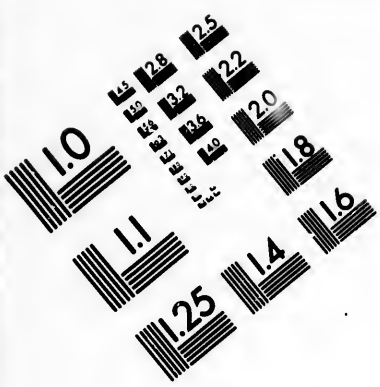

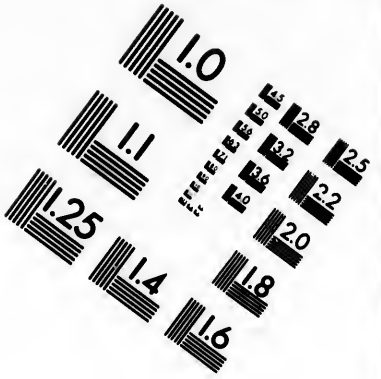

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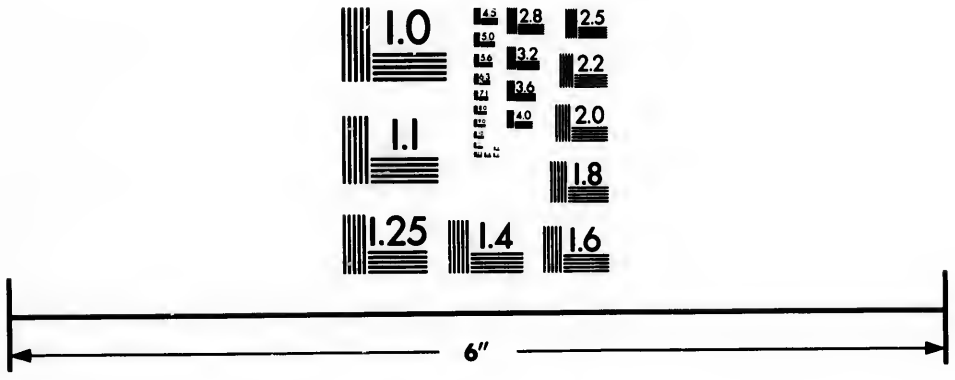

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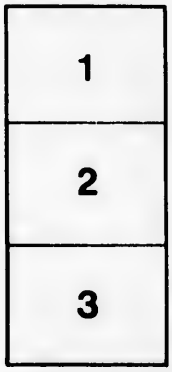

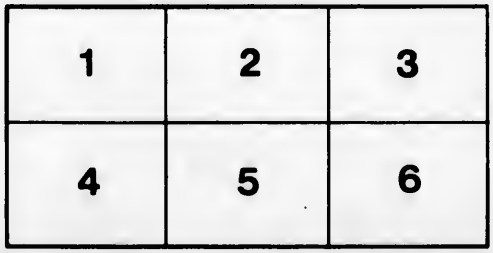

SIX LETTERS

TO

THE HONOURABLE O. MOWAT,

(ATTORNEY-GENERAL, Etc.),

ON THE

AMENDMENT

OF THE

PROVINCIAL CONSTITUTION

BY THE

HON. WM. MACDOUGALL, C.B., M.P.P.

TORONTO:

PUBLISHED BY "THE MAIL" PRINTING COMPANY.

1875.

How Constitutions must be Interpreted.

"A power given by the Constitution cannot be construed to authorize a destruction of other powers given in the same instrument. It must be construed, therefore, in subordination to it; and cannot supersede or interfere with any other of its fundamental provisions."—*Story's Commentaries on the Constitution*, Vol. II., p. 325.

Legislative Bodies are always inclined to Usurp Power.

"De Lolme has said, with great emphasis: 'It is without doubt absolutely necessary for, securing the Constitution of a State, to restrain the executive power; but it *is still more necessary to restrain the legislative.* What the former can only do by successive steps (I mean subvert the laws), and through a longer or a shorter train of circumstances, the latter does in a moment.' "—*Story's Commentaries*, Vol. I., p. 384.

"The representatives of the people will watch with jealousy every encroachment of the executive magistrate, for it trenches upon their own authority. But who shall watch the encroachment of these representatives themselves? Where the legislative power is exercised by an assembly which is inspired by a supposed influence over the people, with an intrepid confidence in its own strength, it is easy to see that the tendency to the usurpation of power is, if not constant, at least probable, and that it is against the enterprising ambition of *this department* that the people may well indulge all their jealousy, and exhaust all their precautions."—*Ib.* p. 385.

Lawyers, as a class, not to be relied on to Defend the Constitution.

"Now, above all was exhibited the base sycophancy of the lawyers, rendered more disgusting by the learned garb in which it clothed the vile language of crouching slaves,—their subserviency the more glaring as it was the more pernicious, and the more infamous in the more elevated positions of the profession. Now were seen the Members of the Middle Temple first hailing with delight the earliest act of the tyrant's reign, his levying money without consent of Parliament, for which wholesome exercise of the prerogative those sages of the law humbly and heartily tendered him their thanks. Again, the raptures of the same vile body knew no bounds when James, himself spurning all bounds, assumed the full dispensing and suspending powers."—*Lord Brougham's British Constitution*, p. 247.

Mill's Admission as to Despotic Tendency of Single Chambers.

"It is important that no set of persons should be able, even temporarily, to make their *sic volo* prevail, without asking any one else for his consent. A majority in a single assembly when it has assumed a permanent character,—when composed of the same persons, habitually acting together, and always assured of victory in their own house,—easily becomes despotic and over-bearing if released from the necessity of considering whether its acts will be concurred in by another constituted authority."—*J. Stuart Mill on Representative Government*, p. 251.

THE CHANCERY LAWYERS

VERSUS

THE CONSTITUTION.

The British North America Act of 1867 united, presently and prospectively, all British North America under one system or constitution of government. The general outlines and principles of the system, and the distribution and limitation of both legislative and executive powers, are set forth in the Act itself. This "supreme law" repealed or superseded *proprio vigore* all previous acts, laws, and constitutions of government inconsistent with, or repugnant to its provisions. It is binding upon all estates, authorities, and persons within the Dominion of Canada, and especially upon those authorities, legislative and administrative, which are created by it. In a word, it is our written constitution, and every contravention or violation of its provisions is a breach of the fundamental law, and an infringement upon the rights of the people. The Organic law in all countries and in all ages, has been regarded as of higher authority than ordinary acts of legislation. In the old Greek democracies it was a criminal offence even to propose any measure in contravention of it. Lord Brougham in his review of Athenian polity, says:—"It was criminal to bring forward any decree or any legislative measure which was contrary to the existing laws. The first step to be taken was propounding a direct repeal. This of itself was a great security," and if "a person propounded a total repeal of the old law, he was compelled to substitute another in its place, and if this was not beneficial to the nation, he was liable to be prosecuted at any time within a year, although the people and the senate should have sanctioned his proposition and passed the law." The Locrians, a ruder people than the Athenians, and according to Gibbon, equally averse from frequent or sudden changes, compelled "the proposer of any new law to stand forth in the assembly of the people with a cord round his neck, and if the law was rejected, the innovator was instantly strangled!" In modern republics the Organic law is protected by less truculent and probably more effective safeguards. No change can be carried by surprise. The concurrence of numerous deliberative assemblies, or of a considerable majority of the people upon a direct appeal, is required before the proposed change can take effect. In our case the supreme power of the empire is in "Parliament." It makes constitutions for Provinces and Colonies, and therefore it only can unmake or alter them.

A "ring" of Chancery lawyers, in Ontario, having first conspired with certain other "rings," composed of applicants for grants of public money and property, seized the reins of government in 1871, and secured control of the legislature. They immediately reconstituted the Courts to suit their own personal and family interests. They degraded our most eminent judges, and weakened public confidence in the administration of justice by subjecting their decisions to review and reversal by men who had never occupied the judgement seat, were scarcely known at the bar, and not to be compared for a moment in respect of the qualities and attainments required on the bench, with the learned, upright and experienced judges over whose heads these men were insultingly and subversively placed. The retention of the venerable ex-Chief Justice of the Queen's Bench as president of the new court, might be put to the credit of the "ring," if they had not confessed that his great age and long service must soon lead to his retirement and thus enable them to complete their domestic arrangements.

This unprincipled combination of cunning, greedy, unscrupulous Chancery lawyers, persuaded one of the Judges of their own Court to doff the ermine, and take command of their forces in the assembly. In close alliance with the "Catholic League" he manipulates the elections, directs legislation, and proclaims openly his intention to distribute the public patronage, money and property, to the "advantage of the *party!*" This shameless avowal, as unprecedented in British annals, as it is repugnant to the spirit of the constitution, has been followed by another more heinous still:—to wit, that he and his majority in the legislature have a right to *alter*, and therefore to subvert every part of our constitution, except one office, and to make a *new* Constitution of their own authority! This startling and revolutionary doctrine was promptly illustrated and enforced by the passage of an act on the eve of the last general election to abolish certain constituencies, remodel others, and by increasing the number of its members, to change the constitution of the legislature. The success of this daring raid upon the constitution has emboldened the Chancery Ring, and they now threaten fresh incursions, for their leader openly and boldly reiterates his *right*, as a constitution-destroyer and constitution-maker, to revolutionize "everything!"

In the following letters, which were published in the *Mail* newspaper within the last few weeks, the writer has endeavoured to show the existence *in the people of this Province* of a superior right, and one that is indefeasible, except as against the Imperial Parliament, to enjoy, and to maintain inviolate, against legislative infringement, every section and every clause of their constitution which is not specially declared to be subject to amendment. It has been suggested, in view of the importance of the question, and the interest these letters have excited among the intelligent readers of the *Mail*, that their publication in pamphlet form might serve the cause of order, promote "the reign of law," and help to defeat the dangerous faction which in this and many other instances has proved itself the enemy of both. They are republished without revision or addition—a few errors of the press excepted.

September, 1875.

SIX LETTERS

ON THE

AMENDMENT

OF THE

PROVINCIAL CONSTITUTION.

Letter I.

Sir,—I have read in the daily *Globe* of this city an extended report of a speech delivered by you at a "great Reform demonstration" in the County of Elgin on the 2nd of July inst. You make several references to me, and to my opinions as a lawyer and as a politician. The speech has been before the public for some days, and I believe you have not found fault with the reporter for any inaccuracy or misapprehension on his part. I am justified therefore in assuming that you hold, have acted, and intend to act, upon the constitutional (or as I think, the unconstitutional) doctrine announced by you in these words :—"The North America Act contained an express clause giving to the Legislatures of the Provinces the power of *altering* their own constitution in *everything* except as regarded the Lieutenant-Governor."

I had ventured to question the constitutional power of the Legislature of Ontario to pass the Act "to readjust the representation," introduced by you at the close of the last session, and to point out to you that if the Act were held to be within the *power* of the Legislature, it was in my view both unnecessary and inexpedient, and as a precedent for tinkering and altering the constitution, open to the very gravest objections. I confess that further examination of the Constitutional Act, and further discussions with intelligent men—lawyers, judges, politicians, and citizens—have not changed my original opinion. The report tells us that your intelligent *Reform* demonstration received your remark that one gentleman—a lawyer— had disputed your right to gerrymander the constituencies on the eve of an election, with "laughter." Knowing how successful you are upon the stump, and with what ease you can excite the risible faculties, I am not at all offended with the good Reformers of West Elgin for laughing even on an occasion so serious. But if they will do me the favour to read these letters and then laugh at me for questioning your right to alter *everything* in the Provincial Constitution whenever you can get forty-four members of the Legislature to agree with you, I will frankly admit that they are too far advanced in their ideas of reform and constitutional government for me, and I will hereafter accept the title "traitor" as the most honourable their platform orators can confer upon me.

First. Let us see what the "Provincial Constitution" is, and where it is to be found.

"The British North America Act, 1867," contains, as I presume you will admit, the *text* of that Constitution. The fifth head or division of that Act is entitled "*Provincial Constitutions.*" All the sections from fifty-eight to ninety-five, both inclusive, establish, define, limit, or relate to the executive and legislative powers of the Provincial Governments. The ninety-first section enumerates the classes of subjects assigned exclusively to the Federal Parliament, but as this enumeration affords a more perspicuous view of the distribution of powers between the general and local Legislatures, it is not out of place where it stands. A few sections in the subsequent part of the Act relate exclusively or chiefly to the Provinces, and being extensions or limitations of the powers already granted, must be regarded as part of the "Provincial constitutions."

It is to be observed that what you claim power to "alter" is one or more—you say all, except the provisions relating to the Governor—of these Imperial enactments! Your claim is not power to "amend," or

make additions to, or to legislate under and in pursuance of these constitutional provisions; but to *alter*, *i.e.*, to repeal, abolish, supersede, ignore, and override them. You claim for your municipal corporation, created by an Imperial Act, with specified and limited powers, the faculty of reconstituting itself in all its parts, except in regard to one "office," by its own volition, *propria manu*, and for this purpose, to "alter" the acts of its creator. I venture to assert this is the first time in the history of constitutional government that an inferior Legislature has undertaken, successfully, to repeal the legislative enactments of a superior Legislature, and that superior its master. A man need not be a lawyer to see the absurdity of such a proposition.

But, you say, the Imperial Act has, by an "express clause," given your Local Legislature this extraordinary faculty. I cannot find it; I would not believe it capable of the construction you have put upon it, even if I had found it. As a lawyer, I must contend that no Legislature, superior or inferior, can create another legislative body and endow it with authority equal to its own. Power to repeal is power to enact. The power to "make laws in relation to matters coming within the classes of subjects" enumerated in the 92nd section of the British North America Act is one thing, but the power to repeal or set aside that Act, or any part of it, is quite a different thing. The first is given to the Local Legislature; the last is not, and in the nature of things, cannot be given to it. If, as you contend, a law of the Ontario Legislature may alter "everything" in the Provincial Constitution, except the provisions regarding "the office of Lieut.-Governor," then you may alter, repeal, set aside, or render nugatory sections 69, 70, 85, 86, 87, 90, and even sections 92 and 93, for they form part of the Provincial Constitution, and are not within the exception. Sections 126 and 128 must be subject to alteration also, for they come within the classes of subjects enumerated, viz., "the Constitution of the Province." You have even attempted to "alter" the first schedule of the Act, which is expressly placed by Section 40 within the legislative jurisdiction of the Parliament of Canada.

Let me point out, for the information of the Reformers of West Elgin, some of the constitutional rights and safeguards which you claim the power to "alter," abolish, or destroy, whenever you can persuade your partizans in the House, provided they constitute a majority, to follow you.

1. You may abolish the Legislature as you "abolished" the constituencies of Niagara and Bothwell. Section 69 secures "a Legislature for Ontario," but if you can "alter" this section because it is a part of the Provincial constitution, you may either enact that the present House shall sit *en permanence* like a French Assembly, or that you and your colleagues shall constitute a commission, or council of five "Tyrants," to govern the Province after the manner of the "thirty tyrants" of Athens.

2. You may "alter" the 70th section (you have already undertaken to repeal it,) so that the Legislature shall be composed of only 54 members, the number you claim as supporters; and so that the Electoral Districts represented by the other 34 shall, for electing "Tories," be disfranchised, or, in your own phrase, "abolished," or you may increase the number to 200 as at Ottawa, or to "between 600 and 700," which you tell us "legislate without any very great difficulty" in the British House of Commons.

3. You may "alter" the 85th section which fixes the legislative term, and instead of *four* years, declare that it shall hereafter be limited to one year, or extended to seven or ten, or any higher number.

4. You may "alter" the 86th section which secures the Province against irresponsible administration, except for a few months, by those whom the people have rejected at the polls. It declares that "there *shall* be a session of the Legislature once at least in every year." You claim the power by a vote of your majority to deprive us of this constitutional right. The Governor of Madrid, with his soldiers at his back, lately dismissed the representatives of the Spanish people to their homes for an indefinite period. You can attain the same end by an Act of the Legislature!

5. You may "alter" the 87th section, which provides rules for the organization of the Legislature, and declares that the "majority" there shall decide all questions. A new provision by which each member of the Council of Five shall have *two* voices, or which will entitle you to vote for Mr. Crooks until he finds a seat, would no doubt commend itself to the Reformers of West Elgin who laughed at my objections to such a proceeding.

6. You may "alter" section 90—our Parliamentary *magna charta*—which secures us against legislative log-rolling, (except with the connivance of responsible advisers of the Governor,) in appropriating the public revenues, and imposing taxes upon the people. The constitutional restraints upon reckless votes of money by the House of Commons, contained in the B. N. A. Act, cannot be evaded or abrogated by the Dominion Parliament, but the identical provisions of that

Act, which the 90th section declares "*shall* extend and apply to the Legislatures of the several Provinces" may, according to your doctrine, be annulled and set aside any day by a vote of the Ontario Legislature.

7. But if you can alter "everything" in the Provincial constitution, you can alter section 92 and diminish or extend the "matters" in relation to which the Ontario Legislature "may exclusively make laws." You will probably admit that your power of alteration does not enable you to encroach upon the "matters" assigned to the Parliament of Canada, but you have already attempted to alter this section in the opposite direction. By the Act of last session respecting boundaries you have transferred to the Dominion Parliament the power to dispose of a large portion of our territory—lands, farms, mines, public works, lakes, rivers—and people!

In another letter I shall adduce some facts and cite some authorities in support of the opinion that the Local Legislature cannot "alter" any section or clause of the Constitutional Act except such as are in express terms made subject to alteration, by "providing" for that exercise of power by the Legislature.

I am, &c.,

WM. MACDOUGALL.

Toronto, July 10th, 1875.

Letter II.

Sir,—In my letter of the 10th inst., I promised to adduce some facts and cite some authorities in support of the opinion that Local Legislatures cannot "alter" any section or clause of the Constitutional Act, except such sections and clauses as are in express terms made subject to alteration by the Local Legislatures.

You rely upon the first clause of section 92, to support the startling doctrine that a majority of one in the Local Assembly may at any session "alter everything" in our Provincial Constitution. I differ from you because,

1. The word "alter" is not in the clause you cite.

2. The word "amendment" is there, and no other. You assume that power to *amend* is power to *alter*. In common parlance, and even in the construction of Parliamentary rules, the distinction may not always be regarded. But in the interpretation of a solemn legal instrument like the Constitution of the United States, or an Act of the Imperial Parliament, which grants, limits, and distributes powers among different and in some respects antagonistic legislative bodies, in a colony or dependency every word is important and must be construed, neither loosely nor strictly, but according to its obvious legal meaning and the evident "intention of the parties." I believe most lawyers will agree with me that what is called "strict construction," must be applied to an Act of the Imperial Parliament when any doubt arises upon it in Canadian Courts. Our Interpretation Act, which declares that every Act shall be deemed "remedial," and "shall accordingly receive such fair, large, and liberal construction and interpretation as will best ensure the attainment of the object of the Act," &c., is not applicable to Imperial statutes. But for the purpose of my argument I am willing to accept the rule of construction adopted by the Canadian Parliament. *Your* construction defeats "the object of the Act," and is therefore much too large and liberal to be comprehended within our rule. Blackstone says that "the intention of a law is to be gathered from the *words*, the *context*, the *subject-matter*, the *effects*, and *consequence*, or the reason and spirit of the law." Mr. Justice Story, in his learned commentaries on the Constitution of the United States, quotes these rules of interpretation with approval, and applies them to that instrument. What, then, is the meaning of the word, "amend?" On referring to a dictionary in common use in England when the Constitutional Act was passed I find that it means—"to make better, to supply a defect." The same authority tells us that "alter" means "to make some change in; to change." "The plain meaning of the words," which all legal authorities tell us is the first thing to be considered in the construction of a statute, demonstrates that a power to *amend* is not so large or so absolute as a power to *alter*. It is a curious and—in a discussion of this kind—an instructive fact, that with one, or perhaps two exceptions, all amendments made to the constitution of the United States since the foundation of the Government, are additions, and not alterations. "Defects" and omissions in the original instrument, have been supplied; better safeguards for the rights and liberties of the people against legislative encroachment, State and Federal, have been provided; but no repeal, or material alteration of the terms of the original constitution, has ever been adopted. Even the 14th and 15th Amendments, to achieve which the nation sacrificed at least a million of lives, and four thousand millions of dollars, have not abro-

gated a single article of the constitution. They simply make it impossible for legislatures or individuals to deny to black men the rights of citizenship, or to abridge the right of any citizen to vote on account of race or colour. By the terms of the American Constitution—which was a voluntary compact or agreement among equals, and not a grant or concession from a superior authority—the right to amend it in all its parts was reserved. Yet amid the conflicts of parties, and the vicissitudes and innovations of a century, the original articles stand to-day as they stood in the first ratified copy—unaltered and unrepealed. The fundamental law of the nation—the palladium of its liberties—has always been regarded as a thing too sacred for experimental revision, or incautious and unnecessary alteration. You tell us, however, with a heart as "light" as that of the French Minister when he advised his master to set out on the journey, which ended at Sedan, and your partizans share your good humour, that *our* constitution is neither sacred nor enduring, that it guarantees nothing, but may be altered in "everything" at two days' notice by a majority of one in the Legislative Assembly!

3. But let me remind you of another fact. One of the resolutions adopted at the Quebec Conference (of which you were a member) was expressed in these words:—

"42. The Local Legislatures shall have power to *alter* or *amend* their constitution from time to time."

When the Legislative Assembly of the Province of Canada afterwards (in the session of 1866) settled the outlines of the Provincial constitutions the above resolution was intentionally omitted. You were not present, having exchanged your seat in Parliament for a seat on the Bench, and may have forgotten this important *alteration*. But the power to "alter and amend" was not merely omitted from the proposed constitutions. A resolution was moved by Mr. M. C. Cameron, seconded by Mr. A. Mackenzie, proposing, among other things, that "the Local Government shall, *until altered by the Local Legislature*, be composed of a Lieutenant-Governor and an Executive Council, to consist of five members," &c., and it was negatived without a division. (Journals 1866 p. 257.) No general power of alteration and amendment of the constitution was therefore *intended* to be given to the Local Legislatures of Ontario and Quebec by the late Parliament of Canada.

4. The next fact in the history of this question is significant; the 42nd resolution of the Quebec Conference does not appear in the Imperial Act as an independent, substantive article, granting an unqualified power. It is *altered*. That ambiguous and dangerous word is altogether excluded. I happen to know, as one of the framers of the Act, that the word "alter" was struck out advisedly, and upon full argument. But I am not pressing my view from any personal knowledge, or upon any grounds that would not be admissible in a court of law. It is enough to show that the word "alter" is not in the clause; that fact upsets the doctrine you asserted in the House last session and reasserted at St. Thomas. But the power to *amend* is a limited or qualified power as it now stands in the Act. The "context" shows that it is a limited power, for it is in the same category with all the other classes of subjects which are placed under the exclusive but necessarily limited jurisdiction of the Local Legislatures. In the exercise of all these powers you must keep within the B. N. A. Act. The moment you step beyond it, or encroach upon Imperial or Federal territory you become a trespasser, and the Courts, or the law officers of the Crown, will turn you back and pronounce your legislation waste paper. You have had this sentence passed upon you more than once; I need not therefore explain to you the meaning of *ultra vires*. Now let us attend to the language of the section, which gives or grants these powers. It reads as follows:—"92. In each Province the Legislature may exclusively make laws *in relation* to matters coming within the classes of subjects hereinafter enumerated." The "amendment of the constitution of the Province" is one of the classes enumerated, and the Legislature is empowered to make laws "in relation to any matter *coming within* that class." What matters come within it? You say "everything," even a law to repeal or "alter" the Imperial Act! I say only two kinds of amendments can possibly come within it. 1st. Those which are contemplated and provided for by the Constitutional Act itself. 2nd. Those which—like the amendments to the American constitution—are in the nature of *additions* to the constitution, or "supply defects," or omissions in it, without directly contravening its mandatory provisions. These two distinct fields of lawful jurisdiction are wide enough and fruitful enough to yield an abundant harvest to the patient and honest Reformer, but they restrain somewhat the political gymnastics of the partizan intriguer, the sensational peddler of crotchets, and the designing, plotting enemies of the British system of government and the British connection.

As a lawyer, and an ex-judge, you ought to have noticed the significance of the words so often repeated in the British North America Act, "until the Parliament of Canada otherwise provides;" "until the Legislature of Ontario or of Quebec otherwise provides," &c. This expression which implies that a power has been, or will be granted in the constitution, enabling the Legislature to "otherwise provide" respecting the matters referred to, occurs in twelve of the sections respecting the Provincial constitutions. These twelve sections, prescribe temporarily, or until they are amended, the law which regulates some of the most important executive and legislative functions, powers, and duties within the range of the local constitutions. On referring to them it will be seen that these sections ought to be subject to amendment, or if you please alteration, from time to time as experience or necessity may suggest, without the trouble or delay of an appeal to the Imperial Parliament. The proposal of the Quebec Conference was therefore adopted with regard to certain matters in the Provincial Constitutions, but not with regard to *all*. The provisions, or clauses, which may thus be amended are easily distinguished. The key that opens them to the Local Legislature is the phrase, "Until the Legislature otherwise provides," and the clause which grants to the Legislature in express terms the power to provide "otherwise" by way of amendment, is the one which you have so strangely misinterpreted.

The exception of "the office of Lieutenant-Governor" from the amending power of the Legislature, which seems to have misled you, was evidently made *ex majori cautela*. The rule *expressio unius*, &c., cannot apply here, for while the 65th section, which relates to the office of Governor, gives express authority to the Legislature to abolish or alter all the "powers authorities and functions" vested in him by previous acts of Parliament, it also expressly excepts all such powers, &c., as may exist under any *Imperial* Act. This exception, therefore, corrects and interprets the other. Indeed, wherever it seemed possible that a power to alter or repeal an Imperial statute might be inferred or claimed by the general Parliament or Local Legislatures, the exercise of such a power has been expressly inhibited. See sections 12, 65, 129. I conclude this letter with the suggestion that the Act you claim power to alter in "everything" affecting Provincial constitutions, is an *Imperial* Act.

I am, sir,

WM. MACDOUGALL.

Toronto, July 14th, 1875.

Letter III.

Sir,—I have shown in my previous letters—

1. That you claim the right—being an officer and adviser of the Crown in Ontario, and sworn to uphold the Provincial constitution—to propose alterations in every part of that constitution, except as to one office.

2. That, according to your contention, the Legislative Assembly is a constituent or constitutive body, and has power in itself, without petitions or instructions from the people, by virtue of the word "amendment" in one of the clauses of the British North America Act, to "alter" at any time, and as often as a majority of that body may think fit, every article and clause of the Act relating to Provincial constitutions, "except as regards the office of Lieutenant-Governor."

I have, in opposition to your claim and contention, affirmed and endeavoured to establish the following propositions:—

1. That to admit the existence of such a power in the Local Legislature is to confess that we have no constitutional rights or guarantees whatever, as citizens of Ontario, but hold our property, our political franchises, our religious and nearly all our civil rights, at the arbitrary will and discretion of a bare majority of a House of eighty-eight members, which, as we have lately seen, *may* be composed of corrupt and unprincipled men who have "gerrymandered" and bribed their way into it.

2. That your doctrine, which converts our boasted monarchical, constitutional, and responsible system of government into an unbridled democracy, involves this legal and logical absurdity, to wit—that an inferior Provincial Legislature can, at its discretion, alter the organic law of its own existence, enacted by the sovereign authority of the nation.

3. That, as a matter of fact, "express" authority is *not* given to the Provincial Legislatures to alter everything in the Constitutional Act relating to Provincial constitutions, except the office of Governor.

4. That the journals of the Canadian Parliament show that the proposal to ask for power to enable the Local Legislatures of Ontario and Quebec to *alter* their local constitutions was not finally agreed to, and, therefore, the *people* of those Provinces, by the mouths of their representatives, then intimated their wish that their [illegible] constitutions should not be subject to alteration in the summary manner claimed by you.

5. That the *intention* of the Imperial Parliament to permit, and at the same time to limit, amendments of the Provincial consti-

tutions is evidenced by the fact that in twelve sections of the Act the exercise of such a power by the Local Legislatures is expressly provided for.

6. That Local Legislatures are at the same time expressly prohibited from repealing or contravening Imperial statutes in the exercise of their amending power.

7. That the British North America Act is included in the prohibition except where it otherwise expressly "provides."

I quoted Blackstone's rules for interpreting statutes and applying them to the case in hand, I now submit that neither the "words," nor the "context," nor the "subject matter," nor the "effects and consequences," nor the "reason and spirit" of the Constitutional Act justify your construction. On the contrary, the *words* "amendment of the constitution of the Province" give that authority or legislative power which is needful and proper in the circumstances, but which is plainly distinguishable from the unlimited, co-imperial, independent power you have claimed and attempted to exercise.

If the words had been, "the amendment or alteration of all the provisions of this Act relating to provincial constitutions," your construction would be within the words. But as the power actually conferred may be exercised: First, in amending twelve sections expressly subjected to the amending process; secondly, in making additions, or providing for cases not mentioned in the organic law, you cannot extend the words, under any rule of construction known to lawyers, so as to include the abrogation of that law.

The "context" is equally against you. I am told that Mr. Blake concurs with you, and that other leading lawyers see nothing wrong in your liberal interpretation of the word *amendment*. You may destroy our existing constitution and make a new one, republican or monarchical, communistic or Draconian, limited or arbitrary, as to your majority in the Assembly may at any time seem expedient! Now, I willingly admit that Mr. Blake is an able expounder of the discretional, Judge-made law of the Court of Chancery, but he has not yet proved himself a respectable authority on constitutional questions. He is much oftener wrong than right. I submit under this head two or three questions which I trust you or some of your legal backers will answer:—

1. If the power to "alter" everything in the B. N. A. Act relating to Provincial constitutions (except the office of Governor) is granted to the Local Legislatures by the 91st section, why is its exercise *specially* provided for in sections 65, 83, 84, 129, 134, and 135? I refer lawyers to their own maxims:—*Omne majus continet in se minus*, 5 Coke, 115 a., Broom's maxims, 175; *Quod semel meum est amplius meum esse non potest*, Coke Litt, 497, Broom's maxims, 415 n. For the benefit of laymen I give the ordinary translation of the text books:—"The greater contains in itself the less." "What is once mine cannot be mine more completely."

2. If the power to alter, etc., is granted by the 92nd section, and if this general authority enables you to alter and also to increase the electoral districts of Ontario, why was it deemed necessary in the case of Quebec, to grant to its Legislature special authority to alter the "limits" of electoral districts? If the greater includes the less, why did the Imperial Parliament assume that the general power of amendment would be interpreted so strictly in her case that, without a special provision in the section creating her Legislature, Quebec would be unable to alter even the *limits* of her electoral districts? You, under the same general power, have assumed the right not only to alter the limits, but to abolish the electoral districts of Ontario, or to increase them *ad libitum*, and yet there is no special provision or authority given in the corresponding section creating a Legislature for Ontario.

An attentive study of the Constitutional Act which ought not to have been necessary in your case, would have led to the discovery that the two Provinces of Ontario and Quebec are not only placed in a different position, constitutionally, from Nova Scotia and New Brunswick, but from one another. Quebec has two Legislative Chambers, while Ontario has but one. The system of representation is the same for both Provinces, and the electoral districts for the general and Local Legislatures are identical. These districts are created by the Imperial Act. They are described, named, and numbered for Ontario in a schedule to the Act, while for Quebec they are ascertained and fixed by reference to the laws in force in that Province at the Union. The number of electoral districts, and therefore the number of representatives for Quebec, was fixed at sixty-five. As regards the Commons, this number cannot be increased except under a general scheme of proportionate increase throughout the Dominion, never likely to be adopted. The General Parliament, and that only, is authorized (sec. 40) to "divide" the Provinces into "electoral districts." It cannot increase the number in any Province, except after each decennial census, and according to certain "rules" specified in the Act. But Quebec, keeping always the fixed number, sixty-five, would probably never in-

vite or require from the Dominion Parliament a re-adjustment of its electoral districts, and as in the progress of settlement and colonization the *limits* of some of these districts might require to be extended or re-adjusted for local, if not for general purposes, that power was given to the Quebec Legislature in express terms. Section 80 permits "the *alteration* thereof," but not the *increase* or the *extinction* thereof. And even this power of "altering the limits" of electoral districts cannot be exercised in the case of certain English constituencies without the concurrence of a majority of the members representing those constituencies. Could any "context" be framed to contradict more completely than this does, by affirmative and negative provisions, your assumption that the 92nd section enables Quebec and Ontario to alter, abolish, or increase their electoral districts as they please? The 70th section contains no words granting to Ontario even the limited authority conferred on Quebec, and the reason is obvious. Every ten years the electoral districts of Ontario are subject to alteration or re-adjustment, and probably to increase, by the joint operation of the census and the rules prescribed in the 51st section of the Act. As often as this re-adjustment takes place, the first schedule is amended accordingly. The Parliament of Canada, as provided by the 40th section, makes the amendment. The Ontario Legislature has no authority to make it. And here I must ask another question—As the "electoral districts *set forth* in the first schedule" to the Constitutional Act are, according to section 70, those which the members of the Ontario Legislature "*shall* be elected to represent;" as the *power* to amend that schedule has been granted exclusively to the Parliament of Canada; as that power had been properly exercised before you introduced your representation bill of last session, under what authority did you venture to set aside or ignore that amended schedule, and undertake to make a new and different schedule for Ontario? Will any one pretend that the members of the new Assembly, when they meet, have been "elected to represent the electoral districts set forth in the First Schedule to this Act," either in its original or amended form? And will you argue that the power to amend "the Constitution of the Province," given by the 92nd section, enables you to rob the Parliament of Canada of one of its exclusive powers, viz., that of "dividing" Ontario into electoral districts, and amending the schedule of the B.N.A. Act? If it does not, then the Legislative Assembly elected under your Act is an illegal body, and its votes and proceedings cannot assume the form or acquire the force of *law*.

I need not remind you that words are to be interpreted according to the *subject-matter*. *Verba, accipienda sunt secundum subjectam materiam.* Coke, 3rd Inst, 236. "Where words," says Mr. Justice Story, "conflict with each other, where the different clauses of an instrument bear upon each other and would be inconsistent unless the natural and common import of the words be varied, construction becomes necessary, and a departure from the obvious meaning of words is justifiable." (Commentaries on the Constitution, vol. 1, p. 315.) But construction is not even required in this case. The clause of our constitution which you have transormed into a monster, with the faculty of swallowing all its fellows at a single meal, and then, by way of dessert, swallowing itself, does not, as I have pointed out, conflict with any other clause. The common import of the words need not be varied to give them the force and effect intended by the framers of the Act. The "subject-matter" here is a constitution of Government; the creation by the sovereign authority of the nation, of subordinate legislative bodies, with limited and specified powers, to be exercised within defined territorial and municipal boundaries; and specially interdicted from encroaching upon the delegated rights of one another, or usurping the powers and attributes of independent Governments. No argument would seem to be needed to convince the ordinary intellect that this subject-matter is inconsistent with, and utterly repugnant to any sovereign or constituent power in one of these subordinate legislatures. The existence of such a power in a municipal corporation or Provincial Legislature, would resemble in its absurdity the pretence of one of Keely's predecessors, who declared that he could lift himself over a fence by his boot-straps.

The "effect and consequence" of such an interpretation as you have given to the word "amendment" in the 92nd section, I pointed out with some detail in my first letter. "The effect and consequence of a particular construction," says Mr. Story, "is to be examined, because, if a literal meaning would involve a manifest absurdity, it ought not to be adopted." I conclude this letter with the remark that if your legal opinion is condemned by all the tests that the most learned jurists of ancient and modern times have laid down for our guidance, those who differ from you need not be afraid of discussion through the press, upon the platform, or in the Legislature itself. Reason, and precedent, and common

sense, and the "law of the land," will prevail over the intrigues of partizan politicians and the fogs, and subtleties, and uncertainties, imported into the Legislature from the Court of Chancery.

I am, etc.,

WM. MACDOUGALL.

Toronto, July 22, 1875.

Letter IV.

Sir,—In my letter of the 10th ult. I directed your attention to an unconstitutional renunciation of legislative power, which, under your guidance, the Ontario Legislature assented to without inquiry and, as I have ascertained from members present, without adequate explanation. I reminded you that "by the Act of last session respecting boundaries you transferred to the Dominion Parliament the power to dispose of a large portion of our territory, lands, farms, mines, public works, lakes, rivers, and people!" I charged that you had not only sinned against the constitution by usurping a power that did not belong to you, but you sinned "in the opposite direction" by attempting to transfer to another body the powers and functions which belong exclusively to the Provincial Legislature. I need not quote authorities or adduce arguments to convince you that "the trust reposed in an agent is personal and intransferable," (Paley on Agency, p. 19), or "that a delegated authority can be executed only by the person to whom it is given; for the confidence being personal cannot be assigned to a stranger," according to the maxim *delegatus non potest delegare* (Ib. 175), nor do you require to be told that "a trustee who has a delegated discretionary power cannot give a general authority to another to execute such power, unless he is specially authorized to do so by the deed or will creating the trust." These are elementary doctrines with which every lawyer is, or ought to be, familiar. Let us look at the boundary question, and your method of dealing with it, in the light of these doctrines.

It may be necessary to state, for the information of the general public, that the boundary of the Province of Ontario on the west and north has never been marked out by surveyors, nor described by metes and bounds. A very cursory examination of the subject, however, will satisfy any candid enquirer that the western boundary, if not the northern, is easily found by reference to the Act of 1774, called the Quebec Act; the commissions to Governors; the Treaties between England and the United States; and the *acts* of the Imperial Government from time to time in relation to boundary adjustments in America. A *natural* boundary—the Mississippi River—marked the confines of the old Province of Quebec in that direction from 1774 to the Treaty of Paris, acknowledging the independence of the United States, in 1783. The same boundary must be referred to in case of dispute to-day, for the Treaty of 1783 merely cut off the south-western corner of the old Province, and established its southern (thenceforth the international) boundary through the middle of the great lakes to Pigeon River, near Thunder Bay, and thence to the 49th parallel in the Lake of the Woods. All the country north of the international boundary and westward to the Rocky Mountains, remained as before with its limitary lines or boundaries undisturbed. The British North America Act, 1867, declares that the part of the old Province of Canada, "which formerly constituted the Province of Upper Canada, shall constitute the Province of Ontario." It results therefore that the higher law, which no municipal authority in Canada can alter, unless expressly authorized by an Imperial Act, has fixed, by reference to *natural* objects, the western boundary of Ontario. The source of the Mississippi can easily be found; so also may "the north-western portion" of the Lake of the Woods be identified. It was the southern limit of the old Province of Quebec in that region in 1786, as appears from the Royal Commission to Governor Carleton in that year. Starting, therefore, at the north-western portion, or as it has since been called, "the North-western Angle," of the Lake of the Woods, and running your line due north "to the southern boundary of the territory granted to" the Hudson Bay Company, which has never been, and cannot now be, defined, you would establish a line to the *eastward* of which, and for many miles inland, no other authority could dispute our right, or presume to exercise provincial jurisdiction. But you have abandoned the rights of Ontario without firing a gun! You know that all the other Provinces are jealous of our populous, and wealthy, and *large* Province; you know that their representatives in Parliament have eagerly listened to the suggestion that a doubt could be raised as to our western boundary, in consequence of an ambiguous word, or rather the accidental omission of a word in the Act of 1774, and will all vote, if they get the opportunity, to cut Ontario in two at Thunder Cape (or the meridian of 88° 50") and thereby appropriate

the western half of it to the uses of the Dominion. You know that our votes, assuming that they would prove faithful, number 88, while those of the other Provinces number 116. Yet, with full knowledge of these facts you deliberately proposed and passed an Act in concert—some may think in collusion—with the Federal authorities, to deprive the people of this Province of the opportunity of even protesting against the intended spoliation! In my judgment you have in this matter committed the gravest breach of trust ever proved against a public man in this country. Lord Ashburton was accused of surrendering a large portion of the Province of Quebec to the State of Maine corruptly. His connection with a certain family largely interested in the timber lands of that State gave some countenance to the accusation. At all events we know that he proved himself a weak and credulous, if not a faithless, negotiator. But Lord Ashburton had not been specially selected by the people of Quebec to defend their rights. *You* were taken from the Bench by a political party that proclaimed itself opposed to the policy of compromise, or even of friendly negotiation with the general government. Mr. Blake signalized the beginning of his official career by abruptly breaking off negotiations with the Dominion authorities in this very matter of boundaries, under the pretence of apprehended danger to the interests of Ontario. Every one expected that "No surrender" of our territorial rights would now be the cry of that Party which he had engineered into office, and which you were appointed to keep in office. But in this, as in every other instance, profession and practice have sadly belied one another. We are now threatened with the expropriation of a large part of the Province—enough to constitute two or three kingdoms of European proportions — and nothing will avert the disaster unless public opinion, indignant and resentful, compels you to suspend your expropriating Act and to rescind your arbitration. I have met so many intelligent persons, even among members of the Legislature that assented to your bill, who entirely misapprehended its purport and object, that I am not surprised at the silence of the press nor at the apparent apathy of the public in the presence of so grave a peril. The general history, and some of the special facts of the question, which you took no pains to communicate, must be understood before the reader of your Act can fully comprehend its unconstitutional character, or perceive its dangerous concessions. If I now formally charge you with incivism in your official treatment of the boundary question, and specify the particulars, you must do me the justice to admit that it is not mere political carping, or, in the polite language of your chief organist, "henpecking" on my part. As soon as I became aware that you had agreed to submit the matter to arbitration, I published my report or memorandum, made at the request of the Ontario Government, in March, 1872. The first time I had the honour to meet you on a public platform since the passing of your Act, I denounced it, and specified the grounds of my objection. You prudently remained silent, but the interest then manifested, even among supporters of your Government, in that one-sided discussion, convinces me that a more detailed and formal statement of the case against you, may not be unacceptable to the public.

1. I object to the recital in the preamble of your Act. You pretend that the Imperial Act of 1871, entitled "an Act respecting the establishment of Provinces in the Dominion of Canada," which was passed, as we all know, for the purpose of confirming the Manitoba and Rupert's Land Acts (the constitutional power of the Dominion Parliament to pass them having been doubted), gives authority to the Dominion Parliament to "alter the limits" of the *old* Provinces! You not only assume that this Act, in spite of its title, preamble, history, enacting clauses, &c., which limit its operation to *new* Provinces, may be extended to Ontario, but that the "consent" of the Local Legislature, without which no alteration of limits or diminution of territory can be made in the case of new provinces, may, in our case, be given in advance, and before the extent, of the alteration or diminution is known! In other words, it is a case of "shut your eyes, open your mouth, and see what you may get," with this grandmotherly addition, that the credulous youngster must first agree that if all the sugarsticks find their way into his big brother's mouth he is not to cry! Such a proposal would be repudiated even in a four-year-old nursery.

2. But admitting for a moment that the 3rd section of the Act of 1871 can be wrested from its place, and extended to the original provinces, whose boundaries have been established as matter of legal description for more than a hundred years, it would not cover your case. The words of that section are—"The Parliament of Canada may from time to time, with the consent of the Legislature, &c., *increase, diminish* or otherwise *alter the limits* of such Province." No one will pretend that a majority of the arbi-

trators, or of the Dominion Parliament are likely to "increase" the limits of Ontario. We may therefore dismiss that case. Authority is next given to "diminish" limits. Did you authorize the Dominion Parliament to do this? So your Act reads. But who authorized you or your colleagues to *cede* our territory, or rather to transfer to another, and on this subject a hostile body the power not of ceding, but of *seizing* it? Did you receive a single petition in favour of your Bill? Were you asked at any public meeting, or by any respectable newspaper in Ontario to pass it? I have no doubt many persons wished you to have the limits of Ontario, especially its western limits, surveyed and marked out upon the ground, but very few imagined that you would allow them to be either *diminished* or *altered* to the disadvantage of the Province. To ascertain the true legal boundaries and to permanently mark them on the ground is one thing; to "diminish" or "alter" those boundaries is another and very different thing. The Imperial Act of 1871 makes no provision for the first, because only new provinces, whose boundaries would of necessity be mentioned in the Acts creating them, were intended or referred to. It might be expedient in the case of a small province like Manitoba, to increase it at some future time, or to divide or diminish a large province if the progress of settlement and public convenience should at any time require it. Hence, no provision for ascertaining or settling disputed boundaries is found in the Act of 1871, but alterations by consent are provided for.

3. My next objection is that the Act of 1871 authorizes "the Parliament of Canada," and, assuming that it applies to Ontario, "the Legislature of the Province," to diminish or alter limits. You have assigned that duty to an irresponsible body unknown to the Act and unknown to the Constitution, to wit: an arbitration. You have not even reserved to the Legislature the right to confirm or adopt the award of the arbitrators. A Legislative Act of confirmation might possibly be held to cure the irregularity, but you have put this out of your power, or rendered it a mere empty form, for you have assigned the right or power of confirmation to the Parliament of Canada! I affirm as a proposition of law, that no Provincial Legislature appointed and authorized to legislate on a particular question can renounce that duty, or transfer it to any other body. The act of that other body will, in such a case, be *ultra vires* and a nullity.

4. But I object to arbitration even if we could legally diminish or alter the limits of the Province by its agency. The true question, which you have entirely ignored, is one of law, not of discretion. It is this,—where according to law is the western limit of Ontario? The same question must be asked as to the northern limit. An arbitration is not the tribunal to answer such a question. Let us see how it will work. You have agreed that two out of three arbitrators shall "determine" this momentous question. You have named the Chief Justice of the Queen's Bench on the part of Ontario. The Dominion Government has named the ex-Governor of New Brunswick. These two, if they can agree upon him, are to name the third arbitrator, "not being a resident of Canada." The determination, therefore, of Ontario's limits on the west and north, has been withdrawn from the Courts, and in case of appeal, from the Judicial Committee of the Privy Council; it has been put out of the reach of the constitutional guardian of the people's rights, the Ontario Legislature, and it is now in the hands of a New Brunswicker and a foreigner, or stranger, at present unknown! The question will be decided *ex æquo et bono*, for arbitrators need not follow the law. We may expect the Chief Justice to contend for the boundary established by law, and to resist all attempts to "diminish" our limits or even to "alter" them. But by the very word *arbitration* you have suggested a "height of land" boundary, or an arrangement which will suit the authorities at Ottawa, into whose hands you have resigned the power of confirmation. The result of such a determination would be agreeable to all our Provincial rivals, for it would cut off from 250 to 300 miles of territory on the west that now legally belongs to us, and on the north, a still larger extent.

I cannot believe that you agreed to arbitration, and framed and hurried through the Legislature your extraordinary Act of last session, for the purpose of asserting or defending the territorial rights of this Province. There is not a word or sentence or clause in it that even squints in that direction. There is one saving clause, however—you can suspend its operation till the new Legislature meets. I give you notice that whether it remains suspended or not, I shall, God willing, propose its repeal as soon as the rules of the House will permit me to submit the question.

I am, &c.,

W. MACDOUGALL.

August 16, 1875.

Letter V.

Sir,—My indictment against you for:—1st, Unconstitutional *assumption* of power; 2nd, Unconstitutional *renunciation* and attempted *transfer* of power, has attracted some attention from the press. Two of your organs, the *Globe* and the St. Thomas *Journal*, have attempted to answer it. I observe that you honoured me with a "slap"—to use the nursery phrase of the reporter—in your speech yesterday at the Welland picnic. If, when fully reported, the "slap" should turn out to be a defence of your own acts, I shall have much pleasure in replying to it. In the meantime, I assume that the *Globe* and *Journal* have, on your behalf and with your sanction, filed your *plea*. In effect, if not in form, it is the plea known to lawyers as the "general issue," for it denies or traverses the whole indictment. Your advocates fill several columns with witticisms, vituperative allusions, false assumptions, and arguments. I shall endeavour to reply to the *arguments*.

The *Globe* contends:—

1. That if any one denies the right of the Local Legislature to alter the Provincial constitution, or to make a new one, he shows himself unwilling to "trust the people."

2. That because the dictionary says "to amend" is to *reform*, to *correct*, and "to alter" is to *reform*, to *change*, to *vary*; therefore, power to amend is the same thing as power to alter.

3. That as there were "able lawyers" in the House when Mr. Mowat carried his Representation Bill and asserted his right to "alter everything" in the Provincial constitution with a single exception, his claim ought not now to be questioned; that the assent of these lawyers is equivalent to *res judicata*.

4. That in denying the existence of this power to alter everything, Mr. Macdougall admits that "he wants to establish popular liberty on a secure basis by depriving the Parliament of Ontario, or, in other words, the people of Ontario, of the power to govern themselves," &c., &c.

Except the usual fetor which the *Globe* emits whenever it runs foul of a political opponent, I find nothing in its long article that may not be answered under these four heads.

The St. Thomas *Journal*, representing the so-called "Reformers," who listened with so much good humour to your announcement that their local constitution is simply the will and pleasure of the Premier for the time being, backed by a majority of one in the legislature, devotes three successive articles to the defence of your position.

The *Journal* contends:—

1. That the doctrine "that no Legislature, superior or inferior, can create another Legislative body and endow it with authority equal to its own," is "of little consequence," shows Mr. Macdougall to be an over-rated man, to be incapable of "interpreting the constitution," &c., *because* the Legislature of Great Britain could, after creating a legislative body for Canada, endow that body with authority equal to its own by "an Act declaring and confirming the independence of Canada!"

2. That, as Worcester tells us, "to amend" means to remove errors from, to correct, to make better, to rectify, to improve, to emend, and "to alter" means to change partially, to make otherwise or different, to vary, to modify; therefore, both words mean the same thing.

3. That the reasoning from the constitution of the United States finds no parallel in its application to ours.

4. That nevertheless because "the sovereignty of every State resides in the people of the State, and they may alter and change their form of Government at their own pleasure," and because "the theory of our system is that the 'absolute despotic power' which in all Governments must reside somewhere is entrusted to Parliament; therefore, the Local Legislatures retain all the powers they formerly held except such as they voluntarily surrendered to the Federal Legislature," including "the power to amend their constitution within certain limits."

5. That "a constitution without this power would be an anomaly."

6. That "If the Legislature consents there is nothing in our constitution to prevent" you from abolishing the Legislature as you abolished Niagara and Bothwell.

7. That "The Legislature may make any other change they please, and the people have only such remedy as" 1. "punishing wrong-doers at the polls" 2. "appealing to the Supreme Court" 3. "appealing to the God of battles."

8. That at first flush there seemed a good deal of force in the argument derived from the case of express power to altar the limits of electoral districts, given to Quebec, but on examination the *Journal* found it "a limitation, not an enlargement."

The *Journal*, while copying the bad habit of your city organ, betrays a consciousness that abusing the plaintiff's attorney will not be accepted for argument by the great jury

now trying the cause. Hence, the greater effort and more decorous treatment of the case by the country advocate. In my replication I shall bracket the arguments of your defenders when they bear on the same point.

1, (*Globe*), 7. (*Journal*). "Don't trust the people" ironically cries the *Globe*. To a lawyer, to any one but a newspaper demagogue, I would answer, "*Don't violate the constitution.*" But cajolery and claptrap are the familiar instruments, and devices of that establishment. I recognize in your *Globe* advocate one of those political Janizaries that Mr. Brown imports from England, as he imports his Bulls for Bow Park farm. These Fleet street penny-a-liners are as mendacious as they are unprincipled. In their ignorance of Canada; their affected contempt for its people; their utter indifference to its future, and in their zeal for the *Aga* to whom they have given up their consciences along with their mercenary pens, they forget that falsehoods, and claptrap, and vituperation, and appeals to the proletariate are not as effective in Canada as in Europe. They forget that the great mass of our people are intelligent and independent freeholders, and that with free schools, a free press, and free institutions, guaranteed to them and to their children under British law, and the power of the British Empire, the demagogues of the pot-house and the "International" will ply their arts in vain either to cajole or to frighten them.

The cry of "He won't trust the people" is raised in defence of what? Of a claim by the people's *servants* to do as they please for four years; to pull down their master's house; to tear up or "alter" his title deeds; to "arbitrate" away his lands, and mines, and forests; to waste his capital and mortgage his income, and if they choose, to prolong their term of service in spite of him, or without reference to him! According to the *Journal* they may do this *lawfully*, and his only remedy is the God of battles! By an evident slip of the pen your rural defender mentions the Supreme Court. That august tribunal—if her Majesty be not advised to disallow it—can give no relief in the case under consideration, for you contend and your advocates also, that you have the legal right and constitutional power to "alter everything." A court of law, therefore, cannot restrain you. As you may, in the case supposed by me, and admitted by your defenders, pass a law to prolong your term of office, and thus evade "the people at the polls," there is evidently nothing for them but an appeal "to the God of battles." To this complexion has it come at last! Trust the people? Yes, I for one am not afraid to trust the people, as you will find when we meet on the floor of the Legislature. But experience and observation have taught me not to trust—too far—the people's servants. Passing by native instances, what is Governor Tilden at this moment revealing to the astonished "people"—those having something to lose—in the State of New York? The canal frauds that threaten to dislocate, if not destroy, political parties in that great commonwealth, are simply breaches of trust. The people's trustees proved faithless, and robbed their employers for their own gain. The Tweed robberies in New York, amounting, it is said to $20,000,000 in two years, belong to the same category. The scenes at Albany and other State capitals, to say nothing of Congress, when wealthy corporations are seeking favours—commonly the power of extorting money from the people—teach us that even in a Republic, trusting the *people*, and trusting the people's *servants*, are not quite the same thing. To the *Globe's* ironical cry—"Don't trust the people," I boldly answer—"Don't break the law," and—"Don't trust the people's trustees—more than can be helped."

2. (*Globe* and *Journal.*) The Dictionary argument may be dismissed in a few words. To say that "amend" and "alter" mean the same thing in every case, is not only to confound the distinctions, and to ignore the origin and history of language, but to insult our common sense. In Crabb's Synonymes we are told that "amend," in Latin *emendo*, from *menda*, a fault in transcribing, signifies to remove this fault." "Alter, from the Latin *alter*, another, signifies to make a thing otherwise." But verbal criticism will not avail much in a case of this sort. In legal discussions, "words must be taken as those who used them intended." "When words have two senses of which one only is agreeable to the law that one must prevail;" "when words are inconsistent with the evident intention they will be rejected." These are rules of interpretation laid down in all the books. They are recognized in courts of law in all civilized countries.

Now, I have shown that those who selected the word to convey their "intention" deliberately rejected *alter*, and retained *amend*, and that they struck out the clause which stood as an independent article in the constitution, and which as originally proposed gave an unrestricted power of amendment, and inserted it in another form among the ordinary legislative powers, all of which must be exercised under the limitations, express and implied, of the Constitutional

Act. I have shewn that there are at least twelve sections of the Act, dealing with grave questions of government, which by express words, repeated in each section, are declared to be the law *until* the Local Legislatures otherwise provide; and that authority to amend these twelve sections is given in the ninety-second section, and nowhere else. I have argued that this authority or power cannot be extended to other sections in which the key "until" is not found,—1. Because if such had been the intention, the key would have been left in the lock. You know the rule, *expressio unius est exclusio alterius.* 2. Because your construction in the language of Justice Story, involves "a manifest absurdity and therefore ought not to be adopted."

3. (*Globe*). The "able lawyers" argument may carry weight with people who do not attend courts or legislatures, and who seldom think or reason for themselves on political and constitutional questions. The able lawyers were there when you passed your Escheat Bill, and yet the law officers of the Crown at Ottawa advised its disallowance because you exceeded your constitutional authority in passing it. Able lawyers were in the House when it passed other Acts that have been disallowed at Ottawa, or declared by the courts to be null. In fact lawyers, and sometimes able lawyers, are to be found in every legislature, and yet these legislatures are always passing hasty, imperfect, ill-advised and injurious measures, and wherever their powers are limited by constitutional provisions, they are constantly, notwithstanding the presence of lawyers, violating those provisions. Are not the books full of cases decided to-day and revised, overruled, or reversed to-morrow? How often are the opinions even of the ablest lawyers, found, when tested before the courts, to be erroneous? And yet your organs ask me to accept all your measures as of undoubted constitutionality, because a few gentlemen of the long robe happened to be members of the Assembly and were present when they passed. The experience of a quarter of a century, in and out of Parliament, has taught me that as a class, lawyers are the worst legislators and the most unsafe guides in questions of parliamentary practice and constitutional law, that any one can appeal to in a case of doubt. In their own field, with precedents, and cases, and text-books to guide them, they excel; but in the broader fields of public life, in the higher sphere of statesmanship and administration, they are often outstripped by merchants and journalists, and sometimes even by tradesmen and mechanics. I have seen many constitutional questions raised, and a few settled in Canada, but I do not remember one which was either raised, or much aided in its solution, by practising lawyers. The question, I submit, is not whether able lawyers were present when the unconstitutional doctrine was propounded, and the illegal Act was passed; but what are the constitutional rights of the people, and how are they to be vindicated?

I must reserve for another letter the reply that is still due to your village champion.

I am, etc.,

WM. MACDOUGALL.

Toronto, Aug. 23, 1875.

Letter VI.

Sir,—Continuing my review of the arguments of the *Globe* and St. Thomas *Journal* in support of your plea of not guilty, I have only a few words to add in reply to your chief organ:—

4 (*Globe*). The attempt to fasten upon me the charge of seeking to "establish popular liberty" by "depriving the people of Ontario of the power to govern themselves" because I deny to our Local Legislature the unrestricted powers of a French constituent Assembly, and contend that it is, and ought to be restrained within constitutional limits like any other subordinate body, is as dishonest as it is illogical. The question is not whether Ontario should be "deprived" of self-government, but whether a corporation created by an Imperial Act should be permitted to exercise ungranted and therefore illegal powers. We are not making, but interpreting a constitution; and he is neither a good citizen nor a loyal subject who attempts to weaken its authority, or to disregard or violate its provisions. The insinuation that I am not a friend of "popular liberty," because I cannot acquiesce in your doctrine, that an "unbridled democracy" which can make and unmake constitutions at pleasure, has been legally established in this Province, comes with a bad grace from a newspaper that resisted my efforts, and opposed the policy and measures of the true Liberals of Upper Canada from 1848 to 1854, for the extension and confirmation of that "liberty." I observe that you never forget to rail against the "Family Compact," and to claim credit to *yourself and present political associates* for the secularization of the Clergy Reserves,

the extension of the franchise and elective principle, &c., and for the achievement of Confederation. I had to remind you in Victoria, where you repeated your stump formula for the first time in my presence, that you could not personally lay claim to one of these "reforms" except the last; and, that in reference to Confederation, as soon as the winds rose, and the vessel of State began to labour, and dangerous breakers appeared directly in her course, you set an example which your leader, Mr. Brown, followed at a later period—you *deserted* the Confederate ship and the Confederate cause, and fled to a secure haven in the Court of Chancery! You joined us in June, 1864, under the leadership of a Lower Canadian "Tory," a class of politicians you seem now to detest; you came into the Government avowedly to assist in accomplishing the greatest reform of our time, but in December of the same year you abandoned the work, resigned it to the "Tories," and accepted office at the hands of Sir John Macdonald! As to the Clergy Reserves, when I was writing and publishing the history of that question, at my own private cost, I got no suggestion, or encouragement, or contribution from you. When I first met you, and made your acquaintance, you were introduced as a *Tory*, which then (1845 or 1846) meant an adherent of the "Family Compact." All your antecedents, all your associations, and proclivities were *Tory*, until it became evident that the policy and traditions of that party, under its "Family Compact" leaders, could not be upheld, and that political power and official patronage must soon be transferred to other hands,—*then* you abandoned the Tory party, became "converted"—and carried South Ontario as a Reformer! I did not then, and shall not now, question your conversion; but I protest against your right, or the right of any of your colleagues, or of any of your Ottawa allies, now claiming the leadership of the *Reform* party, to reproach the "Family Compact," or to claim personal credit for abolishing the Clergy Reserves, or extending popular liberty, or even for carrying Confederation. Among you all there is not a man whose name was ever heard in connection with these early reforms, except as an opponent, and only one or two can be mentioned who at best were very milk-and-water advocates of Confederation! I protest further against the attempt of your organ to falsify history in my case, and to accuse me of turning my back upon the cause of "self-government" which, for a quarter of a century, I have upheld through good report and through evil report. Democratic licence is not popular liberty as I have understood it, nor is the power to set all laws aside, and to break down all constitutional safe-guards at two days' notice, the kind of self-government that I and the old Reformers contended for, in opposition to Messrs. Mowat, Cartwright, & Co., when they were supporters of the "Family Compact"

I have now answered all the *Globe's*, and two of the *Journal's* points or positions in support of your claim to alter the constitution at will. I shall briefly notice the remaining six points of the *Journal*.

1. I readily admit that "an Act of the Imperial Parliament declaring and confirming the independence of Canada," an event certain Reform politicians contemplate with equanimity, if not with hopefulness, would create, or rather enable the people to create, a legislative body with power, equal, in theory, to its own. But I was arguing for a principle of constitutional law, without which the very idea of authority or sovereignty in a State is repugnant and inconceivable. Whenever an inferior or derivative body asserts its right to exercise the authority of its superior or creator, it repudiates that authority and claims an independent existence. Is this, after all, the object and meaning of your policy? The argument of your St. Thomas organ is a mere impertinence if it does not go that far.

3 and 4. Your advocate objects to the authority of American precedents when they are against you, but quotes them and reasons upon them without hesitation when they seem to be in your favour. In this he is neither logical nor honest. But when he concludes his long argument with this deduction, "the Local Legislatures (in Canada) retain all the powers they formerly held except such as they voluntarily surrendered to the Federal Legislature," he shows that he neither comprehends the American nor the Canadian Constitution. There was no Local Legislature in existence in Ontario previous to confederation which could "retain" anything. There was no question of retaining or surrendering, but of repealing certain Constitutional acts and passing others. The Imperial Parliament no doubt was moved to exercise its "absolute despotic power" by our solicitations. But that did not affect the question of right or power. Our constitution is not a compact but a law. The provincial legislatures, unlike those of the States, are municipal only: they are not sovereign; they have no "reserved" rights in the American sense; their powers are those which the superior legislature has delegated to them, either expressly or by necessary implication. Any reserved rights or powers of government in our constitution

belong to the federal or general parliament. Its power extends to "all matters not coming within the classes of subjects *by this Act* assigned exclusively to the legislatures of the Provinces." Sec. 91. The American constitution left this point doubtful; hence the two great parties, federalists and nationalists; hence, at last the decision of the Supreme Court in the case of Dred Scott, in which a majority of the court held that the Union was federative; that Jefferson, and not Hamilton, was its true expositor; and hence the civil war, the greatest and most sanguinary that the world has ever seen. Although your advocate praises the "clearness" of the American constitution, and condemns the "verbiage" of ours, that terrible example of the evil of ambiguous compromise was not lost upon the framers of the latter, as you well know. The Supreme Court was probably wrong when it held that slavery was national and freedom sectional, but the Imperial Parliament took care that no Court in Canada or in England should ever be left in doubt as to the question of *sovereignty* or *reserved rights*.

5 and 6. Your St. Thomas organ contends that a constitution without the power of amendment would be an anomaly. But that is not the question. I have never denied the existence of the power somewhere. My contention is that the power of amendment, except in the cases specified, and to the extent provided in the constitution itself, appertains to the Legislature that made the constitution, *a fortiori* the power to "alter" it fundamentally, or as you contend, in "everything" except one office—must reside in the same Legislature. Suppose one of the Municipal Councils of Ontario should claim the right to alter its constitution—the Municipal Act—and should pass a by-law for the purpose? And suppose some learned and zealous advocate of "the rights of the people" should defend the by-law on the ground of "anomaly," what answer would the Attorney-General make to him? Is there any difference *in principle* between the two cases? I can see none, and therefore we come back to the issue as it stood before the *Journal* abandoned it, and took refuge in the idea of anomaly.

But I deny that the United States affords any example of a power in *the Legislature*, State or Federal, to alter a Constitution, of its own motion, and of its own authority as it would pass an ordinary law. The existence of such a power in the legislature of an American State would indeed be an anomaly. Every Yankee school-boy over ten years of age would laugh at the ignoramus who should gravely ask him, if the Constitution of his State could be altered or amended by an Act of the Legislature. It seems incredible that any literate person in this country, even a writer for a partizan newspaper, should venture to insult the intelligence of his readers by attempting to impose such a fiction upon them. But when an Attorney-General contends that a word of limited signification, with its sphere of operations distinctly pointed out in the Constitution, may be charged into another word conveying the power of altering and overriding "everything," and when he assumes the right and affirms the expediency of making fundamental alterations *per saltum*, as he would pass a law to encourage the growth of pumpkins, or to exterminate thistles, one need hardly feel surprise if here and there his newspaper parasites, since he has deprived "the people" of the right to advertise municipal notices in the papers of their choice, should either through crass ignorance, or wicked design, falsify history and misrepresent the question at issue, in defence of their benefactor. To place this question once for all out of the reach of falsifiers, I shall quote the text of the Federal, and also of a recent *State* Constitution, on the subject of amendments. The Federal article on this head, which has never been *altered*, is as follows:—

"V. The Congress whenever *two-thirds* of both Houses shall deem it necessary, shall *propose* Amendments to this Constitution, or on the application of the Legislatures of two-thirds of the several States, *shall call a convention* for *proposing* Amendments, which in either case shall be valid to all intents and purposes, as part of this Constitution, *when ratified* by the Legislatures of three-fourths of the several States, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress."

The Constitution of Minnesota, adopted in 1858, in the light of adequate experience and under the guidance of able statesmen, provides for its amendment as follows:—

"ARTICLE XIV.—Sec. 1.—Whenever a majority of both Houses of the Legislature shall deem it necessary to *alter* or *amend* this Constitution, they may propose such alterations or amendments, which proposed amendments shall be published, with the laws which have been passed at the same session. And said amendments shall be submitted to the people for their approval or rejection. And if it shall appear in a manner to be provided by law, that a majority of voters present and voting shall have *ratified such alterations* or *amendments*, the same shall be valid to all intents and purposes as a part of this Constitution. If

two or more alterations or amendments shall be submitted at the same time it shall be so regulated that the voters shall vote for or against each separately.

"Sec. 2.—Whenever two-thirds of the members elected to each branch of the Legislature shall think it necessary to call a convention to *revise* this Constitution, they shall recommend to the electors to vote at the next election for members of the Legislature for or against a convention; and if a majority of all the electors voting at said election shall have voted for a convention, the Legislature shall at their next session provide by law for calling the same. The Convention shall consist of as many members as the House of Representatives who shall be chosen in the same manner, and shall meet within three months after their election for the purpose aforesaid."

Thus, in the language of a recent English writer, (Mr. Montague Bernard, Professor of International Law, &c., at Oxford) "behind both general and local authorities there is a power, intricate in respect of machinery, and extremely difficult to set in motion, requiring the concurrence of three-fourths of the States, acting by their Legislatures or in conventions, which can amend the constitution." But the Congress or Legislature of the nation, is only a subordinate division of that power, a mere wheel in the machine, and unable to amend a single word of its own authority. So also the State Legislatures are incapable of any higher function than that of "proposing" amendments. In Minnesota the proposed amendments must be published with the statutes of the same session, to bring them under the public eye, and in due time formally submitted to the people for "approval or rejection." If a majority of the voters approve, they become part of the fundamental law, which no Act of the Legislature can override or repeal. You will notice also that our American cousins recognize verbal distinctions where you ignore them. They provide one method for "altering *or* amending," and another for "revising," (which, I suspect, means your kind of altering,) the constitution. But such refinements of language are unworthy of Legislators fresh from the Court of Chancery, where legality is contemned and justice is measured "by the length of the Chancellor's foot!"

8. This letter is already too long. I must content myself with a brief answer to the 8th and last point of your St. Thomas advocate. The 80th section, gives express authority to the Quebec Legislature to "alter the limits" of any of its sixty-five electoral districts; it contains these words of enlargement, after fixing the number and limits of those districts, "subject to alteration thereof by the Legislature of Quebec"—a power *not* given to, and therefore not possessed by the Legislature of Ontario. The restriction requiring concurrence of particular members is limited to twelve districts out of sixty-five.

I have read your Welland speech as reported in the *Globe*. I find only iteration in it, and therefore nothing to answer. You reassert your right to treat our constitution as a *law*, which like any other in the statute book, may be repealed or altered at will. I have joined issue with you, and intend "to fight it out on that line." The Courts may, but the people ultimately *must*, decide between us.

I am, &c.,

WM. MACDOUGALL.

Toronto, Aug. 28, 1875.