C A N A D I A N C O N S T I T U T I O N A L

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C O N T E N T S.

CHAPTER IV.

ADMINISTRATION OF JUSTICE IN THE DOMINION: Division of Jurisdiction; Law and Justice in the New Territories; The Supreme Court of Canada; Authority and scope; Jurisdiction; Appeals to the Privy Council; Criminal Appeals; Exchequer Court; Admiralty Court; Other judicial bodies; Revising Officers Courts; Patents C ourt; Dominion Railway Board; Precedence in the Courts and the King's Counsel question; Criminal Code; Extradition; Act of 1868 (Dominion); Imperial Act 1870; Relations with the United States as to extradition; Dominion Act of 1873; Edward Blake and extradition; present position of extradition regulations.

Pages..... 22.

CHAPTER V.

REPRESENTATION;THE FRANCHISE AND ELECTIONS: Representation in the Senate, in 1867, and at present; The federal principle and its abandonment; Representation in the House of Commons, in 1867, and at present; Principle of representation by population and its variations; Proposed reduction in the Maritime Provinces; Electorals districts and their change; The Franchise, in 1867; Act of 1869 as to Indians; Franchise Act, 1885; Its repeal, 1898; Present qualifications of electors; Elections; Act of 1874; Trial of controverted elections; The Aylesworth Elections Act.

Pages..... 29

CHAPTER VI.

CONSTITUTION AND PRIVILEGES OF THE HOUSES OF PARLIAMENT: Constitution and privileges in 1867; Dual representation and its abolition; Property qualification and its abolition; The Oath's Bill; Amendment of the British North America Act, 1875; Controverted Elections; Deputy Speaker; Miscellaneous alteration of rules; Obstruction and the Closure Rule; The Senate; Increase in number of Senators; Attempted special increase in number of Senators; The Senate's veto and its exercise; Reform of the Senate.

Pages..... 36.

CHAPTER VII.

THE EXECUTIVE: The Cabinet; Members and Departments at Confederation; The premier as President of the Council; Changes and additions to Departments; The High Commissioner of Canada; The Governor-General; His dual position; The Governor's Instructions; Proposed revision in 1875; Mr. Blake's criticism and amendments; New Instructions, 1878;

CHAPTER VII - (Continued)

Mr. Blake's resolution of 1875; The Prerogatives; Pardon; Commutation of Lepine's sentence; New instructions, 1878; Reservation of Bills; New instructions as to reservation; Dissolution; Appointments to Office; Sir Charles Tupper and the Earl of Aberdeen; The Letellier Affair; Dismissal of Mercier and MacInnes; Relation of the Executive to the Provinces; Reservation of provincial Bills; Disallowance of Provincial Acts; The Civil Service.

Pages..... 41

CHAPTER VIII.

PROVINCIAL CONSTITUTIONS: Provision for alteration; Powers, privileges and immunities of members; Powers of the Lieutenant-Governor; The Executive Departments; Abolition of Legislative Councils; References of controversies to the Supreme Court; Reference of constitutional questions to local courts; Appointment of King's Counsel; Commissions to make enquiries re public matters; Municipal corporations; Elections; Controverted Elections; Official language of Manitoba.

Pages..... 59.

CHAPTER IX.

THE COMMERCIAL-TREATY-MAKING POWER AND FISCAL INDEPENDENCE: Classes of treaties and distinction; The treaty-making power at Confederation; Reciprocity negotiations, 1869 and 1874; Canadian attitude toward treaty-making powers, 1874 and 1882; Colonial attitude; Mr. Galt's representations; Withdrawal and Adherence for the colonies; Lord Kimberley in 1882; German and Belgian Treaties; Mr. A. T. Galt in Spain and France; Sir Charles Tupper at Madrid; Department of Trade and Commerce; Canadian attitude to treaty-making power 1889 and 1892; Reciprocity negotiations 1892; Sir Charles Tupper at Paris and the French Convention, 1893; Colonial conferences and the treaty-making power; Preferential tariff, 1897, and the favored nations; French Treaty, 1907, Statement of Colonial Office; Convention with Germany, 1910; Italy, Belgium and Holland in 1910; Negotiations with the United States, 1910; Reciprocity Agreement, 1911; Royal Commission on Trade Relations, 1909; Royal Colonial Trade Commission, 1912; Summary.

Pages..... 63.

CHAPTER X.

EXTERNAL AFFAIRS AND POLITICAL TREATIES: External Relations in 1867; Reciprocity Treaty, 1854; Ashburton Treaty 1842;

CHAPTER X - (Continued)

Statutory provision; Washington Treaty, 1871; Fisheries Commission, 1877; Sitting-Bull and his Sioux; Attitude of Colonial Office in 1877; Extradition Treaties; Imperial Treaty with Russia, 1887; Fisheries Commission, 1888; Canadian Attitude, 1889; Treaty of Washington, 1892; Behring Sea Controversy, 1895; Anglo-American Joint High Commission, 1898; Behring Sea Arbitration; 1893; Alaska Boundary Arbitration, 1901 - 1903; Canada and Japan, 1894-1906; Mr. Lemieux in Tokio; Fisheries Case, 1909; Anglo-American Arbitration Treaty, 1911; Pecuniary Claims Treaty, 1911; Canada and the diplomatic service; Department of External Affairs; Colonial Conferences on political treaties; Summary.

Pages..... 82.

CHAPTER XI.

IMPERIAL RELATIONS: Prior mention; "Carnarvon Terms"; South-African War; Militia and Land Defences; Imperial Naval Defence; Canadian Navy; Colonial Conferences and Imperial Defence; Imperial Federation; Conclusion.

Pages..... 102.

CHAPTER I.

CANADA AT CONFEDERATION.

The Constitution of Canada was designed to be "similar in principle to that of The United Kingdom", and it unquestionably fulfills that design in its fundamentals. Mr. Dicey's great division of the Constitution of Great Britain into the "Law" and "Custom" of the Constitution applies equally well to that of Canada. Hence, the development or change that has accrued since Confederation can be examined in those two branches. Change in the Law of the Constitution must have been by Statute, by judicial decision, or by some mandate having the force of a statute. Change in the Custom must have come by alteration in practice.

The Custom of the Constitution of Canada does not begin in 1867 as the Law of the Constitution does. The Custom of the Constitution of Canada includes all the constitutional precedents and principles which the English constitution had erected up to 1867, in the operation of those same fundamentals, whcih the two systems have in common, and to this is added Canadian constitutional practice and precedent since that date.

The Law of the Constitution of Canada is found in the British North America Acts of 1867, 1871, 1875, 1886 and 1907, in the commissions and instructions issued to

each Governor-General, in Orders-in-Council of the Imperial Government and of the Dominion Government having the force of law in Canada, in statutes enacted by the Imperial Parliament which apply either expressly or by necessary intendment to the Dominion, in statutes enacted by the Dominion Parliament within the jurisdiction conferred on it, and finally in statutes enacted by the provincial legislatures in so far as they affect the provincial constitutions.

That is the field of research of this essay. The starting-point is Canada's position in 1867.

At that date Canada was composed of the four provinces of Ontario, Quebec, New Brunswick and Nova Scotia. On the South The United States extended the full length of its border. Prince Edward Island and Newfoundland were distinct British colonies. North of Quebec and Ontario was an unsettled and unorganized district. West of the Great Lakes as far as the Rocky Mountains was a country of which little was known, owned by and ruled by the great Hudson's Bay trading Company. West of the Rocky Mountains was the colony of British Columbia.

The Dominion was in every sense a colony in status. Its local affairs were the subject of the watchful care of the Colonial Office, which did not hesitate to direct them in the proper channels if they seemed to err. The Chief Executive was a Governor-General whose instructions authorized him in general to act upon the advice of his responsible ministers, unless he thought it better to do otherwise. The colony had no rights or influence in the

direction of its external affairs. Its defence by land and sea was provided by the Mother country.

On the other hand, the Dominion began the period with a good organization, federal, local and municipal, for the administration of its own affairs. It had been endowed with a fairly large measure of fiscal independence, in that it had the right to frame its own trade policy and customs duties; it had been granted control of the Post-Office and of its currency system. The organization of the machinery for the administration of justice was also fairly complete.

CHAPTER II.

EXTENSION OF BOUNDARIES.

The first House of Commons constituted under the new charter had scarcely been convened before the ambition of the union to extend itself from ocean to ocean was expressed. On December 4, 1867, the Hon. William McDougall moved a resolution in the House, declaring that "It would promote the prosperity of the Canadian people and conduce to the advantage of the Empire, if the Dominion of Canada were extended Westward to the shores of the Pacific Ocean". The result of this resolution was the negotiation with the Imperial authorities for the surrender of the rights of The Hudson's Bay Company in these lands and for the union of Rupert's Land and the North-West Terriroties with the Dominion. The extinguishment of the proprietary rights of the Company was accomplished by purchase negotiated bythe Home Government. An Imperial enactment known as "The Rupert's Land Act, 1868," (1) empowered Her Majesty to accept the surrender of the rights of the Hudson's Bay Company on terms to be agreed upon, "subject to the approval of Her Majesty-in-Council of the terms to be proposed by the Dominion Parliament for the admission of Rupert's Land", and to declare Rupert's Land a part of the Dominion of Canada for legislative purposes.

The negotiations completed, this Act was succeeded by an Imperial Order-in-Council dated 23rd June, 1870,(2) which admitted Rupert's Land and the North-West Terrirotires to the Union and declared the Parliament of Canada to have full power

to legislate for the future welfare and good government of the North-West Territories. Mr. Clement notes in this connection that the legislative power in the North-West Territories was conferred by this Order-in-Council operating as an Imperial Act by virtue of Section 146 of the British North America Act, 1867, while as to Rupert's Land, legislative authority was conferred by the Rupert's Land Act, 1868(3). This distinction was obliterated by the Imperial British North America Act, 1871,(4), when full legislative power over all the territories, not included in the boundaries of any province, was conferred on the Dominion of Canada.

Even before the issue of the Imperial Order-in-Council the Dominion Parliament passed an Act in 1869 called, "An Act for the Temporary Government of Rupert's Land and the North-West Territories when united with Canada".(5) This Act conferred executive control and restricted legislative authority on a Lieutenant-Governor, and nominated Council. This Act has been superceded by other provisions for this government.

The next step was the creation of the new Province of Manitoba from a part of the North-West Territories. The Dominion Act of 1870, called "The Manitoba Act", (6), defined the boundaries and constitution of the Province, making it similar in form to that of the other provinces, with the exception that all Crown lands were reserved to the Dominion. A Lieutenant-Governor, Legislative Council and Legislative Assembly were provided for. Four represenatives in the House

of Commons and two members in the Senate were allotted as Federal representation in the first instance, such representation to be readjusted from time to time in accordance with the provisions of the British North America Act, 1867. This Act was to come into force "on, from and after the day upon which the Queen shall, by Order-in-Council in that behalf, admit Rupert's Land and the North-West Territories into the Dominion of Canada" (7).

The validity of such an enactment was highly doubtful under the terms of the British North America Act, 1867, and for greater security an amendment to the latter Act was passed by the Imperial Parliament on address from the Senate and House of Commons. This Act was called The British North America Act, 1871, (8). It validated the Manitoba Act and the Act respecting the Government of Rupert's Land and the North-West Territories; provided for the authority of the Dominion to erect new provinces from any part of the territory not already incoporated in a Province, for the power to alter the boundaries of provinces with the consent of their legislatures; and that a provincial constitution, when once granted by the Dominion, could not be altered by the Dominion Parliament, such authority to become at once vested in the provincial legislature so created.

It is interesting to note the fact that ever since this Act, the Dominion Parliament has had authority to legislate for the North-West Territories as fully as a colonial legislature may, and in respect of this territory, the powers of both local and federal jurisdiction are vested in the Dominion Parliament. It is true that large powers of self-government

have been from time to time granted the people of the Territories, but these powers are only delegated, and may be revoked by the same authority which conferred them. Herein the Territories differ essentially from the Provinces, whose authority when once erected has been held to be as plenary and as ample within its own sphere as is that of the Dominion Parliament in its federal capacity.(9)

In January of 1871, the Legislature of British Columbia - which was, prior to this time, a distinct Crown colony - passed resolutions approving a union with the Dominion upon certain conditions, and the address presented in pursuance of that resolution was approved by the House of Commons and Senate of Canada, and forwarded by them to Her Majesty-in Council. An Imperial Order-in-Council, dated 16th May 1871 (10), was issued in pursuance of Section 146 of the British North America Act, 1867. This Order-in-Council, after reciting the circumstances of the addresses and their approval enacted that - "from and after the 20th day of July, 1871, the said Colony of British Columbia shall be admitted into and become a part of the Dominion of Canada."

No alteration of the Provincial constitution was made by Imperial Act at the time of union. The Legislative Assembly, already consitituted in the Province, made provision for its own constitution, and practically the only amendment necessary at the union was the appointment of the Lieutenant-Governor by the Federal authorities instead of by the Imperial Government.

Section 146 of the British North America Act, 1867, had anticipated the entry of Prince Edward Island into the Union, and its authority was invoked in 1873. On July 1st of

that year the Island was formally admitted, on address from the Provincial Legislature and the Dominion Parliament, by an Imperial Order-in-Council dated 26th June, 1873.(11) The reppesentation of Prince Edward Island in the Senate and House of Commons had already been provided for IN THE British North America Act, 1867, Section 147. The provincial constitution of Prince Edward Island was already complete.

Dominion legislation in 1875 amended and consolidated the previous legislation as to the constitution of the North-West Territories. The North-West Territories Act, 1875, (12) which was to apply to "the Territories formerly known as Rupert's Land and the North-West Territories, with the exception of such portions thereof as form the Province of Manitoba and the District of Keewatin", provided for the first resident Lieutenant-Governor, and under it the first legislative session in the Territories was held. This Act only came into force on 7th October, 1876.

At the same time the Keewatin Act (13) became operative. This Act created the separate District of Keewatin and for its administration provided that the Lieutenant-Governor of Manitoba should 'ex officio' be the Lieutenant-Governor of the District of Keewatin (14). He was to be assisted by a Council of not more than ten persons and not less than five, to be nominated by the Governor-General-in-Council. Legislative powers were delegated to this Lieutenant-Governor-in-Council in a limited range of subjects.

The North-West Territories Act, 1875, had been in force only six months when it was revised by another Dominion Statute entitled "An Act to amend the North-West Territories Act"(15). Hereby the section which defined the legislative powers of the

Lieutenant-Governor-in-Council was repealed, and those powers were declared to be such as should from time to time be conferred on the Legislature by Order-in-Council, provided always that such powers might at no time exceed those conferred on the several provinces by Section 92 of the British North American Act, 1867. In pursuance of this enactment, an Order-in-Council dated 11th of May, 1877, was promulgated, which enumerated the subjects of legislative competence to the Territories. These were, generally, those of a purely local and private nature.

The North-West Territories Act, 1880, (16) which followed, merely amended and consolidated previous Acts.

At the request of the Parliament of Canada, an Imperial Order-in-Council was issued, dated July 31st, 1880, which declared that all the British possessions in North America, other than Newfoundland and its dependencies, should be included in the Dominion of Canada. Since this right of the Crown to alter the boundaries of a colony by proclamation had been the subject of much discussion as to its validity, an Act was later passed known as The Colonial Boundaries Act, 1895, which confirmed this right in the Corwn and was made retroactive in confirming all acts of the Crown in that behalf formerly performed. This was the Order-in-Council of 1880 validated.

On the 8th of May, 1882, an Order-in-Council was issued which constituted Saskatchewan, Alberta and Assiniboia, with boundaries therein defined, as provisional Districts for the purpose of administration. The Dominion then passed the North-West Territories Representation Act, 1886, which divided the provisional districts into electoral districts,

sending four members to the House of Commons (17). The validity of this enactment being in grave doubt, the Dominion again solved its difficulty by appeal to the Imperial Parliament. The necessary amendment to the British North America Act was thereupon forthcoming, called The British North America Act, 1886, (18). It validated the Dominion Act above referred to (19), and authorized the Parliament of Canada from time to time to make provision for the representation of any Territories which are not included in any province.

In 1888 (20) a Legislative Assembly of twenty-two members replaced the old Council. Three judges were to sit in this assembly as experts, to join in the debates and advise, but not to vote. In 1891(21) additional powers were conceded to the legislature. In 1897 (22) a responsible ~~legislative~~ Executive Council was formed. In 1898 (23) and in 1900(24) legislation resulted in a quasi-provincial constitution. In 1905 the two provinces of Alberta and Saskatchewan were erected out of the North-West Territories, with full provincial rights and powers, save that the control of the Crown lands therein remained vested in the Crown in the Dominion Parliament (25).

At the same time a revision was made of the constitution of what remained of the North-West Territories.(26) This Act is now incorporated in the Revised Statutes of 1906 as Chapter 62, and forms the present charter of the local government of the Territories. The chief executive officer is now called The Commissioner of the North-West Territories. He is assisted by a Council, not exceeding in number four persons, nominated by the Governor-in-Council. Their legislative

powers are such as are from time to time designated by the Governor-in-Council.

Still another district was carved out of the North-West Territories in 1898. This new portion was designated as the Yukon Territory. Its boundaries and constitution are defined by The Yukon Act (27) of that year. From 1898 till 1909 the "Commissioner of the Yukon Territory" and a Council of not more than eleven members, five of whom were elective and the remainder appointed by the Governor-General, made up the local legislature and executive. On 1st May, 1909, the Act to Amend this Yukon Act, passed in 1908, (28) came into force. It substituted for the former Council, a purely elective council of ten members, elected to represent electoral districts to be named and defined by the Commissioner-in-Council. The council so elected was to hold office for three years, subject to being sooner dissolved by the Commissioner..

The boundaries of the individual provinces have been altered from time to time since erection. Power to effect this change was conferred upon the Dominion Parliament by the British North America Act, 1871, (29), Such change to be subject in every case to the consent of the province or provinces concerned. In particular, the delineation of boundaries occasioned a very bitter dispute between Ontario, Manitoba and the Dominion, but since this dispute derives much of its intensity and acrimony from the political differences of the disputants, rather than from the divergence of constitutional opinions entertained, (30) only passing reference need be made to it here. The original dispute was arbitrated but the award of the arbitrators was not accepted. In the final

adjudication of the Privy Council in 1884 it was declared that such an award was not 'per se' effective to alter the boundaries of a province, but the terms of the award having been found to be substantially correct, Imperial legislation was recommended to enforce them. Accordingly, on address from the Parliament of Canada, an Imperial Act (31) determined the boundaries in accordance with the award.

The boundaries of Ontario and Manitoba were extended by concurrent Dominion and provincial legislation in 1912 (32).

The Quebec boundaries were altered by concurrent legislation in 1898 (33), and again in 1912 (34).

REFERENCES: (1) R.S.C.1906, Vol.IV, P.3125; (2) R.S.C.1906, Vol.IV, P.3143; (3)Clement: Canadian Constitution, P.552; (4)R.S.C.1906, Vol.IV, P.3129,s.4; (5) (6)33 Vict. c.3; R.S.C.1906,Vol.IV,P.3135; (7)Ibid s.1; (8)R.S.C.1906, Vol.IV,P.3129; (9) See Hodge vs Regina 9 A.C.117; (10)R.S.C.1906,Vol.IV,P.3165;(11) Ibid P.3175; (12) 38 Vict.c.49, s.1; (13) 39 Vict.c.21; ~~xii~~ or R.S.C.1886,c.53; (14) 39 Vict.c.21 s.3; (15) 40 Vict. c.7; (16) 43 Vict. c.25; (17) 49 Vict. c.24; (18) 49-50 Vict. c.35; (19) 49 Vict. c.24; (20) 51 Vict. c.19; (21) 54-55 Vict. c.22; (22) 60-61 Vict.c. 28; (23) 61 Vict.c.5; (24) 63 Vict. c. 44; (25) 4-5 Ed.VII c. 3 and c.42; (26) 4-5 Ed.VII c. 27; (27) 61 Vict. c.6 now R.S.C.1906 c.63; (28) 7-8 Ed.VII c. 76; (29) 34-35 Vict. c.28;s.3; (30) See O.M.Biggar: Sir Oliver Mowat; (31) Canada Boundaries Act 1889, U.K. 52-53 Vict. c. 28; (32)Dominion Acts: 2 Geo.V. c.40, c. 32. Ontario Act: 2 Geo.V c.3. Manitoba Act: 2 Geo. V. c ; (33) Dominion Act: 61 Vict. c.3. Quebec Act: R.S.Q.1909 c. 2; (34) Dominion Act: 2 Geo.V c.45; Quebec Act : 2 Geo. V c.

CHAPTER III.

MODIFICATION OF FINANCIAL TERMS OF UNION.

Since Confederation there have been constitutional difficulties of another kind that have caused no little local dissatisfaction, and made readjustments of the terms of union necessary. These difficulties arose in connection with the financial terms of union as originally agreed upon.

By the terms of union as set out in sections 102 to 126 of the British -North America Act, 1867, (1) the public debts of the provinces to be assumed by the Dominion were as follows: - The Canada's, $62,500,000.; Nova Scotia, $8,000,000.; New Brunswick, $7,000,000. If the debt of any province was less than the amount so allowed, the Dominion was to pay to that province interest at the rate of five per cent. on the amount of such deficiency. Then yearly subsidies were to be paid to the provinces as follows:- Ontario, $80,000.; Quebec, $70,000.; Nova Scotia, $60,000.; and New Brunswick, $50,000. To each of these amounts was to be added an amount equal to eighty cents per head of the population as ascertained at each preceding census, with $320,000 as the maximum for Nova Scotia and New Brunswick. New Brunswick was to receive an additional annual allowance of $63,000. for a period of ten years.

There was immediate dissatisfaction with these terms which expressed itself as soon as the Act was passed. Nova Scotia was particularly indignant at what it considered very unfair treatment, and feeling in this regard was greatly aggravated by political animus aroused by the methods used

to carry Confederation in the local legislature. The demand for secession from the Union became very strong. Mr. Joseph Howe was despatched to London to demand the denunciation of the union, and the situation for the young confederation was very acute. Dr. Tupper was delegated by the Dominion Government to present its case to the Imperial authorities.(2) The result of the negotiations which ensued in London between Dr. Tupper, Mr. Howe and the Colonial Office, was that better financial terms were offered to Nova Scotia by way of compromise. After further correspondence between Sir John A. Macdonald and Mr. Howe, the Nova Scotia demands for secession were modified, and an agreement come to which was approved by Imperial Order-in-Council dated January 25th, 1869. In pursuance thereof, the Parliament of Canada passed an Act which was assented to June 22nd, 1869, called "An Act respecting Nova Scotia" (3). This Act, reciting that "it is just and expedient to add to the sums payable to the Province of Nova Scotia under the British North America Act, 1867," provided that the provincial debt to be allowed Nova Scotia, and in respect of which interest was to be paid by the Dominion, should be $9,186,756. instead of $8,000,000. as provided in the British North America Act 1867. (4) Further that an extraordinary annual grant should be made to the province of $82,698. for a period of ten years from 1st July, 1867. The last section expressed that the said grants and provisions were made in full settlement of all demands on the Dominion by the Province of Nova Scotia.

The new Provinces of Manitoba and British Columbia required provision for their subsidies, and these were duly agreed upon and incorporated in The Manitoba Act (5) and Order-in-Council admitting British Columbia (6), respectively. Special consideration was accorded in these cases to the facts that the provincial debts were small or non-existent and that Manitoba was not granted control of the Crown lands in the Province.

A further re-arrangement was necessary almost at once. At the time of the passing of the British North America Act,1867, the debt of the old Province of Canada had been estimated at $63,500,000. for the purposes of the union. It was soon found, however, that the actual joint debt of Ontario and Quebec exceeded this amount by the sum of $10,506,088.84. It was therefore necessary to relieve these provinces of this debt and to compensate the other provinces for this addition to the general debt of Canada. For this purpose an Act was passed in 1873(7) increasing the sum fixed by the British North America Act, 1867, for Ontario and Quebec and increasing the amounts on which the other province were entitled to interest in the same proportion.

In the same year New Brunswick was admitted to be entitled to compensation for having passed an Act providing for the repeal of all duties of export on lumber exported from that province. New Brunswick had enjoyed the proceeds of this duty since 1842, but the repeal of the duty was rendered necessary by the terms of the Treaty of Washington as concluded in 1871. Accordingly, an Act was passed by the

Dominion (8) granting to New Brunswick a subsidy at the rate of $150,000 annually as indemnity for the loss of such duties and the right to impose the same, to be paid in addition to the regular subsidy to which the province was entitled.

The terms upon which Prince Edward Island was admitted are found in the address forming the schedule to the Imperial Order-in-Council dated 26th June, 1873,(9)

In 1874 an Act "to declare the intention of the Act 36 Vict. c 30 as regards the subsidy to be allowed to Nova Scotia" (10) was passed. This merely declared that the increase of subsidy provided for by the former Act was to be calculated on the subsidy of $9,186,756. instead of on $8,000,000.

The success which had attended the agisation of Nova Scotia for better financial terms seems to have been interpreted by the various provinces as an invitation to present all kinds of demands for special consideration and readjustment of subsidies. From this time forth there was no intermission in the demands that came from some quarter or other for the financial assistance of the Dominion.

In 1882 Manitoba secured an Act "for increasing the yearly subsidy to the Province of Manitoba"(11) . It recited the unanticipated extension of territory and increase of population of this province and the fact of the lack of public lands, and provided for new subsidies aggregating $215,000. annually, to be paid in lieu of the subsidy provided under "The Manitoba Act" (12).

Then came a general re-adjustment in 1884. A Dominion Act (14) provided that the increase allowed to Ontario, Quebec, New Brunswick and Nova Scotia by the Act of 1873 (13) should be paid as from 1st July, 1867, and not as from the passing of the Act. As for British Columbia, Manitoba and Prince Edward Island, the amounts to be allowed those provinces were to bear the same proportion to their respective populations as did the amount being paid to the four provinces of Ontario, Quebec, New Brunswick and Nova Scotia bear to the combined population of those provinces, such population in all cases to be reckoned according to the census of 1881.

An Act of the same year (15) empowered the Government of Canada to pay to Nova Scotia the sum of $1,200,000. in consideration of the transfer to the Dominion of the provincial railways (The Eastern Extension Railway and the Truro and Pictou Branch Railway) which were added to the Intercolonial System.

The continuous campaign organized by Manitoba for further Dominion aid culminated in the passing of an Act (16) in 1885, known as "An Act for the Final Settlement of the Claims made by the Province of Manitoba on the Dominion". Besides special grants of land, this Act increased the subsidies provided for in 1882 by an amount of $55,000., such increase to date from 1st July, 1885, and for a re-adjustment of the per capita payment according to the population every two and one-half years.

By an Act passed on 1st May, 1885, called "An Act respecting certain advances to the Provinces" (17) the

Governor-in-Council was empowered to advance to British Columbia by way of a loan an amount equal to that required to bring the provincial debt up to the amount permitted by the Act of 1884.

The complicated regulations as to Manitoba's subsidy made necessary an Act in 1886 (18) called "An Act to explain 48 & 49 Vict. c 50". This declared that the rate per capita on which Manitoba's subsidy was to be calculated was 551,447 - the amount of capital upon which the Province was to receive interest- divided by 17,000 - the estimated population according to the Manitoba Act.

Prince Edward Island pressed its claim to damages in respect of alleged failure of the Dominion to fulfill the terms of union from time to time. Finally it obtained two additional annual subsidies of $20,000. on and after 1st July, 1887, (19) and $30,000. on and after 1st of July, 1901 (20), to run concurrently. The latter was expressed to be finally in payment of all claims on this account.

The only possible result of these repeated concessions was a considerable dissatisfaction among the other provinces particularly the older ones, whose subsidies had been unchanged since the Act of 1884. At the Interprovincial Conference of 1887 the readjustment of subsidies was one of the chief subjects of discussion, and resolutions were formulated and approved looking to an early disposal of this matter. In 1902 (21) the subject was

again given preminence at the Conference and a scheme of readjustment was devised and approved. The Conference of 1906 reaffirmed the resolutions of the former conferences and again pressed the scheme formulated in 1902 upon the Federal government. This the Dominion Government finally accepted on the conditions that the new arrangement should be considered final and unalterable. To this all provinces consented except British Columbia. On its behalf, Premier McBride refused to be satisfied with the proposals, and withdrew from the conference, which then passed the resolutions unanimously.(22) An address dated 26th April, 1907, was forwarded by the Senate and House of Commons to the Imperial Government, praying an amendment of Section 118 of the British North America Act, 1867, in accordance with the terms agreed upon. Accordingly, the Imperial British North American Act, 1907, (23) was duly enacted. It provided for a sliding scale of annual ~~xxxix~~ subsidies to the provinces according to population; an additional grant to British Columbia of $100,000. annually for ten years; the population of the prairie provinces to be taken quinquennially for the purposes of this Act; these grants to supercede all others for the same purpose howsoever provided for; the grants to British Columbia and Prince Edward Island not to be decreased, regardless of decrease in population, if any.

The dream of the finality of this measure has been short-lived. In 1912 a delegation from Prince Edward Islnnd(24) headed by the Premier, presented at Ottawa a

further claim for increased subsidy, and the agreement was again contravened by the grant of a further annual subsidy of $100,000. (25)

Manitoba also has obtained new terms. By the Act which extended its boundaries to Hudson's Bay (26), the amount of debt upon which interest should be allowed was increased to $8,107,500. in order to make the terms the same as those given Saskatchewan and Alberta, since the Provinces were now about equal in area.

So the matter rests temporarily - temporarily, because, despite the protestations of the authorities, there seems no guarantee of its permanence. How can any such arrangement be considered permanent which has no scientific basis of any kind - so far as one can judge from its history - and which appears to be determined solely by the bargaining acumen of the respective representatives of the Dominion and the Provinces. Sir Richard J. Cartwright in his "Reminiscences" gives a pungent criticism of the provincial subsidies system, accounting it a continual cause of friction in the federation and a fault in our consttitution which should be remedied before greater damage accrues.

REFERENCES: (1) 30-31 Vict. c.3; (2) Political Annals ; (3) 32-33 Vict. c.2 (4) 30-31 Vict. c.3, s.116; (5) 33 Vict. c. 3, ss. 24 & 25; (6)R.S.B.C.1897, p.lxx OV; (7)36 Vict.c.30; (8)36 Vict. c.41; (9)R.S.C.1906, Vol.IV, p.3175; (10) 37 Vict. c.3; (11) 45 Vict.c.5; (12) 33 Vict.c.3; (13) 36 Vict. c.30; (14) 47 Vict.c.4; (15) Ibid c. 5; (16) 48-49 Vict.c.50; (17) 48-49 Vict. c.4; (18) 49 Vict.c.8; (19) 50-51 Vict.c.8; (20) 1 Ed.VII c.3, also Deb. H. of C. 1901, Vol.II p.4675; (21) Canadian Annual Review,1902, p.43; (22) Canadian Annual Review 1906, p.515, et seq.;(23) 7 Ed.VII c.11 also R.S.S.1909 p.LXXXVIII; (24) Journal of L.A.,P.E.I.1912; (25) 2 Geo.V.c.42 (26) 2 Geo.V c.32.

CHAPTER IV.

ADMINISTRATION OF JUSTICE IN THE DOMINION.

The British North America Act, 1867, which conferred on the provinces exclusive jurisdiction in the matter of "administration of justice in the provinces, including the constitution, maintenance and organization of provincial courts both of civil and criminal jurisdiction and including proceedure in civil matters in these courts" (1), did not exhaust the field of civil jurisdiction in the Dominion. There remained for the administration of the Dominion authorities, not only all matter of criminal law except the constitution of the courts (2), but also fields of civil jurisdiction both superior to and co-planar with that of the provinces. The Act itself reserved to the Parliament of Canada the right to "from time to time provide for the constitution, maintenance, and organization of a general court of appeal for Canada and for the establishment of any additional courts for the better administration of the laws of Canada" (3). Further, when the unorganized territories of the North-West were added to the Dominion by Imperial Order-in-Council, the Federal government became charged with the administation of local justice there. This duty was assumed and provided for by an Act passed in February , 1871.(4)

The superior power referred to was not taken advantage of until 1875, when an Act (5) was passed providing for

the creation of The Supreme Court of Canada. Mr. Clement notes (6) that this legislation of the Parliament of Canada is of paramount authority, and to the extent to which the provincial judicial system is repugnant to it, provincial arrangements must give way, because the clause conferring the power is introduced by a 'non-obstante' clause,- "notwithstanding anything in this Act". In addition to its constitution as a court of appeal from the provinces, including controverted elections causes, it must entertain references by the Governor-in-Council of questions of law or fact touching constitutional matters (7), or decide on the validity of Dominion or provincial Acts if such questions be referred to it by any provincial court.

It was suggested at the time of passing this Act that a clause should be inserted denying the right of appeal from the decisions of The Supreme Court to the Judicial Committee of the Privy Council. When it was intimated, however, that the insertion of such a clause would involve the reservation of the Bill and its probable failure, there was added to the proposed clause the words - "saving any right which Her Majesty may be graciously pleased to exercise by virtue of her Royal prerogative." (9) The result has been held to be that the right of appeal to Her Majesty remains untouched(10), save that special permission to appeal must be obtained from the Privy Council. The position of this court as a "final court of appeal" is even more anomalous, as the right of appeal from judgments of the provincial courts direct to the Privy Council, without reference to The Supreme Court, is still unaffected.

Moreover, leave to appeal is not required in the latter case, but exists as of right if the subject matter falls within certain classes defined by the Act constituting the court, or in the case of Manitoba, by an Imperial Order-in Council, dated 26th November, 1892 (11).

There has been an almost continual agitation in some quarters for the denunciation of any right of appeal to the Imperial court. Any case of popular interest in which the decision of The Supreme Court is reversed in opposition to the sympathies of the people calls forth a new outburst. These were the circumstances in the appeal of The Toronto Street Railway against the City of Toronto in 1907, and the whole subject then came up for discussion in the Colonial Conference of that year, but without effect (12). Though the agitation is still maintained, it is safe to say that the prospect of its success seems as distant as ever. There have been attempts to curtail this right of appeal from time to time. For example, a Canadian Act of 1888 (13) bars the right of appeal entirely in criminal cases. This enactment was approved by the Privy Council because they believed that such cases were better disposed of by the local courts. But there is a very serious question as to whether the Act is not 'ultra vires' the Dominion Parliament: or if 'intra vires', whether it is not void for repugnancy to the Imperial Statute (14) which gives the Crown a paramount right to allow any appeal whatever from a colonial court, by the operation of the Colonial Laws Validity Act (15). However,

the question seems never to have been argued. Probably because, even though such a contention were upheld, that would not advantage the appellant, since the Crown would probably refuse to entertain the appeal,

By the same Act (16) which constituted the Supreme Court of Canada, provision was made for an Exchequer Court for Canada. Generally, this Court has exclusivee jurisdiction in the matter of claims against the Crown in respect of property or personal injury. It has concurrent jurisdiction in respect of all cases relating to the revenue, impeachment of patents, and all actions or suits where the Crown is plaintiff or petitioner. Appeal lies from the Exchequer Court to The Supreme Court, where the amount in controversy exceeds Five Hundred Dollars.

In 1877 The Exchequer Court was constituted a Court of Admiralty within Canada (17), to have all the jurisdiction, powers, and authority conferred on the colonial courts by the Admiralty Act, 1890. There have been other bodies created by the Dominion to which quasi-Judicial powers have been delegated. Of these the chief were The Revising Officers' Courts (18), (now abolished (19)), The Dominion Railway Board (20), and the Court of the Minister of Agriculture (21), "empowered to decide in rem upon the status of a patent (22)".

A matter of dispute which arose from the creation of these Dominion courts was the precedence of officers of Dominion and Provincial Courts. When it was finally decided that both the Dominion and provincial Governments might creat King's Counsel, this matter was also disposed of (23).

The King's Counsel appointed by the Dominion now have precedence in the Dominion courts, and those appointed by the provinces take first rank in the provincial courts.

In 1892 a criminal code (24) was adopted for the Dominion, and thus a uniform general criminal law was established throughout Canada. The Code adopted was that proposed and prepared for Great Britain in but which failed to be enacted there. In dealing with the question of pardon of offenders, the Code expressly reserves the Royal prerogative of Mercy. This prerogative is now exercised by the Governor-General, who is instructed to act solely on the advice of his responsible ministers.

Prior to Confederation the Imperial Extradition Act had applied to all colonies. In 1868 a Dominion Act(26) was passed which recited that certain provisions of the Imperial Act had been found inconvenient in practice in Canada, and that it was expedient to make provision for carrying the objects of the treaty into effect in the whole of Canada by the substitution of other regulations in lieu of those of the Imperial Act. The Act then proceeded to make the desired regulations. In order to give effect to this Act, and Imperial Order-in-Council was issued on 19th June, 1868, (27), which suspended the operation of the Imperial Act in Canada during the continuance of the Canadian Act just referred to. The Imperial Act was, however, replaced by a new statute in 1870 which was expressly made to apply to all the colonies, and hence, the Canadian Act became inoperative. Thereafter,

as respects foreign countries other than The United States of America, any extradition treaty which applied to Canada came into operation under the Imperial Act of 1870.(28)

Relations with The United States for extradition had been on a separate basis. The Ashburton Treaty of 1842 had provided for extradition of fugitive criminals, but it had long been recognized as painfully inadequate. Accordingly, in 1869,(29) and in 1870 (30) Dominion Acts had amended these provisions. By correspondence between the Dominion and Imperial Governments, it was arranged that the Canadian Acts should continue to apply in case of The United States, notwithstanding the Imperial Act of 1870.

A new Dominion Extradition Act was passed in 1873 (31), but although it was assented to by the Governor-General, the Order-in-Council necessary to bring that part of the Act, relating to countries other than those with which specific extradition treaties had been arranged, into force was never issued, and hence the Act remained a dead letter to that extent.

This was the position of the matter when the Honourable Edward Blake took the matter in hand as Minister of Justice. He found the existing arrangements very unsatisfactory. When he was sent to England in 1876, he opened negotiations with the Colonial Office for some better arrangement (32). His efforts in this regard will be dealt with more fully hereafter in the chapter on Foreign Relations and Treaty-Making Powers (33). On his return a joint address of the Senate and House of Commons was submitted, asking His

Majesty, by Order-in-Council, to suspend the operation of the Imperial legislation in order that the Canadian statute might take effect. This request was declined, however. The present position of the matter is unaltered. The Part One of the Canadian Act, which provides regulations of proceedure and formality in connection with extradition to and from countries with which special treaties are in force, is operative, but Part Two has not yet been brought into force. All extradition treaties now negotiated with foreign countries by the Imperial Government, are applicable to Canada, but are in each case made subject to the provisions of Part One of the local Act (34).

REFERENCES: (1) 30 Vict. c.3, s.92, ss.14; (2) 30 Vict.3, s.91,ss.27; (3) 30 Vict. c.3, s.101; (4)
(5) 38 Vict. c.11; (6) Clement: Canadian Constitution, 1904 Ed'n, p.303; (7) R.S.C. 1906, c.139, s.60; (8) Ibid; (9) R.S.C. 1906, c.139, s.59; (10) See Johnston vs Minister and Trustees of St. Andrews Church, L.R. 3 A.C. 159; (11) R.S.M. 1902, Vol.I, p.L; (12) Canadian Annual Review, 1907; (13) 51 Vict. c.43; (14) 7-8 Vict. c.69; (15) 28&29 Vict. c.63; (16) 38 Vict. c.11; (17) now R.S.C. 1906. c.141; (18) See Re North Perth, 21 O.R.538; (19) 61 Vict. c. (20) 3 Ed.VII, c.58; (21) R.S.C. 1906, c.69, s.20; (22) Re Bell Telephone Co. 7 O.R. 605 and 4 Cartwright 618; (23) Biggar: Sir Oliver Mowat, p.523; (24) R.S.C. 1906 c.146; (25) Can. Sess. Pap. 1877 #13; (26) 31 Vict. c.94; (27) Can. Sess. Pap. 1877 # 13; (28) 33-34 Vict. c.52; (29) 32-33 Vict. c.21; (30) 33 Vict. c.5; (31) R.S.C. 1906, c. 155; (32) Can.Sess. Pap. 1877, #13; (33) See post p.87
(34) See 2 Geo.V Imperial Orders-in-Council, 1912.

CHAPTER V.

REPRESENTATION; THE FRANCHISE AND ELECTIONS.

It was, of course, expected that change in the scheme of representation outlined in the British North America Act, 1867, would be found necessary in order to make provision for the growth of the Dominion. It was probably not expected, however, that these necessary changes would completely alter the character of that scheme. This has been the fact in the case of the Senate of Canada.

That body as constituted under the Act was composed of seventy-two members, to be drawn equally from three federal districts, viz., Ontario, Quebec and the Maritime Provinces(1). Until the admission of Prince Edward Island to the Union, the Provinces of Nova Scotia and New Brunswick should each contribute twelve members, but thereafter the two provinces should be represented by ten members each instead of twelve, and Prince Edward Island should be given four appointments to preserve the federal balance of twenty-four in the Maritime District. We can only suppose that the object of the arrangement was the protection of provincial rights, particularly of the small provinces, by means of a check on the House of Commons where representation was by polulation, and that the suggestion on which this scheme was based was made by the system now in vogue for representation of the States in the Senate of the United States of America. In that country each State, regardless of size, population or

wealth, is permitted two representatives in the Upper House. The present constitution of the Senate of Canada has now lost all conformity to such a principle. When Manitoba was created a province it was allowed two Senators: British Columbia was first given three: Alberta and Saskatchewan were each given four. All the federal character of the Senate and all likeness to the corresponding house in the Congress of The United States of America were dissipated by these measures.

The right of the Dominion to make provision for the representation of new provinces or territories in the Senate, notwithstanding the provisions in Sections 21 and 28 of the British North America Act, 1867, was affirmed by amendment to the said Act in 1886.(2)

The lack of adherence to the principles of increase intended by the British North America Act has been equally flagrant in the case of the House of Commons, thoughthe result was not so disastrous to the character of that body. The representation provided in the House of Commons at the time of Confederation was as follows: Ontario, eighty-two; Quebec, sixty-five; Nova Scotia, nineteen; New Brunswick, fifteen. At the present time the House of Commons has a total of two hundred and twenty-one members, divided as follows: Ontario, eighty-six; Quebec, sixty-five; Nova Scotia, eighteen; New Brunswick, thirteen; Prince Edward Island, four; Manitoba, ten; Saskatchewan, ten; Alberta, seven; British Columbia, seven; Yukon Territory, one.

Although in each case the instrument which effected the union expressed the intention that subsequent adjustments

of representation should be made as provided in the British North America Act, no attempt was made to relate the first allocation to that principle. Moreover, in the case of British Columbia, the representation granted was not in any case to be reduced. Sir Richard Cartwright makes a succinct analysis of the effect of these terms(3): he calculates that the unit of population at the time of the union of British Columbia was 18,400; that the white population of British Columbia was 10,586, with 25661 Indians; that British Columbia was allowed six members in Parliament; i.e. that 10,586 people in British Columbia had a representation equal to that of 110,400 people in Ontario or Quebec. Manitoba's case was almost as bad. For a population of about 25,000 people, Manitoba was allowed a representation of four members. These are matters, however, that have righted themselves by the later census, and hence the damage to the Constitution has been trifling compared to what dealt it by the increases in the Senate.

The difficulty as to representation that now confronts the House of Commons arises from the Maritime Provinces. Here the protest is against the enforcement of the principle of representation by population adopted by the Act. UNfortunately for the Maritime Provinces their populations have not increased since Confederation as rapidly as has the unit of population. Indeed, the population of Prince Edward Island has actually decreased. The result is that from time to time the representation of these provinces has had to be reduced. Prince Edward Island has now four members instead of six; New Brunswick has thirteen instead of fifteen; and

Nova Scotia has dropped from nineteen to eighteen. From time to time protest has been made in Parliament against the reduction(4). This was first based upon a construction of Section Fifty-one of The British North America Act, 1867, which interpreted "the aggregate population of Canada" as meaning that of the four provinces originally belonging to the Union only. However, on a reference to the Privy Council this construction was negatived(5) and "Canada" was interpreted to include all provinces at any time added. A better ground of complaint was that the Act of 1898(6) had enlarged the boundaries of Quebec and so increased the unit of population to the disadvantage of the Maritime Provinces. (In this connection it should be noted that in the latest alteration in the Quebec boundaries (7) the express provision is made that the addition shall not be permitted to affect the unit of population for representation purposes.) There is no doubt that the redistribution Bill which must be brought down in the next session will again raise this question and a demand of the Maritime Provinces for some amendment of The British North America Act to meet the circumstances.

The British North America Act, 1867, defined the electoral districts of the four provinces of the union, the divisions so determined to subsist "until the Parliament of Canada otherwise provides"(8). It has, of course, been necessary to alter these from time to time to accord with re-distribution. On the occasion of each change there is a cry raised by the oppositi on in Parliament that the new

boundaries are being juggled for party advantage. Unfortunately there is probably some truth in this protest on all occasions.

In the first constitution of the Dominion, all regulations as to the franchise and elections for the House of Commons were declared to be those provided by the laws of the several provinces for the election of members to the local legislatures of these provinces (9). The first occasion on which the Parliament of Canada took advantage of the privilege reserved to it to "otherwise provide" was in 1869, when an Act(10) was passed providing for the enfranchisement of Indians by the Governor-in-Council upon the recommendation of the Superintendent-General of Indian Affairs.

The first Elections Bill was assented to on March 27th, 1874,(11). It established voting by ballot, and provided that all elections throughout the Dominion should be held on the same day.

Several times Sir John A. Macdonald, the then Premier of Canada, had intimated his intention of bringing in a Franchise Bill before that enacted in 1885 was finally presented. Sir John Willison says (12) that the Bill was six times introduced into Parliament, and in 1870 carried through a second reading, only to be abandoned each time. However, the Franchise Bill of 1885 (13) finally became law. It established a uniform franchise throughout the Dominion. Federal officers were to be appointed for the preparation and revision of the federal voters' lists. There was great opposition to the Bill on the ground that "there was nothing in the Bill to prevent the appointment of the most active

political partisans as revising officers, who were empowered to make, as well as to revise, the lists, and whose judgment as to the qualifications of voters was final and unappealable"(14). It seems to have been generally admitted that the law did not work well. It was repealed shortly after the change in Government (1898)(15); and the franchise then reverted to the provincial basis.

That is the present status of the matter in all the provinces except Alberta, Saskatchewan and the Yukon Territory.(16) In these districts, all male persons, who, not being Indians, are British subjects and of the full age of twenty-one years and have resided in the province or territory for at least twelve months immediately preceding the election, and when in the provinces, at least three months in the electoral district where they seek to vote, are entitled to vote at the election of a member of the House of Commons (17). The provincial enactments as to the qualifications of electors are substantially the same. Nova Scotia and Quebec make minor restrictions as to income, the former requiring the enjoyment of an annual income of two hundred and fifty dollars in default of property qualifications(18); In the other provinces manhood franchise is the rule. Indians are entitled to vote freely in Nova Scotia, Prince Edward Island and Quebec. They cannot vote in New Brunswick, Alberta and Saskatchewan. In Manitoba Indians or persons of Indian blood receiving annuity or treaty money from the Crown, or who have received such moneys within three years previous are not entitled to be registered as voters. In Ontario an enfranchised Indian can vote, and on certain conditions the franchise is given to

unenfranchised Indians, but they are normally excluded from the vote.

The trial of controverted elections was originally disposed of by a parliamentary Committee of Elections, of six members appointed by the Government. This was in accord with the British practice at the time of Confederation. In 1874 the Dominion Parliament passed an Act(19) imposing on the judges of the Superior Courts of the provinces the duty of trying controverted elections of members of the House of Commons. Doubt as to the constitutionality of this Act was dissipated by the judgment of the Supreme Court in a case under the Act(20) and the refusal of the Privy Council to review the same(21). Appeals in election cases lie to the Supreme Court of Canada as in other provincial causes.

A new and elaborate Elections Bill was drawn up by Mr. Aylesworth (now Sir Allen Aylesworth) in 1900, and passed in that year(22). Since consolidation the Act has been amended (23). It now contains the complete regulations respecting the election of members of the House of Commons and the electoral franchise.

References: (1) 31 Vict. c.3;ss.21 & 22; (2) 49-50 Vict. c.35 s.2 (3) Cartwright: Reminisences, p. (4) H.of C. Deb.1907-08, Vol.V pp. 9780 et seq. (5) See Attorney-General of N.B. and P.E.I. vs Attorney-General of Can. 1905 A.C. 37; (6) 61 Vict. c.3; (7) 2 Geo. V c.45; (8) 30 Vict. c.3, s.40; (9) 30 Vict. c.3, s.41; (10) 32-33 Vict. c. 6; (11) R.S.C. 1886 c. 8; (12) Willison: Sir Wilfrid Laurier and the Liberal Party, Vol.I, p.422; (13) R.S.C. 1886 c. 5; (14) Ibid; (15) 61 Vict. c.14; (16) R.S.C. 1906 c.6, s.10; (17) R.S.C. 1906, c.6,ss.32 & 33; (18) R.S.N.S. c.2; (19) 37 Vict. c.10, also R.S.C. 1906, c.7; (20) Valin vs Langlois 3 S.C.R. 1; (21) 5 A.C.115; (22) 65/66 Vict. c.12; R.S.C. 1906 c. 6; (23) 7-8 Ed.VII c.26.

CHAPTER VI.

CONSTITUTION AND PRIVILEGES OF THE HOUSES OF PARLIAMENT.

The preamble to the Act of Union states that the desire of the provinces was to have a constitution similar in principle to that of the United Kingdom(1). In no aspect of the constitution has this intention been so nearly attained as in the construction and operation of the Parliament, English parliamentary precedent and practice have been the model for the Dominion legislative bodies throughout. The changes that have been made in the latter have largely been in sympathy with like changes in the English prototype. There were, however, some respects in which the new Parliament was bound by the custom of the preceding Parliament of Canada and certain changes in this regard were also necessary.

In the first instance it was allowed to members of the provincial legislatures to sit also in the House of Commons for Canada. Many of the most able men in the first Parliament of Canada sat in two legislatures. An Act (2) in the first session of the second Parliament (1873) abolished this system of dual representation. The objections to the system stated in the debate on the Bill were that it was incompatible with the federal principle; the spheres of the local legislatures and of the federal Parliament were quite distinct and the representatives sitting in both Houses must have divided duties and conflicting interests, of which the

inevitable tendency is that the local body sinks into a position of subordination to the central Parliament(3).

The next session made an alteration in the qualifications required of members of the House of Commons. The old Parliament of the United Canadas had required a property qualification of its members. This was abolished by the new Act of 1874(4). Any British subject could thereafter be a candidate in an election for a seat in the House of Commons, and no qualification in real-estate was required.

The Confederation Act had limited the privileges, immunities and powers of the Senate and House of Commons of Canada to those enjoyed at the passing of that Act by the House of Commons of the United Kingdom (5). There seems little doubt that this was really an unnoticed error in the drafting of the Bill, but it created an annoying situation in 1873. That was the year of the sensational charges of corruption against certain ministers of the Crown in connection with the letting of the Canadian Pacific Railway contract. In the investigation proposed to be made by a Parliamantary Committee, the House desired to give that Committee power to take evidence and examine witnesses on oath. For this purpose an Act (6) called "The Oaths Act", was passed. It was, however, disallowed by a Proclamation dated 1st July, 1873, on the ground that the Parliament of the United Kingdom had not acquired the privilege intended to be conferred on the Dominion House by this Bill until 1871, subsequent to the passing of The British North America Act, 1867.

Accordingly, an address praying the amendment of the latter

Act was presented to the Imperial Government, and the amendment, Known as "The Parliament of Canada Act, 1875," was secured.(7) This Act declared the limit of the privileges, immunities and powers of the Dominion Parliament to be those held, enjoyed and exercised from time to time by the House of Commons of the United Kingdom. The Act also validated "The Oaths Act" as from the date on which it was assented to.

It has already been mentioned (8) that the trial of controverted elections formerly heard by a Parliamentary Committee was delegated to the provincial Courts of Superior jurisdiction in 1874 (9).

In 1885, Parliament made provision for the appointment of a Deputy Speaker of the House of Commons (10), abandoning the practice provided by Section Forty-Seven of the British North America Act, 1867, for the English usage of appointing the Chairman of Committees to act as Deputy Speaker when necessary.

From time to time amendments have been made to the rules of the House of Commons which scarcely approached in dignity the rank of constitutional changes. However, a recent innovation that seems sufficiently important to notice here is the new "Closure Rule" introduced in the last session of the present Parliament. The introduction was rather sensational (11) since it determined a week of continuous sitting of the House during which the opposition had deliberately obstructed the Government Naval Aid Bill by a continuous discussion in committee. This resource of an opposition of obstructing has been several times resorted to since Confederation in cases which seemed to demand

extraordinary measures to secure relief. The constitutional importance of the new Closure Rule is that it places in the powers of the Government of the day the means of effectually defeating the most determined resistance of an opposition to its measures, and of placing a time limit upon debates which are often unreasonably prolonged.

The changes in the constitution of the Senate have been less radical. The number of members of that body has been increased from time to time from the original seventy-two to the present eighty-seven, notwithstanding the absolute maximum intended to be placed upon it by the British North America Act, 1867 (12). This was made possible by the British North America Acts, 1871 (13) and 1886 (14).

Only once was it attempted to make use of the privilege vested in the Queen, (15) of increasing the number of Senators by an extraordinary addition of three or six members. This was in 1873, when Mr. Mackenzie, coming to the office of Premier, found his Government in a hopeless minority in the Senate. He addressed an application to the Imperial Government to add six members to the Senate in the public interest. The Earl of Kimberley, who was then Colonial Secretary, replied in a despatch dated February 13th, 1874., that "after a careful examination of the question, he was satisfied that it was intended that this power should be exercised in order to provide a means of bringing the Senate in accord with the House of Commons only in the event of an actual collision of opinion between the two Houses and that Her Majesty could not be advised to take the responsibility of interfering except on an occasion when the Government

"could not be carried on without her intervention, and when "it could be shown that the limited creation of Senators "allowed would apply an adequate remedy" (16).

The reform of the Senate has been an "hardy annual" subject of discussion in Parliament ever since Mr. Mills introduced his resolution in 1875 (17) that "The present mode of constitut-"ing the Senate is inconsistent with the federal principle in "our system of Governement, makes the Senate alike indepen-"dent of the people and the Crown , and is in other material "respects defective, and that our constitution ought to be "so amended as to confer upon each province the power of "selecting its own Senators, and to define the mode of their "election". No agreeable basis of amendment has been found, however (18). Some demand its entire abolition, but in each case, the ardor of the opposition in Parliament for its reform is damped when, on coming into power, the patronage of Government appointments is given into its control.

REFERENCES: (1) 30 Vict. c.3; (2) 36 Vict. c.2 now R.S.C. 1906, c. 11, ss. 2 & 3; (3) Willison: Sir Wilfrid Laurier and the Liberal Party, Vol. I, p. 138; (4) New R.S.C.1906 c.6, s.69; (5) 30 Vict. c.3, s.18; (6) 36 Vict. c.1; (7) 38-39 Vict. c.38; (8) See supra p. 35 (9) 37 Vict. c.10; (10) 48-49 Vict. c.1; (11) H. of C. Deb. 1912-13; (12) 30 Vict. c.3, s.28; (13) 34-35 Vict. c. 28, s.2; (14) 49-50 Vict. 35, s. 2; (15) 30 Vict. c.3, s.26; (16) Buckingham and Ross: Life and Times of Alexander Mackenzie; (17) H. of C. Deb. 1875; (18) For position of Sir Wilfrid Laurier thereon see H. of C. Deb. 1910-11 pp.2768 et seq., Geo. E. Foster, Ibid, pp. 2780, et seq. Sir Richard Cartwright, Sen. Deb. 1911, pp. 262 et seq.

CHAPTER VII.

THE EXECUTIVE.

The subject of The Executive introduces the discussion of the main department of that great division of the Constitution to which Mr. Dicey has given the name - "The Custom of the Constitution". For a proper appreciation of the status of the Executive and its relation to the Parliament of Canada, reference must continually be made to the constitutional history and precedent of British institutions, and the principles which have, in the course of time, been evolved. Very little reference to this department of our Constitution is to be found in the Statutes, except in relation to the actual administrative departments, and the changes that have occurred in the constitution of this department have been consequently difficult to locate and define.

By The British North America Act, 1867, the Executive government and authority of and over Canada is declared to continue and be vested in the Queen (1), who is to be aided and advised by the Queen's Privy Council for Canada, to be composed of such persons as shall from time to time be chosen and summoned by the Governor-General (2). This is the only statutory reference to the Dominion Cabinet. There is no reference whatever to the Premier or to the divisions of the executive work into departments. To supplement this provision, the constitutional experience of Great Britain is applied.

One of the first things that the Dominion Parliament did, however, was to make provision for the various executive departments of state. The first Cabinet was made up of thirteen members, (3) who - in deference to the federal principle - were drawn, five from Ontario, four from Quebec, two from Nova Scotia and two from New Brunswick. The departments of which they had charge were: Departmentof Justice and Attorney-General, Departments of Militia, Customs, Finance, Public Works, Inland Revenue, Marine and Fisheries, and Agriculture; the other members were The Postmaster-General, The Secretary of State, The Receiver-General, The Secretary of State for the Provinces, and the President of the Council. At this time the Premier usually had charge of a department. In fact, during the tenure of office of Mr. Alexander Mackenzie from 1873 to 1878, the Premier had charge of two administrative departments for a great part of the time (4). The present practice is for the Premier to hold the office of President of the Council, and he is thus relieved from arduous administrative functions.

In 1873 two ministers without portfolio were called to the Cabinet, (Mr. Blake and Mr. R. W. Scott), but as Mr. Blake resigned very shortly after, this number was reduced to one.

In 1873 the Office of Secretary of State for the Provinces was abolished, and a new Department of the Interior was created (5).

In 1878 the Speaker of the Senate was called to the Privy Council, without protfolio, and his successor in the

chair was appointed in 1880. Since that time it has been usual for the Leader of the Government in the Senateto be a member of the Ministry without portfolio.

In 1879 the Office of the Receiver- General was abolished, and his duties were given to the Finance Minister.

In the same year, by Proclamation dated 20th May, the Department of Public Works was divided into the two Departments of Railways and Canals, and Public Works, each of which was presided over by a Minister.

In 1887 a new Department of Trade and Commerce was created(6) and a Minister appointed therefor. In order, however, that the number of ministers should not be unduly increased, it was provided that the offices of the Ministers of Customs and of Inland Revenue should be reduced to controllerships. These departments were made subordinate to the Department of Trade and Commerce(7), and their heads had to transact their business with the Cabinet through that Minister, It was generally admitted that this arrangement was insatisfactory, and in the first session of the new Liberal Government, 1896, the Departments of Customs and Inland Revenue were re-instated.

In 1887 (8) an Officer, called The Solicitor-General of Canada, was appointed, "to assist the Minister of Justice in the counsel work of the Department of Justice, and to be charged with such other duties as might be assigned to him."

Other departments that have been added to the list from time to time are, - the Department of Public Printing, which is in charge of The Secretary of State; The Department of Indian Affairs, whose head is called The Superintendent-General

of Indian Affairs; (at the present time the Minister of the Interior holds this position); the Department of Labor was established in 1900[9] under the control of the Postmaster-General, but it was made a separate department with its own minister in 1909[10]; the Department of External Affairs was created in 1909[11] and given in charge of the Secretary of State, but in 1912 this Act was repealed and the head of the Department was called the Secretary of State for External Affairs. "The Member of the King's Privy Council for Canada holding the recognized position of First Minister" was to be the Secretary of State for External Affairs[12]. In 1909 the Department of Naval Service was established under the control of the Minister of Marine and Fisheries. The Department of Geological Survey was constituted in 1892[13], but this department is now only a branch of the Department of Mines, which latter is administered by the Minister of the Interior. In 1901 a branch of the Royal Mint was established at Ottawa[14]. The regulations governing each of these departments will now be found in the Revised Statutes, 1906, except such as have been created since 1906. [15]

The Government of Canada now has an officer resident in London, known as The High Commissioner for Canada. This office had in main a business origin[16]. It developed from that of the Agent-General, as this officer was first known. When Sir Alexander Galt was appointed in 1879 he was nominated to act as "Minister Resident in London" and the term High Commissioner of Canada was finally resolved

upon as suitable, after consultation with the Imperial Government(17). At this time, however, these officers had no official rank in London. Lord Strathcona's personal rank as a Peer naturally satisfied the demands of Canada, and it was not until 1910 that recognition was given the official rank of the office. On several state occasions since the accession of the present King, the representatives of the over-seas Dominions have been given official place.

The Governor-General occupies the dual position of an Imperial appointee and representative and of the chief of the executive, or Privy Council for Canada. A very considerable change has taken place in the status of the Governor-General since Confederation, and because the Governor-General is the sole representative of the Monarch in the Dominion Government, the extent of those changes is largely the measure of the development of responsible government in this period. The history of these changes has been a gradual abdication of powers and privileges by the Governor-General, and the assuming by responsible ministers of those rights laid down by him. In the brief survey of this progress which follows full credit should be given to the Honourable Edward Blake for his part in the development of the period. It was his master mind which conceived the needed changes, and his energy and tact that prosecuted them to a successful conclusion. By his efforts in this regard and in the matter of foreign relations and treaty-making power dealt with hereafter(18), Mr. Blake has placed the "coping-stone upon the structure

of responsible government in Canada".

The change in the status of the Governor-General is largely reflected in the changes adopted in the instructions to him which are issued by the Imperial Government upon the occasion of each new appointment. In 1875(19) it was felt by the Home Office that the form of commission being used for the Governor-General was not suitable for the condition of Canada in her new position. Accordingly, Lord Carnarvon, who was at that time the Colonial Secretary of State, addressed a despatch to the Governor-General, explaining the reasons which had evoked a desire to remodel the practice of issuing Letters Patent to each Governor-General. It was proposed that Letters Patent be issued constituting a permanent office of Governor-General of Canada, with fixed duties attaching to the office as therein defined. When the commission appointing a new Governor had issued, these Letters Patent were to be supplemented by further Instructions issued to the individual appointed. Drafts of these new forms were enclosed and suggestions for amendment were asked. There were referred to Mr. Blake, who was the then Minister of Justice, for consideration. Mr. Blake entered into correspondence with Lord Carnarvon with reference thereto. The forms submitted were practically those which had been issued to Lord Dufferin at the time of his appointment. One clause was as follows: "If, in case you see "sufficient cause to dissent from the opinion of the major "part or of the whole of our said Privy Council so present, "it shall be competent for you to execute the powers and

"authorities vested in you by our said Commission and by "these our Instructions in opposition to such opinion, it "being nevertheless our pleasure that in every case it shall "be competent for any member of our said Privy Council to "record at length on the minutes of our said Council the "grounds and reasons of any advice or opinion he may give "upon any question brought under the consideration of our "Council"[20]. Other clauses provided for keeping of exact minutes of the Council and the confirmation of same, and for the Governor-General presiding at Council meetings. The Governor should consult his Council, it said, except in cases which were urgent or trivial, and in case of urgency he should subsequently communicate his action to them. Mr. Blake's reply was most moderate in tone but unequivocal in its recommendations. It was not the usual practice for the Governor-General to preside at Council meetings and it was highly inconvenient and inexpedient for him to do so; confirmation of the minutes was unnecessary. As to the Governor-General consulting his Council and acting contrary to their advice, he said - "According to the accepted "view of our Government, it is the rule that the Governor " should act under advice, and it would be contrary to this "view now to propose fresh additions to his individual power "of action, and by consequence, fresh limitations to the powers "and responsibilities of his advisers. The language of the clause.....seems to authorize action in opposition to the "advice, not merely of a particular set of ministers, but of "any ministers. Notwithstanding the generality of the "language, there are bu t few cases in which it is possible "to exercise such a power, for , as a rule, the Governor does

"and must act through the agency of ministers and the "ministers must be responsible for such action. As to "cases not falling within this limitation, the sub-committee "assume that the power in question is to be exercised only "in rare instances in which, owing to the existence of "substantial Imperial, as distinguished from Canadian, "interests, it is considered that full freedom of action "is not vested in the Canadian people. In all other "cases the sub-committee assume that the Governor is, of "course, to act on the advice of responsible ministers".

The same fundamental principles of responsible government he carried out in his views on the question of the Prerogative of pardon. He could not admit that the Governor was at liberty to use his personal discretion at all, except where Imperial interests were concerned - and even then he deprecated any reference in the Instructions to the power of deviating from ministerial advice.

In the matter of legislation, the Governor should be allowed full freedom to assent to all Canadian Acts, leaving them to be disallowed if the Imperial Government took exception to them. Mr. Blake's conception and that of the Government of the day was that the whole Government should be that of an independent kingdom, save only in cases where the Imperial Government should intervene as a result of the fact that Canada was not an Imperial power but a dependency. Where Imperial interests were not involved, there should be full ministerial responsibility just as in the United Kingdom.

The result of these negotiations was that in 1878, when

ord Lorne became Governor-General of Canada, Letters Patent ated 5th October, 1878, were issued, constituting a permanent ffice of Governor-General; a Commission under the Great Seal as issued appointing Lord Lorne to this Office, and further nstructions to accompany same. These three documents bstantially accorded with the principles and suggestions hich Mr. Blake had enunciated in the correspondence, - he most important of which have been quoted above. The vent is epoch-marking. Few statesmen of the time would ave appreciated its constitutional importance, much less ave expected what must have been considered extravagant mands to be admitted by the Imperial Government.

A further expression of the attitude of the Government this matter was given in a resolution(21) moved by Mr. lake in the House of Commons on 31st March, 1875, in which repudiated the principle enunciated in certain Instructions om the Home Government, that the Governor-General only d power of disallowance of provincial Acts by virtue of s position as an Imperial Officer, and that his discretion s to be exercised quite independently of his ministry. Mr. ake's resolution, which affirmed the responsibility of nisters to Parliament for disallowance of provincial Acts s approved unanimously.

The concrete form in which these principles have nbested themselves since that time is best seen in the ercise of the Royal Prerogatives, which were vested in e Governor .

The question of the right of the Governor to pardon offender without reference to the advice of his Council

became prominent by reason of the action of Lord Dufferin on 10th October, 1874, in commuting the sentence of death which had been passed on one, Ambrose Lepine, for complicity in murder in the North-West Rebellion, to a short term of imprisonment. This he did "expressly on his own responsi-"bility and according to his independent judgment, thus "relieving his ministers of any obligation whatever in the "matter"(22). The circumstances were such that the Government of Mr. Mackenzie would have been greatly embarassed politically by the necessity of deciding in any way upon the extension of clemency to Lepine, and the Governor, in the goodnes of his heart, proposed to relieve him of that unwelcome duty. The constitutional aspect of the matter, however, came in for very severe criticism. The result was that in the instructions issued to Lord Lorne, the next Governor-General in office, he is enjoined - "not to pardon "or reprieve any such offender without first receiving in "capital cases the advice of the Privy Council for our said "Dominion, and in other cases the advice of one, at least, "of his ministers"(23); but in any case in which Imperial interests are concerned, "before deciding as to either pardon "or reprieve, to take those interests specially into his own "personal consideration in conjunction with such advice as aforesaid". These Instructions define the present position of the pardoning power. Practically it may be said to be exercised by the Cabinet alone, without reference to the opinion of the Governor, save in such cases - and they are most rare - as involve wider Imperial considerations.

The new tendency is evidenced also in respect of the

exercise of the right of the Governor "to assent to, to "withhold his assent to, or to reserve for the signification "of the Queen's pleasure", in respect of Bills enacted by the Parliament of Canada (24). Since the expression of Mr. Blake's opinion in this matter that the interests of the Empire were sufficiently protected by the right of disallowance, the practice has been not to reserve any Bills for the signification of the King's pleasure. The clause formerly included in the Instructions to the Governor-General defining certain classes of subjects, legislation in respect of which was to be reserved, was omitted from the Instructions to Lord Lorne and subsequently. For all practical purposes, the alternatives of the Governor in dealing with a Bill passed by both Houses are only two instead of the three provided for by The British North America Act, 1867, viz.: the assent to or refusal to assent to the Bill. It is safe to go even farther and say that, practically, the Governor has no alternative but to assent to a Bill so passed, since the right of refusal seems to have become atrophied through non-use. However, the check of the right of the Home Government to disallow a Dominion Act is still unimpaired.

Even the right of exercise of the Prerogative of dissolution has been resigned to the Executive by the Governor-General. In no case since Confederation has the Governor-General dissolved a Dominion Parliament, or dismissed a Dominion Ministry, save on the advice of the Ministry itself. At the time of "The Canadian Pacific

Railway Scandal" in 1873, demands were made upon the Governor in a most imperative manner from many sections of the country for the dismissal of the ministers responsible for the corruption proved or admitted. These, however, Lord Dufferin refused to accede to, and no change was made and no new ministers called until the resignations of the then ministers were in the hands of the Governor. The position of the matter is even more clearly seen from the fact that after Mr. Mackenzie had formed his new ministry and after the ministers had been re-elected as required, and at a time when Mr. Mackenzie had an unquestioned majority in the House, the Governor dissolved Parliament at the request of the Ministry.

This shows a very considerable change from the time of Lord Elgin, when Ministries were considered subject to the will of the Governor. As to the advantage of the new order there is still much question. It received the unqualified condemnation of Mr. Goldwin Smith in his "Canada and the Canadian Question", but apart from its merit, it embodies an important change in the attitude of the Governor toward the Government of Canada.

The right of appointment to office has been exercised by the Cabinet ever since Confederation. In this matter an important prededent was established in 1896 when the Earl of Aberdeen, who was then Governor-General, refused to sanction certain appointments recommended by Sir Charles Tupper, who was Prime Minister, because they were made after that Minister's

Government had been defeated at the polls. The argument of the question is given in the correspondence between the Premier and the Governor. (25) The Governor's reason was that even although the Premier's resignation was not yet at hand, and although, because Parliament had not yet been convened since the election, there had been no vote of want of confidence in the Ministry, yet it was a foregone conclusion that the Ministry of Sir Charles Tupper could not command a majority in the new Parliament, and that therefore, only such acts of that Ministry should be sanctioned as were necessary for the conduct of government business until a new Ministry could be called to Office. Many precedents to the contrary were cited by Sir Charles Tupper, including acts of his predecessors in office, Sir John A. Macdonald and Mr. Alexander Mackenzie. The matter was the subject of a heated debate in the House of Commons when assembled, but Sir Wilfrid Laurier naturally upheld the course of action of the Governor. (26)

Another occasion, upon which the responsibility of the Governor to his Cabinet in the matter of appointments was in question, was in what has been called "The Letellier Incident" (27). Briefly, the circumstances were that Mr. Letellier de St. Just, Lieutenant-Governor of Quebec, dismissed the Ministry of that Province because it did not consult him in regard to government measures and for unwarranted use of his name. He then called upon the Leader of the Opposition to form a Government, and in the election which followed the new Ministry was sustained by a majority of one, which some claim was obtained by the appointment of

an opponent to be Speaker of the Legislature. However that may be, the constitutional issue was greatly clouded by political charge and counter-charge. In the last days of the Mackenzie Government a resolution of censure of Mr. Letellier was moved in the House, but failed. When Sir John A. Macdonald was returned to power in 1879 the resolution was revived and carried. The Dominion Ministry then recommended to Lord Lorne that Mr. Letellier should be dismissed from office, because "his usefulness was gone". Lord Lorne hesitated to accept the advice of his ministers and referred the matter to the Home Office. The reply was that while a Lieutenant-Governor was quite within his authority in dismissing a Ministry for cause, yet the Lieutenant-Governor was responsible to the Governor-in-Council, and if the Governor's advisers were of the opinion that he should be dismissed, the Governor had no choice but to comply. While this incident can scarcely be ~~dixidsd~~ regarded as marking a change in constitutional practice, it is valuable for the defining of two principles, - First, that the Lieutenant-Governor may dismiss his Ministers for cause in a manner similar to that in which the Governor-General may dismiss his Cabinet, though the power must be exercised with great discrimination, and Second, that in the matter of appointments and dismissal of officers by the Governor-in-Council, the Governor must be guided solely by the advice of his ministers.

Two other incidents are somewhat related to this and may

be compared therewith. The first is the dismissal of Premier Mercier and his Ministry (28) by Lieutenant-Governor Angiers in Quebec in 1891 for corruption and malversation in office; the second is the dismissal of Lieutenant-Governor MacInnes of British Columbia by the Dominion Government in 1900 because "his usefulness was gone" (29).

Another question which involves the relations of the Cabinet with provincial authorities is the disallowance of provincial Acts and the reservation of provincial Bills. The first instance of reservation of provincial Bills was in 1882 when Sir Oliver Mowat (30) advised the Lieutenant-Governor of Ontario to reserve for the significance of the will of the Governor-General two Bills incorporating the Orange Order, which had been introduced and passed in the Ontario Legislature. The reasons for this course of action appear to have been entirely political, Sir Oliver Mowat wishing to shift the responsibility for the enactment of these Bills to the shoulders of Sir John A. Macdonald and his Conservative Government. The ruse was unsuccessful, for in advising the Governor-General to refuse to take any action in the matter, Sir John A. Macdonald enunciated the principle that - "As in case your Excellency should exercise the power of reservation conferred upon you, you would do so in your capacity as the Imperial officer and under Royal Instructions, so in any province the Lieutenant-Governor should only reserve a Bill in his capacity as an officer of the Dominion, and under instructions from the Governor-General" (31). Like the case of the Dominion too, this power of reservation

is practically obsolete, since the power of disallowance of provincial Acts which is vested in the Dominion is sufficient protection of Dominion interests. There have, however, been a few cases in which provincial Bills were reserved, but in no case was the Dominion Government responsible for it. An instance in British Columbia in 1907, was the latest and one which caused no little provincial political excitement. This was the reservation of the "Act to regulate Immigration into British Columbia".(32) The Executive, however, refused to act in the matter, though when the Bill was re-enacted in the succeeding session and assent given to it by the Lieutenant-Governor, it was disallowed.

In the matter of disallowance of Provincial Acts, Mr. Blake's famous resolution of 1875, referred to above(33), will be remembered, in which the responsibility of ministers to Parliament for disallowance of provincial Acts was affirmed. This principle has continued to be the governing one ever since that time, and now in all cases of disallowance the Cabinet takes the full responsibility. At the Interprovincial Conference of 1887, resolutions were adopted advising the taking of this power of disallowance of provincial Acts from the Dominion Government and giving it to the Imperial authorities, but up to this date nothing further has been done in the matter, and it is probable that the suggestion would not now command much support.

In concluding this chapter reference must be made to the Department of Civil Service and its re-organization. Canada's Executive is assisted by an administration department which is intended to be removed from the influence of

political patronage and the practice known as "The Spoils System". From time to time the Civil Service Act (34) has been amended. Royal Commissions of investigation were appointed in 1892 and in 1908, and these brought in reports recommending improved methods of classification, advancement, et cetera. The Report (35) of 1908 was especially fundamental and radical in its investigation and recommendations, and resulted in an entire re-organization of the service. A new Act was passed and came into force 1st September, 1908 (36), incorporating most of the proposals of the Report, of which the chief was the appointment of an independent Civil Service Commission to be composed of two members, with the status, salary and tenure of a deputy-minister, to recommend the necessary staff required for the carrying out of the work, and have a general oversight of the Department of Civil Service.

REFERENCES: (1) 30 Vict. c.3, s.9; (2) 30 Vict C.3, s.11; (3) Keith: Responsible Government in the Colonies, p. 311; (4) Buckingham and Ross: The Hon. Alexander Mackenzie; (5) 36 Vict. c.4; (6) 50-51 Vict. c.10; (7) 50-51 Vict. c.11D; (8) 50-51 Vict. c.14; (9) 63-64 Vict. c. 24; (10) 8-9 Ed.VII, c.22 also H.of C. Deb. 1909, Vol.IV, pp. 6712 et seq. (11) 8-9 Ed.VII c. 13 also Can. Sess. Pap. 1910, #29 B; (12) 2.Geo.V c.22; (13) 55-56 Vict. c.16; (14) 1 Ed.VII c.4; (15) R.S.C..1906 : Agriculture, c.67, Customs, c. 48, Finance c.23, Geological Survey, c.65, Indian Affairs, c.81, Inland Revenue, c.51, Interior, c.54, Justice, c. 21, Marine and Fisheries, c.44, Militia and Defence, c.41, Post-Office, c.66, Public Printing, c.80, Public Works, c.39, Railways and Canals, c.35, Secretary of State, c.76, Trade and Commerce, c.82, Royal Mint, c.26; (16) Keith: Responsible Government in the Colonies; (17) Ibid, also Parl. Pap.c.2594; (18) See post p.86.(19) Keith: Responsible Government in the Colonies, Vol.I, p. 162 also Can. Sess. Pap. 1877 #13, 1879 #181; (20) Can. Sess. Pap. 1877 #13; (21) H. of C. Deb. 1875 ; (22) Geo. Stewart, Jr.:Canada Under the administration of Earl of Dufferin, p. 412; (23) Clement: Canadian Constitution, App."C". (24) 30 Vict. c. 3, s.57; (25) Keith: Responsible Government in the Colonies, Vol.I, pp. 213 et seq.

References: (Continued) (26) H. of C. Deb. 1896, Vol.I, pp. (27) For more complete particulars as to this matter see Collins: Canada under Lord Lorne; also Willison: Sir Wilfrid Laurier and the Liberal Party; (28) McMullen: History of Canada, pp. 511 et seq. (29) Can. Sess. Pap. 1900 #174; (30) Biggar: Sir Oliver Mowat; (31) Can. Sess. Pap. 1886, (32) Canadian Annual Review 1908, pp. 536 et seq. (33) See supra p.49. (34)R.S.O. 1906 c.16; (35) For analysis of Report see Canadian Annual Review, 1908, pp. 56 et seq. ; (36) 7-8 Ed. VII c. 15.

CHAPTER VIII.

PROVINCIAL CONSTITUTIONS.

The British North America Act, 1867, assigned to the provinces exclusive legislative jurisdiction in the matter of "the amendment from time to time, notwithstanding anything in that Act, of the constitution of the province, except as regards the office of Lieutenant-Governor" (1).

One of the first subjects in respect of which provision was made was the privileges, powers and immunities of the provincial legislatures. These had been defined by the Act in the case of the Dominion Parliament by Section Eighteen, as later amended by ~~ThexBritishxNorthxAmx~~ The Parliament of Canada Act, 1875, but no provision had been made as to the provinces. Accordingly, Quebec(2), British Columbia(3), Ontario(4), and later Nova Scotia(5), New Brunswick(6), Manitoba(7), Saskatchewan(8) and Alberta(9) all passed Acts defining the privileges of their legislatures. There was, at first, some question as to the validity of these enactments, and an Act of 1868-9 of Ontario, to somewhat the same effect, had actually been declared 'ultra vires' by the law-officers of the Imperial Government, but the later Acts were not objected to.

Notwithstanding the fact that the provinces are expressly excluded from altering the position of the Lieutenant-Governors, they have passed measures defining the powers of these officials to be those enjoyed by the Governors or Lieutenant-

Governors of the provinces before Confederation(10). In each case the power of pardoning offenders convicted of violation of provincial Acts was declared to be vested in the Lieutenant-Governor. The question of the validity of the Act was raised in the case of Ontario, but the measure was held to be merely declaratory and hence not 'ultra vires'.

For the four older provinces the Departments of State were already provided for by The British North America Act, 1867, but these have been changed and added to from time to time. Now in the cases of all the Provinces the constitution of the Executive Councils is provided for by provincial statutes.

Quebec, Nova Scotia, New Brunswick, Prince Edward Island and Manitoba were all working with a bi-cameral system at the time of their union. Manitoba was the first to abolish its Legislative Council. This it did by a provincial enactment in 1876(11). New Brunswick also abolished its second chamber in 1892(12), and Prince Edward Island followed suit in 1893(13). Now only Quebec and Nova Scotia retain the Legislative Council.

At the time of the creation of the Supreme Court of Canada the hope was expressed that it would be a Court for the settlement of all disputes of a legal nature between the provinces and the Dominion or between any two of the provinces. Jurisdiction in these matters was conferred on the Court by the Dominion Act which created it. The provinces of Ontario, New Brunswick, Nova Scotia, Manitoba and British Columbia have supplemented this provision by enacting that all such disputes in which they are embroiled

should be referred to The Supreme Court of Canada or The Exchequer Court of Canada for adjudication(14).

The Provinces of Nova Scotia, Quebec, Manitoba, Saskatchewan and Alberta have also made provision (15) for the reference of constitutional and other legal questions by the Lieutenant-Governor-in-Council to the Supreme Court of the province or a judge thereof.

The appointment of King's Counsel(16) and their precedence in the courts have also been provided for by statutes of the provinces since that very bothersome question of jurisdiction was decided.

The investigation and enquiry into the affairs of departments and other public matters have been secured by statutory regulations in the Provinces of Quebec, New Brunswick and Manitoba(17). In these provinces the Governor-in-Council may appoint a Commission of Enquiry with power to enforce the attendance of witnesses and the giving of evidence.

Each of the provinces has made provision for the establishment of municipal corporations within its boundaries, for the conduct of elections, and for the trial of controverted elections.

The Legislature of Manitoba has enacted(18) that the English language shall be the official language of the Province of Manitoba, thus shutting off the French language from the rapid progress it was making in that province.

These enactments include the chief changes that have been made in the provincial constitutions since Confederation.

REFERENCES: (1) 30 Vict. c.3, s.92, ss.1; (2) R.S.Q. 1909, Tit.II, cap. 1; (3) R.S.B.C. 1897, c.47; (4) R.S.O. 1897, c.12; (5) R.S.N.S. 1900, c.2; (6) R.S.N.B. 1903, c.3; (7) R.S.M. 1902, c.96; (8) R.S.S. 1909, c. 2; (9) (10) R.S.B.C. 1897, c.47, R.S.M. 1902, c. 59, R.S.O. 1897, c.13, R.S.N.S. 1900, c. 7, (N.B.) 52 Vict. c. 7. (11) R.S.M. 1902, c.96, s.2; (Dominion and Provincial Legislation 1867-1895, pp. 808 et seq.; (12) N.B. 54 Vict. c.9; (13) See Dominion and Provincial Legislation 1867-1895 pp. 1221 seq. (14) R.S.N.S.1900, c.154, R.S.M. 1902, c.33, R.S.N.B.1903, c.110, R.S.O.1897 c.49, R.S.B.C. 1897, c.53; (15) R.S.S.1909, c.57, R.S.M. 1902, c.33, R.S.N.S.1900, c.166, R.S.Q.1909, Tit. III, cap. 3; (16) R. S. Q. 1909 Tit X, Cap.3, R.S.N.B.1903 c. 69, R.S.S.1909, c. 105, R.S.O. 1897, c. 173; (17)R.S.M. 1902, c.26, R.S.N.B.1903, c.12, R.S.Q. Tit.III, cap.4; (18) R.S.M.1902, c. 126.

CHAPTER IX.

THE COMMERCIAL-TREATY-MAKING POWER AND FISCAL INDEPENDENCE.

The only kind of treaty to be discussed in this essay is that which affects Canada alone, to the exclusion of other parts of the Empire. Any others are, of course, matters for the attention of the Imperial Government. In dealing with these local treaties, it is convenient to divide them into two classes, viz: Commercial and Political. The distinction in terms which has been adopted is that only those are included as Commercial treaties which affect trade regulations, i. e. the tariff of Canada. All others are defined as Political, and will be dealt with in the succeeding chapter.

This distinction in terms must be kept in mind for this nomenclature is not universally adopted. Sometimes the terms seem to be given very different meanings. For instance, in the course of the debates in the House of Commons resolutions have several times been adopted with reference to Commercial treaties, in the course of the discussion of which it becomes evident that what is usually in the mind of the speaker is not "Commercial treaties" as defined above, but, in fact, all treaties of local interest only.

Prior to Confederation, and indeed until about the year

1877, [1] all treaties had been negotiated by the Imperial authorities, and all treaties made by the Imperial authorities had applied to Canada as much as to the United Kingdom or any other part of the Empire. There had been no consideration of or allowance for varying interests of the colonies, and hence treaties were sometimes negotiated which, though advantageous to the United Kingdom, were quite otherwise to Canada. Instances of this are the German Treaty of 1865 and the Belgian Treaty of 1862, of which more hereafter. The reason this fact had not borne more heavily upon the colonies heretofore was that up to 1846 the interests of the colonies were much the same as those of the United Kingdom because of similarity of tariff policies, but in that year England accepted the Free Trade principle, while her colonies remained wedded to a policy of protection or semi-protection. Accordingly, the subjection of Canadian trade to Imperial treaties became increasingly objectionable.

The efforts of Canada to procure a renewal of the Reciprocity Treaty of 1854 - 1866, show in each case an advance in the freedom from the trammels of British diplomacy which was accorded the Canadian Government. The first Reciprocity Treaty had been negotiated entirely by the Colonial Office and by Lord Elgin personally[2]. The first move for its renewal was taken in 1869 by Sir John Rose, the Finance Minister of Canada by correspondence addressed to the British Ambassador at Washington, in an attempt to secure a resumption of negotiations. In this he was unsuccessful. Then when Sir John A. Macdonald went

to Washington as a member of the Joint High Commission which concluded the Washington Treaty of 1871, he endeavored by every means in his power to use those negotiations to secure for Canada freer trade negotiations with the United States, offering to give the right of fishing in Canada's inshore waters for a return to the Reciprocity conditions(3).

When Mr. Mackenzie came into power in 1873, he sent Mr. Brown to Washington in a very informal way to discuss the question of Reciprocity with the authorities there, with whom he was considered to be a 'personna grata'. When Mr. Brown had determined that the prospects of successful negotiations were good, the Canadian Government, in 1874, secured the appointment of him and Sir Edward Thornton, the British Ambassador at Washington, as British Plenipotentiaries for the negotiation of a trade treaty(4). Mr. Brown was, of course, the more active one of the pair of representatives though Sir Edward Thornton was present with Him at the conferences with Mr. Fish and President Grant, the American negotiators. The matter progressed as far as the framing of a draft treaty which was repudiated by the American Senate.

At this time the general principle of independent treaty-making received notice. In his famous speech at Aurora on October 3, 1874, Mr. Blake advocated the concession to Canada of the right to make her own commercial treaties. His views on the matter were later brought before the House of Commons in the form of a resolution introduced in 1882 to the effect that "It is expedient to obtain the necessary powers for Canada to make

her commercial arrangements with any British possession or foreign State[5]. The Prime Minister replied to the resolution by a warning against endangering British connection and a "flag-waving" demonstration. The resolution was defeated on a strictly party vote of fifty-eight to one hundred and one. I

In the meantime, the matter of commercial treaties had been taken up with the Colonial Office, on a request that Canada be relieved from the operations of the Belgian and German Treaties. On 11th June, 1880, Sir A. T. Galt, who was High Commissioner of Canada in London, on request from the Canadian Government, addressed a communication[6] to Lord Kimberley, the Colonial Secretary, in which he drew attention to the position of Canada in regard to treaties of commerce, and set forth that no treaty of commerce should be made by the Imperial Government whereby the freedom of action of the Dominion Parliament would be restrained. He suggested that Canada be relieved of the obligations of the treaties now existing as occasion could conveniently be found, and that in future no stipulation binding upon the commerce of Canada should be introduced into any treaty without reserving to the Dominion the option of acceptance or refusal. Further he asked that the Canadian Government be informed of the inception of any treaty negotiations with foreign countries, to permit them to submit suggestions.

The matter was taken up with the Secretary of State for Foreign Affairs, and there seems to have been an agreement

that the claim was a reasonable one. A circular despatch was issued by Lord Kimberley to the various self-governing colonies, promising consideration in a manner much like that suggested in Sir A. T. Galt's letter, that in case of any further treaties negotiated, the right would be reserved to the colonies to withdraw from the treaty within six months. This practice was followed in the case of a treaty with Servia signed at Nisch on February 7th, 1880[7], and of a treaty with Roumania, signed 5th April, 1880,[7]. In both of these cases the treaties contained a protocol permitting the British colonies to withdraw within six months of the time of signing if they wished to do so. Copies of these treaties were forwarded by the Colonial Office to Canada immediately after signature, with the request that the Canadian Government signify its wishes in the matter. In each case Canada replied that she did not wish to be included in the treaty, and the Imperial Government thereupon arranged for her withdrawal.

In the next year the practice was somewhat altered. In the cases of treaties with Equator, 1882[8], Morocco, 1881[8], Montenegro, 1882[8], the protocols provided that the colonies should be given one year in which to adhere to the treaty if they wished to do so. In this way they did not come automatically under the operation of the treaty, and if they failed to signify their desires to be included therein, they were unaffected by it.

In two other cases slight variations must be noticed. In 1881 the Colonial Office advised the Canadian Government

of the inception of negotiations with Egypt (9) for certain trade concessions, and asked whether there were any matters in respect of which the Canadian Government desired to make special proposals. The reply was that there were none, but that the usual protocol allowing one year to adhere should be inserted.

Certain informal negotiations had been going on - if they could be called negotiations, being merely the correspondence of private persons - with respect to an arrangement of preferential duties between Canada and the West Indies.(10) Thereupon a Colonial despatch dated 29th July, 1882, was sent to Canada in which the principle was laid down that as between portions of the Empire, no duties discriminating in favor of Great Britain or any of the colonies as against foreign industry could be sanctioned by His Majesty's Government. The Canadian Government took the occasion to reply that although no such arrangement was being made with Jamaica, owing to the fact that that Island's fiscal condition would not permit it, still they dissented from the principle expressed, and asserted the competence of the colonies to make such arrangements as appeared expedient.

On 26th March, 1881(11), the Canadian Government followed up the letter of Sir A. T. Galt with copy of an Order-in-Council asking that Canada be relieved as soon as convenient from the obligations connected with any treaties of commerce then in existence, with foreign countries so far as such treaties limited the freedom of action of the Dominion Parliament, and more paticularly from the treaties made with

Belgium in 1862, and with the German Zollverein in 1865. This communication was forwarded by the Government to Sir At. T. Galt; by Sir A. T. Galt to the Colonial Office; by the Colonial Office to the Foreign Office; by the Foreign Office to the Ambassadors at the respective countries; by these Ambassadors to the authorities of Belgium and the German Zollverein. These authorities then intimated that they were unwilling to consider a revision of the existing treaties, and this reply was duly returned trhough the channels by which it had come to the Canadian Government. It was not until July 31st, 1898, that these two treaties were finally abrogated(12), on the occasion of their revision, and the colonies were thereafter exempted from their operation.

The privilege of direct negotiation was accorded Canada in both the year 1879 and 1883. In the first instance, the British Government responded to a request forwarded by Order-in-Council, by appointing Sir A. T. Galt as Ambassador and Plenipotentiary to Spain and France. On this occasion Mr. Galt visited both Madrid and Paris, negotiating directly with the authorities there for trade concessions (13). His efforts were, however, unsuccessful.

In the second case, Sir Charles Tupper was appointed Ambassador and Plenipotentiary to Spain together with Sir Robert Morier, who was the British Ambassador at Madrid. The despatch which appointed him discloses very well the status of Dr. Tupper on that occasion,- "That if the Spanish Government are favorably disposed

"full power for these negotiations will be given to Sir "Robert Morier and Sir Charles Tupper. Naturally the "negotiations will probably be conducted by Sir Charles "Tupper, but the convention, if concluded, must be signed "by both plenipotentiaries and then entered into between "Her Majesty and the King of Spain"(14). It must be admitted that Canada's progress in method of negotiation is shown by this despatch to have been very rapid.

In the year 1887, the increasing importance of the trade and commerce of Canada was marked by the creation of a new Department of State called the Department of Trade and Commerce. Hereafter a responsible minister gave his whole personal attention to this subject, to the very considerable advantage of the country.

It is well to note here the attitude of the country, as reflected in the House of Commons, toward commercial-treaty-making powers. In 1889(15), Sir Richard Cartwright moved substantially the same resolution as that of Mr. Blake in 1882. A very lively debate followed, but as usual the House divided on strictly party lines, and the resolution was defeated. In 1892, Mr. Mills moved "That the time has come when commercial treaties, in the "interests of Canada, should be negotiated by persons who "are responsible to the Government of Canada and for whose "acts the advisers of the Crown in Canada should be held "responsible in the House of Commons"(16). This resolution, seconded by Mr. Laurier, now Sir Wilfrid Laurier, was also defeated on divison by a Government majority. Notwithstanding the defeat of these resolutions,

it is certain that there was a growing sentiment in the country which regarded independence in this regard as highly compatible with the position of increasing importance which Canada occupied. It is interesting to note that in the debate on the last mentioned resolution, Mr. Foster quotes the despatch of Lord Kimberley anent the proposed Jamaica Treaty - "That the Imperial power could not grant to the colonial "power such authority as would enable it to discriminate "against British goods, even where the colonies alone "were concerned, and still less where external countries "were concerned"(17). It was not long after this occasion that this principle was abandoned entirely.

In 1890, the negotiations were renewed with the United States by means of a despatch addressed to Lord Knutsford, Colonial Secretary, suggesting a number of subjects, among which was trade relations, for discussion by representatives of the two governments. The despatch was forwarded through the usual diplomatic channels and the reply , inviting a deputation, came by the same way. In response to it Mr. Mackenzie Bowell, Sir John Thompson, and Mr. Foster went to Washington and were introduced and attended at subsequent conferences by Sir Julian Pauncefote, the British Ambassador at Washington. The negotiations were, however, fruitless in so far as trade concessions were concerned, because the United States authorities demanded that Canada should not admit any other country, including even Great Britain or other colonies, to the same privileges offered to the United States. The Canadian representatives absolutely refused to consider discrimination against Great Britain, and that part

of the negotiations was dropped at once.

Canada's next expedition in search of special trading privileges was to France. In this case a recommendation of the Canadian Privy Council, dated 16th April, 1892(18), was forwarded to the Colonial Office, asking the good offices of Her Majesty's Government in the matter, and that Sir Charles Tupper, then High Commissioner of Canada in London, should be appointed joint plenipotentiary with His Majesty's Ambassador in Paris. This was duly arranged. Sir Charles, on arriving in Paris, was introduced to the French ~~Duffaxin~~ Government by Lord Dufferin, the British Ambassador. The negotiations were then continued by Sir Charles Tupper, with the assistance of Sir Joseph Crowe, and attache of the Embassy. The Canadian Government was kept advised of the progress, and its suggestions formed the basis of the negotiations. The Canadian Government approved the final form of the Convention and the interchange of letters. When the negotiations were concluded, the proposed notes were sent to the Imperial Government, which then gave Lord Dufferin and Sir Charles Tupper instructions to sign on behalf of His Majesty. In his report to Sir John Thompson, dated 6th February, 1893, Mr. Tupper says - "The negotiations have been carried on entirely by myself on the part of Canada"(19).

Commercial negotiations with Australia in respect of a proposed prefenential tariff, culminated in the Colonial Conference held at Ottawa in 1894. The resolutions passed

were to the effect that "provision be made for Imperial "legislation, enabling the dependencies of the Empire to "enter into agreements of commercial reciprocity, including "power to make preferential tariffs with Great Britain and "with one another, and that any provision of existing "treaties preventing the above from taking place ought to "be removed."(20) .... The Belgian and German Treaties and "the most-favored nation clauses came in for a thorough "review, and the above resolutions were for the purpose "of clearing away as far as possible the obstacles which "existed in the way of preferential arrangements".

Three years later a Colonial Conference was held in London at which the Hon. Mr. Chamberlain presided. A similar resolution was adopted to the effect that - "An "early denunciation of any treaty now hampering the "commercial relations of Great Britain and the colonies "is desirable"(21).

The subsequent Colonial conferences held in 1902 and 1907 may also be mentioned here. In substance the discussions were the same as those of 1894 and 1897, although at this time the troublesome German and Belgian treaties had been denounced. The resolutions averred that "All doubts should be removed as to the rights of the self- "governing dependencies to make reciprocal and preferential "fiscal agreements with each other and with the United "Kingdom, and further that such rights should not be fettered "by Imperial treaties or conventions without their concurrence"(22).

In 1897 Canada lead the way in this matter of preferential

tariffs by extending to the United Kingdom tariff reduction of twelve and one-half per cent., which was increased in the succeeding year to twenty-five per cent., and again in 1900 to thirty-three and one-third per cent. In doing so she was bound by Imperial treaties to extend the same privilege to twenty-two favored nations. At this time, however, the Imperial Government gave an undertaking that these treaties would be abrogated as soon as convenient, and this has been largely done. In 1911 there were only twelve such favored nations, - Argentina, Austria-Hungary, Bolivia, Columbia, Denmark, Japan, Russia, Spain, Switzerland, Venezuela, Norway and Sweden, and to the treaties with most of these nations Canada has voluntarily adhered. The German and Belgian Treaties were abrogated in 1898.

The French Treaty of 1907 was the next negotiation of importance which Canada attempted. The question as to whether this negotiation showed any constitutional advance over that of the treaty of 1893, is one which occasioned a dispute between Sir Charles Tupper and Mr. Brodeur(23). Open letters were published in which Sir Charles declared that the proceedings were substantially the same as those in 1893, while Mr. Brodeur in reply claimed a considerable increase in independence.

Briefly, the circumstances of the 1907 negotiation were these:(24) On May 22, 1907, Sir Wilfrid Laurier arrived

in Paris and called on the British Ambassador and the Premier and the President of France. Evidently finding conditions favorable, he was joined by the Honourable Messieurs Fielding And Brodeur, and an informal interchange of views commenced. Sir Wilfrid Laurier returned to Canada about June 30th. On July 10th, Sir Francis Bertie, the British Ambassador at Paris, formally advised Messrs. Fielding and Brodeur that he had arranged for an interview with the French Minister of Foreign Affairs.(25) On July 24th, the French representatives appointed to confer with the Canadian Ministers were announced(26). On August 8th, credentials appointing Mr. W. S. Fielding and Mr. L. P. Brodeur commissioners and plenipotentiaries of Great Britain were issued(27). On September 19th, the Convention was signed at Paris by Sir Francis Bertie, Mr. Fielding and Mr. Brodeur on the part of Great Britain (28). Throughout the conferences, the Canadian representatives were unattended by any British Officer. The conclusion is that something of a progress is indicated here in the absolutely free hand given to the Canadian delegates. The Treaty was submitted to the Colonial Office before it was signed, but this approval was largely formal. ~~The circumst~~

The circumstances of this negotiation were discussed in the House of Lords on May 3, 1908. The effect of the treaty upon Canada's status in the Empire and its influence upon the preferential tariff were analyzed in speeches by Lord Curzon, Lord Lansdowne, Lord Milner and Lord Cromer(29). The Government's explanation was that such negotiation byn

Canadian commissioners was a matter of convenience, and that the past rule as to a British diplomatic representative being associated with the negotiations was simply a formal security against their being entered upon and carried through by a colony independently of and unknown to His Majesty's government.

About the same time the Colonial Office made a statement of the principles which must regulate the substance of such conventions(30). This was simply a reiteration of a despatch of Lord Ripon to the colonies of June 28, 1895(31). The rules to be observed were three: - First, "That no "foreign power can be offered tariff concessions which are "not at the same time extended to all other powers entitled "in the Dominion to most-favored nation treatment". Second, "His Majesty's Government regard it as essential that any "tariff concessions conceded by a Dominion to a foreign "power should be extended to the United Kingdom, and to the "rest of His Majesty's Dominions". Third, "That His "Majesty's Government cannot agree to a colony asking "from foreign powers concessions hostile to the interests "of other parts of the Empire". Mr. Keith adds - (32)

"All these matter have been carefully observed by Canada "in commercial negotiations affecting the trade of the "Dominion. All concessions made to foreign powers have "been given to all the British Empire, and it was "expressly stated in the Canadian House of Commons on January "14, 1908, that in drawing up the terms of the treaty of 1907, "they had aimed to secure that the preference given to France "should as little as possible deal with articles in which there

"was a considerable trade between Great Britain and Canada, "and that their aim was as far as possible to preserve the "preference given to Great Britain, while encouraging the "trade with France".

Notwithstanding Mr. Keith's conservative view of the matter, it is very doubtful if the three regulations quoted above are now considered in the colonies to be binding. The recent negotiations with the United States cast grave doubts upon the currency of the second of these principles. While the proposed reciprocity enactment of 1911 did not interfere with the privileges accorded the United Kingdom, it was certainly not proposed to extend them to all the other British Dominions.

In February, 1910, and agreement(33) signed on behalf of Canada by Mr. W. S. Fielding, and on behalf of Germany by Dr. Karl Lang, Imperial German Consul for Canada, concluded a most unusual series of negotiations. The agreement engaged the High Contracting Parties to make mutual tariff concessions in contemplation of the consideration of a general commercial convention at a later date. The course of these informal negotiations is fully set out in a report a committee of the Privy Council, dated 14th February, 1910(34). Briefly, the substance of the report is that trade relations with Germany had become somewhat unfriendly in 1898, owing to the abrogation of the Imperial German Treaty of 1865, and the granting of the preference to Great Britain, from which Germany was barred. The result had been the application of the German maximum tariff to Canadian goods, and the imposition of a Canadian surtax on German importations. Negotiations

had, however, been continued from time to time in an informal way between the Canadian ministers and the German Consul at Montreal, resulting finally in this convention by which each country abandoned the penalty it had imposed on the goods of the other. In this negotiation the British Government had no part whatever, and so far as the correspondence brought down shows, was not even aware that it was being carried on.

In the years 1909 and 1910 informal arrangements were made with Italy, through the Royal Italian Consul, and with Belgium and Holland, in pursuance of which Orders-in-Council have granted these countries special trade concessions in view of the fact that Canadian product receive favorable treatment there.

Reference must now be made to the manner in which recent trade negotiations have been conducted with the United States. The Payne-Aldrich tariff, accepted by the United States in 1909, provided that a surtax of twenty-five per cent. by way of penalty should be applied to the goods of any country which had extended trading privileges to other nations not afforded to the United States. This surtax was to become automatically operative on 1st April, 1910, unless the President otherwise directed. The clause became at once applicable to Canada on account of the French Treaty of 1907. A considerable uneasiness was caused by the situation to the governments of both Canada and the United States, and they proved to be equally anxious to avoid a collision in the matter. A communication on the subject was first addressed by the Secretary of State of the United

States to the British Ambassador at Washington, who immediately forwarded the same to the Canadian Government[35]. The result of the preliminaries was that the Minister of Finance of Canada came into direct communication with the President of the United States, and an informal conference was arranged for Albany, New York. This conference was quite satisfactory to both. In return for trifling concessions on the part of Canada, the surtax was prevented from coming into operation by action on the part of the President. The communications at this time expressed a desire to continue the negotiations at an early date for the further improvement of trade relations between the two countries.[36]

This was the introduction to the negotiations which ended in the Reciprocity Agreement of 1911.[37] A despatch addressed to Mr. Bryce by the United States Secretary of State was referred directly to the Canadian Government. This advance was favorably received and a delegation from Washington met the Canadian Government at Ottawa. The conference was then adjourned to Washington, and the Honourable Messrs. Fielding and Paterson attended there on behalf of the Canadian Government. At an early stage of the negotiations it was decided to effect the desired object by concurrent legislation by the Parliament of Canada and Congress of United States, instead of by means of a formal treaty. This expedient avoided the necessity of any reference of the matter to the Imperial Government at all, and the negotiations continued to be conducted solely by Canadaians. The agreement finally

arrived at was presented simultaneously in the Parliament and Congress.

In 1909 a Royal Commission on Trade Relations was established for the consideration of improvement of trade relations between Canada and the British West Indies(38). This commission consisted of three members on behalf of Great Britain, and the Minister of Finance and the Minister of Customs on behalf of Canada. This joint commission visited both Canada and the West Indies, and the result of their observations and negotiations was a report with recommendations as to tariff changes. This has eventuat ed in the British West Indies Reciprocity Agreement of 1912.

The movement for improvement of colonial trade relations was accelerated in 1912 by the appointment of a Royal Colonial Trade Commission, composed of representatives of all the self-governing colonies and the United Kingdom. This commission has spent almost a year in visiting the various dominions, and has not yet completed its work. Therefore no report of its proceedings is at hand. The Hon. Mr. Foster, the Canadian Minister of Trade and Commerce, is the local representative upon that Board.

The foregoing survey of the commercial-treaty-making history of Canada needs no supplement by way of review. Its constitutional importance and the progress which it evidences can scarcely be too greatly emphasized. That it indicates the delegation of substantially independent treaty-making powers will surely now be questioned. There are, of course, certain reservations necessitated by Imperial interests, but

it is not to be expected that the circumstances will ever be such that the Canadian Government will wish to contravene them. Certain formalities also must remain as long as Canada is a member of the British Empire under the terms of its present constitution. But it is not going too far to s say that Canada has acquired every privilege in this regard which is practically required, and has achieved a real fiscal independence.

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CHAPTER X.

EXTERNAL AFFAIRS AND POLITICAL TREATIES.

In regard to self-direction of her external affairs, Confederation marked the debut of Canada in international politics. Up to this time Canada's right to consideration of any kind distinct from the British Empire had not been recognized by foreign countries, and it is safe to say that that right did not appear to be recognized even by the Imperial Government. Canada was subject to the operation of all treaty obligations contracted by the Imperial Government, and was not consulted in regard even to those matters which intimately concerned her. She had no official correspondence with foreign countries; any representations which the provinces wished to make were made through the Colonial Office. As mentioned in the preceding chapter, the Reciprocity Treaty of 1854 was negotiated with the United States for Canada by British Representatives. The Ashburton Treaty of 1842 was negotiated by a British plenipotentiary and ratified despite the protests of the Canadian provinces that it was unfair and improvident, and that their interests had been sacrificed for the sake of British diplomatic considerations.

However, Confederation is, in this respect, as in many others, the beginning of a new era for Canada. The British North America Act, 1867, had provided that "The Parliament and Government of Canada shall have all powers necessary or

proper for performing the obligations of Canada or of any province thereof as part of the British Empire, towards foreign countries arising under treaties between the Empire and such foreign countries". This is the only statutory reference to Canada's position in relation to other countries. The increment of power in such matters is found in the change in practice from time to time in the negotiation of treaties with foreign nations and the increased latitude of subjects in respect of which independent action is allowed.

The geographical relation of Canada to the United States is responsible for a great many disputes and contests that have required to be arranged by arbitration or treaty. In 1871 several questions had become vexatious to the authorities of both countries, of which the chief were the use of Canadian fisheries by Americans, the ownership of San Juan Island, claims of Canadian citizens for indemnity for damages caused by the Fenian Raids and a counter-claim against Great Britain in respect of the depredations of the Alabama. The Canadian authorities had suggested the appointment of a Joint High Commission to dispose of these matters, and in this year it was announced that the British and United States Governments had agreed to take this course of action. The first step in the development which is being traced was taken by the British Government in inviting Sir John A. Macdonald, then Premier of the Dominion, to act as one of the five Imperial plenipotentiaries. This he consented to do. The excellent record[1] of the proceedings of this Commission contained in the correspojdence of Sir John

Macdonald with his Government, which is now reproduced in the biography of the late Premier, written by Mr. Pope, shows that the negotiations involved a continual contest between Sir John Macdonald and the British representatives as to the preservation of Canada's interests. The Treaty finally concluded was regarded by Canadaians as highly unsatisfactory, and this fact is unquestionably due to the determination of the British representatives, supported by the Imperial Government, to conclude the treaty even at the expense of a sacrifice of Canadian interests if necessary. On several occasions Sir John Macdonald was strongly inclined to tender his resignation, and was only restrained from doing so by Imperial considerations. As to his position in this regard, another biographer, Mr. J. E. Collins, says of him: "It is an error to suppose that in any sense Sir John was "a Dominion representative; he was merely the interpreter "of Canadian interests. In this Commission the Premier found "his duty as an Imperial representative to support any plan "that would forward the interests of the Empire as a whole, "even though such measure should bear hardly upon his own "province, in conflict with his duty to the interests of the "Dominion"(2).

The treaty in its final form, however, did contain a clause which provided that the clause relating to the disposal of the fishery question should not be operative unless sanctioned by the Dominion Parliament(3). The treaty, known as the Treaty of Washington, 1871, was duly approved and enacted by both Dominion(4) and Imperial(5) statutes. Twelve years after it came into operation, the treaty was

denounced by the United States.

The Treaty had provided that the compensation to be paid by the United States to Canada for the use of her fisheries should be fixed by a new commission of three members, one to be chosen by each of the governments concerned, and the third to be agreed upon by the two representatives so appointed. It was not until the failure of the negotiations for reciprocity in 1874, referred to above(6), that Canada insisted on the carrying out of this clause. In this case Canada was permitted the independent choice of her commissioner. - (Sir Alexander Galt was appointed by the Imperial Government.) - The result was eminently more satisfactory. The decision of the commission was known as "The Halifax Award, 1877". The amount due Canada was assessed at $5,500,000. and was only grudgingly paid after a very considerable delay on the part of the United States.

Meanwhile a most unusual instance of Canadian independence of negotiation occurred. In 1876 an Indian by the name of Sitting-Bull, and a number of his followers of the Sioux tribe, had crossed into Canadian territory in the North-West in order to escape United States troops who were in pursuit of them. Then, using this as a base of retreat, the Indians proceeded to make raids upon American settlers, secure in the fact that the American soldiers dared not cross the line. The situation was a very delicate one which might have developed serious international complications(7). Lord Dufferin, the Governor-General, was absent on a trip to British Columbia at the time and Sir Edward Thornton, the

British Ambassador at Washington, was in England. Feeling that the matter demanded immediate attention, the Premier, Mr. Mackenzie, sent one of his ministers, Mr. Mills, directly to Washington to confer with the United States Government in the matter omitting all formalities of any kind. This breach of international custom elicited a mild protest from the United States Government, and a very decided one from the Colonial Office, but as the result of Mr. Mills mission was completely successful, and the circumstances were considered extraordinary, and both Lord Dufferin and Sir Edward Thornton approved the action after it was done, nothing further was heard of the matter. Under the circumstances, however, there is no excuse to consider the incident as a precedent and for that reason little constitutional significance can be attached to it. Its psychological effect, however, upon the members of the Canadian and United States Governments, is undoubtedly responsible for a new attitude toward Canadian diplomacy whose effect was far-reaching.

The attitude of the Colonial Office in 1877 on the subject of political treaties was quite decided. In fact, it seems to have been taken for granted, since the discussion of treaty-making powers with Mr. Blake made a clear distinction between commercial treaties and political treaties. In the first kind the Dominion was admitted to be entitled to special treatment, and consideration, but in the second Canada's position as a colony barred her from any interference with the foreign relations of the Empire(8). Mr. Blake's resolutions of 1874 and 1882 were confined to the subject of

commercial treaties.

The attitude is well illustrated in the matter of Extradition treaties(9). This was one of the subjects on which Mr. Blake conferred with the Colonial Office in 1875 and 1876(10). Up to this time, the extradition of fugitive criminals from and to the United States was governed by the Ashburton Treaty of 1842, and from and to other foreign nations by treaties made from time to time by the Imperial Government. After the passing of the Imperial Act of 1870, difficulties arose in its operation which caused considerable friction between Great Britain and United States, and which resulted in practically suspending the operation of the Ashburton Treaty(11). Mr. Blake's representations urged the Government to conclude a new extradition treaty with the United States, since the Ashburton Treaty had always been unsatisfactory in operation. Believing that this would be done, a Dominion Act was passed in 1873(12) to come into operation as soon as the new convention was concluded and when the Imperial Government should have suspended the operation of the Imperial Act in Canada. The new arrangement with the United States was never completed, and the fact of the matter is that Canada is still dependent upon the regulations of the old Ashburton Treaty of 1842, amended in some particulars in 1890, for extradition to or from the United States. Canada has,however, presumed to supplement these regulations by enactment informally agreed upon with the United States(13).

Canada has not at any time asked the privilege of negotiating her own extradition treaties, but she has asked

that she be allowed to determine the ways and means by which these treaties shall be made effective, as provided for in the British North America Act, 1867[14]. This was the purpose of the Canadian Actsof 1873 and 11877. When the failure of Mr. Blake's mission to secure new treaty arrangements became apparent, an address was prepared by the House of Commons, and approved by the Senate, reciting the facts of the matter[15], and asking that the Imperial Act be suspended from operation in Canada. This request was refused by the Imperial Government, and it was not until 189 [16] that the request was finally granted. Even then only that part of the Canadian Act referring to countries with whom England had arranged treaties was made operative, and the remaining part, intended to apply to other countries, is still inoperative. Since the recognition of Part One of the Canadian Act, all Imperial extradition treaties have contained a clause suspending the operation of the Imperial Act, 1870, in favor of the Canadian Act, Part One[17]. The result may be summarized by saying that Canada now has the right to make regulations as to the manner in which the extradition treaties made by Great Britain with foreign countries shall be made effective in Canada.

It may be noted here that the Imperial Treaty with Russia of 1877[18], expressly provided that it should only be applicable to the colonies "so far as the laws fot the "time being in force in such colonies will allow".

Subsequent to the denunciation of the Trety of Washington by the United States in 1885, the harmony

of relations between Canada and the Republic were greatly endangered by collisions between the fishermen of the two countries along the coast of the Maritime Provinces. Although in no way entitled to do so, the American fishermen continued to make free use of Canadian waters for fishing purposes until the fleet of cruisers which Canada was obliged to fit out had seized a few American boats. Canada then made application to Great Britain for the appointment of a High Commission to settle the matter with the United States. The proceedure in this case did not show much advance in mthod over that adopted in 1871. Sir Charles Tupper, the High Commissioner of Canada, the Hon. Joseph Chamberlain, and the British Ambassador at Washington were named as the High Commissioners for Great Britain, and two representatives were appointed for the United States. It should be recognized as a new step in the development of the treaty-making power that the acceptance of the treaty by the Canadian Parliament was admitted to be a condition precedent to the ratification of the treaty by Her Majesty. This was made Article Sixteen of the Convention(19). The fact that the same result had been achieved in the first Treaty of Washington had been largely due to the bungling of the Home Office, whose instructions to their ambassadors were at variance with the assurance given to the Canadian Parliament that "Great Britain had no inteniton of disposing of Canada's inshore fisheries without her consent"(20). Hence the advantage gained by Sir Hohn A. Macdonald at that time had been tactical, rather than admitted as of right. It may be added that the discussion in this case was not

complicated by the existence of the Imperial interests which conflicted with those Canadian as in 1871. Hence much greater weight was given considerations of Canadian interests. When the treaty was finally agreed upon and assented to by the Dominion Parliament, it was repudiated by the United States Senate. The contribution of this negotiation may be said to be the principle that Imperial treaties, directly affecting Canada, require the assent of the Canadian Parliament.

The discussions of treaty-making power introduced in the House of Commons from time to time, were confined to the matter of negotiation of what were called "Commercial" treaties. The use of the term in the debates of 1889, 1892 and succeeding years seems to have been quite indiscriminate and to have been applied to all treaties having a local bearing only. For that reason, much of that discussion was applicable to the topics which have been included in this chapter. There are many of the treaties which are here designated as political which do not in any way affect Imperial interests, and are quite within the range intended to be referred to by those who advocated the independent negotiation of commercial treaties by Canada.

Accordingly, it is proper to refer here to the resolution introduced in the House of Commons in 1889 to this effect by Sir Richard Cartwright[21]. The resolution was defeated on a strictly party division of ninety-four to sixty-six, to the accompaniement of much flag-waving and loyalty declamation by the Conservative Government. The discussion showed, however, an unquestioned advance in the public opinion on

this subject, and that a demand which would have been considered absurdly unsuited to Canada's position in earlier times, was being boldly entertained by a large section of the people.

Since that time this resolution has ranked with the matter of Senate Reform for a high place in the list of 'perennials'. In 1892 Mr. Mills introduced a similar resolution, seconded by Mr. Laurier, but it met a similar fate.(22)

In 1890, the Canadian Government, with the approval of Her Majesty's Government, forwarded an intimation to the United States Government, by way of Lord Knutsford of the Colonial Office, that it would be glad to discuss certain subjects named for the mutual advantage of the two governments. In 1892, a response came that the United States was now ready to go into these matters, which included the Alaska Boundary Question, Reciprocity in Wrecking, trade relations, and other things. Upon its receipt, Messrs. Bowell, Thompson, and Foster were delegated by the Canadian Government to meet the United States representatives to discuss these subjects. The Canadians were accompanied to the conference by Sir Julian Pauncefote, the British Ambassador at Washington, and his approval was endorsed upon the minutes of the conferences and upon the communications exchanged by the two governments. On theirreturn of the Canadian delegates, the Government addressed a request to the Secretary of State for the Colonies that Her Majesty's Government should authorize Her Majesty's minister at Washington to conclude formally the arrangements

set out in the report of the proceedings. In this way the Treaty of Washington, 1892, was concluded and ratified(23).

The progress made in this negotiation was very considerable. In the years that followed, delegates of the Canadian Government several times visited Washington under much the same auspices as on this occasion. In 1895 Mr. Mackenzie Bowell and Sir Charles Tupper attended there in the matter of the Behring Sea Controversy. In 1897 Sir Wilfrid Laurier and Sir L. Davies went to Washington to arrange with the authorities as to what subjects should be discussed by the Anglo-American Joint High Commission, the appointment of which had been arranged by correspondence.

This Joint High Commission was appointed by Great Britain and the United States in 1898. It was to deal with all those matters of dispute still outstanding between Canada and the Republic. The advance in freedom of negotiation which this Commission marks is shown by its constitution. Four of its members were Canadian ministers, and only one (Lord Herschell, the Chairman) was appointed by the Imperial Government. The Commission sat at Quebec first and later in Washington, but it adjourned in February, 1899, without having concluded anything of importance. The Joint High Commission was never formally closed, and so from time to time after that date, suggestions were made for its recall, but as no good prospect appeared of completing its work, this was never done.

One other negotiation of this decade may be briefly mentioned, viz. the Behring Sea Controversy. After several near collisions between Canadians and Americans in the

the Behring Sea, the United States agreed to Great Britain's proposal that the matter should be submitted to arbitration.(24) Each of the governments was to be represented by two arbitrators and three independent parties were agreed upon. Great Britain appointed Canada's Prime Minister, Sir John Thompson, and Lord Hannen, a Britisher, as her representatives. The whole conduct of the matter was given to the Canadian Government, and the chief counsel for Great Britain was Mr. Charles Hibbert Tupper, appointed by the Canadian Government. The result was highly satisfactory to the Canadian people.

Canada's next experience with United States' diplomacy gave her much less cause for self-gratulation. The Joint High Commission had failed to effect a settlement of the Alaska Boundary problem in 1899, and had failed to agree upon a form of tribunal for arbitration. The subject was then abandoned by the Commission and turned over to the British Government for negotiation(25). Communications in relation thereto were interchanged by the Colonial Office and the United States Government, and submitted in turn for the approval or suggestions of the Canadian Government. When the matter approached agreement in 1903, a draft treaty was sent to the Canadian Government for approval, which it was intended to conclude between Great Britain and the United States. The proposition of the treaty was the same as that refused by the Joint High Commission in 1899. The Canadian Government urged upon the British Government the great inconvenience of leaving the question to such a tribunal, and offered to have it submitted to the Hague

tribunal.[26] The reply was that this was impossible since the United States Government would not consent. The Canadian Government then approved the treaty, but with many misgivings, and still protesting against the constitution of the tribunal. As soon as the Canadian Government received notice of the American appointment of Secretary Root and Senators Lodge and Turner to be their "impartial jurists of repute", they protested to the Home Office in such terms as would have formed a ground for withdrawal from the treaty, owing to the failure on the part of the United States to fulfill its intentions. Their objections are, however, shown to have been practically overborne by the Colonial Office[27], and there was practically no alternative offered to concurrence in the continuance of the arbitration. Althoughthe first suggestion of the names of the British representatives came from the Colonial Office, the Canadian Government really named them finally. They were The Chief Justiceof England, Lord Alverstone, Sir Louis Jette, a retired Judge of the Superior Court of Quebec, and then the Lieutenant-Governor of that Province, and Mr. Aylesworth. (Mr. Borden, leader of the Conservative Opposition in the House, later criticized the Government for not insisting on the appointment of three Canadian Arbitrators[28].) The Canadian Government also named the British Agent to the tribunal and the counsel for the British contention.

It need only be added that the award of the tribunal was adverse to the Canadian contention, and that it was signed only by four members of the tribunal, the three American

representatives and the Chief Justice of England. The Canadian representatives delivered a dissenting minority judgment. The award was, however, binding by the terms of the treaty. Great complaint came from the Canadians generally of the manner in which the Canadian Government had been dealt with by the Home Government, and though much of this was due to disappointment and chagrin induced by the failure of the Canadian contention, it surely had a considerable foundation in fact as shown by the correspondence.

In 1905 Canada had expressed her wish to be included in the commercial terms of the treaty entered into between Great Britain and Japan in 1894 (29). This reversal of the action of 1894 was due in the main to the passing of laws in Japan restraining the emigration of Japanese, and to the fact that Canada was informally assured that no trouble would be permitted to arise by reason of Japanese immigration to Canada. Accordingly, a special treaty of adherence was arranged through the usual diplomatic channels. In September of 1907, however, riots occurred in Vancouver, resulting in the injury to the persons and property of Japanese in that City, and a settlement with Japan became necessary. A message from the Foreign Minister of Japan, forwarded to the Secretary of State by the Japanese Consul in Canada expressed the hope that in view of the cordial and friendly relations existing between Japan and Canada, the case might be settled at Ottawa independently of the British Government and without going through the usual diplomatic channels (30). The result was that M.r W. L. Mackenzie King was commissioned to conduct an enquiry into the losses

and damages sustained by the Japanese in Vancouver. This amount, so ascertained, was immediately paid to the sufferers. In the meantime, the Canadian Government resolved to send the HON. Mr. Lemieux, Minister of Labour, directly to Japan, to discuss the subject with His Majesty's representative at Tokio and the Japanese authorities (31). This intention was communicated to the Colonial Office and credentials asked for. The Colonial Office, in pursuance of this request, telegraphed to His Majesty's Ambassador at Tokio, stating that Mr. Lemieux's mission had the approval of the Home Office, and asking him to inform the Japanese Government and present Mr. Lemieux to the proper authorities on arrival and assist him in every way (32). The manner of the negotiations, though quite unusual, seemed very effective. In reply to a question in the House as to what was the status of Mr. Lemieux as a Canadian representative, the Prime Minister, Sir Wilfrid Laurier, said - "It is difficult to say exactly on what "ground he stands. We have no diplomatic status anywhere, "but Mr. Lemieux has been introduced to the authorities at "Tokio by His Majesty's Ambassador, and it is under His "Majesty's Ambassador that the negotiations - if negotiations "they can be called - or representations, are being conducted" (33). This negotiation unquestionably marks the high water of Canadian independence of diplomatic relations. The subject of the discussion concerned the right of Japanese subjects to enter, and when residing in, British territory and it points to a most substantial advance in Canada's position in the matter of the subject of this chapter.

In 1909 an arbitration of the fisheries claims was agreed to by the United States. The question was referred to the Hague tribunal and Sir Charles Fitzpatrick, Chief Justice of Canada, was appointed as one of the five members to consider the matter. This was the first occasion upon which a Canadian was made a member of that body. Sir Allen Aylesworth was appointed British Agent, and Mr. J. S. Ewart as one of the counsel for the British case.

In the same year the Boundary Waters Treaty, concluded by the International Waterways Commission, was ratified(34) This Commission was made up of three Canadians and three A Americans, and was the first case in which Great Britain had no Imperial representatives in an international negotiation(35). In addition to this fact, the treaty as settled, was brought before the Dominion Parliament and approved there before ratification by His Majesty's Government and signature by the British Ambassador at Washington.

In 1911 an Imperial General Arbitration Treaty, which had been negotiated and concluded in June, 1908, and also a Pecuniary Claims Treaty were signed. These treaties, providing for the settlement of disputes and pecuniary claims between His Majesty's Government and the United States, expressly provided that His Majesty's Government reserved the right, in case of any question affecting the interests of a self-governing Dominion, to obtain the concurrence of that Dominion in the special agreement which is required under the treaties for the reference to arbitration(36). Unfortunately, however, these treaties were defeated in the

United States Senate on August 15th, 1911, although they had been approved by the President and the foremost statesmen of Great Britain and Canada(37).

Fromtime to time suggestions are heard that while Canada cannot be expected to be permitted distinct diplomatic representatives in the various countries so long as she remains a colony of Great Britain, nevertheless the British diplomatic service should be open to Canadians and that they should have an opportunity of holding positions of confidence of this kind and of securing a training in the business of foreign relations. Both Sir Richard Cartwright and Sir George W. Ross have endorsed this proposition in their recent books.

Another suggestion made is that Canada should have an official attache at the British Embassy at Washington, because of the importance of Canadian interests there, and of the advantage of having someone directly responsible to the Canadian Government in touch with affairs there. This suggestion was introduced in the form of a resolution in the House of Commons in 1909(38), but the resolution was withdrawn at the request of the Prime Minister - made because of the existing cordial relations between the two countries under the present circumstances, and the very efficient service then being rendered by Mr. Bryce, the British Ambassador at Washington, and his staff.

One other evidence of the growing consciousness of Canada's nationhood may be mentioned. That is the creation of a Department of External Affairs for Canada. It must be admitted, however, that this department, created in 1909

under the management of the Secretary of State[39], and transferred in 1911 to the control of the Honourable the First Minister[40], has very little constitutional importance. The chief benefit it confers is an administrative one.[41]

Strange though it may seem, the subject of External relations of the colonies is one which has received very little discussion at the Colonial Conferences. The Conferences of 1894, 1897, 1902 and 1907 all discussed the making of commercial treaties, but this subject was related almost exclusively to the matter of preferential trade within the Empire[42]. In this respect the resolutions preferred asked that treaty-making powers should be unfettered by Imperial treaties or conventions made without colonial concurrence.

A further excursion into the Imperial field was evidenced in 1911 when some colonies proposed a resolution that the Imperial Government should be invited to consult the colonies in matters of its foreign policy and alliances. The movement was, however, very short-lived. Sir Wilfrid Laurier gave the discussion an early quietus by his unqualified opposition on the ground that if the colonies sought consultation in such matters, they must perforce accept a consequent responsibility for the policy adopted, and that, on his part, he was quite unwilling to make Canada responsible for British foreign policy.

Such is the story of the external relations of Canada since 1867. Different constitutionalists seem to draw very

different conclusions from its survey. The conclusions reached by Mr. Keith in his study of the subject registers very little progress for Canada in the last twenty-five years. In his mind there seems little distinction between the circumstances of the Japanese negotiation of 1907, or the German and Italian negotiations of 1910 and those labyrinths of diplomatic communication required at the time of the Spanish 'near-treaty' in 1883 or the sacrifice of Canadian interests to British political exigencies in 1871. He says - "Xxxxxx "It will be seen that in no case has "Canada concluded a treaty with a foreign power direct; "that in two cases provisional arrangements have been made "of an informal character, expressly in contemplation of "formal arrangements, and that even in these cases the "approval of His Majesty's Government has been obtained, "while in one case an agreement for reciprocal legislation " was arranged"(43). That is true. But Mr. Keith allocates too much importance to what is in reality only a shadow of authority. Canada has considerably farther to go yet before she can claim the power of independent treaty-making that some of her more enthusiastic champions already ascribe to her in their effusive moments, but it is not too much to say that she has indeed obtained, in fact, a high measure of authority in this regard. To all practical purposes Canada now enjoys independent negotiation of treaties and the formality still required for their inception and the ratification of the resultant conventions will, before long, be very much simplified. When this is done the constitutional advance already secured by Canada will be much more readily

appreciated and those remnants of authority still displayed by Mr. Keith as tokens of Canada's colonialism will be recognized to be what Mr. Dicey would call "mere constitutional fictions".

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CHAPTER XI.

IMPERIAL RELATIONS.

The Imperial has ceased to attempt to exercise any real influence on Canadian local affairs. Local matters are now left entirely to local settlement, and there is scarcely a vestige left of what was once known as "Downing Street Domination".

Probably the last instance of interference of this kind was in the matter of the dispute between the Dominion and British Columbia. Considerable difficulty had arisen over the carrying out of the agreement under which British Columbia entered the Union as originally made. It was found absolutely impracticable to fulfill its terms and a re-adjustment was necessary. Accordingly, Lord Carnarvon, who was at that time Colonial Secretary, offered his services as an arbitrator. There is some difference of opinion as to whether or not the offer was accepted on such an understanding. Messrs. Buckingham and Ross declare in their "Life of Alexander Mackenzie", that Mr. Mackenzie declined Lord Carnarvon's services as an arbitrator, but accepted his offer to mediate in the matter. Mr. Keith, in his "Responsible Government in the Colonies", says that both the Dominion and the Province accepted his proposal. At any rate, both sides submitted

their cases and arguments to him. In a despatch on August 16, 1874, Lord Carnarvon made suggestions for the settlement of the whole matter, but these suggestions were not satisfactory and the discussion continued. A later despatch, dated 17th November, 1874, declared the award of the Secretary of State, which was still unacceptable to the Dominion, and the matter remained a source of friction and dispute. Then on 26th February, 1876, the Legislative Assembly of British Columbia petitioned the Queen to insist on the Federal Government observing the award. Fortunately, no coercion was attempted. In the same year Lord Dufferin visited the Province, and by diplomacy and tact was able to allay the trouble for the time. It broke out again in 1878, and was finally settled by Sir John A. Macdonald, when that gentleman was returned to power in 1879. The unhappy attempt of the Home Government to interfere was not repeated, and until the present time, the policy of 'laisser-faire' has been strictly adhered to in matters of local concern.

The South-African War had an important constitutional bearing, in that, for the first time, Canadians were recruited for service in a foreign war, and the expense of the contingents was borne by the Dominion. The enlistment was, however, a special and voluntary one, and for that reason its importance was mainly in the impetus given to Imperial sentiment.

In 1855 Canada took charge of her own land defences, and Great Britain steadily withdrew her troops, until the only British Garrisons left in Canada were at Halifax and Esquimalt. The British troops were replaced by an organized Canadian Militia[10]. The Department is in charge of the Minister of

Militia. Under the orders of the Minister was the General Officer Commanding, who was appointed by the Imperial Government. The choice was, however, always subject to the approval of the Minister, and if any friction occurred, the General Officer Commanding was recalled. An instance of this occurred in 1904 when Lord Dundonald was recalled for insubordination to the Minister. A considerable agitation was made at the time for the appointment of a Canadian to this position, but after the retirement of Lord Dundonald's successor, the office was abolished. The first officer under the Minister, other than the Deputy Minister of Militia, is now called "Chief of the General Staff". Until recently, this office was occupied by Major-General Mackenzie, of the Imperial Army, but when friction occurred between him and Colonel the Honourable Sam. Hughes, he resigned, and the office is now vacant.

For a time prior to 1905, the costs of maintenance of the garrisons at Halifax and Esquimalt was divided equally between the Imperial and Dominion Governments. In 1902 the Dominion Government offered to bear the whole expense and this offer was finally accepted in 1905.

The question of Canada's naval defence is one which still awaits settlement. Great Britain has, till the present time, maintained naval bases at Halifax and Esquimalt as headquarters in Canada for the Atlantic and Pacific divisions of the Imperial fleet. The policy of concentration adopted by the Admiralty has resulted, however, in the complete withdrawal of the Pacific squadron. There is now no provision what ever for naval defence on the Pacific coast. In 1909

it was decided by the Dominion to organize a local naval service, and for this purpose two training-ships were secured for the incipient navy, and tenders were called for for several armed cruisers. In 1910 the Admiralty property in the prts of Halifax and Esquimalt was transferred to the Dominion Government on a promise of its maintenance, by Orders-in-Council dated the 23rd October, 1910, and May 4, 1911, respectively. Then the election of 1911 unseated the Laurier administration, and put an effectual stop to these preparations. The Naval Service Act of 1909 has not yet been repealed, but all operations under it have been suspended. The two training-ships have been returned to Great Britain and their crews discharged. In 1912 a discussion as to the best method of Imperial assistance was renewed. The defeat of the Naval Aid Bill in the Senate leaves the whole matter unsettled.

This problem of Imperial defence is one that has largely engaged the attention of all the Colonial Conferences since 1887, without, seemingly, much unanimity being arrived at as to concerted action in the matter. In 1909 Premier Asquith proposed an Imperial Defence Committee, to be composed of the Premiers of all the colonies, of the United Kingdom and of the officers of the Admiralty. This Committee was to have purely advisory functions. However, any satisfactory settlement of the whole question, particularly in Canada, where the policy has become entrained in political issues, seems as far distant as ever.

It was in his famous speech at Aurora on 3rd October, 1874,

that Mr. Edward Blake first suggested the scheme of Imperial Federation. From time to time the proposal is discussed and a few advocates have been enlisted, of whom the chief is The Honourable Joseph Chamberlain. The majority of English statesmen, however, still consider the idea an impossible scheme and a political chimera.

In conclusion, it merely remains to note that the Imperial attitude towards Canada has psychologically changed since Confederation. In those early days it was the common talk of English statesmen that the ultimate goal of the colonies was independence. Lord John Russell - to the despair of Lord Elgin - seemed never weary of warning his fellow statesmen to prepare for the time when Great Britain show release her colonies to independence and their separate destinies. This attitude has greatly changed since that time. The English people of to-day have found a new interest in, as they have found a new acquaintance with, the colonies. They are beginning to believe that the colonies are a valuable asset to the Mother Country, and it must be admitted that while Imperial control over Canada has continually weakened, the bonds we call "the ties of Empire" have been very sensibly strengthened. In this respect at least, the Imperial relations seem to more and more make for permanence of the colonial connection.

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