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A CENTURY OF CONSTITUTIONAL DEVELOPMENT UPON THE NORTH AMERICAN CONTINENT.

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A little more than a hundred years ago and within three years of one another, two forms of Constitution were instituted upon the North American Continent both in reality, and one avowedly, in large measure an imitation or adaptation to the circumstances of the country concerned of the British Constitution, as it presented itself to the observer at that stage of its development. The one was the Federal Constitution of the United States, and the other was comprised in the Canadian Constitutional Act of 1791, which imposed one and the same form of Constitution upon each of the provinces of Upper and Lower Canada. The Canadian Constitutions have been replaced by other constitutions imposed by Act of the same Imperial Parliament: the United States Constitution remains after a hundred years, save for a few supplementary provisions with which we are not here concerned, in theory intact; and it is claimed by a recent American writer that it should now be ranked as the oldest but one, or bearing in mind the essential transformation of the British Constitution since the Reform Bill of 1832, as perhaps the very oldest among the constitutional governments now existing in the world.

When, however, we observe the American Constitution in its actual operation at the present time we may, perhaps, be led to the conclusion that the framers of that instrument would find it almost as hard to recognize it as the same constitution which they devised, as those who lived in the British Isles before the days of responsible government and reform would find it to identify the Constitution of England now with that of their own time. To indicate in brief outline some features of this development, to compare the actual constitutional condition of the two great sections of the North American Continent, and to emphasize the value of the British institutions which we enjoy in Canada, is the object of the present paper.

The Constitutional Act of 1791(*a*), established in each of the

(*a*) Imp. 31 Geo. III., c. 31.

provinces of Lower and Upper Canada a Legislative Council and a Legislative Assembly, the members of the former to be appointed by the Governor or Lieutenant-Governor under the authorization and direction of the Crown for life, the members of the latter to be elected by voters possessed of a small property qualification, the Governor or Lieutenant-Governor to have the power of fixing the time and place of holding the meetings of the Legislature and to prorogue and dissolve it whenever they deemed either course expedient. The Act also recognized an Executive Council to be appointed by His Majesty, his heirs or successors within each province for the affairs thereof(*a*'). The Legislature was to be called together once at least every year and to continue for four years unless sooner dissolved by the Governor or Lieutenant-Governor, who were to have power to give or to withhold the royal assent to all bills, and to reserve such as they should think fit for the signification of the pleasure of the Crown. This, Mr. Egerton(*b*) says, was an imitation of the English Constitution, it is true, but of the English Constitution under the Stuarts. Certain it is, however, that the avowed intention of the Imperial Parliament was to assimilate the Constitution of Canada to that of Great Britain as then existing, "as nearly as the differences arising from the manners of the people and from the present situation of the province will admit"(*c*). "Part of the province" Edmund Burke had said on the debate on the bill, "was inhabited chiefly by persons who had migrated from the United States. These men had fled from the blessings of American government, and there was no danger of their going back. There might be many causes of emigration not connected with government, such as a more fertile soil, or more genial climate; but they had forsaken all the advantages of a more fertile soil, and more southern latitudes, for the bleak and barren regions of Canada. There was no danger of their being so much shocked by the introduction of the British Con-

(*a*') S. 38.

(*b*) Short History of British Colonial Policy, by H. E. Egerton, p. 253.

(*c*) Despatch of Lord Grenville to Lord Dorchester, of October 20th, 1789.

stitution, as to return''(*d*). And Governor Simcoe, in closing the first session of the Legislature of Upper Canada declared that it was the desire of the Imperial Government to make the new constitutional system "an image and transcript of the British Constitution''(*e*). What Mr. Egerton seems to have overlooked is the fact that responsible government cannot be said to have been operative in England under George III. at the time when either of the two constitutions we are considering were instituted.

A great step towards that system was taken on the accession of George I., when the principle was adopted of admitting only members of a single party into the Cabinet(*f*). But when we are dealing with an unwritten constitution in a state of constant development, it is necessarily difficult to fix the precise moment when a change in form which has been gradual in its growth, can be said to have become complete; and it is not surprising that there is some discrepancy of opinion among historians as to when our modern system of Cabinet government can be first said to have established itself. Sir Henry Maine, in his work on Popular Government, says of George III. that Cabinet government was exactly the method to which he refused to submit. He carried on the struggle with the colonists of North America with servants of his own choosing, and when the Americans were framing their constitution he had established his right for the rest of his reign.

Mr. Hearn, in his Government of England(*g*), considers the second Rockingham Ministry, that of 1782, as the first of the modern ministries, and Mr. Traill(*h*) appears to agree with him, but the former adds(*i*) that if it were required to indicate the period at which our modern system of ministries may be re-

(*d*) Parliamentary History, Vol. 29, p. 365.

(*e*) Cited Bourinot's Manual, p. 25.

(*f*) Lecky's History of England in XVIIIth Century, Vol. 3, p. 180.

(*g*) P. 213.

(*h*) Central Government, by H. D. Traill, D.C.L., p. 21.

(*i*) Hearn, ibid., p. 227.

garded as permanently and completely established we must look to Lord Grenville's administration in 1806. On the other hand Sir William Anson(*j*) states that "the only ministers before 1830 who resigned in consequence of defeats in the House of Commons were Sir Robert Walpole in 1741 and Lord Shelburne in 1783. . . . The defeat which drove Walpole from power however, took place in a committee of the House sitting to hear an election petition. Shelburne was beaten on a vote of approval on the Peace of Versailles. There is no instance before 1830 of a ministry retiring because it was beaten on a question of legislation or even of taxation." Nevertheless Mr. Hearn seems to put the matter too strongly when he says(*k*) that "neither in the writings of Hamilton or of Jefferson, nor in the debates upon the organization of their new Government, can we discover any indication that the statesmen who framed the Constitution of the United States had the least acquaintance with that form of Parliamentary government which now prevails in England." For we find Roger Sherman, a member of the great convention of 1787, avowing that he "considered the executive ministry as nothing more than an institution for carrying the will of the legislature into effect; that the person or persons (who should constitute the executive) ought to be appointed by and accountable to the legislature only, which was the depository of the supreme will of the society"(*l*); and we may compare also the words of Madison in No. 47 of the Federalist that "on the slightest view of the British Constitution we must perceive that the legislative, executive, and judiciary departments are by no means totally separate and distinct from each other. The executive magistrate forms an integral part of the legislative authority." Mr. Baldwin goes so far as to say that(*m*) the framers of the United States Constitution had clearly before their view the system of Cabinet government in Great Britain whereby "the

(*j*) On the Crown, 2nd ed., pp. 137-8.

(*k*) Government of England, p. 213.

(*l*) Quoted in Congressional Government, by Woodrow Wilson, p. 268.

(*m*) Modern Political Institutions, p. 32.

leader of the House of Commons had become the real king," and that they deliberately rejected the device of a parliamentary ministry.

To return to Canada, the Constitution of the Canadian colonies under the Act of 1791, could in truth be called a transcript of the British Constitution in little more than outward form of governmental machinery, for the Canadians by no means enjoyed under it the free administration of their own affairs. Not only did the appointment of the members of the Legislative Council rest with the Governor, but, the mercantile system still continuing, the British Parliament reserved to itself(*n*) the right of establishing regulations, and imposing, levying and collecting duties for the regulation of navigation and commerce to be carried on between the two provinces or between either of them and any other part of the British dominions or any foreign country. The policy of conferring upon colonists the liberty of dealing with their own internal affairs was by no means the lesson which Imperial statesmen at first deduced from the result of the American War of the Revolution. On the contrary, Mr. Creswell, in his recent and in many respects excellent little work on the British colonies(*o*), gives a distinct place in the constitutional history of British colonies to the period when after losing the American colonies by tampering too much with the self-government conceded to the settlers, the English colonial administrators, thinking too much internal liberty a dangerous thing, sought to check colonization and impound liberty altogether, taking no service from the colonies, but assuming all expenses of their defence; while Sir Erskine May, in like manner, in his Constitutional History of England, states that "from the period of the American war, the Home Government, awakening to the importance of colonial administration, displayed greater activity and a more ostensible disposition to interfere in the affairs of the colonies"(*p*). And when in a despatch of

(*n*) Imp. 31 Geo. III., c. 31, s. 46.

(*o*) Pp. 131-2.

(*p*) 4th ed. Vol. 3, p. 360.

December 21st, 1794, to the Colonial Secretary recommending the establishment of municipal corporations in Upper Canada, Governor Simcoe ventured to impress upon the latter the wisdom of the principle of rendering "the province as nearly as may be a perfect image and transcript of the British Government and Constitution," we find the Duke of Portland in a reply of May 20th, 1795, somewhat casting cold water upon his enthusiasm by saying. "I have entered purposely more at large into these proposed measures because I have observed that your adoption of them arises from an idea that by assimilating the modes of the government of the provinces to the modes of the government of England you will obtain all the beneficial effects that we receive from them, whereas to assimilate a colony in all respects to its Mother Country is not possible, and if possible would not be prudent. The one may have many institutions which are wholly inapplicable to the situation of the other;" and he adds that "some may be objectionable in a colony as tending to lessen the authority which the parent state ought to posesss over it as long as that relation exists between them"(p^1). And all possibility of calling the Constitution of Canada the very image and transcript of the British Constitution soon ceased by the full development of responsible parliamentary government in Great Britain, while in Canada the executive continued to be appointed by the Governor at his own discretion, subject to confirmation by the Imperial authorities; and it may be fairly enough said that what the great body of reformers in Upper Canada aimed at was to make the Canadian Constitution once more worthy of that description by securing that the Crown should in Upper Canada as at home entrust the administration of affairs to men possessing the confidence of the Assembly(q).

The culmination of the free trade movement in England

(p^1) The originals of these despatches are in the Record Office, London. The above extracts are from copies in the possession of Mr. Justice Hodgins, of the Admiralty Court, Toronto.

(q) Bourinot's Constitutional Manual, p. 37n.

undoubtedly facilitated giving effect to their wishes in this respect. Mr. Egerton may be right in some sense in his Short History of British Colonial Policy where he gracefully observes (*r*) that the result of the war of the American Revolution "knocked the bottom out of" that great system of national regulation of industry and commerce which is generally spoken of as the Mercantile System. But certainly prior to the passing of the Imperial Act of 1849 Great Britain maintained a very large measure of control over Canadian trade which could hardly have continued after the concession of responsible government. Anybody can see what this measure of control was by looking at the numerous petitions from various boards of trade and other public bodies in Canada which were submitted to the Imperial Government in 1846 and are printed in volume 15 of the collection of Imperial blue books relating to Canada. There existed in the first place under the Imperial Acts at that time a system of Imperial differential duties imposed upon the commerce of Canada with the view of giving the manufacturers of the Mother Country and the planters of the West India Islands a monopoly, so far as laws could effect that object, in Canadian markets for the consumption of the articles respectively produced by them, an arrangement which could not reasonably be objected to under the balanced system which theretofore prevailed between the Mother Country and Canada in which the products of Canada enjoyed a preferential duty in the markets of Great Britain.

Moreover navigation laws were still in force so framed as virtually to give an absolute monopoly of the carrying trade of Canada both internal and external to the British shipowner. Thus no goods could be exported from the United Kingdom to any British possession in America except in British ships; nor could any goods be carried from any British possession to any other British possession or from one part of any such possession to any other part of the same except in British ships; nor could any goods be imported into any British possession in foreign

(*r*) Short History of British Colonial Policy, pp. 256, 258.

ships unless the same belonged to the country of which the goods were the produce, and from which they were imported; nor could goods the produce of America be imported into the United Kingdom to be used therein in foreign ships unless they were ships belonging to the country of which the goods were the produce or from which they were imported. To obtain the repeal of these restrictions was the object of the petitions to which I refer, and their repeal naturally followed upon the triumph of the Free Trade movement. And so the dates of the events marking that triumph coincide with the dates of the concession of responsible government to the British colonies. The year 1846 which witnessed the abolition of the Corn Laws in England witnessed also the passing of the Imperial Act(*s*) authorizing the British colonies in America to reduce or repeal by their own legislation the duties imposed by the Imperial Acts to which I have referred upon foreign goods imported from foreign countries into the colonies in question. The Imperial Act of 1849(*t*) repealed the navigation laws and allowed the River St. Lawrence to be used by vessels of all nations; while the year 1854 saw in the reciprocity treaty between Canada and the United States the first instance of a trade treaty being negotiated between a foreign power and a British colony as distinct from the Mother Country. And six years from 1846 to 1852 witnessed the transition of the power of government over colonial internal affairs from Downing Street to the great colonies. By his celebrated report of 1839, Lord Durham had recommended a federal union of the provinces of Lower and Upper Canada, and an executive council responsible to the Assembly. The first was carried into effect by the Union Act of 1840(*u*), the second was definitely established by the royal instructions to Lord Elgin in 1847, and by 1848 the provinces of Canada, Nova Scotia, and New Brunswick were in the full enjoyment of a system of self-government.

Thus we have passed from the time when Lord Chatham

(*s*) Imp. 9-10 Vict. c. 94.

(*t*) Imp. 12-13 Vict. c. 29.

(*u*) Imp. 3-4 Vict. c. 35.

could declare in his place in Parliament without manifest absurdity that the British colonies of North America had no right to manufacture even a nail for a horse shoe, to the time when Sir Robert Peel could deliver the opposite opinion that the colonies should as far as possible be treated as though "they were integral parts of the kingdom"(*v*). And so we find Lord Elgin, in a letter to Lord Grey in March 23rd, 1850(*w*), marking the connection between these two matters, by observing that as the idea of maintaining the colonial empire for the purpose of exercising dominion or dispensing patronage had been for some time abandoned, and that of regarding it as a hot-bed for forcing commerce and manufactures more recently renounced, a greater amount of free action and self government might be conceded to British colonies without any breach of Imperial policy, than had, under any scheme yet devised, fallen to the lot of the component parts of any federal or imperial system. And so Mr. Lucas in his introduction to his recent edition of Sir G. Cornewall Lewis's Government of Dependencies(*x*), in like manner, observes that "the new colonial system of England has not resulted in a compromise as is the rule with English policy, but has been carried out boldly and generously to its logical conclusion. The explanation of a policy so foreign in this respect to the English cast of mind is to be found in the coincidence of the free trade question at home and the colonial question abroad."

Criticising in 1872 the colonial policy of the period we have now reached, Mr. Disraeli contended that self government ought to have been conceded to the colonies as part of a great policy of Imperial consolidation; that it ought to have been accompanied by an Imperial tariff and also by a military code, which should have precisely defined the means and the responsibilities by which the colonies should be defended, and by which, if necessary, Great Britain should call for aid from the colonies

(*v*) Walpole's History of England from 1815, Vol. 6, p. 329.

(*w*) Walrond's Letters and Journals of Lord Elgin, pp. 115-6.

(*x*) (London, 1891), p. 33.

themselves(*y*); and, in fact, Lord Durham in his report had mentioned trade with the Mother Country, with the regulation of foreign relations, as among the few matters which should be retained in the control of Great Britain. That no attempt was made to place such limitations upon the measure of political liberty conceded to the colonies, was due to the strength of the free trade movement. "The granting of the new constitutions to Canada and the Australian colonies," says a recent writer (*z*), "came at the moment of the flush of the free trade victory. In the freshness of that triumph, hopes were strong that the victory won for free trade in England was won for the world; only faint-hearted or interested people doubted that the generation before them would see all nations coming into the fold of natural trade. We might as well have chosen a moment when a Roman Consul was descending from the car of his triumphal procession to the Capitol to ask him to acknowledge that the empire was growing too fast, as have asked free trade victors between 1846 and 1848 to think of removing the control of trade from the self government then being granted to the colonies," while as to military defence, such considerations would have marred what the late Mr. C. H. Pearson, in his National Life and Character(*a*), describes as "the vision of inspired Manchester men that the angel of peace was to descend on the world in a drapery of untaxed calico." No doubt as to the world at large Mr. Pearson is justified in adding that that vision is still as far from accomplishment as the vision seen at Patmos; nevertheless it may be fairly claimed that the English free trade policy has been of the greatest service to the Empire in modifying foreign jealousy and hatred, and it is a fact that since the American war of 1812, no colony of Great Britain has felt the brunt of foreign war, but the strength of the United Kingdom

(*y*) Speeches, (T. E. Kebbel) Vol. 2, p. 530; quoted Egerton's Short History of British Colonial Policy, p. 362.

(*z*) Caldecott's English Colonization and Empire (University Extension Series), pp. 177-9.

(*a*) P. 138.

has sufficed up to the present to secure to British colonies their safety even during great European wars.

Thus then, with a Legislative Assembly and a Legislative Council, the members of which were appointed by the Governor-General, in accordance with the royal instructions, from among "persons who might be pointed out to him as entitled to be so by their possessing the confidence of the Assembly"(*b*); and free from the trammels of Imperial trade regulations, Canada might claim, in a truer sense than ever, to have a constitution similar to that of the Motherland. And what Lord John Russell called in the House of Commons in 1850, the maxim of policy by which our ancestors were guided, was adhered to so far as she was concerned, namely, that "wherever Englishmen went they should enjoy English freedom and have English institutions"(*c*). The position of affairs, however, was regarded with anything but agreable feelings by many.

Mr. Spencer Walpole justly observes that "men who had grown up in the faith that foreign possessions were advantageous because of their trade could not be expected to admit that the dependencies were still useful when the exclusive trade was destroyed(*d*). Mr. Cobden in 1851, declared in the House of Commons: "We have now no monopoly in the market of the colonies; they have none in ours. Therefore we have got rid of a plea formerly used for keeping up expenses in the colonies"(*e*). "Colonies," wrote the Quarterly Review in 1847, "are, we say boldly, of no intrinsic value whatsoever. It is only as they are nurseries for native seamen and markets for native industry that they are of any worth. Ships, colonies, and commerce, used to be a favorite toast, involving a wise and protective principle; but without ships and commerce, colonies are a burthen, and the sooner we get rid of them the better"(*f*). More-

(*b*) Grey's Colonial Policy, Vol. 1, p. 213.
(*c*) Greswell's British Colonies, p. 195.
(*d*) History of England from 1815, Vol. 6, p. 334.
(*e*) Hans., Vol. 95, p. 1441.
(*f*) Vol. 81, p. 571.

over a feeling of despondency prevailed as to the possibility of retaining the colonies if they were allowed to control their own affairs under a system of responsible government. The Quarterly Review for March, 1849, referring to Lord Durham's report declared that if that "frank and infectious report did not receive the high, marked, and energetic discountenance and indignation of the Imperial Crown and Parliament, British America was lost"(*g*); while in Bowyer's Constitutional Law published in 1846, we find the author saying that under a system of responsible government "the colonies would be, in fact, perfectly independent of the Mother Country," and that their continued nominal allegiance would in a short time become almost ridiculous(*h*). Lord Elgin, however, here again displayed the political foresight for which he was so conspicuous. "When you concede to the colonists constitutional government, in its integrity," we find him writing in a letter to Lord Grey, of December 17, 1850, "you are reproached with leading them to Republicanism and the American Union. . . . I believe, on the contrary, that it may be demonstrated that the concession of constitutional government has a tendency to draw the colonists the other way; firstly, because it slakes the thirst for self government which seizes on all British communities when they approach maturity; and secondly, because it habituates the colonists to the working of a political mechanism which is both intrinsically superior to that of the Americans, and more unlike it than our old colonial system"(*i*).

But I need not dwell upon the period of doubt and distrust as to the possibility on the one hand, or the advisability on the other, of the maintenance of a united empire; a phase of feeling which we may surely hope has now passed away never to return. There is not the slightest ground for thinking that the great heart of the English people was ever anything else but staunch and loyal to the Imperial union, notwithstanding the temporary

(*g*) Quoted Greswell's British Colonies, p. 163.

(*h*) (London, 1846), pp. 55-6.

(*i*) Walrond's Letters and Journals, pp. 122-3.

aberration of some men of supposed light and leading among them. I do not believe that there ever was a time when that great people would not have responded with enthusiasm to the sentiment expressed in the words of Mr. Watkin, member for Stockport, upon the debate on the British North America Bill in 1867, when he said that "he believed that the people of England felt a deep attachment to their Empire, and that not even a barren rock over which the flag of England had once waved, would be abandoned by them without a cogent and sufficient reason"(*j*).

We may pass on to the grand event of the accomplishment of Dominion confederation merely observing that the analogy between the Canadian Constitution and the British was temporarily broken in upon by the Canadian Act of 1856(*k*), providing, in accordance with the power given by an Imperial Act of 1854(*l*), for an elective Upper House. The intention of the founders of confederation was to preserve as closely as possible that analogy under the Union. As the third Quebec Resolution expressly declares: "In framing a constitution for the general Government, the conference, with a view to the perpetuation of our connection with the Mother Country, and the promotion of the best interests of the people of these Provinces, desire to follow the model of the British Constitution, so far as our circumstances will permit." They desired that we should enjoy, in the words of Sir John Macdonald, premier of the Province of Canada, "the privileges of constitutional liberty according to the British system"(*m*); and declared expressly in the preamble to the British North America Act that the Canadian Provinces were to be federally united into one Dominion under the Crown with a Constitution similar in principle to that of the United Kingdom. That declaration, however, in the preamble of the

(*j*) Hans., 3rd Ser., Vol. 185, p. 1188.

(*k*) 19-20 Vict. c. 140; Con. Stats. of Can. c. 1.

(*l*) 17-18 Vict. c. 118.

(*m*) Quoted Gray on Confederation, p. 114.

Act, Mr. Dicey has designated as "official mendacity"(*n*), or at all events "diplomatic inaccuracy"(*o*). He maintains that in its essential features the Constitution of Canada is modelled on that of the United States, and that if we look at its federal character "we must inevitably regard it as a copy, though by no means a servile copy of the Constitution of the United States"(*p*), although he admits, of course, that in respect to our system of parliamentary Cabinet government we follow England, and in no wise imitate the presidential government of America. But, despite the authority of Professor Dicey as a constitutional writer, I nevertheless venture to think that, quite apart from Cabinet government, if we look into the matter with a little minuteness, it is impossible to concede that the Canadian polity can with fairness and accuracy be called in any sense a copy of the Constitution of the United States. Perhaps I may be allowed to repeat here more briefly what I have stated elsewhere more at large on this subject(*q*).

It is, of course, perfectly true that the British North America Act has like the Constitution of the United States, federally united several communities before the Union having separate governments and separate parliaments; but when we examine its scheme and methods for attaining this end, we see many and fundamental divergencies from American ideas and institutions, in which the founders of confederation faithfully followed by preference, and with much ingenuity, principles of the British Constitution. We can only deal very briefly with the matter here, but one of the points of contrast in which the Constitution of Canada follows English analogy and not American, is in the unfettered character of her legislatures. They have not been put into "straight jackets" as American legislatures are, to quote an expression of a recent writer. Even the legislative

(*n*) Law of the Constitution, 3rd ed., p. 155; also Article on Federal Government in Law Quarterly Rev., Vol. 1, p. 93.

(*o*) Law of the Constitution, 6th ed., p. 161.

(*p*) Ibid., 5th ed., p. 157.

(*q*) Legislative Power in Canada, Introductory Chapter.

powers conferred upon Congress in the Federal Constitution are thus fettered by many restrictions. For example, though Congress may regulate commerce with foreign nations and among the several States, it must not give any preference thereby to the ports of one State over another. It must not establish any religion, or abridge the freedom of speech, or of the press, or of the right of the people peaceably to assemble. And we see this distrust of legislatures constantly being more and more displayed in the separate State Constitutions as amended from time to time. As Mr. Bryce says(*r*), the people of the several States shew an increasing tendency to take subjects which belong to ordinary legislation out of the category of statutes, place them in the Constitution and then handle them as part of this fundamental instrument. For example some State Constitutions entirely prohibit their legislature undertaking works of internal improvement, or contracting debts in that behalf or guaranteeing railways. But it is needless to multiply instances. In his recent book already referred to, Mr. Baldwin points out that whereas up to 1855 Missouri had imposed only three of such restrictions upon the law-making authority, by 1875 she had imposed thirty-three.

And this same American distrust of those who exercise public authority is also illustrated by the way in which they endeavour to separate executive power from legislative power and judicial power from both. The former feature of their system we shall have occasion to refer to again presently. The extent to which they carry the latter is very remarkable. Thus to give two examples, it had been held in several States that if a tax has once been declared illegal by the Courts, the Legislature cannot direct that it be levied and collected however right or reasonable it may be, because this would be to attempt to reverse judicial action (*r*'). In New Jersey the Supreme Court has held that the Legislature cannot require a majority of the members of the Court of Errors and Appeal competent to sit to be present and

(*r*) American Commonwealth, (2 Vol. ed.), p. 450.

(*r*') Cooley's Constitutional Limitations, 6th ed., p. 113, n. 1.

concur in order to the reversal of a decision of the Supreme Court, on the ground that the effect would be, if the Court were not full, to make the opinion of a minority in favour of affirmance control that of the majority in favour of the reversal, unless the latter were a majority of the whole Court(*r*²). In New Hampshire it is held that the Legislature cannot pass an Act to empower a guardian of minors to make a valid conveyance of the real estate of his wards(*r*³). When one considers the strong position in which the judiciary are thus placed in America, reinforced by the constitutional provisions everywhere found, providing that no person shall be deprived of life, liberty, or property without due process of law, and the vague generalities on which the American system permits Courts to found decisions as to the validity of legislative enactments, such as 'fundamental principles of justice,' 'natural rights,' 'insuperable incidents to Republican government, 'consistency with regulated liberty,' it is not surprising that Mr. Burgess should call the governmental system of the United States "the aristocracy of the robe"(*s*).

Now this policy of distrust of those vested with public authority is obviously contrary to the principles of the British Constitution. Throughout that we seem to see the idea dominant that good servants ought to be trusted. The Ministry of the day is trusted with seats in Parliament and supreme direction and influence therein so long as it can command a majority, while Parliament itself is omnipotent even over the most fundamental institutions of the realm. In Sir Edward Coke's words the power and jurisdiction of Parliament is so transcendent and absolute that it cannot be confined either for causes or persons within any bounds. It can regulate or alter the succession to the Crown. It can change the established religion of the land; and create afresh even the Constitution of the Kingdom or of the Parliaments themselves.

(*r*²) Ibid. at p. 115, n. 1.

(*r*³) Ibid. at p. 121, n.

(*s*) Political Science and Comparative Constitutional Law, p. 365.

The hampering and restricting of legislative action by provisions of a fundamental law such as those mentioned above, is and was in 1867 when that Act was framed, whether it be wise or unwise, quite foreign to the principles of the Constitution of the United Kingdom which protects the liberty of the subject without destroying the freedom of action of the legislature. The framers of the Canadian Federal Constitution could not, of course, create a legislature precisely similar to the British Parliament in respect to supreme control over all matters whatever in Canada, because they were bringing into existence not a legislative union, but a federal union of the provinces. But they adhered as closely as possible to the British system in preference to that of the United States. They distributed all legislative power whatever over the internal affairs of the Dominion between the Federal Parliament on the one hand and the Provincial Legislatures on the other. They did not merely grant certain legislative powers to the Federal Parliament leaving, subject to them, the legislative powers of the several provinces intact, as is the case with Congress, but they specified certain broad subject-matters over which the provinces should have the same exclusive power as the Dominion Parliament was to have over its own enumerated subjects, though, indeed, in the case of irreconcilable conflict between laws made under over-lapping powers, Dominion legislation, it has been decided, must predominate(*t*). The founders of the confederation, moreover, gave both the Dominion and the Provincial Legislatures, not merely power to do certain things and make all laws necessary and proper for carrying such powers into execution, as is the case with Congress(*u*), but the broad power to "make laws in relation to" the various broad *subject-matters* of legislation committed to their respective jurisdictions(*v*). They gave them that power

(*t*) *Tennant* v. *The Union Bank*, [1894] A.C. 31; *Attorney-General of Ontario* v. *Attorney-General of Canada*, [1894] A.C. 189; Liquor Prohibition Appeal, 1895, [1896] A.C. 348.

(*u*) Constitution of United States, Art. 1, ss. 8, 93 and 95.

(*v*) British North America Act, 1867, ss. 91, 92, 93.

in each case not as mere delegates or agents,—which is the position of American legislatures(*w*)—not subject to all manner of fundamental restrictions,—but authority as plenary and as ample within the limits prescribed, as the Imperial Parliament in the plenitude of its power possessed or could bestow(*x*). They recognized no reserve of power either in the people of the Dominion at large or in the people of the provinces in particular, any more than such reserve is recognized under the British Constitution, although it is under the American(*y*). Between the Dominion Parliament and the Provincial Legislatures was distributed all power whatever over the government of the internal affairs of the country in every respect. They rounded off and completed the powers of the Dominion Parliament over federal matters by bestowing upon it a general residuary power to make laws for the peace, order and good government of the country in relation to all non-provincial subjects(*z*), thus making it,—not like Congress, which has no such residuary power,—but like the Parliament of the United Kingdom, so far as all such matters are concerned. In like manner also they rounded off and completed the power of Provincial Legislatures over provincial matters by giving them a residuary power over, generally, all matters of a merely local or private nature in the province(*a*). Furthermore, and still adhering to British principles, the framers of the Dominion Constitution made the respective powers of Parliament and the Provincial Legislatures, not concurrent as are for most part federal and State powers in the United States(*b*), but exclusive in each case the one of the other, thus making the parliamentary bodies they were creating each supreme in its own domain. They did not prohibit members

(*w*) Story on the Constitution, 5th ed., Vol. 2, p. 567; Federalist (Knickerbocker ed.), No. 46, at p. 292.

(*x*) *Hodge* v. *The Queen*, 9 App. Cas. at p. 132; *Maritime Bank of Canada* v. *Receiver-General of New Brunswick*, [1892] A.C. at p. 442.

(*y*) Constitution of the United States, Amendments, Art. 10.

(*z*) British North America Act, 1867, s. 91.

(*a*) Ibid. s. 92, No. 16.

(*b*) Story on the Constitution, 5th ed., Vol. 1, p. 335.

of either the Dominion or the provincial executives sitting in the Legislature during their continuance in office, after the fashion of the United States Constitution(*c*), and so preserved the British system of responsible government in Dominion and province alike. In framing the fundamental law for the Dominion they restrained their hands(*d*), and allowed as free scope, as in the nature of the case was possible, for that process of organic growth of the nation, which is one great virtue of the Constitution of the United Kingdom. In a word, they did their best to secure to Canadians as a heritage forever the precious forms of British liberty. Such is the Canadian system of confederation and surely one may say with Mr. Egerton that in it the dream of Lord Elgin has been fulfilled "that it was by creating such a country as might fill the imagination and satisfy the aspirations of its sons that the danger of absorption with its great neighbour might be for ever set at rest"(*e*).

But it may be said with confidence that no part of the whole scheme of Canadian confederation was of such material importance as the maintenance of the British Cabinet system under the new conditions, and this alone should, one would think, have been quite sufficient to protect the preamble of the British North America Act from any charge of mendacity. To consider the nature and effect of this British system of parliamentary Government which Canada enjoys as compared with the condition of things which has developed itself in the United States where that system does not obtain, will bring to our notice vital differences in the two forms of national Government in respect to which none have recognized more clearly than American writers the superiority of the former.

I need not dwell long upon the characteristics of the Cabi-

(*c*) Constitution of the United States, Art. 1, s. 6.

(*d*) "The very inflexibility of the Constitution tempts legislators to place among constitutional articles maxims which (though not in their nature constitutional) have special claims upon respect and observance:" A. V. Dicey in Article on Federal Government, Law Quarterly Rev., Vol. 1, pp. 86-7.

(*e*) Short History of British Colonial Policy, p. 373.

net system. It is too well understood to render that at all necessary. Under that system the Ministers of the Crown not only may, but must have seats in one or other House of the Legislature, and are directly responsible to the popular House. They are constantly present in the Legislature to defend themselves and the policy of the Government, if attacked, and to answer questions put to them by the representatives of the people. In the words of Bagehot, the British system is a Board of Control chosen by the Legislature out of persons whom it trusts and knows, to rule the nation(*f*). Cabinet Ministers form a committee of the Legislature, chosen by the majority for the time being. They are accountable to the Legislature and must resign office as soon as they lose its confidence, or else dissolve Parliament and accept whatever verdict the country may give. "The essence of responsible government," said the late Lord Derby, "is that mutual bond of responsibility one for another wherein a Government, acting by party, go together, frame their measures in concert, and where if one member falls to the ground, the others also as a matter of course, fall with him"(*g*). The bills introduced into the House of Commons by the Cabinet embody the definite schemes of the Government, and thus we are introduced to what Sir Henry Maine calls the great modern paradox of the British Constitution, namely, that "while the House of Commons has assumed the supervision of the whole executive Government, it has turned over to the executive Government the most important part of the business of legislation For it is in the Cabinet that the effective work of legislation begins"(*h*). To cite Mr. Bagehot once more: "The efficient secret of the English Constitution may be described as the close union, the nearly complete fusion of the executive and legislative powers"(*i*).

This system has been, as we have seen, in operation in most

(*f*) The English Constitution, 5th ed., p. 13.

(*g*) Quoted in Central Government, by H. D. Traill, p. 26.

(*h*) Popular Government, p. 237.

(*i*) The English Constitution, 5th ed., p. 10.

of the Canadian provinces since 1848, and has existed as part of the Canadian system since 1867. Now in his work on the Government of Victoria(*j*), Australia, Professor Jenks lays it down that the working of Cabinet Government is not altogether satisfactory under colonial conditions. Coming nearer Canada Mr. Lawrence Lowell, in his Essays on Government, says: "We hear suggestions from France and from Canada that a system of responsible ministry is the cause of most of their misfortunes"(*k*); while no less an authority than Mr. James Bryce in his American Commonwealth observes in one place, with something of a sneer, that the example of the Canadian Provincial Legislatures, in each of which there is a responsible Ministry sitting in the Legislatures, does not seem to recommend the adoption of that system for imitation by the American States(*l*). On what these gentlemen found their criticisms I have been quite unable to ascertain. I may say, however, that I have hitherto failed to find the slightest corroboration of the view that the system of Cabinet Government is otherwise than successful in Canada. I find my own impression everywhere confirmed, that it works with success, and that the conventions of the Constitution are well sustained.

But while the manifest advantages of the British system over that in operation in the United States will, it is hoped, abundantly appear before the close of this paper, like everything else, it has the defects of its qualities. In a book published a few years ago, and widely read, an interesting passage is quoted from the journals of Nassau Senior in which he records how Sir Charles Wood, the first Lord of the Admirality, complained of the labour thrown on the Government by requiring them to be legislators as well as administrators. "Our defects as legislators," he says, "which is not our business, damage us as administrators, which is our business." And in a speech delivered in 1888, at Liverpool, the Duke of Devonshire, then Lord Harting-

(*j*) At p. 380.

(*k*) At p. 21.

(*l*) Vol. 1, at p. 525 (2 Vol ed.)

ton, complained of the degree in which members of the Government were at the mercy of the triflers, the bores, and the obstructives of the House of Commons, who in thoughtlessness or in malice laid upon them intolerable burdens, and interfered with their devoting themselves with the requisite amount of energy and reflection to the real and essential work of administration(*m*). It is well, then, while we criticise the Americans, to remember that even the British system, though in the generous language of an American writer, to whom I shall have many occasions presently to refer, it "challenges the admiration of the world to-day"(*n*), can nevertheless not pretend to absolute ideal perfection, which is indeed impossible under human conditions.

It will also be well to commence our enquiry into the American Government by endeavouring to see correctly what were the main ideas by which the framers of the United States Federal Constitution were actuated, and to which they endeavoured to give effect. One of the principal things which they obviously had to determine was the position which they would give to the president as the head of the executive Government, and what powers they would place in his hands. A very able American writer, Mr. Alexander Johnston, considers that the president's office was simply a development of that of the Governors of the States(*o*). But we find in the pages of Sir Henry Maine what is perhaps the explanation of the latter as well as the former. "It is tolerably clear," he says, "that the mental operation through which the framers of the American Constitution passed was this: they took the King of Great Britain, went through his powers and restrained them whenever they appeared to be excessive or unsuited to the circumstances of the United States. It is remarkable that the figure they had before them was not a generalized English King nor an abstract constitutional monarch;

(*m*) Times, December 29, 1888.

(*n*) Congressional Government, by Woodrow Wilson, p. 308.

(*o*) New Princeton Review, September, 1887; quoted Bryce's American Commonwealth (2 Vol. ed.), Vol. 1, p. 667.

it was no anticipation of Queen Victoria but George III., himself, whom they took for their model''(*p*). George III., he tells us, in a passage I have already made some reference to, ''cared nothing for Hanover and much for governing England. He at once took a new departure in policy by making peace. and setting himself to conduct the Government of England in his own way. Now, the original of the President of the United States is manifestly a treaty-making king, and a king actively influencing the executive Government. Mr. Bagehot insisted that the great neglected fact in the English political system was the Government of England by a committee of the legislature calling themselves the Cabinet. This is exactly the method of government to which George III. refused to submit, and the framers of the American Constitution took George III.'s view of the kingly office for granted. They give the whole executive Government to the President, and they do not permit his ministers to have seat or speech in either branches of the legislature''(*q*). ''I hope to shew,'' says Sir Henry Maine, ''that the Constitution of the United States is coloured throughout by political ideas of British origin, and that it is in reality a version of the British Constitution, as it must have presented itself to an observer in the second half of the last century''(*r*). And in this last general statement we find a brilliant American writer, Mr. Woodrow Wilson, entirely agreeing. ''The convention of 1787,'' he says, ''was composed of very able men of the English-speaking race. They took the system of government with which they had been familiar, improved it, adapted it to the circumstances with which they had to deal, and put it into successful operation. Hamilton's plan, like the others, was on the British model, and it did not differ essentially in details from that finally adopted''(*s*). But what Sir Henry Maine does

(*p*) Popular Government, p. 212-3.

(*q*) Ibid. p. 213.

(*r*) Ibid. pp. 207-8.

(*s*) Congressional Government, p. 307, quoting from Lodge's Alexander Hamilton (Amer. Statesmen Series), pp. 60-1.

not seem to make clear is, that a distinction must be drawn here between the position of the President with regard to the appointment of his ministers, and the position of the President with his ministers in relation to Congress. In respect to the former we see that the plan adopted was modelled upon that upon which King George himself acted. The President's Cabinet are men of his own choosing, they are his own agents, responsible politically to himself alone. But with regard to the relation between the executive and Congress, the object of the framers of the United States Constitution seems to have been to avoid the state of things which they saw existing in the Mother Country. "It was perfectly natural," says Mr. Wilson, "that the warnings to be so easily drawn from the sight of a despotic monarch binding the usages and privileges of self government to the service of his own intemperate purposes should be given grave heed to by Americans, who were the persons who had suffered most from the existing abuses. It was something more than natural that the convention of 1787 should desire to erect a Congress which would not be subservient, and an executive which could not be despotic. And it was equally to have been expected that they should regard an absolute separation of these two great branches of the system as the only effectual means for the accomplishment of that much desired end"(*t*). And he appositely quotes the words of Bagehot: "They shrank from placing sovereign power anywhere. They feared that it would generate tyranny; George III. had been a tyrant to them, and come what might they would not make a George III."(*u*). "The sovereignty" (in England), continues Mr. Wilson, "was at see-saw between the throne and the Parliament,—and the throne end of the beam was generally uppermost. Our device of separated, individualised powers was very much better than a nominal sovereignty of the Commons which was suffered to be over-ridden by force, fraud, or craft, by the real sovereignty of the King. The English Constitution was at that time in reality much worse

(*t*) Congressional Government, pp. 308-9.

(*u*) English Constitution, 5th ed., p. 225.

than our own; and, if it is now superior, it is so because its growth has not been hindered or destroyed by the too tight ligaments of a written fundamental law''(*v*).

But apart from the desire to render it impossible to deal with Congress in the same way that King George dealt with the House of Commons, the pages of the Federalist clearly shew that the opinions of Montesquieu were regarded as of paramount authority, and no opinion had more weight with its writers than that which affirmed the essential separation of the executive, legislative, and judicial powers. This theory of separation of powers the Americans desired to carry out to the uttermost. "The theory of our Governments, State and National," says an American judge, "is opposed to the deposit of unlimited power anywhere. The executive, the legislative, and judicial branches of these Governments are all of limited and defined powers''(*w*). I have already referred to the degree to which the judicial branch of the Government is protected from encroachments of the Legislature; and as to the separation of the executive, the intention is clearly shewn by the provision in the Constitution that "no person holding any office under the United States shall be a member of either House during his continuance in office''(*x*). "The founders of the American Constitution," says John Morley, in his life of Robert Walpole, "have all along followed Montesquieu's phrases, if not his design, about separating legislature from executive by excluding ministers from both Houses of Congress. This is fatal to any reproduction of the English system. The American Cabinet is vitally unlike our own on this account''(*y*). "The two most striking characteristics of our political system," says an American lady, who has recently produced an excellent constitutional treatise on the Speaker of the House of Representatives, "are, first, the careful arrangement of

(*v*) Congressional Government, p. 311.

(*w*) Per Miller, J., in *Savings and Loan Association* v. *Topeka*, 20 Wall. at p. 663.

(*x*) Art. 1, s. 6.

(*y*) Walpole (Twelve English Statesmen Series), p. 154.

'checks and balances' adopted to avoid the undue influence of any one department of Government; and secondly, the fear which it manifests of one-man power"(*z*). "Is there," wrote John Adams in 1814, "a Constitution upon record more complicated with balances than ours? In the first place, eighteen States and some territories are balanced against the national Government. . . . In the second place, the House of Representatives is balanced against the Senate, the Senate against the House. In the third place, the executive authority is, in some degree, balanced against the legislative. In the fourth place, the judicial power is balanced against the House, the Senate, the executive power, and the State Governments. In the fifth place, the Senate is balanced against the President in all appointments to office and in all treaties," and so on(*a*). The idea underlying the English representative system has been stated by Mr. Joseph Chamberlain to be this, that "subject to certain general principles of morality, the majority of a nation has the right to determine the details of its Government"(*b*). And Americans claim in like manner that the main principle of their Constitution is government by the people through their representatives at Congress(*c*). But Mr. Lawrence Lowell tells us that we must remember that in the United States "it is considered of the first importance to protect the individual, to prevent the majority from oppressing the minority, and except within certain definite limits, to give effect to the wishes of the people only after such solemn formalities have been complied with as to make it clear that the popular feeling is not caused by temporary excitement, but is the result of a mature and lasting opinion"(*d*). In a word, as an eminent American jurist puts it, "By the Constitu-

(*z*) The Speaker of the House of Representatives (Longman's, 1896), p. 323.

(*a*) Works, Vol. 6, p. 467; quoted Congressional Government, pp. 12-3.

(*b*) "Shall We Americanize Our Institutions?"; Nineteenth Century, for December, 1890 (Vol. 28, p. 861).

(*c*) Congressional Government, p. 243.

(*d*) Essays on Government, p. 22.

tion of the United States the American people protected themselves against themselves''(e).

So much then for the main ideas which underlie the written Constitution of the United States. Let us now consider the manner of its actual operation. ''We of the present generation,'' says Mr. Woodrow Wilson, ''are in the first season of free, outspoken, unconstrained, constitutional criticism''(f). It certainly cannot be said that modern American writers are not sufficiently outspoken and unsparing in their criticisms of their own institutions. There seems a general agreement as to the unhappy condition that governmental machinery has got into, but one man lays stress upon an alleged abuse of the Constitution in one direction, while another sees the root of the evil apparently somewhere else. I shall take my criticisms entirely from recent American writers. Thus Mr. Simeon Baldwin, in a chapter, headed ''Absolute Power an American Institution''(g), finds nothing too strong to say about the autocratic power now exercised by the President. Mr. Woodrow Wilson complains with equal earnestness of the way in which Congress has absorbed all power, and of the utter inadequacy and imperfection of the means it has of exercising it properly; while Miss Follett and others lead us to think that it is the Speaker of the House of Representatives who should be denounced on account of his usurpations of authority. Perhaps some key to any apparent discrepancy may be found in the words of Lord Elgin, written as far back as 1850, where he says that in the United States ''each power in the State goes habitually the full length of its tether; Congress, the State Legislatures, Presidents, Governors, all legislating and vetoing without stint or limit till pulled up short by a judgment of the Supreme Court''(h). And I may refer also to the words of Mr. Lowell in one of his Essays on Government: ''At times the power of Congress has been in the ascendant, at

(e) Dillon's Laws and Jurisprudence of England and America, p. 166.

(f) Congressional Government, p. 5.

(g) Modern Political Institutions, c. 4.

(h) Walrond's Letters and Journals of Lord Elgin, p. 113.

times that of the President; and this must continue to happen as long as Congresses differ so much in the talent and experience of their members, and as long as a weak and shortsighted President is unable to exercise as much influence as a President of ability and force of character''(*i*). One thing, however, appears very clear, and that is that so far as the checks and balances of the United States Constitution still operate at all, they operate to produce disunity of policy, abuse of power, and failure of responsibility in every direction.

As to the President, Mr. Baldwin's language is certainly startling enough, and in view of the more militant phase of their national life upon which the Americans appear to have now entered sufficiently ominous. ''I think it may be fairly said,'' he writes, ''that of the leading powers in the world, two, only, in our time represent the principle of political absolutism, and enforce it by one man's hand. They are Russia and the United States''(*j*). ''Once elected,'' he tells us, ''the President, during half the year is the United States more truly than ever Louis XIV was France''(*k*). He is ''a king who for a four years' term rules in his own right(*l*). No Sultan in the presence of his divan is as uncontrolled and absolute as the President of the United States at a Cabinet meeting''(*m*). ''In regard to our standing military and naval establishment,'' he writes, ''the orders of the President are always absolute. They may involve the pulling down or setting up the Government of a State. They may bring a sudden stop to combinations of labour. . . They may compromise our relations with foreign powers, and even authorize an invasion of foreign territory or the blockade of ports before Congress has declared the existence of war''(*n*). And he illustrates the abuse of executive power since the Civil

(*i*) Essays on Government, p. 52.

(*j*) Modern Political Institutions, p. 84.

(*k*) Ibid., p. 86.

(*l*) Ibid., p. 88.

(*m*) Ibid., pp. 88-9.

(*n*) Ibid., pp. 91-2.

War by what took place a few years ago when without a special message, as the result of a private interview at the executive mansion between President McKinley and a few of the leaders of the party in power, Congress unanimously put fifty millions into his hands to be expended absolutely at his will for any purposes of national defence(*o*). The President can veto a bill because he deems it expedient, or because he deems it unconstitutional. He can decline to execute a statute on the latter ground, and the absolute power of decision of action or inaction in either case is equally in him(*p*).

Mr. Woodrow Wilson, however, as I have already stated, does not appear quite to share Mr. Baldwin's views of the excessive power of the President. What he complains of in his Essay on Congressional Government is that while the form of the present theory of the Constitution is one of nicely adjusted ideal balances, the actual form of the present Government of the United States is simply a scheme of congressional supremacy. He appears to agree with Von Holst who says that "Congress can easily bring down the President to acting merely as an executive organ of the legislative will of Congress"(*q*). He considers that Congress is so constituted as to be entirely unfit, safely or wisely to exercise the power which it has absorbed.

The condition of things which has developed itself in Congress, though not perhaps difficult to explain, is certainly startling when it is first called to our notice(*r*). It is of course neces-

(*o*) Ibid., p. 95.

(*p*) Ibid., p. 99.

(*q*) Constitutional Law, p. 191.

(*r*) It seems sufficient to confine our attention to Congress. "The State Governments bear a family likeness to the National or Federal Government, a likeness due not only to the fact that the latter was largely modelled after the system of the old 13 States, but also to the influence which the Federal Constitution has exerted ever since 1789 on those who have been drafting or amending State constitutions. Thus the Federal Constitution has been both child and parent:" Bryce's American Commonwealth, Vol. II., p. 147. The committee system including the great powers of the Speaker, has been transplanted to all the State legislatures of the country, although in Massachusetts the practice of requiring reports from committees, and of sometimes passing bills against the recommendation of a committee, makes the system less rigorous. See Professor Bushnell Hart's "Actual Government as applied under American conditions" (Amer. Citizens Series; Longmans, 1903), c. VII., on State Legislatures.

sary for every legislative body to evolve some kind of organization, and being debarred from having the ministers of the day as a ruling committee controlling all business as in England, the Houses of Congress took the alternative of distributing business amongst a number of small standing committees to each of which is assigned a specific class of subjects indicated by the names of the committees, such as Ways and Means, Appropriations, Banking and Currency, Rivers and Harbours, and so on. These committees consist of only from three to, at most, sixteen members each. We may confine our view to the House of Representatives, but the system in both Houses is the same. And while I shall derive mainly what I am about to state, from the pages of Mr. Woodrow Wilson's work on Congressional Government, I may say at once that his statements seem to be in no way impugned by other American writers.

Now to some of these small standing committees each and every Bill, Memorial, Proposition, or Report of a Department, is referred without debate, and what we find is, that all legislation is at the mercy practically of the particular committee to which a bill is assigned. These committees deliberate in secret, and no member speaking in the House is entitled to state anything that has taken place in committee other than what is stated in the report of that committee. They are practically under the control of their chairman, who are strict party men, appointed by the Speaker, himself under the American system a staunch and avowed partisan, and as I shall presently have occasion to point out when I refer to him again, the most powerful man in the House by virtue of his power of appointing these chairmen of the standing committees, and of his other functions. "I know not how better to describe our form of government in a single phrase," says Mr. Wilson, "than by calling it a government by the chairman of the standing committees of Congress"(*s*).

(*s*) Congressional Government, p. 102. References are to the 4th edition published in 1887. However in letters written to the writer of this pamphlet in March, 1906, of which Mr. Woodrow Wilson has kindly authorized quotation, he says: "In many details the present method of conducting business in Congress differs from that described in my Congressional Government, but not in any essential particular, except that the House Com-

These chairmen, however, do not constitute a co-operative body like a ministry; they do not consult and concur in the adoption of homogeneous and mutually helpful measures; there is no thought of acting in concert. Each committee goes its own way, at its own pace, and it is impossible to discover any unity of method in the disconnected and desultory action of the House, or any common purpose in the measures which its committees from time to time recommend.

We will now glance for one moment at the way in which legislation is conducted under this system. In the first place as to the initiation of legislative measures. Under the British system, which is also the Canadian, public bills fall into two classes, those brought in by the ministry of the day as responsible advisers of the Sovereign, and those brought in by private members. In neither House of Congress, on the other hand, is there any such thing as Government bills. In England or Canada a strong Cabinet can obtain the concurrence of the Legislature in all acts which facilitate its administration; it is, so to speak, the Legislature. For, as Sir Henry Maine says, "The nation whose constitutional practice suggested to Montesquieu his memorable maxim concerning executive, legislative, and judicial powers, has in the course of a century falsified it. The formal executive is the true source of legislation; the formal Legislature is incessantly concerned with executive government"(*t*).

In America, on the other hand, the initiation of legislation belongs to nobody in particular. Any member may introduce

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mittee on Rules, which consists of the Speaker of the House of Representatives and four other members, has now a degree of control which was not looked forward to twenty years ago. That committee from time to time introduces a programme for the conduct of the business of the House, which determines the amount of time to be devoted to the several parts of the House's business. This constitutes the committee a sort of "Steering Committee" and it gives great power. . . . The ascendency of the Committee on Rules in the House of Representatives has no further effect than this, that it gives the House a definite programme. But that, so far as I can see, is all that it does, except to increase still further the arbitrary power of the Speaker of the House who is, of course, the domineering member of the Committee."

(*t*) Popular Government, p. 239.

a bill or resolution upon any subject in which he feels an interest, and a dozen of these may be presented upon the same subject, which differ entirely from one another. Mr. Woodrow Wilson gives a very amusing sketch(*u*), too long to quote, of what would be the experience of a new member going to Washington as the representative of a particular line of policy and endeavouring to bring the matter up for legislation before the House. No debate at all is allowed upon the first or second reading of bills, which, of course, prevents the public being necessarily apprised of what measures are before Congress. Without debate the bill is sent to the proper committee, discussion only being allowed as to what committee it shall be sent to. And we are told that the fate of a bill committed is not uncertain, for as a rule a bill committed is a bill doomed. Mr. Joseph Chamberlain has told us in 1890, that in the preceding session of Congress more than sixteen thousand separate bills were introduced, of which less than one-tenth were finally dealt with by the House, the remainder being either rejected in committee or practically stifled by not being reported to the House(*v*). It is perfectly easy for the committee to which a bill has been referred, and therefore common, to let the session pass without making any report at all upon the bills deemed objectionable or unimportant, or to substitute for reports upon them a few bills of the committee's own drafting(*w*). So that the practical effect of this committee organization by the House is to consign to each of the standing committees the entire direction of legislation upon the subjects which have come under its consideration.

When, however, these committees do report upon a bill it might be supposed that full debate would be allowed. On the contrary we are told on the authority of Senator Hoar of Massachusetts, a man of very long Congressional experience, that, supposing the two sessions which make up the life of the House to

(*u*) Congressional Government, p. 64 et seq.

(*v*) "Shall We Americanize our Institutions?" Nineteenth Century for December, 1890, Vol. 28, p. 863-4.

(*w*) Congressional Government, pp. 69-70.

last ten months, most of the committees have at their disposal during each Congress but two hours each in which to report upon, debate, and dispose of all the subjects of general legislation committed to their charge(*x*). And even that space of time is not allowed to free and open debate. The reporting committee man is allowed to absorb a great part of it, and as to the rest the Speaker recognizes only those persons who have previously come to a private understanding with the makers of the report, and these only upon their promise to limit their remarks to a certain number of minutes. In addition to all this a practice has risen of hastening the passage of bills by suspension of the rules, "by means of which," says Senator Hoar, "a large proportion, perhaps the majority, of the bills which pass the House are carried through. . . . It requires two-thirds of the members voting to adopt such a motion. Upon it no debate or amendment is in order. In this way if two-thirds of the body agree, a bill is by a single vote, without discussion and without change, passed through all the necessary stages, and made a law, so far as the House of Representatives can accomplish it; and in this mode hundreds of measures of vital importance receive, near the close of an exhausting session, without being debated, amended, printed, or understood, the constitutional assent of the representatives of the American people"(*y*).

However, even this stringent practice apparently was not deemed sufficient. In his article to which I have already referred, Mr. Joseph Chamberlain describes a proceeding then recently introduced under the provocation of obstruction or filibustering, by which a resolution is brought up to the House from the committee on rules fixing the length of time and the conditions under which further debate on a measure which it is desired to carry in this way, can be carried on, and this resolution is passed by the majority under the action of "the previous question" rule without discussion or amendment. The chairman of this

(*x*) Quoted in Congressional Government, at p. 72, from an Article in the North American Review.

(*y*) Quoted in Congressional Government, at p. 111-2.

committee on rules is the Speaker himself, who is thus entitled in practice to decide how long the discussion on every bill or stage of a bill shall be allowed, and when the final vote must be taken(*z*). It appears that the late Mr. Reed, when Speaker of the House of Representatives, was asked what under this system becomes of the rights of a minority, to which he replied that "the right of the minority is to draw its salaries, and its function is to make a quorum"(*a*). "Thank God," the same gentleman once exclaimed, according to the New York Weekly Post, "the House is not a deliberative body"(*b*). "It is like a woman," said Secretary Evarts, "if it deliberates, it is lost"(*c*).

Space will not permit us to dwell upon the contrast presented here with the system in vogue in the British House of Commons, and the Canadian House of Commons at Ottawa. The committees of the House of Commons at Ottawa, as those of the House of Commons in London, merely investigate and report. They are not appointed by the Speaker but are chosen with care by a committee of selection composed of members of both parties. Moreover, they are very large,—some of them comprising two-thirds of the whole House. Thus the committees entrusted with private bills in the House of Commons at Ottawa, comprise from 43 to 162 members each. And as to opportunities for debate, anyone who wishes to see what they are can do so in Sir John Bourinot's Canadian Studies in Comparative Politics, or in Mr. Chamberlain's article above referred to. Under the British system, as Mr. Chamberlain states, "there may be lengthened discussion on all the six stages of an English bill, and such discussion almost invariably takes place on four of them"(*d*).

Nor, again, can I dwell upon the numerous evil incidental

(*z*) Nineteenth Century, December, 1890, Vol. 28, p. 866. See supra p. 31 n. (s.)

(*a*) Ibid., p. 871.

(*b*) New York Weekly Post, January 4th, 1890.

(*c*) Nineteenth Century, December, 1890, Vol. 28, p. 870.

(*d*) Ibid., at p. 864.

effects of the Congressional system, interesting as they are. Congress becomes under it, as Mr. Wilson says, a "disintegrate mass of jarring elements"(*e*). It is not surprising to read that constructive statesmen are not forthcoming for there are no great prizes of leadership to be gained, such as exist under the British system, to stimulate men of strong talents to great and conspicuous public service(*f*). There can be no carrying out of any definite policy of majority or minority(*g*). Constituencies can watch and understand a few banded leaders who display plain purposes and act upon them with promptness; but they cannot watch or understand forty odd standing committees, each of which goes its own way in doing what it can without any special regard to the pledges of either of the parties from which its membership is drawn(*h*). The average citizen may well be excused for esteeming government at best as a haphazard affairs upon which his vote and influence can have little effect (*i*). The practical result of the piecing of authority, the cutting of it up into small bits, which characterises the American constitutional system is, we are told, that it is impossible to fix responsibility anywhere. It is not surprising to read in Mr. Bryce's American Commonwealth that "not uncommonly there is presented the sight of an exasperated American public going about like a roaring lion, seeking whom it may devour, and finding no one"(*j*).

But notwithstanding the length this article has already reached, we cannot pass over without some special mention such a potentate as the Speaker of the House of Representatives appears to have become. The only clause in the Constitution relating to him is this: "The House of Representatives shall choose their speaker and other officers"(*k*). Mr. Woodrow Wilson de-

(*e*) Congressional Government, p. 210.
(*f*) Ibid., pp. 190, 203, 206, 214.
(*g*) Ibid., p. 99.
(*h*) Ibid., p. 186.
(*i*) Ibid., p. 331.
(*j*) Vol. 2, p. 320,(2 Vol. ed.).
(*k*) Art. 1, s. 2, clause 5.

clares him as he actually is, to be "a constitutional phenomenon of the first importance," and "an autocrat of the first magnitude"(*l*). But one would scarcely gather from his, Mr. Wilson's, pages an adequate conception of his powers. For that we must look to Miss Follett's book, to which I have already referred, and of which so good an authority as Dr. Bushnell Hart has expressed an opinion that it is the best book he knows of on the workings of Congressional institutions since 1779(*m*). No doubt as Mr. Wilson says, "Mr. Speaker's powers must vary with the character of Mr. Speaker," and at times of great excitement Congress may, as the New York Evening Post, of October 22nd, 1899, expressed it,—referring to the way in which Speaker Reed's policy in regard to the Spanish war and expansion had been over-ridden by the House of Representatives, "roll on its way over the prostrate form of the Speaker." "The theory of the Speaker as an American Prime Minister," it added, "did not contemplate times of storm and stress. In the ordinary routine work of Congress the conception of the Speaker as an absolute dictator of legislation was plausible enough." With these reservations I will summarise what we learn about this official from Miss Follett's pages.

The Speaker of the House of Commons at Ottawa or at Westminister, as he steps into the chair is expected to shake from him all party ties, and to administer parliamentary law with absolute impartiality to friends and foes alike. Miss Follett cannot go further than to say, that "on occasions when nothing is to be gained by partisanship, the Speaker of the House of Representatives attempts to keep up the fiction of the Speaker as a parliamentary officer." He is an avowed partisan, and is not only allowed but expected to use his position to advance party interests. But matters have gone much farther than this. We read: "The idea which Carlisle, Reed, and Crisp," (Speakers from 1885 to the time of the publication of Miss Follett's book), "have sought to establish is that of a Speaker with a legislative

(*l*) Congressional Government, p. 106.

(*m*) Private letter to which reference is permitted.

policy of his own, using every possible means to impose that policy on majority as well as minority''(*n*). Again our author says, ''the House of Representatives in the same way is no longer the legislative power, and it is not the maker of the legislative power, it is but the maker of the real maker, the Speaker of the House of Representatives''(*o*). I have already pointed out that it rests with the Speaker to constitute the all-powerful committees, and that he is himself now ex officio the chairman of the most important committee of all, namely, that upon rules, of which he appoints, of course, the other two members. This committee practically decides what shall be considered, how long debates shall last, and when the vote shall be taken. The calendars are far too crowded for any measures to come forward not favoured by this powerful committee of three persons(*p*). The Speaker has many opportunities to constitute the committees so that he may to a great extent procure or prevent whatever legislation he wishes. He may give a good committee to a poor chairman, or he may satisfy the general opinion in the appointment of a chairman and then give him a committee which represents the Speaker's, and not the chairman's, views, and on which therefore the chairman cannot act. When we have got so far as this, it will scarcely occasion any surprise to hear that the practice has gradually grown up of the Speaker using the parliamentary duty of recognition for political purposes, and recognizing only such persons as he pleases. Again and again when a man rises the Speaker asks ''for what purpose.'' Indeed the records of Congress, as we find from Miss Follett, may almost parallel the story of the Lieutenant-Governor of a Western State, who when presiding over the Senate turned to the doorkeeper and said, ''Go out and find Senator Gumson—he is somewhere about the Capitol—and tell him that he has been recognized and has the floor.''

The practice as to the Speaker's power of recognition makes

(*n*) The Speaker of the House of Representatives, p. 274.

(*o*) Ibid.

(*p*) Ibid., pp. 274, 277.

possible the neutralizing of members whom the Speaker dislikes. Cases are not wanted where members have sat through two years of service without being permitted to catch the Speaker's eye, so that the Speaker may practically take away the representation of a district(*q*). An interesting example of the extent to which Mr. Carlisle, the Speaker from 1883 to 1889 carried the power of recognition is given in the history of the Blair Educational Bill. This measure it appears was pending in Congress during the whole of Mr. Carlisle's long administration. It passed the Senate three times, but was never even voted upon by the House, because Mr. Carlisle would never recognize any member to move to take it up for consideration, or to fix a day for its consideration(*r*). What perhaps may be said to cap the climax in this matter is, that it is quite in accordance with usage for the presiding officer of American legislative bodies to suggest points of order to be taken, by upholding which they may checkmate proceedings adverse to their personal wishes(*s*). Several examples of this are given in Miss Follett's pages. It seems little to be wondered at that a member of the House of Representatives said in 1881: "When this Republic goes down it will not be through the man on horse back or any President, but through the man on the wool-sack in this House, under these despotic rules, who can prevent the slightest interference from individual members; who can, if he will, make or unmake laws like an Emperor; hold back or give the sinews of war or the salaries of peace"(*t*).

Thus wherever we have looked we have seen one-man power operating in a strangely despotic way in the United States. We have seen it in the President, in the chairman of committees, and lastly in the Speaker. A strange comment surely this upon the statement quoted earlier in this paper, that to avoid one-man power was one of the main objects of the United States Constitu-

(*q*) Ibid.
(*r*) Ibid., pp. 260-2.
(*s*) Ibid.
(*t*) Ibid., p. 300.

tion; and justifying Miss Follett's remark that "the whole history of the United States goes to prove that one-man power is inevitable"(*u*).

Many other things there are in the political government of the United States, which did space allow call for special comment. For example there is the strange condition of things by which the debit side of the national account is managed by one set of men, and the credit side by another set, both sides working separately and in secret, without any public responsibility, and without any intervention on the part of the executive official who is nominally responsible; of which system the 'Nation' wrote in 1882, "No other nation on earth attempts such a thing or could attempt it without soon coming to grief, our salvation thus far consisting in an enormous income, with practically no drain for military expenditure."

Then again we cannot dwell at all upon the results of the fact that, pursuant to the theory of checks and balances, the two Houses of Congress possess substantially equal and co-ordinate power, a state of things existing in no other great country in the world, whence arise, says Mr. Bryce, frequent collisions between the two Houses(*v*). "Congress was weakened," he says, "as compared with the British Parliament, in which one House has become dominant, by its division into two co-equal Houses, whose disagreement paralyses legislative action" (*w*). Neither can we discuss the way in which the Electoral Colleges contemplated by the Constitution have been reduced to the condition of so many voting machines; or the establishment of national conventions accompanied by the creation of an elaborate party machinery, and the systematic use of patronage as an engine in party warfare, until the organization has become as important a factor in the life of a party as the issues that are supposed to justify its existence. "On more than one occasion, indeed," says Mr. Lowell, "the perfection of its mechanism and

(*u*) Ibid., pp. 304-5.

(*v*) American Commonwealth, Vol. 1, p. 183, (2 Vol. ed.).

(*w*) Ibid., p. 278.

the necessity of conventions for the election of candidates has kept a party alive after it has ceased to represent any principles whatever. The modern American party without a principle is like a centipede without a head, which continues to march until destroyed by some external force"(x). And on this point it is worth noting that Canadians probably owe the fact that they are not dominated by the political machine to anything like the same extent as their neighbours very largely to this that their chief magistrate being appointed by the Crown, they escape the necessity of periodical presidential elections.

But it may be said, if the evils which have developed themselves in the Constitution of the United States are so great, the Constitution will doubtless be amended. The requirements of Art. 5 of the Constitution, however, under which alone any amendment can be made, are such that it is apparent, as Mr. Woodrow Wilson says, that "no impulse short of the impulse of self-preservation, no force less than the force of revolution, can nowadays be expected to move the cumbrous machinery of formal amendment of the Constitution of the United States"(y). And so long as a people, of energetic political talents and a keen instinct for progressive development, "adhere to the forms of a written Constitution, so long as the machinery of Government supplied by it is the only machinery which the legal and moral sense of such a people permits it to use, its political development must be in many directions narrowly restricted because of an insuperable lack of open or adequate channels"(z). And as to responsible government, I may mention that in one of his Essays on Government, Mr. Lowell shews conclusively that a responsible ministry cannot be engrafted into American institutions without entirely changing their nature and destroying their most treasured features.

"The fact is," wrote Lord Elgin, the Governor-General of Canada, to Lord Grey in 1850, "the American system is our old

(x) Government and Parties in Continental Europe, Vol. 2, pp. 320-1.
(y) Congressional Government, p. 242.
(z) Ibid., p. 312.

colonial system with, in certain cases, the principle of public election substituted for that of nomination by the Crown. Mr. Filmore stands to his Congress very much in the same relation in which I stood to my Assembly in Jamaica. There is the same absence of effective responsibility in the conduct of legislation, the same want of concurrent action between the parts of the political machine"(*a*). And referring to his experiences in respect to the negotiations for reciprocity at Washington the session before, he says: "There was no Government to deal with. The interests of the union as a whole and distinct from local and sectional interests, had no organ in the representative body; it was all a question of canvassing this member of Congress or the other. It is easy to perceive that under such a system, jobbing must become, not the exception, but the rule. Now I feel very strongly, that when a people have been thoroughly accustomed to the working of such a parliamentary system as ours, they will never consent to revert to this clumsy, irresponsible mechanism. Whether we shall be able to carry on the war here long enough to allow the practice of constitutional government and the habits of mind which it engenders to take root in these Provinces, may be doubtful"(*b*).

No one can dispute that the practice of constitutional government and the habits of mind which it engenders have taken permanent root in Canada notwithstanding Lord Elgin's forebodings. But many things have happened since the days of Lord Elgin. Provincialism disappeared in the conception of a Canadian nationality in a federated Dominion. And how weighty the influence of the Dominion has come to be in the councils of the Empire may be read in Sir John Bourinot's article in a recent number of the Forum, where a justly deserved tribute is paid to Lord Salisbury for his conduct in matters where the interests of Canada have been deeply concerned (*c*). But more than that, the dream of Lord Brougham in 1803

(*a*) Walrond's Letters and Journals of Lord Elgin, pp. 120-1.

(*b*) Ibid.

(*c*) Canada's Relations with the United States and Her Influence in Imperial Councils, Forum, May, 1898.

—for it could have been called nothing else at that time—has been undeniably realized. In his work on the Colonial Policy of the European Powers, published in that year, he wrote: "May we presume to hope that the colonial story of Great Britain will exhibit to future statesmen, a useful picture of advantages which may fairly be expected from just views of provincial government; that it will hold out the prospects of certain success to the enlightened and generous policy which shall consider the parts of an Empire, however situated, as members of the same political body; that it will display the possibility of retaining the distant provinces in the relations not of subordination, but of union, even after having become more worthy of bearing the same name in their progress in wealth, in arts and in arms; and teach every nation of Europe, which is happy enough to possess such settlements, how amply their nurturing care must finally by recompensed, even in a political view, by the efforts of their mature age."

A. H. F. LEFROY.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

EXCHEQUER COURT.

Burbidge, J.] THE KING *v.* CONNOR. [Jan. 26.

Subrogation—Partnership debt—Rights of one partner paying same.

Under the principles of the common law as it obtains in England and in Ontario a partner who pays a partnership debt cannot be subrogated to the rights of the creditor against his co-partner. (The law as applied in similar cases by the Courts of Quebec and of the United States discussed.)

Chrysler, K.C., and *Bethune*, for plaintiff. *Aylesworth*, K.C., *Stockton*, K.C., *Gormully*, K.C., *Hogg*, K.C., *Murphy*, *J. F. Orde* and *A. Beament*, for defendants.

Burbidge, J.] THE KING *v.* DODGE. [March 29.

Expropriation—Rifle range—Compensation—Witnesses led into error in their valuation—Report of Referee—Appeal from—Smaller assessment on appeal.

Where the witnesses, on whose evidence the referee seemed to rely, were in the opinion of the judge led into the error of applying to a large number of acres (in this case 623) a value which appeared to represent the value of a portion of the property, but not the whole, the amount of compensation recommended by the referee was reduced.

2. Where average values are applied to ascertain the value per acre of land taken by the Government, such average values should be applied with great care and moderation.

McIlreith, for plaintiff. *Roscoe*, K.C., for defendants.

Province of Ontario.

COURT OF APPEAL.

Full Court.] THE KING *v.* WALTON. [Feb. 23.

Criminal law—Summoning grand jurors and petit jurors—Constitution of Courts — Procedure — Ontario Legislature — Dominion Parliament.

A Provincial Legislature has power to determine the number of grand jurors to serve at Courts of oyer and terminer and general sessions this being a matter relating to the constitution of the Courts, but the selection and summoning of jurors relate to procedure in criminal matters in respect of which the Dominion Parliament alone has power to legislate. The Dominion Parliament can exercise its power by adopting the provincial law and has done so by section 662 of the Criminal Code. *The Queen* v. *Cox* (1898) 31 N.S.R. 311; 2 Can. C.C. 207, approved.

Cartwright, K.C., Depty. Atty.-Genl., for Crown. *J. B. McKenzie*, for prisoner.

Full Court.] [June 16.

BECK MANUFACTURING CO. *v.* ONTARIO LUMBER CO.

Rivers and Streams Act—Constructions and improvements—Floating logs—Payment of tolls—Fixing of tolls—Condition precedent to action.

The Rivers and Streams Act, R.S.O. 1897, c. 142, confers exclusive jurisdiction to fix the tolls chargeable for the use of construction and improvements made in rivers and streams for the purpose of making them navigable for saw-logs upon the different tribunals mentioned in section 13; and renders it incumbent on any person seeking payment in the nature of tolls for such use, to produce as the condition precedent to recovery, an order or judgment of one of such tribunals fixing them.

Per OSLER and GARROW, JJ.A.—It is not necessary that the tolls should be so fixed before the logs are floated, but until they have been fixed no action can be maintained.

Per GARROW, J.A.— (1) The Act merely gives the local judge or stipendiary magistrate the power to fix the proper rate of

toll to be paid for the use by anyone but the owner of his improvements in the stream, but it does not give him power to determine whether or not the rate fixed by him shall apply to the past or to the future. That is a question solely for the Court to determine when it arises in an action.

(2) Parties entitled to such tolls are not confined to the statutory remedy by distress proceedings (section 19), but may bring an action, nor is such action confined within one month, the period within which by section 19 the seizure must be made.

Per MEREDITH, J.A.—That which the plaintiffs were entitled to was a toll when fixed in the manner prescribed by the Act, until which time the common right to use the stream continued unburdened.

Riddell, K.C., and *Hodgins*, K.C., for plaintiffs, appellants. *Aylesworth*, K.C., and *A. G. F. Lawrence*, for respondents.

HIGH COURT OF JUSTICE.

Meredith, C.J.C.P.] [April 19.

IN RE WIARTON BEET SUGAR CO.
FREEMAN'S CASE.

Company—Winding-up—Bonus shares—Transfer of—Contributory—Directors—Breach of trust—Winding-up Act.

A man to whom bonus shares in a company have been issued as fully paid up and who has transferred them previously to winding-up order to bonâ fide purchasers for value without notice, is not liable to be placed on the list of contributories for the amounts which ought to have been paid on them as between the company and himself—there being nothing in the Winding-up Act, R.S.C. c. 129, which creates any such liability on the part of a past member of a company, where he is not subjected to such a liability by the Act under which the company was created or some Act relating thereto.

But the alleged contributory in this case having been a director of the company where the bonus shares were allotted to

him was liable as for a breach of trust in being a party to the allotment of the shares as fully paid up, as well as in putting them off on his transferees to the prejudice of the company as fully paid up shares, and might properly be made liable under s. 83 of the Act.

W. M. Douglas, K.C., for shareholder. *W. H. Blake*, K.C., for liquidator.

Falconbridge, C.J.K.B.] [June 11.

IN RE JANSEN.

Insurance—Apportionment of benefits between wife and children—Preferred beneficiaries—Instrument in writing—Invalid will.

A document intended to operate as a will, but wholly invalid as such, cannot be treated as an instrument in writing under s. 160, sub-s. 1, of the Ontario Insurance Act, R.S.O. 1897, c. 203, whereby the assured may by an instrument in writing attached to or endorsed on or identifying a policy by its numbers or otherwise vary a policy or declaration or apportionment previously made in respect to the benefit to be taken under a policy by wife or children respectively.

Laidlaw, for widow. *A. G. F. Lawrence*, for five children.

Province of Manitoba.

KING'S BENCH.

Full Court.] SINCLAIR *v.* RUDDELL. [May 7.

False imprisonment—Reasonable and probable cause—Malice—Malicious prosecution—Application for new trial—Putting questions to jury—Misdirection—Evidence as to character of plaintiff.

The defendant McKay, a peace officer, at the request of the defendant Ruddell, arrested the plaintiff on suspicion of having

stolen a valise in a hotel and detained him in custody for about two hours. The plaintiff brought this action for false imprisonment. At the trial the judge told the jury that in his opinion there was an entire absence of reasonable and probable cause for the arrest, but left that question to be decided by them on the evidence. The jury returned a general verdict for the plaintiff and assessed the damages at $500, $250 against each defendant. On application to this Court for a new trial the following points were decided.

1. The trial judge was not bound to put to the jury specific question, such as, "Did the defendants take reasonable care to inform themselves of the facts?" "Did the defendants honestly believe that the plaintiff was guilty of the offence for which he was arrested?" but might, with a proper charge, submit all the facts to the jury leaving them to return a general verdict.

2. In charging the jury, the Judge should not suggest to them that they might put themselves in the plaintiff's position, and consider how much they ought in that case to be paid, but this only affected the quantum of damages as to which no objection had been raised. *Hesse* v. *St. John Ry. Co.*, 30 S.C.R. 218, followed.

3. Evidence to prove the bad character of the plaintiff was properly rejected at the trial: *Newsome* v. *Carr*, 2 Stark. 69; *Jones* v. *Stevens*, 11 Price 235, and *Downing* v. *Butcher*, 2 Moo. & R. 374.

4. The judge's charge to the jury that it is necessary in such an action for the plaintiff to prove malice (as he would in an action for malicious prosecution) was wrong, but, although there was no evidence of malice, the misdirection was not a ground for disturbing the verdict, as it was not attacked as being excessive.

5. There is no ground for an action for malicious prosecution unless the acts complained of are the result of a complaint laid before a magistrate: *Austin* v. *Dowling*, L.R. 5 C.P. 534.

Howell, K.C., for plaintiff. *Hoskin* and *Bowen*, for defendants.