Egerton and Grant, *op. cit.*, p. 256.

[37] Egerton and Grant, *op. cit.*, pp. 266-270.

[38] *Mirror of Parliament*, Vol. 35, p. 1025. On March 6, previous he had elaborated the same idea.—*Ibid.*, Vol. 34, p. 458.

[39] The House of Commons had affirmed the grant of constitutions conferring responsible government upon the peoples of the Transvaal and Orange River Colonies.

[40] *Speeches of Sir Henry Campbell-Bannerman*, Times Ed., pp. 232.

[41] Egerton and Grant, *op. cit.*, 173 to 188.

[42] Shortt, *Life of Lord Sydenham*, p. 291.

[43] *Ibid.*, pp. 224, 226, 227.

[44] The resolution, as amended, affirmed the principle that "the chief Advisers of the Representative of the Sovereign, constituting a Provincial Administration under him, ought to be men possessed of the confidence of the representatives of the people."—*Journals, Legislative Assembly, Canada, 1841*, p. 481.

[45] Morison, *Brit. Supremacy and Can. Self-Government*, pp. 139, 140.

[46] *Ibid.*, pp. 148-151.

[47] *Ibid.*, p. 155.

[48] Kaye, *Life of Lord Metcalfe*, Vol. II, p. 230.

[49] *Ibid.*, pp. 344, 349, 359, 367, 368, 478, 479.

[50] *Ibid.*, pp. 383, 389; Morison, *op. cit.*, pp. 179-180.

[51] Earl Grey, *The Colonial Policy of the Administration of Lord J. Russell*, Vol. I, pp. 212.

[52] *Mirror of Parliament*, Vol. 34, p. 534.

[53] "It is above all things necessary to inculcate the belief (to which I must with great deference say a shake was given under Lord Metcalfe's rule) that the British Government and its Representative place entire confidence in the loyalty of all parties in the Province that they seek in the exercise of their influence only the good of the Colony—and that they seek it by means that are strictly constitutional. I may be mistaken, but I have no apprehension whatsoever that a change of administration, should such an event take place, will weaken my influence or render me less able to carry on the Government to your satisfaction."—Lord Elgin to Earl Grey, May 18, 1847, Canadian Archives, *Elgin-Grey Correspondence*, (original manuscripts, not published), Vol. III. ". . . It is not without much pains and circumspection that I have succeeded in impressing the leading men of all parties with a thorough conviction of my impartiality and sincerity and of my readiness not only passively to endure, but within constitutional

limits, to give active support to, any administration which might commend itself to me as possessing the confidence of Parliament. . . . As it is, I start fair with the new men—and by everything which I have done since I came here the ground is laid for a good understanding. . . . My present council unquestionably contains more talent and has a firmer hold on the confidence of Parliament and of the People, than the last."—Lord Elgin to Earl Grey, March 17, 1848, *Ibid.*, Vol. III.

[54] Lord Elgin to Earl Grey, March 2, 1848, *Ibid.*, Vol. III.

[55] "My ministers admit that they are beaten, and the press is unanimous in this sense. I left it to them to determine whether they would meet Parliament or resign at once, stipulating that if they adopted the former course Parliament should be summoned without delay. . . . The Council will resign in a body. I have I think placed myself in a favourable position to meet the crisis. The working of the system of Government established in these Colonies is about to be subjected to a trial under conditions which are on the whole advantageous."—Lord Elgin to Earl Grey, February 5, 1848, *Ibid.*, Vol. III.

[56] "I am very anxious to hear that you have taken steps for a repeal of so much of the act of Union as imposes restrictions on the use of the French language. . . . I must moreover confess that I for one am deeply convinced of the impolicy of all such attempts to denationalize the French. Generally speaking they produce the opposite effect from that intended, causing the flame of national prejudice and animosity to burn more fiercely. But suppose them to be successful what would be the result? . . . Depend upon it, by methods of this description, you will never Anglicise the French inhabitants of the province. Let them feel on the other hand that their religion, their habits, their prepossessions, their prejudices if you will, are more considered and respected here than in other portions of this vast continent . . . and who will venture to say that the last hand which waves the British flag on American ground may not be that of a French Canadian?"—Lord Elgin to Earl Grey, May 4, 1848, *Ibid.*, Vol. III.

[57] Murdock, *Hist. of Nova Scotia*, Vol. II, p. 324.

[58] Gierke, *op. cit.*, p. x.

[59] Egerton and Grant, *op. cit.*, pp. 349-351.

[60] H. G. Wells in his *Outline of History*, considers that the great historical event of 1867 was the death of Emperor Maximilian; Vol. III, p. 623. See Skelton, *Life of Galt*, p. 473.

[61] Goldwin Smith, *Can. Question*, p. 143.

[62] Skelton, *op. cit.*, p. 195.

[63] *Ibid.*, p. 158.

[64] *Ibid.*, pp. 238-244.

[65] Letter to Lord Knutsford, July 18, 1889; Pope, *Memoirs of Sir John Macdonald*, Vol. I, p. 313.

[66] Skelton, *op. cit.*, pp. 410-411.

SECOND LECTURE

[1] For the sake of continuity the limits imposed by the title have not been strictly observed in some instances.

[2] Bryce, *American Commonwealth*, new Ed. 1910, Vol. I, p. 401; see also pp. 363-364, 397-400.

[3] *Ibid.*, p. 397.

[4] Anson, *Law and Custom*, 3rd Ed., Vol. I, p. 23.

[5] Lowell, *Govt. of England*, Vol. I, pp. 10-11; see also Dicey, *Law of the Const.* (8th Ed.), pp. 414-428. Maitland, *Const. Hist. of England*, pp. 341-343, 398, 526-529.

[6] "Such is the flexibility of the British constitution that the great changes which this declaration would involve in inter-imperial relations could be made for the most part without resort to Imperial legislation—simply by the creation of new 'conventions of the Constitution' or by giving authoritative expression to conventions already existing in an immature form. By this means the Dominions, in the eyes of the whole world, would be placed upon a footing of complete constitutional equality with the United Kingdom or any other independent state. Complete legal equality could only be obtained by adding to this a declaration of legal independence—that is, by the formal disruption of the Empire. . . . Just as the royal veto in England has been limited out of existence by the growth of a constitutional convention, more effectively than it could

have been by means of a statute, so the constitutional conventions, established by means of this general declaration, would limit out of existence the royal veto on Dominion legislation, and the sovereignty of the British Parliament in respect of the Dominions."—*British Commonwealth of Nations*, p. 230. See also pp. 230-235.

[7] "That it will be to the advantage of the Empire if a Conference, to be called the Imperial Conference, is held every four years, at which questions of common interest may be discussed and considered as between His Majesty's Government and His Governments of the self-governing Dominions beyond the seas. The Prime Minister of the United Kingdom will be ex-officio President, and the Prime Ministers of the self-governing Dominions ex-officio members of the Conference. The Secretary of State for the Colonies will be an ex-officio member of the Conference and will take the chair in the absence of the President. He will arrange for such Imperial Conferences after communication with the Prime Ministers of the respective Dominions. Such other Ministers as the respective Governments may appoint will also be members of the Conference, it being understood that, except by special permission of the Conference, each discussion will be conducted by not more than two representatives from each Government, and that each Government will have only one vote."—*Col. Conf.*, 1907, Vol. I, p. v.

[8] It also made provision for a secretarial staff, and for subsidiary conferences when necessary on particular subjects.

[9] The British practice under which the Prime Minister confers with the Sovereign as to important matters of public policy, and gives explanations where that course seems desirable, prevails also in Canada in respect of the relations between the Prime Minister and the Governor General. The counsel or suggestions of a Sovereign or a Governor General experienced in public affairs may often be helpful and valuable.

[10] *Can. Sess. Pap.*, 1879, No. 181 (not printed), referred to in Keith, *Resp. Govt.*, Vol. I, p. 159 *et seq.*

[11] In this respect the instructions followed the form then in use since 1867.

[12] *Commissions, Letters Patent of Office, and Instructions of the Governors General of Canada*, p. 26. Mr. Blake's views, generally, on the relations between the Government of Canada and the Imperial Government appear in the following passage:

"As a rule the Governor does and must act through the agency of Ministers, and Ministers must be responsible for such action. . . . Upon the argument that there are certain conceivable instances in which, owing to the existence of substantial Imperial as distinguished from Canadian interests, it may be considered that full freedom of action is not vested in the Canadian people, it appears to me that any such cases must, pending a solution of the great problem of Imperial Government, be dealt with as they arise. . . . The effort to reconcile, by any form of words, the responsibility of Ministers under the Canadian Constitution with a power to the Governor to take even a negative line independently of advice, cannot, I think, succeed. The truth is, that Imperial interests are, under our present system of Government, to be secured in matters of Canadian executive policy, not by any such clause in the Governor's instructions (which would be practically inoperative, and if it can be supposed to be operative would be mischievous); but by mutual good feeling, and by proper consideration of Imperial interests on the part of His Majesty's Canadian advisers; the Crown necessarily retaining all its constitutional rights and powers, which would be exercisable in any emergency in which the indicated securities might be found to fail."—*Can. Sess. Pap.*, 1877, No. 13, p. 4. Keith, *Resp. Govt.*, Vol. III, pp. 1415-1416, 1561-1566, points out that the Governor General's Instructions do not authorize him to pardon an offence committed outside, but triable in, Canada.

[13] *B.N.A. Act.*, secs. 55-57, 90.

[14] "At first, a distinct claim was preferred by Her Majesty's Secretary of State for liberty to review, and under certain exceptional circumstances to disallow, provincial legislation, through instructions to the Governor General as an Imperial Officer. Afterwards this ground was abandoned, and the constitutional propriety, if not the abstract right, of the Imperial Government to interfere with provincial legislation, unless in extraordinary cases and under very exceptional circumstances, was no longer urged. The Secretary of State then claimed that the Governor General personally had an 'independent' right (without the consent of his ministers, whether actual or prospective) to determine upon the expediency of allowing or disallowing provincial statutes; and in proof of this contention he appealed to the wording of the British North America Act. Mr. Blake's argument was directed to show the inconsistency of this

position, with an acknowledgement of the principle of self-government in matters of local concern."—Todd, *Parl. Govt. in the Brit. Colonies*, pp. 452-453. Todd, *op. cit.*, pp. 453-454, puts forward considerations (criticized by Keith, *Resp. Govt.*, Vol., II, pp. 729-730) in support of the view advanced by Mr. Blake.

[15] Todd, *op. cit.*, pp. 453-455; Keith, *op. cit.*, Vol. II, pp. 726-730.

[16] Pope, *Memoirs of Sir John Macdonald*, Vol. II, pp. 168; Todd, *op. cit.*, pp. 179, 180. Keith, *op. cit.*, Vol. II, p. 1031.

[17] Todd, *op. cit.*, pp. 158, 177-184; Keith, *op. cit.*, Vol. II, pp. 1010 *et seq.*, 1025; Keith, *Imp. Unity*, p. 151; Sir Charles Tupper, *Recollections*, p. 95.

[18] See *Colonial Laws Validity Act*, 28-29 Vic. cap. 63.

[19] *Correspondence on the Subject of the Law of Copyright in Canada*, 1895, C. 7783, p. 4.

[20] Keith, *Resp. Govt.*, Vol. I, pp. 413-420, and *Imperial Unity*, pp. 237-243.

[21] Keith, *Imperial Unity*, p. 239.

[22] Sir John Thompson in his letter of July 21, 1894, said: "the treatment which Canada has received on this subject is too bad to be spoken of with patience."—*Correspondence on the Subject of the Law of Copyright in Canada*, 1895, C. 7783, p. 93.

[23] Pope, *op. cit.*, Vol. II, pp. 88-140.

[24] *Ibid.*, p. 105.

[25] *Ibid.*, p. 132.

[26] *Ibid.*, p. 133.

[27] *Ibid.*, p. 106. The British Government had the right to appoint one of the three arbitrators who were to determine the compensation to be paid to Canada and Newfoundland under the Treaty of Washington. The Canadian Government insisted that a Canadian should be selected and Sir A. T. Galt was appointed.

[28] *Unpublished Despatch*, June 26, 1879, Dept. of External Affairs, Ottawa, quoted from Tupper, *op. cit.*, p. 174. The same supercilious tone is to be observed in the correspondence relating to the status and duties of the High Commissioner.—*Correspondence between the Imperial and Canadian Governments*, 1880, C 2594 p. 3. See also Skelton, *Life of Galt*, pp. 523-526.

[29] Tupper, *cp. cit.*, p. 175.

[30] Unpublished Despatch, July 26, 1884, Dept. of External Affairs, Ottawa, quoted from Tupper, *op. cit.*, pp. 174-175. See also *Col. Conf.*, 1887, Vol. I, pp. 475-476.

[31] *Can. Sess. Pap.*, 1888, No. 366, p. 1.

[32] *Can. Hans.*, 1891, Vol. III, p. 6310.

[33] *Col. Conf.*, 1894, pp. 82, 154.

[34] *Col. Conf.*, 1897, p. 14.

[35] Canada thereupon imposed a sur-tax on importations from Germany, and eventually an amicable solution was reached, *Can. Hans.*, 1903, Vol. I, p. 1411 *et seq.; Can. Hans.*, 1906, Vol. I, p. 1882 *et seq.*, p. 1894 *et seq.*

[36] Moreover the arrangement effected with Germany by Lord Salisbury hardly seemed consistent with the principle laid down in Lord Ripon's despatch of June 28, 1895, which contained the following paragraph:

"13. In regard to the other side of the question, namely, as to the terms which a Colony seeks from a foreign power, the considerations mentioned appear to require that a Colony should not endeavour in such a negotiation to obtain an advantage at the expense of other parts of Her Majesty's Dominions. In the case, therefore, of preference being sought by or offered to the Colony in respect of any article in which it competed seriously with other colonies or with the Mother Country, Her Majesty's Government would feel it to be their duty to use every effort to obtain the extension of the concession to the rest of the Empire and in any case to ascertain as far as possible whether the other Colonies affected would wish to be made a party to the arrangement. In the event of the excluded portions of the Empire being seriously prejudiced, it would be necessary to consider whether it was desirable, and in the common interests, to proceed with the negotiation."—*Despatches from the Secretary of State for the Colonies on Questions of Trade and Commercial Treaties*, 1895, C. 7824, p. 17.

[37] *Can. Hans.*, 1910-11, Vol. I, p. 4.

[38] See Note 34.

[39] *Brit. Hans.*, 5th Series, Vol. 21, p. 470.

[40] *Imperial Unity*, p. 294.

[41] *Resp. Govt.*, Vol. III, p. 1149, note.

[42] Mr. Bryce took every means of making himself acquainted with the conditions and needs of Canada. Shortly after his appoint-

ment he visited Ottawa and during his tenure of office he made periodical visits. This useful and desirable practice which he inaugurated has been followed by his successors.

[43] *Imp. Conf.*, 1911, p. 333.

[44] It had long been the practice to insert a provision in commercial treaties that no self-governing Dominion should be bound thereby, unless it acceded thereto. A period within which the Dominion shall communicate its determination is usually fixed by the terms of the treaty. Canada did not in the first instance accede to the treaty of 1894 between Great Britain and Japan. In 1906 a supplementary treaty or convention was negotiated at the instance of the Canadian Government under which Canada finally adhered to the treaty of 1894.

[45] Hall, *op. cit.*, pp. 151-152.

[46] *The Imp. Conf.*, Vol. II, p. 273.

[47] *Op. cit.*, p. 146.

[48] *Imp. Conf.*, 1911, p. 22.

[49] *Ibid.*, p. 46.

[50] *Ibid.*, pp. 52, 54, 68.

[51] *Ibid.*, p. 70.

[52] *Ibid.*, p. 71.

[53] London *Times*, July 23, 1912.

THIRD LECTURE

[1] For the sake of continuity the limits imposed by the title have not been strictly observed in some instances.

[2] No further allusion will be made to the military events of the war as these lectures are concerned solely with constitutional development.

[3] In 1862, as a result of the rejection by the Legislature of Canada of the Militia Bill, the Secretary of State for the Colonies (Duke of Newcastle) wrote to the Governor General that this action had

"produced a disadvantageous impression on the minds of the English people,"

and while the British Government did not infer from it

> "that either the Canadian Ministry or the Canadian people are reluctant to make proper provision for their own defence . . . they . . . regretted that, at such a moment, both should be exposed to misconstruction of their motives and intentions, not only by the people of England but by those of the United States. Her Majesty's Government disclaim both the right and desire to interfere in the party politics of Canada, and they would evince no concern . . . if it were not connected with an event which appears to impugn the patriotism of her people. . . . We have the opinions of the best military authorities, that no body of troops which England could send would be able to make Canada safe without the efficient aid of the Canadian people."

The Secretary of State made certain suggestions as to the organization of the Canadian Militia which were disapproved by the Governor General in his reply, with which was forwarded a report of the Canadian Executive Council. The report expressed surprise at a suggestion from the Secretary of State that the charge for the militia, or a fixed portion of it, should be voted for a period of three or five years. Such a measure, the report stated,

> "will never and ought never to be entertained by a people inheriting the freedom of British institutions,"

and it added that

> "popular liberties are safe against military despotism wielded by a corrupt government, only when they (the people) have in their hands the means of controlling the supplies required for the maintenance of a military organization."—*Can. Sess. Pap.*, 1867-8, No. 63, pp. 3, 4, 9.

[4] *Can. Hans.*, 1871, pp. 819-821.

[5] "That this House fully recognizes the duty of the people of Canada, as they increase in numbers and wealth, to assume in larger measure the responsibilities of national defence.

"The House is of opinion that under the present constitutional relations between the Mother Country and the self-governing Dominions, the payment of regular and periodical contributions to the Imperial Treasury for naval and military purposes would not, so far as Canada is concerned, be the most satisfactory solution of the question of defence.

"The House will cordially approve of any necessary expenditure designed to promote the speedy organization of a Canadian Naval Service in co-operation with, and in close relation to the Imperial Navy, along the lines suggested by the Admiralty at the last Imperial Conference, and in full sympathy with the view that the naval supremacy of Britain is essential to the security of commerce, the safety of the Empire, and the peace of the world.

"The House expresses its firm conviction that whenever the need arises the Canadian people will be found ready and willing to make any sacrifice that is required to give to the Imperial authorities the most loyal and hearty co-operation in every movement for the maintenance of the integrity and honour of the Empire."—*Can. Hans.*, 1909, Vol. II, p. 3564.

[6] Mr. Asquith, at Cardiff, November 5, 1920, is reported to have said:

"In time of war the Dominion Governments agreed to transfer their fleets bodily to the control of the Admiralty."—London *Times*, November 6, 1920. By the terms of the agreement the two Dominions reserved to themselves liberty of action. See also the Canadian *Naval Service Act, 1910*, secs. 22, 23.

[7] In the autumn of 1915 effective measures became necessary to guard against attacks of submarines on the Atlantic Coast of Canada, and large numbers of small craft were acquired both for defence and for mine sweeping.

[8] The reply of the Dominion ministers was as follows:

"The Dominion ministers, having considered the Admiralty Memorandum of May 17th, 1918, on the Naval Defence of the British Empire, which was circulated to the Imperial War Conference, 1918, submit the following conclusions and observations:

1. "The proposals set forth in the Admiralty Memorandum for a single navy at all times under a central naval authority are not considered practicable.

2. "Purely from the standpoint of naval strategy the reasons thus put forward for the establishment of a single navy for the Empire, under a central naval authority, are strong but not unanswerable. The experience gained in this war has shown that in time of war a Dominion Navy (*e.g.* that of Australia) can operate with highest efficiency as part of a united navy under one direction and command established after the outbreak of war.

3. "It is thoroughly recognized that the character of construction armament and equipment, and the methods and principles of training, administration and organization, should proceed upon the same lines in all the navies of the Empire. This policy has already been followed in those Dominions which have established naval forces.

4. "For this purpose the Dominions would welcome visits from a highly qualified representative of the Admiralty who, by reason of his ability and experience, would be thoroughly competent to advise the naval authorities of the Dominions in such matters.

5. "As naval forces come to be developed upon a considerable scale by the Dominions it may be necessary hereafter to consider the establishment for war purposes of some supreme naval authority upon which each of the Dominions would be adequately represented."—*Can. Hans.*, 1920, Vol. IV, p. 3499.

[9] *Imp. Conf.*, 1911, pp. 394-408.

[10] This resolution is as follows:

"The Imperial War Conference is of opinion that effect should now be given to the principle of reciprocity approved by Resolution XXII of the Imperial War Conference, 1917. In pursuance of that Resolution it is agreed that:

1. "It is an inherent function of the Governments of the several communities of the British Commonwealth, including India, that each should enjoy complete control of the composition of its own population by means of restriction on immigration from any of the other communities.

2. "British citizens domiciled in any British country, including India, should be admitted into any other British country for visits, for the purpose of pleasure or commerce, including temporary residence for the purpose of education. The conditions of such visits should be regulated on the principle of reciprocity, as follows:

(*a*) "The right of the Government of India is recognized to enact laws which shall have the effect of subjecting British citizens domiciled in any other British country to the same conditions in visiting India as those imposed on Indians desiring to visit such country.

(*b*) "Such right of visit or temporary residence shall, in each individual case, be embodied in a passport or written permit issued by the country of domicile and subject to visé there by an officer

appointed by, and acting on behalf of, the country to be visited, if such country so desires.

(*c*) "Such right shall not extend to a visit or temporary residence for labour purposes or to permanent settlement."

3. "Indians already permanently domiciled in the other British countries should be allowed to bring in their wives and minor children on condition (*a*) that not more than one wife and her children shall be admitted for each such Indian, and (*b*) that each individual so admitted shall be certified by the Government of India as being the lawful wife or child of such Indian.

4. "The Conference recommends the other questions covered by the memoranda presented this year and last year to the Conference by the representatives of India, in so far as not dealt with in the foregoing paragraphs of this Resolution, to the various Governments concerned with a view to early consideration."—*Imp. War Conf.*, 1918, p. 195.

[11] *Imp. War Conf.*, 1918, p. 165.

[12] *Ibid.*, p. 165.

[13] Keith regards this step as important: "The attendance of a cabinet by a Dominion minister is totally without precedent in the history of the Empire, and its significance was duly noted at the time. It is a privilege not even accorded to Lord Onslow when acting in lieu of the Secretary of State during the visit of Mr. Chamberlain to the South African colonies; when his opinion was desired on colonial matters it could not be given and discussed by him in cabinet, but only to some members of the Government, who could repeat it in Cabinet."—*Imperial Unity*, p. 545.

[14] This was the formal constitution of the Imperial War Cabinet, but other ministers and important officials constantly attended as required.

[15] *Imp. War Conf.*, 1917, p. 5.

[16] *Manchester Guardian*, Centenary Number, May 5, 1921.

[17] London *Times*, July 10, 1919.

[18] "There is need of serious consideration as to representation of the Dominions in the peace negotiations. The press and people of this country take it for granted that Canada will be represented at the Peace Conference. I appreciate possible difficulties as to the representation of the Dominions but hope you will keep in mind that certainly a very unfortunate impression would be created and

possibly a dangerous feeling might be aroused if these difficulties are not overcome by some solution which will meet the national spirit of the Canadian people. We discussed the subject to-day in Council and I found among my colleagues a striking insistence which doubtless is indicative of the general opinion entertained in this country. In a word they feel that new conditions must be met by new precedents. I should be glad to have your views."—*Can. Sess. Pap.*, 1919, Special Session, No. 41j.

[19] The British Empire Delegation was really the Imperial War Cabinet under another name.

[20] The proposal was accepted by the British Empire Delegation and by the Peace Conference substantially as made; and the various treaties have been drawn up accordingly. Thus the Dominions appear as Signatories, and their concurrence in the treaties, subject to ratification, is given in the same manner as that of other Powers.

[21] The Prime Minister of Canada made a formal request for some appropriate step to establish the connection between this Order in Council and the issuance of the Full Powers, so that it might appear of record that they were issued on the responsibility of the Government of Canada.—*Can. Sess. Pap.*, 1919, Special Session, No. 41j. Under British practice the Letters Patent constituting full powers are signed by the King as Head of the State without any counter-signature, so that the formal connection between the action of the Canadian Government and the issuance of these Full Powers by the King can be established without anomaly. *Full Powers* is the technical designation of the special empowering document that sets forth the authority of a plenipotentiary sent on an extraordinary mission, *e.g.* representation at a Congress, etc.—See Oppenheim, *Int'l. Law*, 3rd Ed., Vol. I., Sec. 371.

[22] See Preamble and Articles 1, 2, 3, and 7 of the draft Covenant presented to the Plenary Session of February 14, 1919, by the Commission on the League of Nations.

[23] See Preamble and Articles 1, 2, 3, and 4, and Annexe of Covenant, as incorporated in the Treaty of Peace.

[24] Corresponding to the Council of the League there is a Labour Governing Body, consisting of Delegates nominated by a limited number of Governments, in addition to employers' and employees' Delegates. Corresponding to the Assembly of the League there is the General Labour Conference. The draft Convention presented

by the Commission on International Labour Legislation to the Plenary Session of April 11, 1919, while contemplating that Dominion Government Delegates might be sent to the General Conference, definitely excluded them by definition from the Governing Body; a resolution having been moved in the same Plenary Session that the Peace Conference approve this draft Convention, the Prime Minister of Canada moved that the resolution be amended by adding the following:

"The Conference authorizes the Drafting Committee to make such amendments as may be necessary to have the Convention conform to the Covenant of the League of Nations in the character of its membership and in the method of adherence."

This amendment carried, and as a consequence the Labour Convention was finally amended so that the Dominions were placed on the same footing as other members of the International Labour Organization, becoming eligible for selection to nominate Government Delegates to the Governing Body.

[25] Oppenheim, *op. cit.*, Vol. I, secs. 94a, 94b, sets forth the following interesting conclusions as to the effect of the war upon the self-governing nations of the British Commonwealth:

"94a. Formerly the position of self-governing Dominions, such as Canada, Newfoundland, Australia, New Zealand, and South Africa, did not in International Law present any difficulties. Then they had no International position whatever, because they were, from the point of view of International Law, mere colonial portions of the mother country. It did not matter that some of them, as, for example, Canada, and Australia, flew as their own flag the modified flag of the mother country, or that they had their own coinage, their own postage stamps, and the like. Nor did they become subjects of International Law (although the position was somewhat anomalous) when they were admitted, side by side with the mother country, as parties to the administrative unions, such as the Universal Postal Union. Even when they were empowered by the mother country to enter into certain treaty arrangements of minor importance with foreign states, they still did not thereby become subjects of International Law, but simply exercised for the matters in question the treaty-making power of the mother country which had been to that extent delegated to them."

"94b. But the position of self-governing Dominions underwent

a fundamental change at the end of the World War. Canada, Australia, New Zealand, South Africa, and also India, were not only separately represented within the British Empire delegation at the Peace Conference, but also became, side by side with Great Britain, original members of the League of Nations. Separately represented in the Assembly of the League, they may, of course, vote there independently of Great Britain. Now the League of Nations is not a mere administrative union like the Universal Postal Union, but the organized family of Nations. Without doubt, therefore, the admission of these four self-governing Dominions and of India to membership gives them a position in International Law. But the place of the self-governing Dominions within the family of Nations at present defies exact definition, since they enjoy a special position corresponding to their special status within the British Empire as 'free communities, independent as regards all their own affairs, and partners in those which concern the Empire at large.' Moreover, just as, in attaining to that position, they have silently worked changes, far-reaching but incapable of precise definition, in the Constitution of the Empire, so that the written law inaccurately represents the actual situation, in a similar way they have taken a place within the family of Nations, which is none the less real for being hard to reconcile with precedent. Furthermore, they will certainly consolidate the positions which they have won, both within the Empire and within the family of Nations. An advance in one sphere will entail an advance in the other. For instance, they may well acquire a limited right of legation or limited treaty-making power. But from this time onward the relationship between Great Britain and the self-governing Dominions of the British Empire is not likely to correspond exactly to any relationship hitherto recognized in International Law unless the British Empire should turn into a Federal State."

[26] *Can. Hans.*, 1920, Vol. III, pp. 2177-2178. Among diplomatic envoys Ambassadors are of the first rank and next to them are Ministers Plenipotentiary and Envoys Extraordinary. The difference in rank between Ambassadors and Ministers Plenipotentiary is of theoretical rather than practical, importance. Ambassadors have the right to be received by the Head of the State personally, and enjoying of right the title of Excellency, which is accorded to Ministers only by courtesy. The privilege of

such direct negotiation is now of little value, as all important business is transacted through the hands of the Foreign Secretary in States enjoying constitutional government: See Oppenheim, *op. cit.*, Vol. I, Secs. 365, 366; Satow, *Diplomatic Practice*, Vol. I, p. 235, note 2. A State has a right to appoint more than one permanent diplomatic Envoy to represent it in a Foreign State. A few years ago, in the reorganization of the British Embassy at Washington, three Ministers Plenipotentiary were appointed to act under Lord Reading, the High Commissioner and Ambassador Extraordinary.

[27] Oppenheim, *op. cit.*, Vol. I, Sec. 361, enumerates several States not possessing full sovereignty which enjoy the right of legation, among them several States of the German Empire before the World War. Bavaria, for example, used to send and receive separate diplomatic envoys. "It would be wrong to maintain that States which are not fully sovereign can never be parties to international negotiations. For they can indeed conduct negotiations on those points concerning which they have a standing within the Family of Nations. Thus, for instance, while Bulgaria was a half-sovereign State, she was nevertheless able to negotiate on several matters with foreign States independently of Turkey. Or they may be separately represented at an international conference. For instance, the British Dominions—Canada, Australia, South Africa, New Zealand, and India—were separately represented at the Peace Conference at Paris in 1919." *Ibid.*, Sec. 478.

[28] *Can. Hans.*, 1910-11, Vol. I, p. 953.

[29] *Can. Hans.*, 1912-13, Vol. IV, pp. 6958-6960.

[30] *Ibid.*, p. 7550.

[31] *Resp. Govt.*, Vol. I, pp. 372-401; *Imperial Unity*, pp. 216, 217, 444.

[32] 11-12 Geo. V, (Can.) cap. 4, sec. 1.

[33] *Parliament and Revolutions*, p. 88.

[34] *Gov'ts. and Parties in Cont'l. Europe*, Vol. I, pp. 128-129.

[35] *Modern Democracies*, Vol. I, p. 252.

[36] *Ibid.*, p. 254.

[37] *Ibid.*, pp. 119, 122.

[38] Ostrogorski, *Democracy and the Organization of Political Parties*, Vol. I, p. xliv.

[39] *Ibid.*, Vol. II, p. 739.

[40] Lord Acton, *Hist. of Freedom and other Essays*, p. 298.