The Canadian and American Constitutions

BY

William Renwick Riddell

REPRINTED BY PERMISSION FROM
THE CANADIAN MAGAZINE,
JUNE 1910.

THE CANADIAN AND AMERICAN CONSTITUTIONS

A COMPARISON

BY WILLIAM RENWICK RIDDELL,

JUSTICE OF THE KING'S BENCH DIVISION, HIGH COURT OF JUSTICE FOR ONTARIO

IT has happened that I have within the last few years had occasion to attend meetings of bar associations in the United States, and to visit State and Federal courts. Nothing else upon these occasions has so attracted my attention and excited my wonder as the relative amount of discussion of constitutional questions. I do not think I exaggerate when I estimate the time occupied in such discussions at more than one-fourth of the whole. In Canada, on the contrary, perhaps not one per cent. of the time of such bodies is thus taken up.

This is an exceedingly curious or, rather, interesting, point of difference between two peoples largely of the same language, same origin, similar institutions and customs, and actuated by the same motives and aspirations. And it may not be entirely without advantage briefly to consider this difference.

It all rests on the fundamental fact that Canada has in substance the same constitution as the United Empire. The British North America Act of 1867 begins with the preamble "Whereas the Provinces of Canada, Nova Scotia and New Brunswick have expressed their desire to be federally united into one Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a constitution similar in principle to that of the United Kingdom." This desire was granted.

Now the United Kingdom has in reality no constitution at all in the sense in which the word is used in the United States.

In Britain this or that is said to be "constitutional" or "unconstitutional" as it is conceived to conform or not to conform to the general principles, more or less vague, upon which it is thought the Empire is governed. What these principles are is often a matter of opinion. They are changing from generation to generation and have nowhere an authoritative presentation.

In the United States the fathers of the Union collected what they believed to be the true principles upon which government should be carried. Most of these they got from the Mother Country. These principles were reduced to writing, and so became fixed. No better illustration can be found of the truth of the saying "The letter killeth and the spirit giveth life" than the course since that time of the Constitutions of the two nations. In the old land the Constitution is changing from time to time to meet the advance of the people and change of views. In the United States everything is referred

to the letter of the written document framed a century and more ago. The United Kingdom has the most profound confidence in the people; the United States the most profound suspicion. In the former the people must have their way; in the latter they can have their way only so far as they are allowed by the terms of a document framed by the hand of a dead and gone generation. The nation which is called feudal and aristocratic is wholly free to do as the people say; that which is called democratic is hemmed in on every hand by barriers as of iron: and these not of their own making. The President of the United States has even now practically all the powers of the British King of the time of George III., while the power of the King has been continually changing and diminishing. And so in our government—as I have already said—we have, speaking generally, the same Constitution as the Mother Country.

There is, of course, the division of the objects of legislation between Dominion and Province, but given that the object of legislation is within any class of subjects assigned to Dominion or Province (as the case may be) there is no question of the extent of the power of parliament or legislature respectively.

Now this, it seems to me, is the cardinal difference between the two countries. In the United States, Congress may legislate upon a subject admittedly within its jurisdiction, but if the legislation clash in any way with the provisions of the Constitution, it is void. And not only if it be contrary to an express provision of the Constitution, but also if it be opposed to what the courts may have read into the Constitution.

By Section 10, Article 1, of the Constitution of the United States, it is provided that "No State shall pass any law impairing the obligation of contracts." [There is nothing, I may say in passing, to prevent the United States in Congress passing such laws.]

The most extraordinary consequences have followed from this provision. For example, in 1769 the King, George III., granted to the trustees of Dartmouth College in New Hampshire a charter of incorporation as a private charitable institution. After the Revolution—in 1816—the legislature of the State of New Hampshire passed an Act taking away from the trustees the government of this college and vesting it in the executive of the State—in other words, changing the college from a private to a State institution. The Act, while continuing the trustees as a corporation as Trustee of Dartmouth University, purported to form a new body called a Board of Overseers, of whom the President of the Senate and the Speaker of the House of Representatives of New Hampshire, the Governor and Lieutenant-Governor of Vermont, were ex-officio members, and to this Board of Overseers was given the power of confirming or vetoing the acts of the trustees relating to the appointment and removal of president, professors and permanent officers, the determination of their salaries, the establishment of professorships, and the erection of new buildings. The Legislature, later on in the same year, passed another act, making it an offence for any one to act as president, professor, etc., except in conformity with the Act just named. One Woodward had been secretary-treasurer of the corporation before the passing of the Acts, but he apparently took sides with the Legislature because he was removed by the Trustees of Dartmouth College before the last Act, and he was reappointed by the trustees of Dartmouth University organised under the new Acts. The old board brought an action against him for taking possession of the books of their records.

It will be seen that the simple question was: Had a new corporation of trustees of Dartmouth University being legally created? And that depended upon whe-

ther the Acts of the Legislature were valid. The Supreme Court of New Hampshire decided that the Legislature had not exceeded its authority, and so dismissed the action. An appeal was taken to the Supreme Court of the United States. The case for the old board was argued by the celebrated Daniel Webster, and the Supreme Court decided that the charter was a contract. The Chief Justice, the well-known John Marshall, says: "It can require no argument to prove that the circumstances of this case constitute a contract." Then the court proceeded to hold that this charter was a contract of the kind protected by the Constitution, and that the Legislature had no right to change it in any way.

In Canada the Legislature, without any hesitation, entirely changed the constitution of King's College, the predecessor of the University of Toronto; and no one imagined that the legislation was vulnerable in any point.

If to-morrow the Legislature should decide to change the status of Queen's University, there can be no doubt that it has the power to do so. If even the change were to bring about a relation of that University to the Methodist Church identical with that it now bears to the Presbyterian Church, the validity of the legislation would not be questionable.

So in England, the position of the ancient universities of Oxford and Cambridge has been seriously modified by Parliament; and no one in or out of Parliament questions the power of Parliament to make even more radical changes.

Again, if any enterprise receive a charter, that charter can be either in the old land or in Canada modified or abrogated at the will of the law-making body and without the consent of the corporation or any one else. In the United States, if any State should grant any exclusive privilege, this grant is looked upon as a contract and cannot be recalled. For example, if a State were to grant to a named individual or corporation the sole right for a fixed term to establish a slaughter house in a certain city, (and it has been held that a legislature may validly give such a right) the monopoly would be irremediable and the people helpless. With us, the law-making body can take what it can validly give.

If a State make an arrangement with any person or corporation that it will not tax property or rights or franchises, or will tax at only a fixed rate agreed upon, this, too, if for consideration, is a contract; and the Legislature cannot take up its lost sovereignty and exercise the power of taxation at will. Our Legislature cannot contract itself out of any of its powers given by the British North America Act. No act of the Legislature is so binding that it cannot be repealed by the Legislature or its successor.

In the case of a contract made by a State, some at least of the States manage to get out of any difficulty. For example, when I was in Missouri last fall at a meeting of the Bar Association of that State, I heard a long discussion as to whether the State had broken its contract with a firm of publishers in another State. I confess it seemed to me that the State had been in the wrong; and I asked why the matter was not tried in the courts. To my astonishment, I was told that the State, being sovereign, could not be sued: that as there was no such proceeding as exists in all British countries for testing the meaning of a contract with the Government, the publishers had to go without redress.

A writer in *The American Law Review* quotes me as saying: "Of the matters of difference between your country and mine, the third is a matter which I can't quite get through my mind so as to reconcile it with my sense of justice. I heard, yesterday, and I understand it is the law, that no man has a right of action against

the Sovereign State. In my country, in our jurisprudence, if a person conceives himself to be wronged by the Sovereign, all he has to do is state his facts by way of petition to the attorney-general, and with the leave of the attorney-general the matter is brought into court and threshed out the same as an ordinary civil action. No court can compel the Sovereign to do what it does not want to do. The jurisdiction of the court over the Sovereign is only advisory. It says what is just and right and proper; but the theory of our law is, and I suppose it should be the theory of all law, that the Sovereign body does not intend to do wrong, and, if it has unintentionally done wrong, then, being informed of its wrong by properly constituted authority, that Sovereign body will right the wrong. In our jurisprudence we say the King does not intend to do wrong. His subjects, or mere denizens, might have a contract with His Majesty in Canada. He wouldn't intend to do any wrong. He might believe, his advisers might believe, the contract meant one thing; you might say, 'No, I intended it to mean another, let the court determine what that actually means,' and His Majesty, truly advised, says, "if I am wrong, of course I will do you justice.' "

A provision in the same part of the Constitution is that no person is to be deprived of property without due process of law. No matter in what devious ways a person may have become possessed of property, and no matter to what amount, he cannot be deprived of any part of it without due process of law; and a law cannot be framed up to meet the case because *ex post facto* legislation is forbidden. For example, if a railway company has issued its bonds bearing a high rate of interest, legislation cannot give to the company the power to replace these with debentures at a lower rate against the will of a *bona fide* holder. The Parliament of the Dominion did pass such legislation, and no one in Canada dreamt of questioning its validity; but the courts of the United States, apparently looking upon legislatures with us as of the same powers as their own, held that this statute was void.

In a very well known case in Ontario it was contended that a company had acquired vested rights to a certain valuable mine, which was afterwards declared by the Legislature to belong to another company. The courts in Ontario without any dissent or difference of opinion (and the Judicial Committee of the Privy Council have approved) considered that even if the first-named company owned the disputed property, the Legislature had the power to take it away.

So the right to bring an action at law is a right which cannot be taken away from anyone in the United States. Congress tried by statute in 1863 to make an order of the President during the rebellion a valid defence in all courts against any action for arrest or imprisonment, etc., made under such order. But the courts promptly held that Congress had no power to deprive citizens of redress in the courts for illegal arrests and imprisonments.

In Canada we have had statutes of indemnity, *e. g.*, in 1838. After the Rebellion an Act was passed (1 Vic., c. 12) which recited that before and during the "insurrection" it became necessary for justices of the peace, officers of the militia and others in authority in the Province, and also for loyal subjects, to apprehend persons charged or suspected of joining in the insurrection. The Act then provided that all proceedings brought for such acts should be void and the persons who had committed them indemnified. All such proceedings were to be stayed, and if the plaintiffs went on they should be liable for double costs. No one had the slightest idea that this Act was not perfectly valid. So in Ireland a similar Act was passed after the Rebellion of 1798; and also in Cape Colony in 1836, 1847

and 1853; in Ceylon in 1848; in Saint Vincent in 1862, and in New Zealand in 1865 and 1867. In Jamaica, after the troubles of 1865, the Legislature passed an Act of indemnity which had the effect of preventing the prosecution of actions against Governor Eyre.

In Ontario we have had a recent instance of the exercise of such a power by the Legislature. In the Hydro-Electric matters, the Legislature has said actions are not to be taken or, if taken, are not to be proceeded with. The courts so far have upheld the power so exercised.

A law of New York State authorised anyone to take an animal trespassing on his lands and have it sold by a justice of the peace, who would first retain his own fees, then pay the person trespassed upon for the keep of the animal and hand the remainder to the owner of the animal if he should claim it within one year. This was held to be unconstitutional. Our pound-keepers are exercising this power of sale every day under the provisions of a chapter in our Revised Statutes.

By the Constitution of the United States and the several States, the term of office of President and Governor is fixed. Short of impeachment, there is no way of getting rid of a Chief Executive no matter how much he may run adverse to the desires and opinions of the people. The term of representatives and Senators is fixed and no power exists to shorten this a day. In our system, in practice a new election can be called at any time that it is thought advisable by a ministry which can command a majority in the Parliament and often by one that cannot—a parliament may extend its own life indefinitely.

The Prime Minister of Canada, who (and not the Governor-General) corresponds in Canada with the President in the United States, cannot remain in power a day without the support of the majority of the people's representatives. Compare with his position that of President Johnson, who held his position for years while bitterly distrusted and disliked by a majority of the citizens of the United States.

It seems to me that the cardinal difference between Canada and the country to the south is well illustrated by the process of legislation. In the United States the executive officers do not sit in Congress—they are not responsible for the legislation at all. President Taft made his campaign largely upon a promise that the tariff should be revised. He could not introduce a bill himself. That must be done by a member of Congress. No direct responsibility rested upon the President for the bill introduced. All he could do was to intimate openly or secretly to congressmen what his views and wishes were, and to use the influence given him by his power of appointing to offices in the service of the country, if he considered such a use of his influence proper. He could not in person in the House or Senate defend any provision or assail any amendment proposed. And the President has or has not "made good" according as to how far he has been able by the exercise of influence or argument or persuasion in having his promises implemented. But nobody holds him responsible for the tariff. It is not "Taft's Bill," but it is the "Payne-Aldrich Bill," like the former "Dingley Bill," "Wilson Bill," and "McKinley Bill." And whether he has pleased his party or the nation, he sits until the end of his term; and he would have done so had his party been defeated in Congress and Senate and utterly routed before the electorate. No responsible officer is responsible for the legislation.

Now, in Canada, if an election is fought on any issue the required legislation is introduced by a responsible ministry. If they can command a majority of the people's representatives, it in practice passes into law after having been scrutinised by the Senate. If the responsible ministry cannot command a majority of the House, a new

prime minister is sent for and a new ministry formed, and these take the responsibility for legislation. If the people do not like it, the members soon find that out; and there is or need be no delay in public opinion making itself felt. No prime minister has any fixed term of office; and he cannot sit serene in the consciousness that he cannot be removed.

A word or two as to the position of the courts. I think the people of the United States were the first to put themselves absolutely under their courts. It is for the courts to declare the meaning of the Constitution, to determine the constitutionality or otherwise of an enactment. The legislatures cannot set aside a construction of the law already determined by the courts, nor compel the courts to adopt in future a particular construction of a statute allowed to remain in force; nor can the legislatures, for example, compel the courts to grant a new trial or extend time for appealing to a party who had allowed the time prescribed by the general law to expire.

With us, the legislatures are supreme in all such matters. The courts are not instituted by any constitution; they were all instituted by the legislatures, all their powers came from the legislatures, and the same hand which gave can take away. As was said in one case, "If the legislature has in fact said that the true boundary between two adjoining lots is to be determined by three farmers or by a land surveyor, it is my duty loyally to obey the order of the Legislature and stay my hand; the Legislature has the legal power—and that is all I may concern myself about — to say that His Majesty's Court shall not determine the property rights of His Majesty's subjects in respect of the extent of their land."

It will at once be observed that this is closely allied to the principle we have already been examining as to the sacredness of private rights; but it goes much further. The substance is that the dead and gone generation is in the United States saying to the present and living, "Thus far shalt thou go and no farther"—a prohibition to which I do believe no British people would submit.

In this, as in everything else in our Constitution, the people are the ultimate court of appeal, and they hold the ministry of the day responsible for all the acts of parliament or legislature. So in the exercise of the powers of legislation which I have referred to, if parliament or legislature should take away a charter once granted, the people might disapprove and punish the responsible ministry by refusing them a majority. If the people thought that the courts should not be closed to litigants, they could say so. And generally all the acts of the legislating bodies come or should come for judgment from time to time by the citizens of Canada, and it is for them to say what is to be allowed and what forbidden.

In the other country, it is not the people who can allow or disallow. The people are not trusted. They cannot say to a monopolist: "You shall not retain your ill-gotten wealth." They cannot say to one who is litigating simply to embarrass the construction or operation of a great public work: "You shall not litigate."

All this power possessed by Canadian legislating bodies is old—there is nothing new about it. It is possessed by our kinsmen across the sea, by our kinsmen in Australia, New Zealand, South Africa and elsewhere; and thus far, at least, there seems to be no symptom of any move to limit or change it.

Parliament and the Legislative Assembly could not themselves validly restrict their power—if any self-denying ordinance should be passed to-day it might be rescinded and repealed to-morrow by the same body which enacted it, or next year or next century by a successor. The only way in which these powers can be validly limited is by an Act of the Imperial

Legislature; and that I cannot think will ever be applied for or passed *in invitum*.

It is sometimes said by those who should know better that there was no intention to give such great powers to the Provinces or Dominion, and that the British North America Act in that regard was passed, as it were, in inadvertence. Nothing can be further from the truth. Elsewhere I have said, and I repeat:

"It is sometimes said that the British Parliament could not in passing the British North America Act have intended to confer on a local legislature such unlimited powers. The best way of determining what a parliament intends is to find out the meaning of what it says. The meaning of the language is perfectly plain and does not admit of question. Those who assert that the British North America Act does not express the real meaning and intent of parliament, it seems to me, forget that practically all the power Ontario has, she has had from the time of the Act of 1791, 31 Geo. III., ch. 31. It was not just the other day that our Province 'came of age'—she is over 100 years old. All the powers we have been considering were undoubtedly hers since 1791. And I much mistake the temper of my countrymen if they in 1867 would have been or would now be content to accept any legislation which would cut down in any wise their power of governing themselves. All these powers are possessed in fact by our kinsmen across the seas, and for myself I can see no reason why our rights in Ontario in local mattters should be any less than the rights of those in the British Isles, why Britons on this side of the Atlantic should any less govern themselves than those on the other.

"Nor were those who drew up the British North America Act ignorant men. The colonial statesmen were men of great ability, who knew what they wanted, and knew how to put in plain language what they did want. They had the assistance of the ablest lawyers in England; they were experienced legislators themselves; and it is idle to speak of the result of their labours as being other than what was intended."

I have not said anything about the power to amend the Constitution in the United States. Such a power does exist, but it is so slow and the machinery so cumbrous that it might for all practical purposes be non-existent. We in Canada can change our Constitution in an hour if both Houses of Parliament or the legislative body are willing. A majority of both houses can force a change within, at the most, a few months. No change can in the United States be made immediately if every man in the country from President down should desire it—and no really contested change can be effected in as many years as we require months. Take, for example, the constitutional amendment proposed a short time ago by President Taft, giving the United States the power to impose an income tax. The proposition is dragging its slow length along, and it almost seems as though the objection of one man, Governor Hughes, was effective to prevent its adoption. "The Government" cannot force it through, and it must take its course, involving, perhaps, years.

I suppose that it is not to be expected of me, a Canadian and a British Judge, that I should be able to form a wholly unbiased opinion as to the relative value of the two Constitutions, but, for what it is worth, I may be permitted to say that with such study as I have been able to give to the subject, and such intellect as I am blessed with, I am wholly sure that ours offers the best hope for the future, for the advantage of the commonalty, both in wealth and in intelligence, and for the realisation of the prophetic apothegm, "All men are born free and equal."