

(November 15th, 1937)

The British North America Act, 1867

HON. C. H. CAHAN.

T. D'ARCY LEONARD, Chairman:— Gentlemen, before we hear from our guest-speaker we have another pleasant feature on this program. Today closes the fortieth year of the existence of the Canadian Club of Toronto, and your executive officers have felt we could best celebrate the passing of our fortieth milestone by honoring a man who was the first president of this club, and who has continued during all these years to give the club the benefit of his time, energy, and wisdom. Col. J. A. Cooper, on behalf of the club it is my privilege to read you the following address:

November 15th, 1937.

Colonel John A. Cooper,
Toronto, Ontario.

Dear Colonel Cooper,

Your fellow members of the Canadian Club of Toronto wish to take this opportunity of enrolling you as an Honorary Life Member of this Club. Forty years ago, November 16th, 1897, the organization meeting of the Club was held and you were appointed the First President. Since that time the Club has expanded from a membership of 57 to over 2,000 members and during these years your interest in its welfare has been steadily maintained. On at least twenty occasions you have acted as Chairman of the Nominating Committee.

In addition to your continued interest in the welfare of this Club you have given active and sympathetic support to the Canadian Club movement in Canada, having on several

occasions addressed other Clubs and at present you are a member of the Executive of the Association of Canadian Clubs.

It is with the greatest pleasure that your fellow members join with me in electing you an Honorary Life Member of the Canadian Club of Toronto.

Yours sincerely,

T. D'ARCY LEONARD,
President.

(November 15th, 1937)

CANADIAN CLUB SPEECH

I quite recognize that the honour which the Club has bestowed upon me to-day is a compliment to all the Charter Members, and I accept it as such. In his remarks at the 25th Anniversary Banquet of the Club, the late Sir Edmund Walker stated that the first members of the Club were perhaps not aware of what they were creating. Sir Edmund intended this as a compliment but I may be permitted to say that I hold a somewhat different view. There was much correspondence between Sanford Evans and myself before the preliminary meetings were held, and the possibilities of the organization were discussed privately and publicly over a considerable period. Two public meetings were held before the organization meeting.

At the largest of these public meetings there were some "doubting Thomases". They thought that an organization known as the Canadian Club might be misunderstood. They feared that the frank cultivation of national sentiment might be deemed antagonistic to imperial sentiment. However, those of us who entered the organization at that time refused to be dismayed by such a fear and looking back over forty years I think we were right in our belief that a vigorous and more united Canada would mean a bigger and better Empire.

We began our work with studies and conversations among ourselves. We soon saw that what we needed was education so the weekly luncheon with a special speaker developed almost immediately. We organized in November

and by February we were meeting regularly once a week. We merely desired to be more enthusiastic and better informed Canadians.

Reviewing these forty years, I have nothing to regret as a Club member. The beginnings were humble, but the basis was reasonably sound. The growth was slow but sure. After forty years Canadian Clubs everywhere, even in New York and London, indicate that this Club in particular has contributed towards a greater confidence and pride in the past and future of our brand of civilization.

THE BRITISH NORTH AMERICA ACT, 1867

In accepting the invitation of this Canadian Club to address you on the subject of the British North America Act, 1867, one is confronted with the difficulty of deciding whether to present the terms of that Act as they were conceived and expressed by leaders of public opinion in these British North American Colonies, in their own language with which our fathers were thoroughly familiar, or whether to present its terms as authoritatively construed and applied by successive decisions of the Judicial Committee of the Privy Council sitting in London.

In a debate in the House of Commons at Westminster on March 28th, 1867, Mr. Gladstone, referring to the enactment of the British North America Act, 1867, said that this Act had been passed "with a promptitude which, if it had been a measure affecting ourselves, would have been precipitancy." This was, however, he continued, "an acknowledgment of the title of these colonies to deal practically with their own affairs."

Mr. Lowe, afterward Lord Sherbrooke, who followed, remarked that the Act had been passed with the expedition commented on by Mr. Gladstone just because parliament felt it was a matter with which it had only the most formal concern.

In enacting this measure, the Parliament of Westminster was merely adopting and confirming a draft prepared by Canadian statesmen, who were expressing in the English language, as they understood it at the time, their own final conclusions, and that parliament, without detailed discussion,

enacted the bill as it had been drafted. In my earlier years, therefore, the opinion prevailed that the terms of the Act should be construed in accordance with the clearly expressed intentions of those who framed it.

Despite the disdainful comments of critics of our time, I regard the British North America Act, 1867, as one of the most monumental and enduring political documents of the last century. Its completeness of details, and, when construed in accordance with the clearly expressed intentions of its framers, its adequacy and suitability to existing Canadian conditions, even in our time, is really remarkable.

It was framed, after most careful study of the Constitution of the United States, with a view to avoiding difficulties, out of which the Civil War arose in that Republic, and, in consequence, the residual or unappropriated powers there vested in the legislatures of the States, were here granted to the parliament of Canada, by providing that parliament should be empowered "to make laws for the peace, order and good government of Canada in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the legislatures of the provinces."

The British North America Act, 1867, was studied by experts appointed by the German Government to frame the German Constitution of 1871. It was, in part, the basis from which was drafted the Swiss Federal Constitution of 1874, and the Australian Constitution Act of 1900.

At Heidelberg University, commencing in 1872, German experts, for many years, gave to German and Swiss students lectures upon this Act, construing its terms by detailed studies of all available documents relating to the constitutional development of the Canadian provinces during the previous century.

It is, I repeat, a memorable historic document, and, in my opinion, after the lapse of three score and ten years since its enactment, except as may be necessary to rectify certain decisions of the Judicial Committee of the Privy Council, which have admittedly frustrated the clear intentions of its framers, the Act is adequately adapted to meet the complex economic and social conditions of our present time.

The members of the Judicial Committee of the Privy Council, in dealing with colonial and Dominion constitutional issues, have assumed that one of their functions is to exercise political as well as judicial supervision over the public policies expressed in colonial and Dominion enactments, and not only to direct the trend of such policies in conformity with their personal conceptions of what may constitute Imperial interests, but also, from time to time, as experienced statesmen, endowed with incomparable political wisdom, to rewrite the text of the Canadian constitution. Their decisions may only be enforced by Orders in Council of successive governments of the United Kingdom, and, while the Supreme Court of Canada is bound to follow decisions of the Judicial Committee, that Committee does not deem itself bound even by the prior decisions given by their predecessors, who, for the time, constituted that Committee.

In consequence, members of the Supreme Court of Canada must frequently refrain from considering the real meaning and intent of the framers of the British North America Act, and restrict their intellectual efforts to ascertaining, as best they can, the purport of apparently conflicting decisions of the Judicial Committee.

Those who have carefully studied the constitutional development of these colonies will frankly concede that the clear intentions of the framers of the Quebec Conference resolutions, on which the Act of 1867 was based, have, in many instances, been completely frustrated by decisions of the Privy Council, which our Canadian Courts have been obliged to follow, despite their own opinions to the contrary.

When I entered the Law School of Dalhousie University at Halifax, some sixteen years after the British North America Act, 1867, came into force, we were urged by Dean Weldon, who had studied our Canadian constitution under those same experts at Heidelberg and whom I still regard as one of the sanest constitutional authorities whom Canada has reared, to read carefully all available public documents and discussions relating to the political history of Canada as preliminary to our study of the B. N. A. Act, for, as he then contended, in that Act, it was in a formal and technical

sense only that Imperial Parliament spoke, but in a real and substantial sense that Canadian statemen spoke; and that it was to their language, as they understood it at the time, that effect should be given by the Courts. They were fully acquainted with the phraseology and nomenclature of the official documents, legislation and jurisprudence of the pre-confederation era, and where, in framing the Quebec resolutions and the British North America Act, they used terms and phrases which, for many years, had well-defined meanings in legislation relating to the Canadian provinces, that meaning should be adhered to in construing the terms and phrases used by them in drafting that Act.

In fact, it was clearly apparent to the students of that day, more than a half century ago, that the distribution of legislative powers between the proposed federal parliament and provincial legislatures as they appear in the Quebec Conference resolutions, were drafted after a careful comparison of the Consolidated Statutes of the Province of Canada, of 1859, which applied to both Upper and Lower Canada, the Consolidated Statutes of Upper Canada of the same year, which were in force in Upper Canada alone, the Consolidated Statutes of Lower Canada of 1861, which applied to Lower Canada alone, and the first Codification of the Civil Laws of Lower Canada, which was commenced in 1859, completed in 1864 and enacted in 1865, and with which the framers of the British North America Act of 1867 were thoroughly familiar.

In fact, the enumerated subjects of legislation, as proposed to be distributed in the Quebec Conference resolutions, were substantially identical with the classifications made in the indices to the three volumes of Canadian Consolidations of the then existing enactments, which, we as students were compelled to study with care.

For example, in framing the exclusive power of the provinces to make laws in relation to property and civil rights, a phrase was adopted, which, with slight variations, had been employed in old Quebec and subsequently in Upper and Lower Canada, as designating a restricted and definite class of subjects, for nearly a century before it was inserted in Sections 92 and 94 of the B. N. A. Act.

PEACE, ORDER AND GOOD GOVERNMENT

Moreover, when the framers of our Constitution vested in the federal parliament the residual power to make "laws for the peace, order and good government of Canada," they used another phrase which, with slight variations, had also been familiar to colonial officials for more than a hundred years, as granting the most extensive jurisdiction, consistent with Imperial control, that was then deemed possible. But during the past seventy years, successive decisions of the Judicial Committee of the Privy Council have so far frustrated the intentions of the founders of the Canadian Confederacy as almost to obliterate the residual power of the Parliament of the Dominion to make "laws for the peace, order and good government of Canada," and so extended the legislative jurisdiction of the provinces to make laws "in relation to property and civil rights" as almost to reverse the relations originally intended to exist between federal and provincial powers.

The founders and framers of our Constitution contemplated that the power of the Parliament of Canada to make laws "for the peace, order and good government of Canada" might possibly conflict with the exclusive power of a legislature to make laws in relation to "all matters of a merely local or private nature in the province", and they made a safeguarding provision accordingly; but they certainly did not conceive of such conflict arising in respect of the provincial power to make laws "in relation to property and civil rights in the province," which they understood, from their reading of the public documents and discussions of the previous century, to be a clearly defined and restricted class of subjects.

The commission issued on May 22nd, 1749 to Edward Corndallis as Governor in Chief in, and over the province of Nova Scotia authorized the appointment of a Council and the election of a General Assembly, and declared that the Governor "with the advice and consent of our said Council and Assembly, or the major part of them respectively, shall "have full power and authority to make, constitute and "ordain laws, statutes and ordinances for the publick peace, "welfare and good government of our said province."

This power to make laws for the public peace, welfare and good government of a colony was throughout a century of Canadian history deemed so expansive as to cover every matter which could become the subject of colonial legislation.

The Royal Proclamation of October 7th, 1763, made provision for the government of Quebec, East Florida, West Florida and Grenada, which comprised the Grenadines, and the Islands of Dominica, St. Vincent and Tobago, which had been ceded to the British Crown by the Treaty of Paris of February 10th, 1763. This Proclamation, as in the case of Nova Scotia, declared:

"We have also given power to the said governors, with the consent of our said Councils and the representatives of the people so to be summoned as aforesaid, *to make, constitute, and ordain laws, statutes and ordinances for the public peace, welfare and good government of our said provinces, and of the people and inhabitants thereof, and such others as shall resort thereunto*, and for the benefit of us, our heirs and successors; which said laws, statutes and ordinances are not to be repugnant, but as near as may be agreeable, to the laws and statutes of this our Kingdom of Great Britain."

In the instructions to Governor Murray, issued on the same date, October 7th, 1763, the phrase "for the peace, order and good government of our said province" is used instead of the phrase "public peace, welfare and good government of our said province," which appears in the commission.

The authority to make laws for the "public peace, welfare and good government," or "for the peace, order and good government" of a colony or province, as these terms frequently appear in constitutional documents throughout the ensuing century, was construed and ever used as conceding wide legislative powers, subject only to the special restrictions expressed in the commissions and instructions to successive Governors.

The instructions given to Governor Carleton in 1768 declared that, as it might be impracticable for the present to summon a general assembly, "you are in the meantime to make such rules and regulations by the advice of our said Council as shall appear to be necessary *for the peace, order and good government of our said province.*"

The Quebec Act, 1774, "An Act to make more effectual provision for the government of the province of Quebec in North America," on the ground that it was then inexpedient to call an assembly, provided for the constitution and appointment of a council, "which council so appointed shall have power and authority *to make ordinances for the peace, welfare and good government of the said province*," with the consent of His Majesty's Governor, or, in his absence, of the Lieutenant Governor, or Commander in "Chief for the time being."

The new instructions dispatched to Governor Carleton, dated January 3rd, 1775, recites the provision of the Quebec Act that the Council shall have "power and authority *to make ordinances for the peace, welfare and good government of the said province* with the consent of the governor."

The Constitutional Act of 1791 made provision for the repeal of certain parts of The Quebec Act, 1774, and proceeds in the second section to enact:

"That in each of the said provinces respectively His Majesty, His heirs or Successors shall have power, during the continuance of this Act, by and with the advice and consent of the Legislative Council and Assembly of such province respectively, *to make law, for the peace, welfare and good government thereof*, such laws not being repugnant to this Act; and that all such laws . . . shall be and the same are hereby declared to be, by virtue of this Act, valid and binding to all intents and purposes whatever, *within the province* in which the same shall have been so passed."

The Union Act of 1840 provided for the re-union of the two provinces of Upper and Lower Canada into one province, under the name of the Province of Canada. The third section of that Act contains the following:—

"*Within the province of Canada*, Her Majesty shall have power, by and with the advice and consent of the said Legislative Council and Assembly, *to make laws for the peace, welfare and good government of Canada*, such laws not being repugnant to this Act . . . and that all such laws being passed by the said Legislative Council and Assembly, and assented to by Her Majesty, or assented to in Her Majesty's name by the Governor of the Province of Canada,

shall be valid and binding to all intents and purposes within the Province of Canada."

Acts of the parliament of Great Britain, commissions to the governors of the provinces and other constitutional and provincial documents made it very clear that the terms, "peace, welfare and good government" and "peace, order and good government," expressed the same meaning and intent; and that the power to make laws for the peace, order and good government of a province or colony included all laws which were not repugnant to statutes of the parliament of Great Britain that extended to such province or colony.

The British North America Act 1867 subsequently enacted that on and after a day to be proclaimed "the provinces of Canada, Nova Scotia and New Brunswick shall form and be one Dominion under the name of Canada."

The 17th Section of the British North America Act, 1867, enacts that:

"17. There shall be one parliament for Canada, consisting of the Queen, an Upper House styled The Senate, and the House of Commons."

The 91st section of the Act enacts that:

"91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the peace, Order and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,—";

and then follows an enumeration of twenty-nine classes together with this express provision:

"And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of

Subjects by this Act assigned exclusively to the Legislatures of the Provinces."

Lord Carnarvon, Colonial Secretary, in introducing the British North America Bill to the House of Lords on February 19th, 1867, said:

"In closing my observation upon the distribution of power, I ought to point out that just as the authority of the central parliament will prevail whenever it comes into conflict with the local legislatures, *so the residue of legislation, if any, unprovided for will belong to the central body.* It will be seen under the ninety first clause, that the classification is not intended to 'restrict the generality' of the powers previously given to the central parliament, but that those powers extend to all laws made 'for the peace, order and good government' of the Confederation—*terms which, according to all precedent, will, I understand, carry with them an ample measure of legislative authority.*"

PROPERTY AND CIVIL RIGHTS IN THE PROVINCE

On the other hand, the meaning of the words "property and civil rights in the province," which was one of the classes of subjects assigned to provincial legislatures by Section 92 of the British North America Act, may be discerned throughout the century preceding the Quebec resolutions from such citations as the following:—

In the articles of capitulation, subscribed at Montreal on September 8th, 1760, the Marquis of Vaudreuil, representative of the King of France in Canada, and General Amherst, Commander in Chief of the British troops and forces in North America, Vaudreuil demanded, in the forty-second article, that:

"The French and Canadians shall continue to be governed according to the Custom of Paris, and the laws and usages established for this country, and they shall not be subject to any other imposts than those which are established under the French Dominion."

To which General Amherst replied:

"Answered by the preceding articles, and particularly by the last," which declared that "they become subjects of the King."

From that day the discussion continued throughout the ensuing century, as to whether the Custom of Paris, and the French ordinances and usages that had theretofore been followed in Canada, should thereafter apply to its Canadian inhabitants, and, throughout that discussion the true meaning of "property and civil rights in the province," as subsequently used in the British North America Act, 1867, clearly developed.

On June 5th, 1762, General Murray, who had been appointed Governor, in reporting to the British Government upon the state of the government of Quebec under the French administration in Canada, said:

"The only Laws were the Kings Edicts or the Arrets of his Council of State, register'd at the Council Superieur, and the Intendant's ordonnances. In matters of property they follow'd the Custom of Paris, but in marriage settlements they were at liberty to follow the Custom of any other province in that Kingdom (of France)."

The Treaty of Paris of February 10th, 1763, in paragraph IV, ceded to his Britannic Majesty "in full right, Canada with all its dependencies, as well as the island of Cape Breton, and all the other islands and coast in the Gulph and River of St. Lawrence," etc., "in the most ample manner and form, without restriction."

"His Britannick Majesty, on his side, agrees to grant the liberty of the Catholick religion to the inhabitants of Canada; he will, in consequence, give the most precise and effectual orders that his new Roman Catholick Subjects may profess to worship of their religion according to the rites of the Romish Church, as far as the laws of Great Britain permit"

There was no reservation in this treaty guaranteeing the continued application of the Custom of Paris or other French laws or ordinances to the French inhabitants of Canada.

A commission was issued by His Majesty to James Murray, as Governor of the province of Quebec, on November 28th, 1763, in which the Governor was authorized to constitute a council and, "as soon as the situation and circumstances of our said Province under your Government

will admit" to call an assembly of freeholders; and declaring that:

"You the said James Murray, by and with the advice and consent of our said Council and Assembly, or the major part of them, shall have full power and authority, to make, Constitute or Ordain, Laws, Statutes and Ordinances for the public peace, welfare, and good Government of our said province, and of the people and inhabitants thereof."

On the 17th of September, 1764, the Governor, by and with the consent of His Majesty's Council, enacted an ordinance establishing civil courts for the province, including a court of common pleas, and, as a court of appeal, the Court of King's Bench.

This ordinance declared that:

"The French Laws and Customs to be allowed and admitted in all Causes in this Court between the Natives of this Province, where the Cause of Action arose before the first day of October, One Thousand Seven Hundred and Sixty-four."

This ordinance, which restricted the application of the Custom of Paris and French ordinances to Causes of Action that arose prior to October 1st, 1764, was the occasion of numerous protests by the French inhabitants to the Governor and to His Majesty the King against such restriction.

On November 19th, 1765, His Majesty referred all memorials and petitions from his subjects in the Province of Quebec to Attorney General York and Solicitor General De Grey for a report thereon; and on April 14th, 1766, the said Attorney General and Solicitor General of England made a report thereon, in which they said:

"The Second and great source of disorders was the alarm taken at the construction put upon His Majesty's Proclamation of October 7th, 1763. As if it were his Royal Intentions by his Judges and Officers in that Country, at once to abolish all the usages and Customs of Canada, with the rough hand of a Conqueror, rather than with the true Spirit of a Lawful Sovereign, and not so much to extend the protection and benefit of his English Laws to His New subjects, by securing their lives, libertys and propertys with more certainty

than in former times, as to impose new, unnecessary and arbitrary Rules, especially in the *Titles of Land, and in the modes of Descent, Alienation and Settlement*, which tend to confound and subvert rights, instead of supporting them."

They, therefore, recommended the following general rules:

"*First* in all personal actions grounded upon Debts, promises, Contracts and Agreements, whether of a Mercantile or other nature, and upon wrongs proper to be compensated in damages, to reflect that the substantial maxims of Law and Justice are everywhere the same. The modes of proceeding and Trial, and perhaps in some degree also the strict Rules of Evidence may vary, but the Judges in the province of Quebec cannot materially err, either against the Laws of England, or the ancient Customs of Canada, if in such Cases they look to those substantial maxims.

"*Secondly, in all suits or Actions relating to Titles of Land, the Descent, Alienation, Settlements and incumbrances of Real property, we are humbly of opinion, that it would be oppressive to disturb, without much and wise deliberation and the Aid of Laws hereafter to be enacted in the province, the local Customs and Usages now prevailing there; to introduce at one Stroke the English Law of Real Estates, with English modes of Conveyancing, Rules of Descent and Construction of Deeds, must occasion infinite confusion and Injustice. British Subjects who purchase Lands there, may and ought to conform to the fix'd local Rules of Property in Canada, as they do in particular parts of the Realm, or in the other Dominions of the Crown. The English Judges sent from hence may soon instruct themselves by the assistance of Canadian Lawyers and intelligent Persons in such Rules, and may Judge by the Customs of Canada, as your Lordships do in Causes from Jersey by the Custom of Normandy. It seems reasonable also, that the rules for the Distribution of personal property in Cases of Intestacy the modes of assigning and Conveying should be adhered to for the present.*"

Many other interesting and instructive reports are found in our archives, of which that of Attorney General Thurlow, afterward Lord Chancellor of England, dated January 22nd,

1773, and that of Advocate General James Marriott, published in 1774, are of particular interest.

In 1770, leading French-Canadians sent a Petition to His Majesty, in which they state:—

"From the moment, Sire, of the union of this Province to the Dominion of your Crown, your most humble servants have taken the liberty of frequently representing to you, of what importance to their interests it was to be judged and governed according to the Laws, Customs and Regulations under which they were born, which serve as the Basis and Foundation of their possessions, and are the rule of their families."

Subsequent protests of the French-Canadian inhabitants continued to demand the application of the Custom of Paris and French ordinances which had obtained prior to the Treaty of Paris, 1763, until the enactment by the parliament of Great Britain of The Quebec Act, 1774 (14 George 3, Chap. 83), abated the controversy.

When the Quebec bill was discussed in the House of Commons in May, 1774, Attorney General Edward Thurlow, afterward Lord Chancellor Thurlow, strongly advocated the retention of the French customs and ordinances. Referring to the Royal Proclamation of 1763, he said:

"If it is to be considered as importing English laws into a country already settled, and habitually governed by other laws, I take it to be an act of the grossest and absurdest and cruellest tyranny that a conquering country ever practised over a conquered country."

As to the contention that Englishmen, in making new settlements, always carry their constitution and the English laws with them, the Attorney General said:

"When the Crown of Great Britain makes a conquest of any foreign established country, if it be true that it is an article of humanity and justice to leave the country in the possession of their laws, then I say, if any English resort to the country, they do not carry the several ideas of laws that are to prevail the moment they go there: it would be just as wise as to say, if an Englishman goes to Guernsay, the laws of the city of London were carried over with him."

Several witnesses were heard by the House of Commons sitting in committee. Governor Carleton appeared before the committee and gave evidence as follows:—

“Do you conceive the people of the country to be at all informed of the French law they lived under?”

“They understand the French law from education, as the people of England understand the English law from education, from the customs and usages of the place.

“Do they understand more than the general custom of descent and heritage and the mode of conveying property?”

“They are acquainted with the laws of property generally, and the Custom of Canada, but as to the other laws of Paris, they are not introduced: they are as much unknown to them as the laws of England . . . “The Canadians are very anxious to have Canadian law to decide in matters of property. I believe they are pretty indifferent in regard to the criminal law.”

Francis Maseres, former Attorney General of Quebec, also gave evidence:

“Would not the Canadians think themselves happy without the restoration of their laws and customs?”

“I think they would not be happy without the restoration of their laws and some of their family customs, as tenures of land, the mode of conveying, marriages, descent and dower, and the rule in cases of persons dying intestate.”

William Hay, Chief Justice of Quebec, also gave evidence as follows:—

“The Canadians conceived that the introduction of English laws, and the exclusion of their own, at least their doubt and uncertainty how far that matter went, was their greatest grievance; and the remedy proposed to be applied was the restoration of their own laws and customs in toto. I own myself I thought that went too far . . . I was willing to allow them the whole law with respect to their tenures, with respect to the alienation, descent and mode of conveying or incumbering their real property, to the rights of dower and marriage, and the disposition of their personal estate in case of intestacy . . . The rest of their law, as the law respecting contracts, debts, disputes of a commercial

nature, the law of evidence, and many other matters of that kind I thought might safely stand upon English bottom . . . They seem perfectly satisfied with the English criminal law.”

The Quebec bill, as amended in Committee of the House of Commons, was finally enacted on June 22nd, 1774, and is known as The Quebec Act of 1774.

Section 8 of this Act of 1774 enacted as follows:

“8. *His Majesty's Canadian subjects, within the province of Quebec, the religious orders and communities only excepted, may also hold and enjoy their property and possessions, together with all customs and usages relative thereto, and all other their civil rights, in as large, ample, and beneficial a manner, as if the said proclamation, commissions, ordinances, and other Acts and instruments had not been made, and as may consist with their allegiance to His Majesty, and subjection to the crown and parliament of Great Britain; and in all matters of controversy, relative to property and civil rights, resort shall be had to the laws of Canada, (i. e. the Custom of Paris and French ordinances), as the rule for the decision of the same; and all causes that shall hereafter be instituted in any of the courts of justice, to be appointed within and for the said province by His Majesty, His Heirs and Successors, shall with respect to such property and rights, be determined agreeably to the said laws and customs of Canada, until they shall be varied or altered by any ordinances that shall, from time to time, be passed in the said province by the governor, lieutenant governor, or commander in chief, for the time being, by and with the advice and consent of the legislative council of the same, to be appointed in manner hereinafter mentioned.*”

The French civil laws and customs, which obtained in Canada prior to 1763, were thus restored; but by Section 11 of the Quebec Act, it was declared that the Criminal Law of England “shall continue to be administered, and shall be observed as law in the province of Quebec;” and by an Ordinance of the Legislative Council in 1785 (25 Geo. 3 Chap. 9, Sect. 10), the English rules of evidence were introduced in commercial cases.

His Majesty's instructions to Governor Carleton, dated January 3rd, 1775, then also declared in paragraph 12, that:

"It is Our Gracious purpose, conformable to the spirit and intention of the said Act of Parliament that Our Canadian Subjects should have the benefit and use of their own Laws, Usages and Customs in all controversies respecting Titles of Land, and the Tenure, Descent, Alienation, Incumbrances and Settlement of Real Estates, and the distribution of the personal property of persons dying intestate."

This paragraph indicates the restricted application of the phrase property and civil rights as then understood.

His Majesty's instructions to Lord Dorchester as Governor in Chief of the Province of Quebec in America, dated August 23rd, 1786, contained the following:—

"It is our gracious purpose, conformable to the spirit and intention of the said Act of Parliament (The Quebec Act, 1774) that Our Canadian subjects should have the benefit and use of their own laws, usages and customs in all controversies respecting the titles of land and the tenure, descent, alienation, incumbrances and settlements of real estates and the distribution of personal property of persons dying intestate."

The instructions then follow those given to Governor Carleton, dated January 3rd, 1775.

The Constitutional Act of 1791 (31 George 3, Chap. 31) divided the province of Quebec into the two provinces of Upper and Lower Canada, each with a legislative council and legislative Assembly. Section 33 of said act provided that "all laws, statutes and ordinances" then in force, "shall remain and continue to be of the same force, authority and effect in each of the said provinces respectively, as if this act had not been made, and as if the said province of Quebec had not been divided; except in so far as the same are expressly repealed or varied by this act, or in so far as the same shall or may hereafter by virtue of and under the authority of this Act, be repealed or varied by His Majesty, his heirs or successors, by and with the consent of the legislative councils and assemblies of the said provinces respectively."

The Customs of Paris and the French ordinances, the English criminal law, and, in part, the English commercial

law, then applied to the inhabitants of each of the two provinces into which Quebec was then divided.

The first act of the first legislature of the new province of Upper Canada, enacted on October 15th, 1792, was entitled an act "to introduce the English law as the rule of decisions in all matters of controversy relating to property and civil rights."

This act then proceeds, in respect of the new province of Upper Canada, to repeal the said provision of the Quebec Act 1774 "that in all matters of controversy relative to property and civil rights resort should be had to the laws of Canada as the rule for the decision of the same," and to enact that:

"The authority of the said laws of Canada, and every part thereof, as forming a rule of decision in all matters of controversy relative to property and civil rights, shall be annulled, made void, and abolished throughout this province, (of Upper Canada), and that the said laws, nor any part thereof as such, shall be of any force or authority within the said province, nor binding on any of the inhabitants thereof."

"III. And be it further enacted by the authority aforesaid that from and after the passing of this act, in all matters of controversy relative to property and civil rights, resort shall be had to the laws of England, as the rule for the decision of the same."

From that date the Custom of Paris and other French laws and Ordinances no longer applied to the people of the province of Upper Canada.

Even under the Constitutional Act of 1791, dissensions arose in both Upper and Lower Canada, which eventually developed in 1837-1838 into insurrections in both provinces, and led to the appointment, in 1838, of Lord Durham as Governor General of Canada, who reported, on August 9th, 1838, to Lord Glenelg, then Colonial Secretary, that in Lower Canada—

"The subject of dissension has been, not the connexion with England, nor the form of the Constitution, nor any of the practical abuses which have affected all classes of the

people, but simply such institutions, laws and customs as are of French origin, which the British have sought to overthrow and the Canadians have struggled to preserve."

One result of Lord Durham's extended report, which was dated at London, January 31st, 1839, was that the English government decided to re-unite Upper and Lower Canada. The bill which formed the basis of The Union Act, 1840, was first drawn up in Canada, under the supervision of Chief Justice Stuart of Lower Canada, and introduced to the parliament of Great Britain and then enacted with some changes on July 23rd, 1840. It was entitled "An Act to Re-unite the Provinces of Upper and Lower Canada," and appears as 3-4, Victoria, Chapter 35.

The Union Act of 1840 provided that the two provinces of Upper Canada and Lower Canada should constitute one province under the name of the Province of Canada.

Section 46 of said Union Act of 1840 provided that the French laws and ordinances, *relating to property and civil rights*, which were in force in the province of Lower Canada at the date of the Union, should continue in force in that part of the new Province of Canada.

Effective measures were not taken until 1857 to codify the Custom of Paris and other French laws and ordinances in force in Lower Canada.

The Bill for the codification of the civil laws of Lower Canada, which was introduced in the Legislature of the Province of Canada by Hon. George Etienne Cartier, became law on June 10th, 1857.

It was not till February, 1859 that Commissioners were appointed for the purpose of preparing the proposed codification of the civil laws of Lower Canada. The Commissioners presented seven successive reports, the final report being made on November 25th, 1864.

On January 31st, 1865, the bill consolidating the Civil Code of Lower Canada was introduced to the Legislature of Canada, and a second edition of these seven reports of the Commissioners was then laid before the Legislature.

On March 8th, 1865, this bill was enacted; and the Civil Code of Lower Canada was, by proclamation, brought into full force and effect on August 1st, 1866.

The First Book of this code, under the heading of "enjoyment and loss of rights," dealt with acts of civil status, domicile, marriage, separation of bed and board, filiation, parental authority, tutorship, curatorship and the like.

The Second Book, under heading of "property and its ownership" dealt with ownership, usufruct, real servitudes and emphyteusis.

The Third Book dealt with "the acquisition and exercise of rights of property", including successions, gifts *intervivos*, marriage covenants, sale and exchange, lease and hire, mandate loan, deposit, partnership, life-rents, suretyship, pledge, privileges and hypothecs, registration of real rights, prescription, imprisonment in civil cases.

The Fourth Book dealt with the Commercial Code, including bills of exchange, notes and cheques, merchant shipping, affreightment, carriage of passengers in merchant vessels, insurance, bottomry and *respondentia*, which were not derived from the Custom of Paris, and which, since 1867, have been largely dealt with in laws enacted by the Dominion Parliament, under the provisions of Section 91 of the B. N. A. Act.

Those who drafted the British North America Act, 1867, were well informed of the terms of the reports of the commissioners who made the Consolidation of the Civil Laws of Lower Canada.

MATTERS OF FUNDAMENTAL CIVIL LAW

It is perfectly clear, I think, that the framers of the British North America Act, 1867, had clearly in their minds that the matters comprised in the class of subjects designated, "property and civil rights in the province", which were exclusively reserved to the provincial legislatures, were such matters of fundamental civil law as related to the ownership, alienation or conveyance and transfer of property, the leasing and mortgaging of property, the devolution of estates by inheritance and by will, rights arising from personal status and domestic relations, legitimacy, minority, capacity to contract or alienate, marriage, judicial separation, tutorship, curatorship, and the like, as appear from the statutes

and public documents of the hundred years of our history preceding the enactment of the British North America Act.

The reservation contained in Section 92 that "in each province the legislature may exclusively make laws in relation to matters coming within the class of subjects therein designated as "property and civil rights in the province" was made, as declared at the time and as all students of our Canadian history well know, for the protection of these French customs, laws and ordinances which had been definitely ascertained and embodied in the final report of the Commissioners on November 24th, 1864.

That the framers of the British North America Act, 1867 conceived of "property and civil rights in the province" as a definite class of matters, is also apparent from the terms of Section 94 of said Act:

"94. Notwithstanding anything in this Act, The Parliament of Canada may make Provision for the *Uniformity of all or any of the Laws relative to Property and Civil Rights in Ontario, Nova Scotia, and New Brunswick*, and of the Procedure of all or any of the Courts in those Three Provinces, and *from and after the passing of any Act in that Behalf the Power of the Parliament of Canada to make Laws in relation to any Matter comprised in any such Act shall, notwithstanding anything in this Act, be unrestricted*; but any Act of the Parliament of Canada making Provision for such Uniformity shall not have effect in any Province unless and until it is adopted and enacted as Law by the Legislature thereof."

This Section 94 clearly expresses the conception that laws relative to property and civil rights, than already adopted, and laws in relation to property and civil rights, which might thereafter be enacted, were deemed to comprise a body of fundamental civil law, which, when once consolidated into a uniform statute for the English provinces, would be placed under the legislative jurisdiction of the parliament of Canada.

It was a *sine qua non* of the acceptance by the French inhabitants of Quebec of the British North America Act that their own laws "in relation to property and civil rights" should be maintained intact, except as they might thereafter be modified by the legislature of that province.

But laws "relating to property and civil rights" in Ontario, Nova Scotia and New Brunswick, though differing in unimportant particulars, as expressed in their existing statutes, were originally derived from the English law, chiefly from the English common law, and, in each of the said three provinces, were substantially the same in their purpose and effect. It was deemed expedient, therefore, to make provision for the uniformity of these provincial laws, while reserving to Quebec complete legislative control over their own laws, in relation to property and civil rights, which were derived from the Custom of Paris and the French ordinances in force at the time that Canada was acquired by the English Crown by the Treaty of Paris of 1763.

It was this fundamental body of civil law, then definitely ascertained, which was placed within the legislative jurisdiction of each province by the terms of Section 92, Sub-section 13 of the British North America Act, which enacted that:

"92. In each province the legislature may exclusively make laws in relation to matters coming within the classes of subjects, next hereinafter mentioned; that is to say,—":

"13. Property and civil rights in the province."

The words of the statute "in relation to", as they appear in the phrase "in relation to property and civil rights in the province," with its several variations, such as laws "relating to property and civil rights" and laws "relative to property and civil rights", had been previously employed, time and time again, in English and in Canadian Statutes and official documents, as meaning the dealing definitely, directly and essentially with certain fundamental laws therein indicated.

PERVERSION OF THE ORIGINAL TEXT

The Judicial Committee of the Privy Council have failed, however, to give to these words the restricted signification which was clearly intended by the framers of the B. N. A. Act and which was attached to them throughout a century of Canadian history. The signification of the words "property and civil rights" has been so widely extended that, except as otherwise restricted, they would include almost every subject of legislation excepting the criminal law. In fact the words "in relation to property and civil rights in the province," as now defined by the Judicial Committee,

who have substituted for the words "in relation to" the one word "affecting",—which they employ as meaning incidentally touching upon property and civil rights, in the widest application of those terms—would place every conceivable subject of legislation within the provincial jurisdiction, excepting the subjects specifically enumerated in Section 91 of the B. N. A. Act; and so they have perverted the original text and completely frustrated the clear intention of the framers of our Constitution.

As a young man I knew personally, and I might also say, intimately, several of the leading statesmen then living, who had been engaged in promoting and drafting the British North America Act. I knew their views as publicly and privately expressed, and I am confident that, as founders of the Canadian Confederation and framers of that Act, they undoubtedly believed that they were establishing on the Northern half of this continent a new Canadian nation. With that end in view, they sought to reserve to the National Parliament such extensive legislative powers as would prove adequate to meet all national responsibilities which might thereafter, from time to time, arise, and thus avoid those deplorable conditions which had then so recently resulted in civil war in the neighbouring republic.

In the belief in the paramount legislative authority of the Parliament of Canada, in respect of all matter not specifically vested in the provincial legislatures, we rested secure from doubts, until successive decisions of the Judicial Committees of the Privy Council necessarily modified our conceptions of the law of the Constitution by holding that the phrase "in relation to property and civil rights in the province," extended to matters, which, for a century prior to Confederation, had never been deemed to be included in the historic use of that phrase as employed in public documents relating to the British American province; and by holding that the residuary powers of the Parliament of the Dominion in respect of peace, order and good government, were restricted to cases arising out of extraordinary peril, such as foreign wars or domestic convulsions, and so precluding, as at present, the satisfactory solution by the Parliament of Canada of the complex economic and social problems which now confront the people of this country.

The Judicial Committee have thus reversed the relationship between Canada and the provinces of Canada, which the framers of the Constitutional Act believed that they had clearly established by employing words and terms which had been employed, with a restricted significance, throughout the previous century of Canadian history.

I am convinced that no person then imagined that the phrase "property and civil rights in the province" included legislative jurisdiction over such matters of general interest and concern as laws regulating life and fire insurance, laws for the regulation of all branches of industry operating throughout the Dominion, laws relating to employment in industry, wages of those employed in industry, arbitration of industrial disputes, industrial insurance for the unemployed, unemployment relief, days of rest, hours of labour, and laws relating to pensions for the aged and the blind, and the like, all of which are now alleged to be laws relating to, in the sense of incidentally affecting, "property and civil rights in the province" and which are now judicially declared to be within the exclusive legislative jurisdiction of the provinces.

Lord Sankey, then Lord Chancellor, after a careful study of some of the constitutional documents, to which I have referred, stated in 1929, that:

"The British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits."

But that dictum has been arbitrarily repudiated by more recent decisions of the Judicial Committee, which have confined our Constitution in a strait-jacket of their own making, and thus precluded the possibility of our Canadian Constitution being developed in the future by judicial decisions, in accord with the clearly expressed intentions of the Canadian statesmen who framed the first B. N. A. Act.

That growth and that expansion, to which Lord Sankey referred, must now be determined by the development throughout Canada of an informed public opinion which must ultimately control our political destiny. I shall be grateful indeed if this cursory discussion shall assist, even

to a modest measure, in clarifying the constitutional issues now before the country.

A Royal Commission has been appointed, under the chairmanship of the Chief Justice of Ontario, to investigate and report upon the financial and constitutional relations of the Dominion and the provinces. That report must eventually be approved in whole or in part by the Parliament of Canada, before effect can be given to any of its recommendations, and, therefore, all Canadians who desire to see Canada develop as a united and vigorous nation, capable of taking its proper place in the councils of the Commonwealth and of exercising its rightful influence in international affairs, must carefully consider these constitutional issues and be prepared to give an intelligent verdict when they are submitted to the final judgment of the Canadian people.

Colonel Cooper, might I now welcome you as our fifth honorary life member. We are proud to enrol your name along with those of Sir Frederick Banting, Dr. Charles Best, Sir Robert Falconer and Leslie.

COLONEL COOPER:—Mr. President and fellow members I assume that the honor you have conferred on me today is really an honor which embraces all the charter members of the Canadian Club of Toronto, and I am proud to see that there are fourteen or fifteen other members who are able to be here to celebrate the occasion.