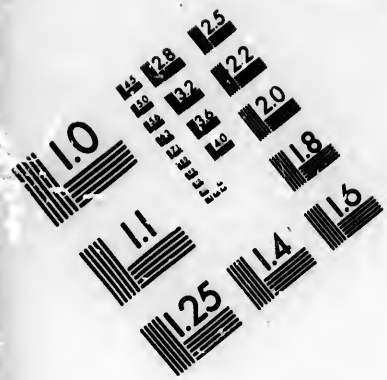

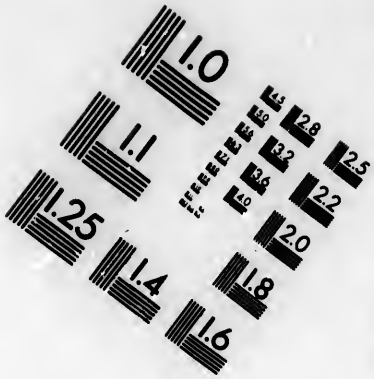

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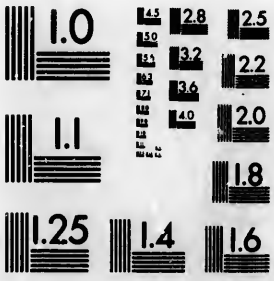

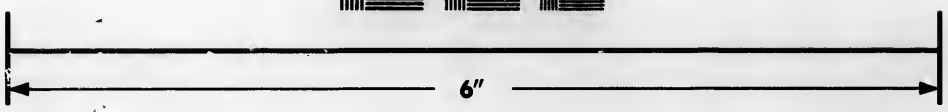

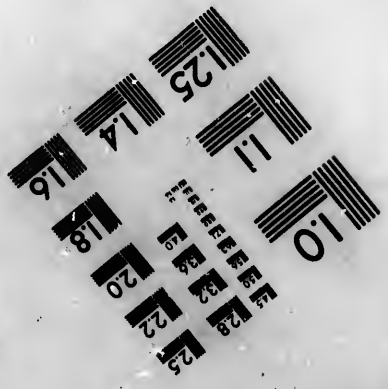

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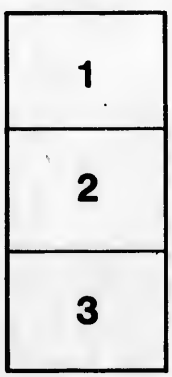

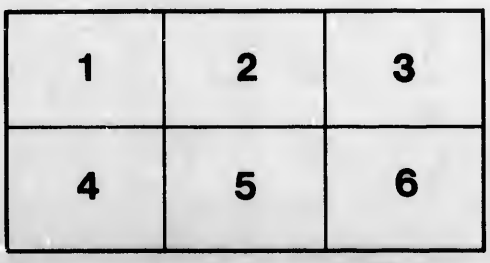

OBSERVATIONS

ON

THE CONSTITUTIONS,

POLITICAL AND JUDICIAL,

OF THE

BRITISH COLONIES;

WITH

PROPOSED AMENDMENTS,

SUGGESTED BY THE

POLITICAL DIFFERENCES NOW EXISTING IN THE PROVINCES OF UPPER AND LOWER CANADA:

IN

A Letter

TO THE

RIGHT HONOURABLE LORD GLENELG,

His Majesty's Principal Secretary of State for the Colonies.

BY

JAMES CHRISTIE ESTEN, LL.D.

Late Chief Justice, and President of the Council, of the Bermudas.

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A

LETTER

TO THE

RIGHT HON. LORD GLENELG,

&c. &c.

My Lord,

The disputes between the King's Representatives and the House of Assembly, in the Canadas, (particularly in the Lower Province), have at length arrived at a point, which must give serious uneasiness to every considerate person, who wishes well to the Colonies. Every such person is disposed to inquire, what is now to be done?

If the ability and the dignified moderation of Lord Gosford have failed to produce any effect upon the ambitious projects and extravagant views of the dominant party in the Assembly, it is to be apprehended that the case is nearly desperate; and that his Majesty's Government will not very easily make up their minds respecting the measures proper to be adopted, in a case of so much difficulty. If on the one hand, it be determined to persevere in the present mild and conciliatory, but firm and consistent, mode of proceed-

ing; what has already happened fully evinces, that however much such conduct deserves to succeed, and in ordinary cases, would be sure to effect the desired purpose, it will certainly fail here; and if on the other, Government should decide upon giving up the matter in dispute, and agree to such an organic change in the constitution, as that the members of the legislative council, instead of being (as heretofore) nominated by the Crown, shall in future be elected by the same constituency as chooses the representatives of the people in the House of Assembly, who can tell the consequences of such a change? Or rather what statesman, in the smallest degree versed in political history, or who has made forms of Government ever so little the subject of his contemplation, will not at once see, that the constitution of Lower Canada will by this change be made too democratic, and that if even now the Assembly be suspected of aiming at independence on this country, when there is a legislative council nominated by the Crown, which may be supposed inclined to thwart such ambitious views, when that council shall by popular election be identified with the Assembly in political sentiment, they will both concur in the same views, whatever they may be; and that at all events, the new constitution of Lower Canada, intended by its framers to be a transcript, however faint, and a copy, however imperfect, of the English constitution, will become a republic, of which the King's govenor will be merely the president?

The great objection to such a change is, that the legislative council and the assembly, being elected by the same constituents, would be so completely identified, as to be really and in fact the same Assembly, and that

therefore all the advantages which have been supposed to result from a more mature and dispassionate discussion of legislative questions, in another House than that originating the question, and chosen by other electors and upon different principles, will be voluntarily abandoned. The same thing will happen, as happened in this country before the passing of the Reform Bill, when a majority of the House of Commons being notoriously the nominees of the House of Lords, spoke their sentiments and did their will; so that the principal business of your Lordship's House was *then* merely to register the edicts of the Commons House, which were in fact their own edicts; their Lordships *then* reversed the direction of their writ of summons, *ad consulendum,* and adopted that of the Commons *ad consentiendum.* But has that, my Lord, been the case, since the passing of the Reform Bill? The case has been, and is, widely different—*quam mutatus ab illo!* Your Lordship's House, ever since that auspicious event, acting up to the full dignity of their high station, have asserted their right (with the exercise of which they had before dispensed), *ad consulendum;* and have fully shewn themselves (what the constitution intended them to be) an Assembly elected and acting upon different principles from those of the Commons House. Thus the great advantage is secured of a more mature, deliberate and dispassionate discussion of all legislative questions in another chamber, chosen upon different principles. But this advantage would be wholly lost in Lower Canada, were the legislative council to be elected by the people.

It is impossible to consider this subject, without being struck with another analogy between the projected change

in Lower Canada, and one proposed in this country. Your Lordship will see that I refer to Mr. O'Connell's plan for reforming the House of Lords, by the passing of a law, requiring the representative Peers to be elected by the same constituency as that which now chooses the members of the Commons House. Such an organic change would, in my humble opinion, be destructive of the principles of the constitution, and would at no distant period, convert it into that of a republic. When the Peers should be chosen by the new electors, doubtless the same pledges as are now frequently exacted from the members of the House of Commons, would be taken from them, to legislate in the way most agreeable to the electors. The two chambers would therefore be in all respects identified, and might as well, (for all purposes of legislation) meet in the same House.

Has such a change ever been recorded in history (ancient or modern) and not been followed by a tyranny exercised either by one, or many? When the federal constitution of the United States of America was under debate in convention, in the year 1787, it was supposed to be in contemplation by one party to vest the federal legislative powers in one assembly. This was opposed by many, and among others by Franklin, (the Socrates of America,) who in a familiar apologue, (which is well known to have been his favourite mode of exhibiting moral and political truths, after the manner of his great prototype) pointed out its danger and its folly. But the plan, if ever it were seriously entertained, was completey demolished in a work, elaborate and masterly, though written upon the spur of the occasion, by John Adams, (the second President of the United States, and father of the present Mr. Adams) who

was then on an embassy in Europe. Alarmed by what he considered the impending danger of such a project, in a series of letters to a friend, (entitled a "Defence of the American Constitutions"—that is, of the *State Constitutions*, all of which establish *two Chambers*)—he shewed the numerous instances, both in ancient and modern times, of a Government by one Assembly always degenerating into a tyranny, either of one or many.

This work, my Lord, is a mine of historical information and sound political remark upon this very important subject, and deserves to be consulted before such a project shall be acted upon.

The advocates for such a reform in the Lords House allege, as a farther reason for it, that at present they are *irresponsible*. The proper answer to this objection has been given by Sir Robert Peel; the Lords are responsible for the upright exercise of their high functions to GOD. This is the only effectual responsibility in every rational and moral agent, compared with which the responsibility to the people (the immediate constituents) is as dust in the balance. To whom is the King responsible, but to GOD? To whom are the members of the Commons House ultimately responsible, but to the same Almighty Being? Should their responsibility to their constituents come in collision with this superior responsibility, with this paramount obligation to their Maker?—that is to say, should their constituents require of them to act in a given case in a manner which they conceived inconsistent with their religious duty, would they hesitate one moment to resign their seats? Thus their

responsibility to their electors, in every case of any importance, is merged in that by which they are bound to GOD.

Is not the Legislature responsible to the Almighty, that it will enact nothing that is contrary to the Divine law? and are not the Judges, in like manner, responsible that they will make the same Divine law the rule and standard of their interpretation, in expounding that of the land?

Again: say the advocates for a reform in the House of Lords, that they represent nobody but themselves? I conceive that the Lords represent the people as fully as the members of the Commons House. The only difference is that they are elected in a different manner; the constitution providing that the King, who is the representative of the whole nation, should elect the Lords. It was well said by Lord Redesdale, at a late conservative dinner, that the Lords represented the higher and educated classes of the community;—in the language of Burke, that they were the Corinthian Capital of polished society.

The President of the United States is elected in a manner different from that either of the senators or the representatives in the lower chamber. The people at large in each of the different States, nominate electors, equal in number to the representatives and senators of that State, and these electors choose the President.

Another reason assigned for the adoption of this organic change in the constitution is, that in conse-

quence of the opposition made by the Lords to many bills sent up to them from the Commons, legislation is at a stand-still; and that the alteration proposed is necessary to harmonize the two branches. In the first place, as the Lords have an equal right with the Commons to exercise an independent opinion, who shall say which is wrong in the collision that has taken place between them? In the next place, two chambers, perfectly independent on each other, as the Lords and Commons *now* are, and elected in a different manner and upon different principles, will very probably hold different opinions upon inportant subjects, such as have engaged the attention of Parliament since the passing of the Reform Bill. Some collision is therefore natural, and was to be expected. But this difference of opinion and want of harmony, were still more to be expected from the annoyance and disappointment of the Lords at losing that influence in directing the votes and proceedings of the Commons, which they possessed before the Reform bill was passed. These feelings are, from their nature, temporary, and harmony will doubtless at no distant period be restored to the proceedings of the Legislature.

What, however, cannot be denied, as the necessary result of that independence on each other, which was the first fruit of the Reform Bill, is, that as real a revolution in the constitution has taken place as was brought about in 1688. Until that period, the Crown had the predominance; since that period and until the passing of the Reform Bill, the Lords commanded a majority in the Commons House, and it is only since that all-important bill became the law of the land, that a new and untried era has opened for the

constitution. It remains to be seen whether it will work well under the new machinery, and according to its theory, as laid down by Montesquieu, de Lolme, Blackstone, Adams, Hallam, Millar, and other writers of eminence, who have almost exhausted language in eulogising the English constitution. What they eulogised was evidently a very different constitution from the actual one, as administered by King, Lords, and Commons, before the year 1832.

I am one of those, my Lord, who believe that the new constitution will work well, and with renovated vigour, in consequence of the changes wrought by the Reform Bill. But I am also of opinion, that the constitution is now sufficiently democratic, and that any change, more especially the projected alteration in the House of Lords, would be highly injurious; would, in fine, at no distant period occasion the abolition of monarchy, and substitute a republican form of government in its place.

Although, my Lord, these observations may appear digressional from the principal subject of this letter, yet they will be found, I think, closely connected with, and illustrative of it. I now proceed, with your Lordship's permission, to inquire into the Constitutions, (both political and judicial,) of the different British Colonies.

The Canadas are, I believe, the only Colonies which have two Councils, the executive and the legislative,—both of course, appointed by and removable at the pleasure of the Crown. All the other Colonies have but one Council, called simply *the Council*, but exercising legislative functions; in some, as the Upper House, where there is a

Lower House, the Assembly; in others making laws in conjunction with the Governor, where there is no popular branch of the Legislature. In the Bermudas alone, as far as I am informed, this single Council receives the denomination of *legislative*, or *privy*, according as it co-operates with the Governor and the Assembly in making laws, or exercises the function of advising the Governor. This distinctive denomination was given the Council by the late Sir George Beckwith, when Governor of the Bermudas, who having been a long time at Quebec, upon the staff of Lord Dorchester, the Governor General of Canada, was quite familiar with the Constitution of that province.

In almost all the Colonies, the Council, in addition to the functions already described, constitutes in conjunction with the Governor, the Court of Errors, to which a writ of error lies from the principal Court of Common Law, variously denominated in the different Colonies; and also the Court of Chancery; while at Jamaica and in some other Colonies, the Governor is sole Chancellor. From the Court of Errors, and the Court of Chancery, in all suits of a specified value, and upward, an appeal lies to the Judicial Committee of the Privy Council in this country.

The Constitutions of the Colonies were doubtless intended by their framers to be as exact a transcript of that of the parent country, as circumstances permitted. The Governor was to represent the King; the Council, the House of Lords; and the Privy Council and the Assembly, the Commons House of Parliament. The first and the last

exhibit a considerable degree of resemblance; but the Council bears little or no likeness to its intended prototype. In vain do we look in the Council, for the independence of the Lords House of Parliament. The members of the Colonial Council, hold their seats only during pleasure, and may be, and frequently are, suspended by the Governor,—sometimes, of course, upon grave and adequate reasons, but in many cases on trivial grounds, which are generally disallowed as soon as the matter is investigated in the Colonial Office here, and the suspended Councillor is directed to resume his place at the Colonial Council Board.

This power of the Governor is inconsistent with the independence of spirit which ought to characterise every legislator. It must, in the nature of things, have a tendency to make the Councillor (a result which, in fact, often takes place,) subservient to the Governor. Hence the strife and bickerings, which so often divide the different branches of a Colonial Legislature.

My Lord Chesterfield, indulging a witty licence, permitted himself to call the House of Lords, (of which he was himself a member and distinguished ornament,) a "Hospital of Incurables." Had his Lordship applied the same terms to a Colonial Council, little fault could have been found with the description; for though, doubtless, in every such body there are many gentlemen of upright independent spirits, who would disdain sacrificing their opinion to that of a Governor, yet as a general proposition it cannot be denied that the members are *incurably* attached to the Governor for the time being, and are actu-

ated by an irresistible propensity to fall in with his Excellency's sentiments upon almost every subject. The

"Nullius addictus jurare in verba Magistri,"

is a praise to which such members can by no means offer a just claim. But this is human nature. The fault is not in the men, but in the institution. The Governor in suspending a Councillor, deprives him not only of his seat at the Privy Council, but also of his place as a Legislator, as a Judge of the Court of Errors, and as a Judge in Chancery. Besides the temporary degradation, the suspension inflicts also a loss of pecuniary emolument in all these places. The Governors of our Colonies are most generally military men, accustomed to be obeyed without a word; and they are but too apt to forget or to disregard the characteristics of a civil governor.*

The want of independence in the Council, is the great defect of the Colonial Constitution; and writers upon Colonial affairs have suggested what they considered would remove the defect. Among others, the late Mr. Bryan Edwards, in his valuable history of the West Indies, proposes, if I remember right, (not having the book, I cannot refer to it,) to appoint the legislative Councillors for life.

This would perhaps be going too far upon the other extreme. I would, instead of that, my Lord, suggest the

* As exceptions to this general description, I will mention the late Sir George Beckwith, Governor of the Bermudas from 1798 to 1802; and General John Hodgson, who was Governor from 1806 to 1811. Both these Governors made it an invariable rule of their administration to exalt the civil above the military power.

propriety of changing the tenure of the office of *legislative Councillor* from "*during pleasure,*" as it now is, to that by which the Judges of Westminster Hall hold their places, *viz.* "*quamdiu se bene gesserint;*" and as the Judges are removeable upon an address to the King to that effect by both Houses of Parliament, so I would make the *legislative* Councillors removable from their office of *legislator* only upon an address to the King to that effect, by the Governor and the House of Assembly. This would, I think, make the *legislative* councillors sufficiently indepependent, and would ensure them respect from both the Governor and the Assembly, and also the inhabitants of the colony. In their capacity of *privy* Councillors, they should still be removable at pleasure; but, in order to promote harmony among the different branches of the legislature—to make the different parts of the machine of Government interlace and fit properly, and the whole to work together smoothly and without jarring—I would propose that the privy Council should be selected from the ablest and most influential members of the legislative Council, and of the House of Assembly.

Much of the discordance that so often exists in the Colonial Legislatures, arises from the Governor's having no member to recommend and support the measures he wishes to be adopted in the Assembly; while but too often mutual jealousy subsists between that House and the Council. A privy Council, such as I have recommended, from both Houses, would, in concert with the Governor, previously deliberate upon the matters to be submitted to the Legislature, and lay such a regular plan for carrying them into execution, as would in most cases

ensure that success, which is now lost, for want of concert and arrangement. As I fear I am trespassing upon your Lordship's time, I will briefly touch upon the changes which I would recommend in the judicial system of the Colonies. In those in which the Governor is sole Chancellor, he must depend upon some lawyer to dictate his decrees. In others, in which the Governor and Council exercise the function of Chancellor, the Chief Justice, who is President of the Council, is the mouth of the Court, and pronounces the decrees.

Why have so much unnecessary machinery, and keep the Secretary, the Treasurer, and the Collector of the Customs (who are usually members of Council) from employment in their respective offices, to attend as Judges in Chancery?

I would recommend that the Chief Justice be sole Chancellor. The Prothonotary of his Court, and the Registrar of the Court of Chancery, might act as Masters in Chancery (a function now exercised at the Bermudas, and I believe in some other Colonies, by members of Council). These two officers might also discharge the duty of Examiners in Chancery. The Chief Justice ought, of course, to be a member of both the legislative and the privy Council. He cannot properly be Judge of the Court of Admiralty, because a prohibition goes from his Court to the Admiralty. The Attorney General will very properly be the Judge of the Admiralty, (which, if I mistake not, used to be the case in Virginia, when one of our Colonies,) and the Advocate General will in that Court protect the interest of the King *jure coronæ*, while the

Advocate of the Admiralty will defend the King's rights in his office of Admiralty.

These are the changes, which I would propose to your Lordship to adopt in the political and judicial constitutions of the Colonies. The alteration suggested with respect to the Legislative Council not being subject to suspension at the will of the Governor, but holding office by the same tenure as the Judges of England, "*quamdiu se bene gesserint;*" and being removable, in like manner as they are, only by a joint address to the King for that purpose, from the Governor and House of Assembly, ought to satisfy the discontented among the inhahitants of Lower Canada, and would, if adopted, give universal satisfaction to the other Colonies.

This change would remove the greatest defect in the constitution of the British Colonies, and would assimilate it, in a considerable degree, to that of this country,—the boast of ages,—the wonder of the civilized world,—the fruitful parent of liberty and of every social blessing,—and to which, invigorated as it is, and brought back to its original principles, by the Reform Bill, I would address the wish, and use the emphatic words of Father Paul, "*Esto perpetua.*"

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