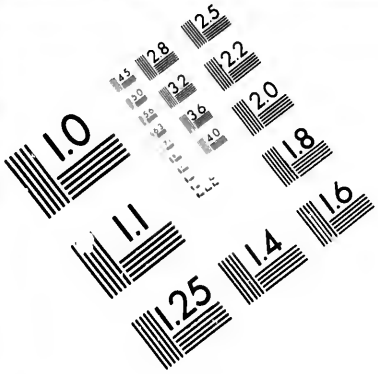

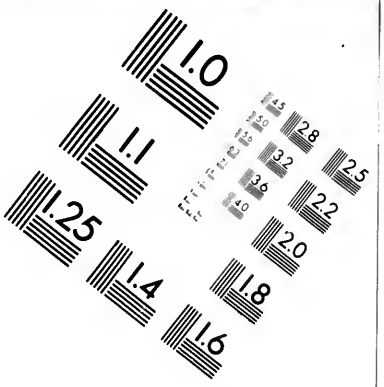

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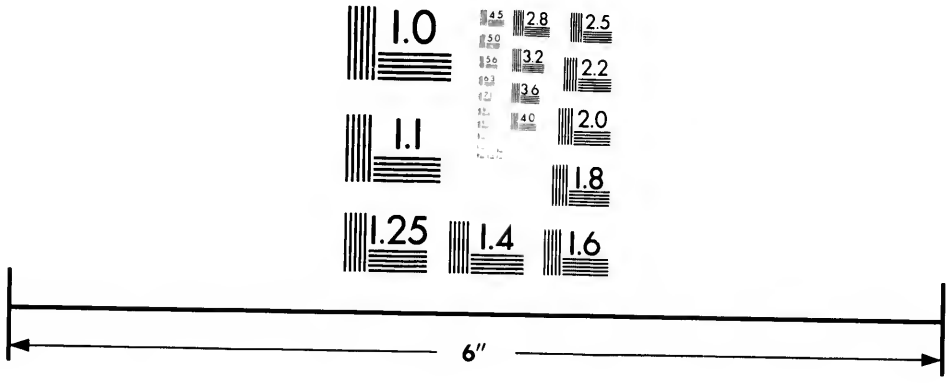

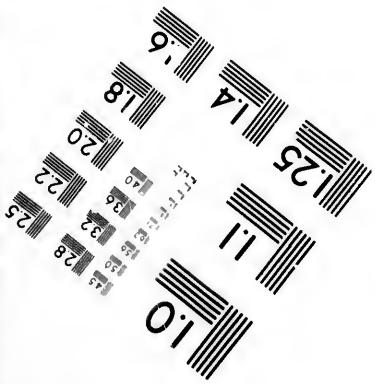

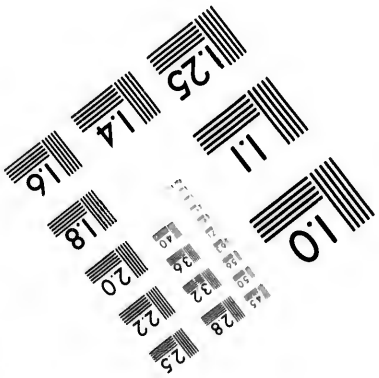

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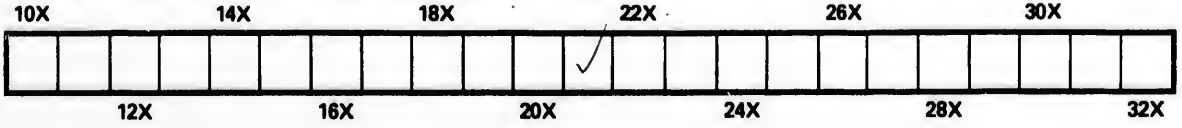

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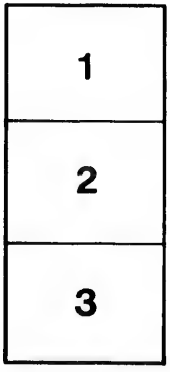

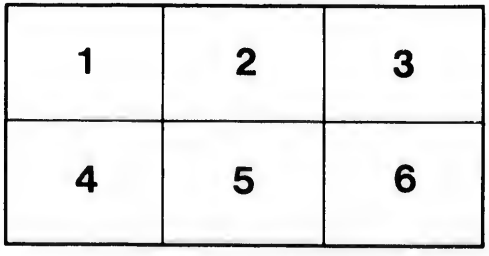

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Edited by

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Of Osgoode Hall, Barrister-at-Law.

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THE
CANADIAN LAW TIMES.

SEPTEMBER, 1889.

FEDERAL GOVERNMENT IN CANADA (*a*).

IN the addresses to the Queen embodying the resolutions of the Quebec conference of 1864, the legislatures of the provinces respectively set forth that "in the federation of the British North American Provinces the system of government best adapted under existing circumstances to protect the diversified interests of the several provinces, and secure harmony and permanency in the working of the Union, would be a general government charged with matters of common interest to the whole country, and local governments for each of the Canadas, and for the Provinces of Nova Scotia, New Brunswick and Prince Edward Island, charged with the control of local matters in their respective sections."

In the third paragraph the resolutions declare that "in framing a constitution for the general government, the conference, with a view to the perpetuation of our connection with the mother country, and the promotion of the best interests of the people of these provinces, desire to follow the model of the British Constitution so far as our circumstances permit." In the fourth paragraph it is set forth: "The executive authority or government shall be vested in the

(*a*) This article is composed of abstracts of lectures delivered in June last before Trinity University, Toronto, and I now avail myself of the permission accorded me to publish a necessarily brief abstract of their material points in the pages of the CANADIAN LAW TIMES before they can appear in full in the publications of Johns Hopkins University. J. G. B.

sovereign of the United Kingdom of Great Britain and Ireland, and be administered according to the well-understood principles of the British constitution by a sovereign personally, or by the representative of the sovereign duly authorized."

In these three paragraphs we see tersely expressed the leading principles on which our system of government rests; a federation with a central government exercising general powers over all the members of the Union, and a number of local governments having the control and management of certain matters naturally and conveniently falling within their defined jurisdiction, while each government is administered in accordance with the British system of parliamentary institutions. These are the fundamental principles which were enacted into law by the British North America Act of 1867.

The law and the conventions or understandings of the constitution.—Before I proceed to refer to the general features of the federal system, I may here appropriately observe that the practical operation of the government of Canada affords a forcible illustration of a government carried on, not only in accordance with the legal provisions of a fundamental law, but also in conformity with what has been well described by eminent writers as conventions or understandings, which do not come within the technical meaning of laws since they cannot be enforced by the Courts. It was Professor Freeman (*b*) who first pointed out this interesting and important distinction, but Professor Dicey has elaborated it in a recent work, in which he very clearly shows that "Constitutional Law," as we understand it in England and in this country, consists of two elements: "The one element, which I have called the 'law of the constitution,' is a body of undoubted law; the other element, which I have called the 'conventions of the constitution,' consists of maxims or practices which, though they regulate the ordinary conduct of the Crown and of Ministers and of others under the constitution are not in

(*b*) Freeman's Growth of the English Constitution, pp. 114, 115.

strictness law at all" (*c*). In Canada this distinction is particularly noteworthy. We have first of all the British North America Act (*d*), which lays down the legal rules for the division of powers between the respective federal and provincial authorities, and for the government of the federation generally. But it is a feature of this government that, apart from the written law, there are practices which can only be found in the usages and conventions that have originated in the general operation of the British Constitution—that mass of charters, statutes, practices, and conventions, which must be sought for in a great number of authorities. For example, if we wish in Canada to see whether a special power is given to the Dominion or to the Provincial Government, we must look to the written constitution—to the 91st and 92nd sections; but if we would understand the nature of the constitutional relations between the Governor-General and his advisers, we must study the conventions and usages of parliamentary or responsible government as it is understood in England and Canada. The Courts accordingly will decide whether the parliament or the legislatures have a power conferred upon them by the Constitutional Law whenever a case is brought before them by due legal process; but should they be asked to adjudicate on the legality of a refusal by a government to retire from office on an adverse vote of the people's house, they could at once say that it was a matter which was not within their leading functions, but a political question to be settled in conformity with political conventions with which they had nothing whatever to do.

In short, we have not only a written constitution to be interpreted whenever necessary by the Courts, but a vast storehouse of English precedents and authoritative maxims to guide us—in other words, an unwritten law which has as much force practically in the operation of our political system as any legal enactment to be found on the statute book.

(*c*) Dicey's Law of the Constitution, p. 25.
(*d*) 30-31 Vict. c. 3 (Imp.).

Position of Canada as a Colonial Dependency of Great Britain.—The Queen is the head of the executive authority and government of Canada (*e*), and her supremacy can alone be acknowledged in all executive and legislative acts of this dependency. As she is unable to be present in person in Canada, she is represented by a Governor-General appointed by Her Majesty in Council. This high functionary has dual responsibilities, for he is at once the governor in chief of a great dependency who acts under the advice of a ministry responsible to its parliament—as I shall show later on—and at the same time the guardian of imperial interests. Canada being a colonial dependency and not a sovereign state, cannot directly negotiate treaties with a foreign power, but must act through the intermediary of the imperial authorities, with whom the Governor-General, as an imperial officer, must communicate on the part of our government not only its minutes of Council, but his own opinions as well, on the question under consideration.

The general power possessed by the Imperial Government of disallowing any measure, within two years from its receipt, is considered as a sufficient check, as a rule, upon colonial legislation. The cases where a bill is reserved (*f*) and allowed are now exceedingly limited. Only when the obligations of the Empire to a foreign power are affected, or an Imperial statute is infringed in matters on which the Canadian Parliament has not full jurisdiction, is the supreme power of England likely to be exercised.

The Imperial Parliament has practically given the largest possible rights to the Dominion Government to legislate on all matters of a Dominion character and importance which can be exercised by a colonial dependency; and the position Canada consequently occupies is that of a semi-independent power. Within the limits of its constitutional jurisdiction, and subject to the exercise of disallowance under certain conditions, the Dominion Parliament is in no sense a mere delegate or agent of the Imperial Parliament, but enjoys

(*e*) B. N. A. Act, s. 9.

(*f*) The latest case was the Bill in 1886 respecting the Fishery dispute between Canada and the United States.

an authority as plenary and ample as that great sovereign body in the plenitude of its power possesses (*g*). This assertion of the legislative authority of the Dominion Legislature is quite reconcilable with the supremacy of the Imperial Parliament in all matters in which it should intervene in the interests of the Empire. For that parliament did not part with any of its rights as the supreme authority of the Empire, when it gave the Dominion Government "exclusive authority" to legislate on certain classes of subjects enumerated in the Act of Union. This point has been clearly explained by the late Mr. Justice Gray of the Supreme Court, British Columbia, and one of the members of the Quebec Conference of 1864. In deciding against the constitutionality of the Chinese Tax Bill, passed by the legislature of his province, he laid down that "the British North America Act, 1867, was framed, not as altering or defining the changed or relative positions of the provinces towards the Imperial Government, but solely as between themselves." Proceeding, he said that the Imperial Parliament "as the paramount or sovereign authority could not be restrained from future legislation. The British North America Act was intended to make legal an agreement which the provinces desired to enter into as between themselves, but which, not being Sovereign States, they had no power to make. It was not intended as a declaration that the Imperial Government renounced any part of its authority."

A question of great legal importance was raised in the last session of the Dominion Parliament. An Imperial Statute (*h*), passed in 1865, expressly declares that any colonial law "in any respect repugnant to the provisions of any Act of Parliament extending to the colony to which such law may relate," shall, to the extent of such repugnancy, be "absolutely void and inoperative." And in construing an Act of Parliament, "it shall be said to extend to any colony, when it is made applicable to such colony by the express words or necessary intendment" of the

(*g*) See *Regina* v. *Burah*, 3 App. Cas. 889; *Hodge* v. *Reginam*, 9 Ib. 117.
(*h*) 28 & 29 V. c. 63 (Imp.).

same. Since the passage of this Act Canada has received a larger measure of self government in the provisions of the B. N. A. Act, which confers certain powers on the Dominion and the Provincial authorities. No one can doubt that it is competent, as Mr. Justice Gray has intimated, for Parliament to pass any law it pleases with respect to any subject within the powers conferred on the Dominion or Provinces; and any Canadian enactment repugnant to that Imperial Statute would be declared null and void by the Courts, should the question come before them. But the point has been raised whether it is in the power of the Canadian Parliament or Legislatures to pass an Act repealing an Imperial Statute passed previous to the Act of 1867, and dealing with a subject within the powers expressly granted to the Canadian authorities. It must be here mentioned that the Imperial Government refused its assent to the Canadian Copyright Act of 1872, because it was repugnant, in the opinion of the law officers of the Crown, to the provisions of an Imperial Statute of 1841 extending to the Colony (*i*).

On the other hand, in the debate on the constitutionality of the Quebec Jesuits Bill it was contended by the Minister of Justice that a provincial legislature, "legislating upon subjects placed under its jurisdiction by the B. N. A. Act, has the power to repeal an Imperial Statute passed prior to the B. N. A. Act affecting those subjects" (*j*). In support of this position he referred to three decisions of the judicial committee of the Privy Council. One of these, *Harris* v. *Davies*, held that the legislature of New South Wales had power to repeal a statute of James I. with respect to costs in case of a verdict for slander (*k*). The second case was that of *Powell* v. *Apollo Candle Co.*, in which the principles laid down in *Regina* v. *Burah*, and in *Hodge* v. *Reginam*, were affirmed (*l*). The third and most

(*i*) 5 & 6 V. c. 45 (Imp.); Can. Sess. Pap 1873, No. 28.

(*j*) See Can. Hansard, March 27, 1889.

(*k*) *Harris* v. *Davies*, 10 App. Cas. 279.

(*l*) *Powell* v. *Apollo Candle Co.*, 10 App. Cas. 282; *Regina* v. *Burah*, 3 *Ib.*, 889; *Hodge* v. *Reginam*, 9 *Ib.* 117.

important case as respects Canada was *Regina* v. *Riel*, in which it was practically decided that the Canadian Parliament had power to pass legislation changing or repealing (if necessary) certain statutes passed for the regulation of the trial of offences in Rupert's Land before it became a part of the Canadian domain (*m*). This contention is thus directly raised for the first time, but it is not supported by the several authorities who have referred to the relations between the parent state and her dependencies (*n*).

The question is too important to be treated summarily in this brief review, especially as it will come up formally in connection with the Copyright Act of 1889, in which the same conflict as in 1875 arises. The new Act necessarily contains a clause permitting it only to come into force by a proclamation of the Governor-General (*o*). No doubt the fundamental principle that rests at the basis of our constitutional system is to give Canada as much power over all matters affecting her interests as is compatible with Imperial obligations. In the debate of last session it was urged that the Parliament and the Legislatures have frequently repealed Imperial enactments in the course of general legislation. In the case in question, however, the assertion of Canadian legal independence is more emphatically and definitely made than on any previous occasion (*p*).

The Queen's Privy Council of England has the right to allow appeals to the judicial committee—one of the survivals of the authority of an ancient institution of England —from the Courts of Canada. This right is only exercised on principles clearly laid down by this high tribunal, but

(*m*) *Riel* v. *Reginam*, 10 App. Cas. 675.

(*n*) See Hearn's Government of England, App. II.; Todd's Government in the Colonies, pp. 188-192; Dicey's Law of the Constitution, pp. 95 *et seq.*

(*o*) Can. Hans., April 20, 1889.

(*p*) The Dominion Act of 1888 (51 V. c. 43), providing that "notwithstanding any royal prerogative," no appeal shall be brought in any criminal case from any judgment or order of any Court in Canada to any Court of Appeal in the United Kingdom, may be cited as a remarkable assertion of Canadian judicial independence, objected to by the Imperial authorities in strong terms; but the Act has not been disallowed.

it is emphatically a right to be claimed by the Canadian people as forming part of the Empire under the sovereignty of England. It is a right sparingly exercised, for the people of Canada have great confidence in their own Courts, where justice is administered with legal acumen and strict impartiality; but there are decided advantages in having the privilege of resorting in some cases, especially those affecting the constitution, to a tribunal which is generally composed of men of great learning.

In the foregoing paragraphs I have briefly referred to the relations that should naturally exist between the supreme head of the Empire and its colonial dependencies. I may here add, what will be obvious to every one, that the power over peace and war, and the general control of such subjects as fall within the province of international law, are vested in the home Government, and cannot be interfered with in the least degree by the Government of the Dominion.

The respective powers of the Dominion and the Provinces.—We come now to consider the nature of the federal system, the respective powers of the Dominion and the Provincial Governments, and the relations that they bear to one another under the constitution. The statesmen that assembled at Quebec believed it was a defect in the American constitution to have made the national government alone one of enumerated powers and to have left to the States all powers not expressly taken from them (*q*). For these reasons mainly the powers of both the Dominion and the Provincial Governments are stated, as far as practicable, in express terms with the view of preventing a conflict between them; the powers that are not within the defined jurisdiction of the Provincial Governments are reserved in general terms to the central authority. In other words, "the residuum of power is given to the central instead of to the States authorities." In the B. N. A. Act we find set forth in express words in the ninety-first, ninety-second, ninety-third, and ninety-fourth sections,

(*q*) See remarks of Sir John Macdonald, Confederation Debates, p. 33.

1. The powers vested in the Dominion Government alone.

2. The powers vested in the provinces alone.

3. The powers exercised by the Dominion Government and the provinces concurrently.

4. Powers given to the Dominion Government in general terms.

The conclusion we come to after studying the operation of the Constitutional Act, until the present time, is that while its framers endeavoured to set forth more definitely the respective powers of the central and local authorities than is the case with the constitution of the United States, it is not likely to be any more successful in preventing controversies constantly arising on points of legislative jurisdiction. The effort was made in the case of the Canadian constitution to define more fully the limits of the authority of the Dominion and its political parts; but while great care was evidently taken to prevent the dangerous assertion of provincial rights, it is clear that it has the imperfections of all statutes, when it is attempted to meet all emergencies. Happily, however, by means of the courts in Canada, and the tribunal of last resort in England, and the calm deliberation which the parliament is now learning to give to all questions of dubious jurisdiction, the principles on which the federal system should be worked are, year by year, better understood, and the dangers of continuous conflict lessened. It is inevitable, if we are to judge from the working of a federal system in the United States, that there should be, at times, a tendency either to push to extremes the doctrine of the subordination of the provinces to the central power, or, on the other hand, to claim powers on behalf of the provincial organizations, hardly compatible with their position as members of a confederation based on the principle of giving complete jurisdiction to the central government over all matters of national and general import. It is obvious that in certain legislation the Dominion Parliament must trench upon some of the powers exclusively given to the local organisations, but it cannot be argued, with a due

regard to the true framework of the Constitutional Act and the principles that should govern a federal system like ours, that the powers of the provinces should be absorbed by the Dominion or central authority in cases of such apparent conflict. Referring to this point, the Privy Council calls attention to the fact that the general subject of "marriage and divorce" is given to the jurisdiction of the Dominion Parliament, and the "solemnization of marriage" to the legislature of a province. It is evident that the solemnization of marriage would come within the general description of the subject first mentioned; yet no one can doubt, notwithstanding the general language of the ninety-first section, that the subject is still within the exclusive authority of the legislatures of the provinces. "So," continues the Privy Council, "the raising of money by any mode or system of taxation is enumerated among the classes of subjects in section ninety-one; but though the description is sufficiently large and general to include direct taxation within this province in order to aid the raising of a revenue for provincial purposes assigned to the provincial legislatures by the ninety-second section, it obviously could not have been intended that in this instance also the genera. power should over-ride the particular one" (*r*).

It is now laid down by the highest judicial authorities that the Dominion Parliament has the right to interfere with 'property and civil rights' in so far as such interference may be absolutely necessary for the purpose of legislating generally and effectually in relation to matters confided to the Parliament of Canada. Laws designed for the promotion of public order, safety or morals, and which subject those who contravene them to criminal procedure and punishment, belong to the subject of public wrongs rather than to that of civil rights. They are of a nature which brings them within the general authority of Parliament, to make laws for the good order and government of Canada, and have direct relation to criminal law, which is

(*r*) *Citizens Ins. Co.* v. *Parsons*, 45 L. T. N. S. 721; 1 Cart. 272, 273.

one of the enumerated classes of subjects assigned exclusively to the Parliament of Canada. Few if any laws could be made by the Parliament for the peace, order, and good government of Canada which might not, in some incidental way, affect property and civil rights; and it could not have been intended when assuring to the provinces exclusive legislative authority on the subject of property and civil rights, to exclude the Parliament from the exercise of this general power whenever any such incidental interference would result from it (*s*).

As on the one hand the Federal Parliament cannot extend its own jurisdiction by a territorial extension of its laws, and legislate on subjects constitutionally provincial, by enacting them for the whole Dominion; so, on the other hand, a provincial legislature cannot extend its jurisdiction over matters constitutionally federal, by a territorial limitation of its laws, and legislate on matters left to the federal power, by enacting them for the province only, as for instance, incoporate a bank for the province (*t*).

When the B. N. A. Act enacted that there should be a legislature for a province, and that it should have exclusive authority to make laws for the provinces and for provincial purposes in relation to the matters enumerated in the ninety-second section, it conferred powers not in any sense to be exercised by delegation from or as agents of the Imperial Parliament, but authority as plenary and as ample within the limits prescribed by the section, as the Imperial Parliament, in the plenitude of its power, possesses and could bestow (*u*).

In short, each legislative body should act within the legitimate sphere of its clearly defined powers, and the Dominion Parliament should no more extend the limits of

(*s*) *Russell* v. *Reginam*, 7 App. Cas. 829.

(*t*) *Citizens Ins. Co.* v. *Parsons*, 4 S. C. R. 310.

(*u*) *Hodge* v. *Reginam*, 9 App. Cas. 117; 3 Cart. 162. The same power exists in the States. "When a particular power," says Judge Cooley, is found to belong to the States, they are entitled to the same complete independence in its exercise as the National Government in wielding its own authority."

its jurisdiction, by the generality of the application of its law, than a Local Legislature should extend its jurisdiction by localising the application of its statute (*v*).

The Federal Government should as far as possible work in harmony with the provincial institutions, and by leaving them full scope within the limits of the constitution at once give strength and elasticity to the central government and confidence to the various local organizations without which it could not exist.

The power of disallowing Provincial Acts.—In one most important respect the Dominion Government exercises a direct control over the legislation of each province. While the Imperial Government can disallow any Act of the Canadian Parliament at variance with the interests of the Empire, the Governor in Council may, within one year from its receipt, disallow any Act of a Provincial Legislature. This power of disallowance is not limited in terms by the fundamental law but may be exercised even with respect to an Act clearly within the constitutional jurisdiction of the provincial legislatures (*w*).

From the instances so far of the exercise of this political power, the student will see that it is one to be exercised with great discretion and judgment, as otherwise it may involve consequences fatal to the harmony and integrity of the confederation. This power can be properly exercised when the Act under consideration is beyond the constitutional competency of the legislature, or when it is repugnant to Dominion legislation in cases where there is concurrent jurisdiction, or when it is hostile to the rights enjoyed by a minority under the constitution, or when clearly hostile or dangerous to the peace and unity of the Dominion generally. The principal danger arises from the exercise of the power on the grounds of public policy, in the case of a question clearly within the constitutional powers of a legislature. The principle that should prevail

(*v*) Legal News, (the late Mr. Justice Ramsay) in *Hodge* v. *Reginam*, Jan. 26, 1884.

(*w*) B. N. A. Act, sec's 56, 90.

in the opinion of the advocates of provincial rights is to leave to their operation all acts that fall within the powers of the Provincial Legislature, which within its legal sphere has as absolute a right of legislation as the Dominion Parliament itself.

Opinion is divided as to the wisdom of a provision which gives so sovereign a power to a political body, and it may be doubted if in this respect our constitution is an improvement upon that of the United States. The authors of the American constitution wisely decided, as experience seems to show, to leave the judicial branch of the constitution to determine the constitutionality of all Acts of Congress or of the Legislature. Political considerations cannot enter into this judicial determination. As long as a statute is within the constitutional jurisdiction of a body that passed it, the federal judiciary cannot do otherwise than so declare, even if it be objectionable at the time on grounds of public policy. The future will soon prove whether this extraordinary supervision, given to the Dominion over the provinces, is calculated to strengthen the confederation, or has in it the elements of political discord and disunion.

The inexpediency of disallowing any measure believed to be within the constitutional jurisdiction of a province was strongly asserted in the debate in the Canadian House of Commons in 1889, on the Quebec Statute, 51-52 Victoria, c. 13, "An Act respecting the settlement of the Jesuits' Estates." In the course of the learned debate that took place on the merits of this very vexatious issue, a very clear exposition was given by several speakers, from their respective points of view, of the principles by which the relations between the Dominion and the Provincial Governments should be governed. But there is another conclusion which I think may be fairly deduced from a debate of this character. An executive power which can be thus questioned in the political arena seems obviously fraught with perilous consequences. If all questions of the constitutionality of a provincial Act could be decided only in the Courts, Parliament would be saved the discussion of matters which once mixed up with political and other issues, must necessarily

be replete with danger in a country like this. In Canada there is so much respect for the law that the people rarely question the wisdom of a judicial decision on any subject of importance. Can as much be said for the judgment of a political body, however carefully considered and honestly rendered it may be?

Importance of the Supreme Court of Canada as a Court of constitutional reference.—It is on the Courts of Canada, aided by the ripe judgment and learning of the judicial committee of the Privy Council, we must, after all, mainly depend for the satisfactory operation of our constitutional Act. The experience of the United States has shown the inestimable value of the decisions given by the Judges of the Supreme and the Federal Courts on questions that have arisen, from time to time, in connection with their constitution. The judiciary in all the provinces of Canada can and do constantly decide on the constitutionality of Acts passed by the various legislative authorities of the Dominion. They do so in their capacity as Judges and exponents of the law, and not because they have any special commission or are invested with any political duties or powers by the Constitution. The Supreme Court of Canada established in conformity with the B. N. A. Act (section 101), however, may hear and consider any matter which the Governor-General in Council may deem advisable in the public interest—a useful provision if discreetly used in cases of constitutional difficulty. A reference to the summary of the powers of the Court will show that it is intended to be as far as practicable a court for the disposal of controversies that arise in the working of the constitution of Canada. So far its decisions on the whole have won respect and have been rarely over-ruled by the judicial committee of the Privy Council.

The Governor-General: his functions and responsibilities.—The Governor-General assembles, prorogues, and dissolves parliament, assents to or reserves bills in the name of Her Majesty; but in the discharge of these and all other executive functions which are within the limits of his commission, and in conformity with the constitution, he acts

entirely by and with the advice of his council, who must always have the support of the house of commons. Even in matters of imperial interest affecting Canada, he consults with the council and submits their views to the colonial secretary of state in England. On Canadian questions clearly within the constitutional jurisdiction of the Dominion he cannot act apart from his advisers, but is bound by their advice. Should he differ from them on some vital question of principle or policy he must either recede from his own position or be prepared to accept the great responsibility of dismissing them; but such an alternative is an extreme exercise of authority and not in consonance with the sound constitutional practice of modern times, should his advisers have a majority in the popular branch of the legislature. Should he, however, feel compelled to resort to this extreme exercise of the royal prerogative, he must be prepared to find another body of advisers, ready to assume the full responsibility of his action and justify it before the house and country. For every act of the Crown, in Canada as in England, there must be some one immediately responsible, apart from the Crown itself. But a governor, like any other subject, cannot be "freed from the personal responsibility of his acts, nor be allowed to excuse a violation of the law on the plea of having followed the advice of evil advisers" (*x*). Cases may arise when the Governor-General will hesitate to come to a speedy conclusion on a matter involving important consequences, and then it is quite legitimate for him to seek advice from his official chief, the secretary of state for the colonies, even if it be a matter not immediately involving imperial interests (*y*).

It will therefore be evident that power is practically vested in the ministry, and that the Governor-General, unless he has to deal with imperial questions, can constitutionally perform no executive function except under the responsibility of that ministry. The royal prerogative of mercy, and the power of allowing or disallowing provincial acts are not

(*x*) Hearn's Government of England, p. 133.

(*y*) See case of Lieutenant-Governor Letellier de St. Just, 1878-79.

exercised on his own judgment and responsibility, but under the same constitutional restraints and limitations which apply to all other acts of executive authority. Even with respect to the all important prerogative of dissolution, which essentially rests in the Crown, he acts on the advice of his advisers; and it is obvious from many examples in the recent history of Canada, he does not hesitate to follow that advice under all circumstances.

The Privy Council or Ministry.—The British North America Act provides that the Council, which aids and advises the Governor-General, shall be styled the "Queen's Privy Council for Canada." Here we have one of the many illustrations that the constitutional system of the Dominion offers of the efforts of its authors to perpetuate as far as possible in this country the names and attributes of the time-honoured institutions of England. The ministry is practically a committee of the two houses. Its head is generally known as the Premier, or Prime Minister, who, as the leader of a political party, and from his commanding influence and ability, is in a position to lead the House of Commons and control the government of the country. The moment he is entrusted with this high responsibility it is for him to choose such members of his party as are likely to bring strength to the Government as a political body, and capacity to the administration of public affairs. The Governor-General on his recommendation appoints these men to the ministry. As a rule on all matters of public policy the communications between the Cabinet and Governor take place through the Premier, its official head. If he dies or resigns, the Cabinet is *ex officio* dissolved, and the ministers can only hold office until a new premier is called to the public councils by the representative of the Crown. In case a government is defeated in parliament, the premier must either resign or else convince the Governor-General that he is entitled to a dissolution on the ground that the vote of censure does not represent the sentiment of the country. If the circumstances are such as to justify a dissolution of parliament the premier must lose no time in obtaining an expression of public opinion;

and should it be apparently in his favour he must call parliament together with as little delay as possible; or if, on the other hand, the public sentiment should be unequivocally against him he should resign; for this course has been followed in recent times both in England and Canada. Strictly speaking, parliament alone should decide the fate of the ministry; but the course in question is obviously becoming one of the conventional rules of the constitution, likely to be followed whenever there is a decided majority against an administration at the polls.

From what precedes it will therefore be seen that while there is a nominal constitutional separation between executive and legislative authorities, still it may be said that, in Canada as in England, parliament governs through an executive dependent on it. The Queen is at once the head of the executive authority and the first branch of the legislative department. The responsible part of the executive authority has a place in the legislative department. It is a committee of the legislature, nominally appointed by the Queen's representative, but really owing its position as a government to the majority of the legislative authority. This executive dependence on the legislature is an invaluable, in fact the fundamental, principle of parliamentary government. This council thereby becomes responsible at once to crown and parliament for all questions of public policy and of public administration. In a country like ours legislation is the originating force, and the representatives of the people are the proper ultimate authority in all matters of government. The importance then of having the executive authority represented in parliament and immediately amenable to it is obvious. Parliament is in a position to control the administration of the executive authority by having in its midst men who can explain and defend every act that may be questioned, who can lead the house in all important matters of legislation, and who can be censured or forced from office when they do wrong or show themselves incapable of conducting public affairs. By means of this check on the executive, efficiency of government, and

guarantees for the public welfare are secured beyond question. The people are able through their representatives to bring their views and opinions to bear on the executive immediately. The value of this British system of parliamentary government can be best understood by comparing it with the American system which so completely separates the executive from the legislature.

JNO. GEO. BOURINOT.

(To be concluded.)

THE

CANADIAN LAW TIMES.

OCTOBER, 1889.

FEDERAL GOVERNMENT IN CANADA.

(*Concluded.*)

The Senate.—The Upper House of the Canadian Parliament bears a name which goes back to the days of ancient Rome, and also invites comparison with the distinguished body which forms so important a part of the American Congress; but neither in its constitution nor in its influence does it resemble those great assemblies (*a*).

The Senate of Canada is nominated by the Crown for life, and has limited powers even of legislation since it cannot initiate or even amend money or revenue bills; the Senate of the United States is elected by the state legislatures for a limited term, has a veto on treaties and important appointments to office, can amend appropriation bills so as to increase money grants to any amount, and can sit as a court of impeachment. In one respect, however, the Senate of Canada can be compared to the American house; it is a representative of the federal, as distinguished from the popular principle of representation. The three great divisions of Canada, the Maritime Provinces, Ontario, and Quebec, have been each given an equal representation of twenty-four members with a view of affording a special

(*a*) See article in *Quarterly Review* by Sir Henry Maine (No. 313), "Essay on the Constitution of the United States."

protection to their respective interests— a protection certainly so far not called into action even in the most ordinary matters. Since 1867, the entrance of other Provinces, and the division of the territories into districts has brought the number of senators up to seventy-eight in all, but at no time can the maximum number exceed eighty-four, even should it be necessary to resort to the constitutional provision allowing the addition of three or six new members—a position intended to meet a grave emergency such as a dead lock in a political crisis. But no doubt as long as our parliamentary system is modelled on the English lines, an upper house must more or less sink into inferiority when placed alongside of a popular house, which controls the treasury and decides the fate of administrations. It is in the Commons necessarily that the majority of the ministers sit and the bulk of legislation is initiated. In 1888, the two houses passed one hundred and eleven bills, and of these only three public bills and five private bills originated in the upper house; and the same condition of things has existed since 1867, though now and then, as in 1889, there is a spasmodic effort to introduce a few more government bills in the Senate. In the session of 1888, twenty-six Commons bills were amended out of the one hundred and three sent up to the upper house, and the majority of these amendments were verbal and unimportant. Under these circumstances it may well be urged that by arrangement between the two houses, as in the English parliament, a larger number of private bills should be presented in the Senate, where there is a considerable number of gentlemen whose experience and knowledge entitle them to consider banking and financial questions, and the various subjects involved in legislation. For reasons already given, government measures must as a rule be introduced in the Commons, but still even in this respect there might be an extension of the legislative functions of the upper chamber, and the effort made in 1889 by the goverment in this direction ought certainly to be continued until it becomes a practice and not a mere matter of temporary convenience.

The House of Commons.—It is in the commons house that political power rests. As I have already shown it has both legislative and executive functions, since through a committee of its own it governs the country. Like its great English prototype it represents the people, and gives full expression to the opinions of all classes and interests, to a greater degree indeed than in England itself, since it is elected on a franchise much more liberal and comprehensive. At the present time the Canadian House of Commons contains two hundred and fifteen members or about one member for every twenty thousand persons. The representation is re-arranged after every decennial census by Act of Parliament in accordance with the terms of the constitutional law.

No property qualification is now demanded from a member of the Commons nor is he limited to a residence in the district for which he is elected, as is the case in the United States by law or usage; but should he not be able to obtain a seat in the locality or even in the Province where he lives he can be returned for any constituency in the Dominion. This is the British principle which tends to elevate the representation in the Commons; for while as a rule, members are generally elected for their own district, yet occasions may arise when the country would for some time lose the services of its most distinguished statesmen should the American rule prevail.

The House of Commons may be regarded as fairly representative of all classes and interests. The bar predominates, as is generally the case in the legislatures of this continent (*b*); but the medical profession, journalism, mercantile and agricultural pursuits contribute their quota. It is an interesting fact that a large proportion of members have been educated in the universities and colleges of the provinces, and this is especially true of the representatives from French Canada, where there are a number of seminaries or colleges, which very much resemble the collegiate

(*b*) The Parliamentary Companion notes sixty-two lawyers in the present House of Commons.

institutes of Ontario, or the high schools of the United States, where a superior education, only inferior to that of the universities, is given to the youth of the country. Another matter worthy of mention is the fact that a good proportion of the House has served an apprenticeship in the municipal institutions of Ontario.

The Provinces as Political Organizations.—The Provinces are so many political entities, enjoying extensive powers of local government, and forming parts of a Dominion whose government possesses certain national attributes essential to the security, successful working, and permanence of the federal union. It has been urged by an eminent judge (*c*) that the British North America Act carried out Confederation "by first consolidating the four original provinces into one body politic, the Dominion, and then redistributing this Dominion into four provinces." In other words the provinces were newly created by the Act of Union. But by no reasoning from the structure of the Act can this contention, which makes the provinces the mere creations of the statute, and practically leaves them only such powers as are specially stated in the Act, be justified (*d*). If it were so, there must have been for an instant a legislative union, and a wiping out of all old powers and functions of the provincial organizations, and then a redivision into four provinces with only such powers as are directly provided in the Act.

The weight of authority now appears to rest with those who have always contended that in entering into the federal compact the provinces never intended to renounce their distinct and separate existence as provinces, when they became part of the confederation. This separate existence was expressly reserved for all that concerns their internal government; and in forming themselves into a federal association under political and legislative aspects, they formed a central government for inter-provincial objects only. Far

(*c*) Mr. Justice Strong, *St. Catharines Milling Company* v. *Reginam*, 13 S. C. R. 605.

(*d*) See, however, *per* Hagarty, C.J., *Regina* v. *Hodge*, 46 U. C. R. at p. 149.—Ed. C. L. T.

from the federal authority having created the provincial powers, it is from these provincial powers that there has arisen the federal government to which the provinces ceded a portion of their rights, property and revenues (*e*).

The constitutions of the four provinces, which composed the Dominion in 1867, are the same in principle and in details, except in the case of Ontario where there is only a legislative assembly. The same may be said of the other provinces that have been brought into the union since 1867. All the provisions of the British North America Act that applied to the original provinces were as far as possible made applicable to the provinces of British Columbia, Manitoba and Prince Edward Island, just as if they had formed part of the union in 1867. All of the provinces have the authority under the law to amend their constitutions, except as regards the office of Lieutenant-Governor. As in Ontario, there is only one House in Manitoba and in British Columbia.

In all the provinces, at the present time, there is a very complete system of local self-government administered under the authority of the British North America Act and by means of the following machinery:

A lieutenant-governor appointed by the governor general in council.

An executive or advising council, responsible to the legislature.

A legislature, of an elective house in all cases, with the addition of an upper chamber appointed by the crown in three provinces, and elected by the people, in one.

A provincial judiciary, composed of several courts, the Judges of which are appointed and paid by the Dominion government.

A civil service with officers appointed by the provincial government, holding office as a rule during pleasure and not removed for political reasons.

(*e*) See argument of Hon. E. Blake, Q.C., in the case of the *St. Catharines Milling Co.*, 1888.

A municipal system of mayors, wardens, reeves, and councillors, to provide for the purely local requirements of the cities, towns, townships, parishes and counties of every province.

The Lieutenant-Governor.—The Lieutenant-Governor is appointed—practically for five years—by the Governor-General in council, by whom he can be dismissed for "cause assigned" which, under the constitution must be communicated to parliament. He is therefore an officer of the Dominion as well as the head of the executive council of the Province and possesses, within his constitutional sphere, all the authority of a Lieutenant-Governor before 1867. He acts in accordance with the rules and conventions that govern the relations between the Governor-General and his privy council. He appoints his executive council and is guided by their advice as long as they retain the confidence of the legislature. He has "an unquestionable constitutional right to dismiss his ministers, if, from any cause, he feels it incumbent upon him to do so. In the exercise of this right as of any other of his functions, he should of course maintain that impartiality towards rival political parties which is essential to the proper performance of the duties of his office; and for any action he may take he is (under the fifty-ninth section of the British North America Act) directly responsible to the Governor-General." Doubts have been raised from time to time, though rarely now, compared with the earlier years of the working of our system, whether the Lieutenant-Governor of a Province represents the crown as before the union of 1867, but it is generally admitted that in the discharge of all the executive and administrative functions that devolve constitutionally upon him and require the interposition of the Crown in the Province the Lieutenant-Governor has all the necessary authority.

The Executive Council.—The executive council which is the name now given to the administration of each province, a name borrowed from the old provincial systems of government, comprises from nine members in Prince Edward Island, to five in British Columbia, holding as a rule, various

provincial offices as heads of departments. Their titles vary in some cases, but generally there is in every executive council an attorney-general, a provincial secretary, and a commissioner of mines and lands. All the members of the executive council, who hold departmental and salaried offices, must vacate their seats and be re-elected as in the case of the Dominion ministry. In Prince Edward Island there are six members without portfolios. The principle of ministerial responsibility to the Lieutenant-Governor and to the legislature is observed in the fullest sense.

The Legislatures.—The legislatures of all the provinces have a duration of four years,—except in Quebec, where the term is five years—unless sooner dissolved by the Lieutenant-Governor. They are governed by the constitutional principles that obtain at Ottawa. The Lieutenant-Governor opens and prorogues the legislature with the usual formality of a speech. A speaker is elected by the majority in each assembly or is appointed by the Crown in the Upper Chamber. The rules and usages that govern their proceedings are derived from those of England and do not differ in any material respect from the procedure in the Dominion parliament. The legislatures of Ontario and Quebec, like the Dominion parliament must sit once every twelve months; but apart from the law to the effect that supply has to be voted every twelve months the Act demands an annual session. None of the provinces have yet adopted biennial sessions in imitation of the very general practice of the State legislatures. Not only does the British practice of voting annual estimates stand in the way of this change which could only be effected by constitutional amendments, but it would be hardly acceptable to an opposition in a legislature, since it would greatly strengthen an administration and lessen their responsibilities to the assembly. In the United States there is no cabinet with seats in the assembly dependent on the vote of the majority, and biennial sessions have their advantages, but it would be in this country a radical change hardly consistent with the principles of responsible government.

The subjects that come under the purview of the legislature, from session to session, are multifarious, so extensive is the scope of their legislative powers. The very section giving it jurisdiction over property and civil rights necessarily entails legislative responsibilities which touch immediately every man, woman and child in the province.

The Veto of the Lieutenant-Governor over Provincial Legislation.—It is not necessary to dwell at greater length on the power of disallowance than I have already done, but there is one question of some interest which requires a few words of comment since it is not quite intelligible on sound constitutional principles. The British North America Act gives the Lieutenant-Governor, as well as the Governor-General, the power to "reserve," as well as "veto," a bill when it comes before him. The power of reserving bills is exercised by the Governor-General in very exceptional cases affecting Imperial interests; but there is no instance in our parliamentary history since the concession of responsible government, of the exercise of the veto, a royal prerogative in fact not exercised even in England since the days of Queen Anne. Lieutenant-Governors not unfrequently reserve bills, in all the provinces, for the consideration of the Governor-General in council, and this is constitutionally justifiable; but the same functionaries in the maritime sections have occasionally vetoed bills of their respective legislatures. Their legal right is unquestionable, but it is a right clearly quite inconsistent with the general principles of British constitutional government which should govern us in all cases.

In the United States where the power of veto is given to the President, and to all the governors of the states, with only four exceptions, the cabinet or executive officers have no responsibility whatever in matters of legislation, and the power generally operates as a useful check on the legislatures, which otherwise would be left practically without any control on their proceedings. In the Canadian provinces, however, the case is very different, for the ministry in each is responsible to the House and to the Lieutenant-Governor for legislation. If any bill should

pass the Houses despite their opposition as an administration, it is clear that they have, more or less, according to the nature of the measure, forfeited the confidence of the people's representatives, and it would be a virtual evasion of their ministerial responsibility, for them at the last moment to advise the Lieutenant-Governor to intervene in their behalf and exercise his prerogative. He might well question their right to advise him at all, since they had shown they had not the support of the legislature of which they were a committee. In Ontario and Quebec no ministry has ever occupied so anomalous a position, and the only explanation that can be offered for the existence of the veto in the other provinces is that by carelessness or ignorance governments have permitted legislation, which the Lieutenant-Governor has found to be beyond the competency of the legislature, or otherwise very objectionable, and that he has been forced to call the attention of his cabinet to the fact.

An executive council has, under these circumstances, (for I am speaking from authoritative information on this interesting point), felt itself bound to accept the situation and advise the disallowance of the bill. Under the peculiar circumstances that probably existed the veto may at times have proved advantageous to the public interests; but looking at the nature of our government, it would be probably wiser to be content with the check which the Constitutional Act already imposes on improper legislation in a provincial legislature—that is, the general power of veto by the Dominion Government.

General Remarks on the Judiciary.—The judiciary, like its English prototype, evokes respect in every Province of Canada, for the legal attainments and high character of its members. Entirely independent of popular caprice, and removable only for cause on the address of the two houses of parliament, it occupies a very advantageous position compared with the same body in many of the United States. While the administration of justice, including the constitution, maintenance and organization of the Provincial Courts, both of civil and criminal jurisdiction, is one

of the matters within the purview of the legislatures; the government of the Dominion alone appoints and provides the salaries of the Judges of the Superior, District and County Courts, except those of the Probate Court in Nova Scotia and New Brunswick. It has also been decided that the Dominion Parliament is at liberty to create new Courts, when public necessity may require it, for the better administration of the laws of Canada, or to assign to the jurisdiction of existing Courts any further matters appro priate to their sphere of duty. For when legislating within its proper bounds, that Parliament is clearly competent to require existing Courts in the respective provinces, and the Judges of the same, who are appointed and paid by the Dominion, and removable only by address from the same Parliament, to enforce its legislation (*f*).

The position of the judiciary of Canada may be compared with that of the federal judiciary of the United States, since the latter has a permanency and a reputation not enjoyed by the Courts of all the States. The President appoints, with the approval of the Senate, not only the Judges of the Supreme Court at Washington, but the Judges of the Circuit and District Courts. In the majority of the States, however, the Judges are elected by the people, and in only four cases is there a life tenure. The Supreme and Circuit Courts of the United States occupy a vantage ground from their permanency, and the nature of their functions, which embrace a wide sphere of study and interest. In Canada the salaries are even less than in the United States; and there are also inequalities between the large and small provinces which ought to be removed as soon as salaries generally are readjusted and increased, so as to be more in consonance with the great responsibilities of these high positions. The county and district Judges especially receive far too small a sum for the onerous and responsible work which they have to perform. Although the salaries are small compared with what a leading lawyer can make at the bar, yet the freedom of

(*f*) *Valin* v. *Langlois*, 3 S. C. R. 70; 5 App. Cas. 115.

the office from popular caprice, its tenure practically for life, its high position in the public estimation, all tend to bring to its ranks men of learning and character. Since those deplorable times in Canadian history when there was a departure from the wise principle of having the executive and legislative department in separate hands, the Bench has evoked respect and confidence; and there have been no cases of the removal of a judge on the address of the two houses.

The Legal Powers of Municipalities.—The municipal institutions of Canada are the creation of the respective legislatures of Canada and may be amended or even abolished under the powers granted to that body by the ninety-second section of the fundamental law. The various statutes in force establish councils, representative in their nature in accordance with the principle which lies at the basis of our general system of local government. All the municipalities have large borrowing powers, and the right to issue debentures to meet debts and liabilities incurred for necessary improvements or to assist railways of local advantage. The councils, however, cannot directly grant this aid, but must pass by-laws setting forth the conditions of the grant, and means of meeting the prospective liabilities, and submit them to the vote of the rate-payers, of whom a majority must approve the proposition. The reference to the people at the polls of such by-laws is one of the few examples which our system of government offers of a resemblance to the *referendum* of laws passed by the Swiss federal legislature to the people for acceptance or rejection at the polls. It is a practice peculiar to municipal bodies, though the same principle is illustrated in the case of the Canada Temperance Act.

On the right of the provincial legislatures to delegate powers specially given them by the constitution to any body or authority also created by themselves, we have a decision by the Privy Council in the case of the Liquor License Act of Ontario (the most important yet given by that tribunal on the constitutional jurisdiction of the provinces), which authorized certain license commissioners to pass resolutions

regulating and determining within a municipality the sale of liquors. The maxim *delegatus non potest delegare* was distinctly relied upon by the opponents of the measure, but the Judicial Committee emphatically laid down that such an objection is founded on an entire misconception of the true character and position of the provincial legislatures. Within the limits of its constitutional powers "the local legislature is supreme and has the same authority as the Imperial Parliament or the Parliament of the Dominion would have had under the circumstances to confide to a municipal institution or body of its own creation, authority to make by-laws or resolutions as to subjects specified in the enactment, and with the object of carrying the enactment into operation and effect." Such an authority is, in their opinion, "ancillary to legislation, and without it an attempt to provide for varying details and machinery to carry them out might become oppressive or absolutely fail." A legislature in committing important regulations to agents or delegates it is decisively stated, does not by any means efface itself; for "it retains its powers intact, and can, whenever it pleases, destroy the agency it has created, and set up another, or take the matter directly into its own hands," and how far it "shall seek the aid of subordinate agencies and how long it shall continue them, are matters for each legislature, and not for Courts of law to decide."

General Remarks on the Municipal System.—The municipal system on the whole is creditable to the people of Canada. It has its weaknesses owing in some measure to the disinclination of leading citizens, especially in the cities and large towns, to give up much of their time to municipal duties, although every person is so deeply interested in their efficient and honest performance. Jobbery and corruption are, however, not conspicuous characteristics of municipal organizations in the provinces; and we have happily no examples in our history at all inviting comparison with the utter baseness of the Tweed ring in New York. In the rural municipalities of Ontario there is a greater readiness than in the large cities to serve in the municipal councils, and as I have already shown those bodies have given not a

few able and practical men to parliament. On an effective system of local self-government rests in a very considerable degree the satisfactory working of our whole provincial organization. It brings men into active connection with the practical side of the life of a community and educates them for a larger though not more useful sphere of public life.

Political organization of the Territories.—The Government of the Dominion now holds complete jurisdiction over the Territories. The provisional district of Keewatin was formed some years ago out of the eastern portion until the settlement of the boundary dispute between Ontario and the Dominion, but since that difficulty was adjusted it has only a nominal existence, though it still remains under the government of the Lieutenant-Governor of the Province of Manitoba. In 1882 a large portion of the North-West was divided into the four districts of Assiniboia, Saskatchewan, Alberta, and Athabasca, for postal and other purposes. Beyond these districts lies an unorganized and relatively unknown region, watered by the Peace, Slave, and Mackenzie Rivers.

Until the winter of 1888, the Territories were governed by a Lieutenant-Governor and Council, partly nominated by the Governor-General in council and partly elected by the people. In the session of 1888, the Parliament of Canada passed an Act granting the Territories a legislative assembly of twenty-two members, but they do not yet enjoy responsible government like the Provinces. The Lieutenant-Governor, who is appointed by the Governor in council for four years, has, however, the right of choosing from the assembly, four members to act as an advisory council in matters of finance. Three of the Judges of the Territories sit in the assembly as legal experts, to give their opinion on legal and constitutional questions as they arise, but while they may take part in the debates they cannot vote. The assembly has a duration of three years and is called together at such times as the Lieutenant-Governor appoints. It elects its own speaker and is governed by rules and usages similar to those that prevail

in the assemblies of the provinces. The civil and criminal laws of England are in force in the Territories, so far as they can be made applicable; and the Lieutenant-Governor and assembly have such powers to make ordinances for the government of the North-west as the Governor-General in council may confer upon them; but their powers cannot at any time exceed those conferred by the constitutional Act upon the provincial legislatures. There is a Supreme Court composed of five Judges, appointed by the Ottawa government and removable upon the address of the Senate and House of Commons.

The Court has within the Territories, and for the administration of the law, all such powers as are incident to a superior court of civil and criminal jurisdiction. The Territories are represented in the Senate by two senators and in the House of Commons by four members, who vote and have all the other privileges of the representatives of the provinces. In this respect the territories of Canada enjoy advantages over the United States territories which are not represented in the Senate, but have only delegates in the house of representatives without the right of voting. Year by year, as the population increases, the people must have their political franchises enlarged. The time has come for introducing the ballot, and the inhabitants are an exceedingly intelligent class, drawn for the most part, so far, from Ontario and the other English provinces, and are in every way deserving of governing themselves in all local matters, with as little interference as possible from the central authority.

JNO. GEO. BOURINOT.

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