and other Acts of all the provinces restrictions for the protection of women and young persons.

General.

A uniform Life Insurance Act, prepared by the Commissioners on Uniformity of Legislation, and finally approved in 1923, has been adopted by every province whose legislation in the interval is available for reference at the time of writing.

A uniform Warehousemen's Lien Act, prepared by the Commissioners, has been adopted by Alberta, British Columbia, Manitoba, New Brunswick, Ontario and Saskatchewan.

The locomotive habits and customs of the people are reflected in current legislation, Alberta, Quebec and Saskatchewan having consolidated their laws with regard to motor vehicles in 1924, and Ontario having done so in 1923, when a comprehensive Highway Traffic Act was passed.

OUR CONSTITUTION OUTSIDE OF THE BRITISH NORTH AMERICA ACT.[1]

Ever since 1867 the discussions of the Canadian Constitution have centered around the British North America Act. For nearly sixty years now there have been many fights, not only in the Courts but in the political arena, over the interpretation of that Act. Sections 91 and 92, and of course sometimes 93, have been the battlefield, although at times there have been questions of Crown property come up; there have been other important questions too. But I think one of the rather unfortunate results of that long series of contests has been to lead to the impression, not only among the public at large but in the profession to some extent, that all our Constitution is contained in the British North America Act. In the May number of the CANADIAN BAR REVIEW, for instance, you will find these words:—"But it is a mistake to think that the Constitution of the Dominion of Canada, though a written one, is intended to be rigid"—a direct statement that our Constitution is a written one and contained in the British North America Act. Expressions of that kind are continually found, particularly in the public press, from which the public gain their impression of our Constitution; and you will find it conveyed continually

[1] From an address delivered to the members of the Saskatchewan Bar Association at Regina on 25th June, 1924.

that the British North America Act contains our Constitution. I know perfectly well that no one of you, when asked to write on an examination paper, would forget your Clement and say anything of that kind. I am speaking simply of the popular current impression which, as I have instanced in the quotation I have made, does sometimes creep into Bar reviews. And all I hope to do in the few things I have to say is to give some reasons why an earnest endeavour should be made to correct this impression and to shift the point of view and to emphasise the extreme importance of certain other parts of our Constitution not contained in that statute.

And first with regard to the British North America Act itself: I think there is a popular impression that it was a great extension of colonial legislative power. Of course a moment's thought will enable you to realise that its importance lies not so much in any extension, but in a division and distribution, of legislative power. When we remember that by section 91 the residuary legislative power is left to the Federal Parliament, and that by that section the Federal Parliament is given power to make laws generally for the peace, order and good government of Canada, and when we compare that phrase with the language used long before, in 1748, 1773 and 1784 in the commissions to the Governors who were by an exercise of the Royal prerogative authorised to set up local legislatures, and when we compare it with the language of the Constitutional Act of 1791 and the language of the Union Act of 1840, we at once realise that there has been, in form, practically no extension of legislative power by the British North America Act. Even before Confederation the Legislative Assemblies could pass laws for the peace, order and good government of the colonies; and if we examine the statutes of the Imperial Parliament back as far as you like, I think it would surprise you to find how very very few there are, except constitutional ones, which have been passed and which could not be repealed by either our Federal or our Provincial Legislatures. Such a statute as that abolishing slavery, I suppose, is one example, a statute which no one would think of repealing. It is for this reason, I repeat, that the importance of the British North America Act lies not in the extension of power, but in its division and distribution so as to constitute a Federal system and to make possible the uniting of the scattered provinces. In fact Viscount Haldane, in the *Bonanza Creek* case, looked at it in a very casual way. Referring to the Constitution of 1840 he said: "This Constitution was modified by the Act of 1867." Now to come exactly to the point, I want you to look on these matters as merely illustrative when I mention them, because I am perfectly conscious that I am going to speak about com-

monplaces to-day. Nearly everything I shall say, in so far as it is a question of law at all, will be a perfect commonplace, and I realise that quite well. But I shall simply use the matters I refer to as illustrations to emphasise the importance of things in our Constitution that are not contained in the British North America Act.

First let me speak of something which of course will appear to you as a commonplace. Our Cabinet system, our executive government, as everyone knows, is based on an entirely different idea from that which the American Constitution presents. The President and his Cabinet are quite distinct from and not responsible to the House of Representatives. They do not appear there. Our Premier and Cabinet have seats and votes in Parliament and must retain its confidence. There is that intimate connection between legislative and executive authority which is the essence of our system. To speak of this is trite; but what I wish to emphasise is this fact, which I think is a fact, that the law upon which this system rests is not found in the British North America Act. More than that, it is not, I venture to suggest, sufficient to say, "Oh, that is one of the conventions, that is the British system which we have adopted." The fact is that the system, if I am right, and I think I am, is made possible, not by any mere convention, not by the British North America Act, not by any Imperial statute, but by statutes passed by the Canadian Parliaments themselves, both Federal and Provincial. The House of Commons Act—the Federal Act—the Legislative Assembly Acts of the Provincial Legislatures contain the provisions which, first, prevent persons holding remunerative offices under the Crown from sitting in the House, prevent a flood of office holders becoming elected to the popular House, and then, by an exception effective under certain conditions, permit the great officers of State who are members of the Privy Council or Executive Council, that is of the Cabinet, nevertheless to be so elected and to sit and to vote; and it is those statutes which make possible and effective our Canadian system of Cabinet Government. It is true that we have copied this from the British system, that these statutes follow, as many Canadian statutes, upon private law follow, the precedents set by the British Parliament; but I wish to here take this opportunity of expressing my regret that you will not find in any book on the Canadian Constitution that I have yet read—and I think I went through them pretty closely for the purpose of confirming this statement—a single reference to a single one of those statutes to which I have referred, and which really are the basis and which make effective our Cabinet system of government. You will not find it in Bourinot—a place you would expect to find it; you will not find it in Lefroy, although you would

not expect to find it there perhaps, owing to the nature of the book; you will not find it even in Clement; and you will not find any reference to it in a recent book, which I think is rather over-praised in the reviews, on the Canadian Constitution by Professor Kennedy of Toronto. I think it is a matter of regret that we have in Canada no political scientist, no publicist who has yet done for Canada what was done for England by Professor Lowell of Harvard in his "Government of England," what was done for France by M. Poincare before the war in his book on the Government of France, what was done for the American system by Viscount Bryce in his "American Commonwealth." I mean that there is no book which the ordinary layman can read without being absolutely confused by intricate quotations from judicial decisions which he could not understand. Of course Bourinot is excellent in its way, but it is not now up to date. It is a matter of regret, I say, that we have not such a book in Canada, and I would hope that before long it may come from some of those sitting here, and in such a book I would hope to see a statement clearly laid down as to the law, for instance, upon which our Cabinet system rests to which I have referred.

Let me proceed to another subject. If we interpret the expression "the Canadian Constitution" as covering the whole system of public law establishing throughout Canada the various Government authorities, legislative, judicial and executive, both Federal and Provincial, it will at once be recognised that much of it lies outside the British North America Act. In the United States a sharp distinction is drawn between the Constitution of the United States and the State Constitutions. We draw, I think, no such sharp distinctions in Canada. How seldom, for instance, you ever hear anybody speak of the Constitution of Saskatchewan, or of the Constitution of the Province of Nova Scotia. The reason for this obviously lies in the fact that the State Constitutions all have the same origin,—a vote of the people of State upon a very elaborately drawn document. But if we search for something which you might call the Provincial Constitutions, we find the utmost variety in their origin. In form they never come by a vote of the people, as it were from below, but by way of the granting of powers by some authority, as it were, from above. The Constitutions of Nova Scotia and New Brunswick and Prince Edward Island are not the creatures of any statute; they rest for their ultimate origin, as you will remember, upon the same basis as the British Parliament does, namely, upon an exercise of the prerogative power of the King through his Governor in calling them into existence, by the measures to which I have referred, in 1748, 1773 and 1784. The British North America

Act left those Constitutions as they were with this exception, that it transferred from the Legislative authority then existing in those provinces certain powers which it put into the Federal Legislature. The Constitution of British Columbia rests in its ultimate origin upon an Order-in-Council of Queen Victoria in 1858 establishing a Legislative Council for British Columbia; upon an amendment to it, in 1866, I think—some time there—making it partially elective; and upon an Ordinance of the Legislative Council itself passed under the authority of the Colonial Laws Validity Act, turning itself into a completely elective Assembly just before British Columbia entered Confederation in 1871. The Prairie Provinces, I need only say, rest their Constitutions upon enactments of the Parliament of Canada, and ultimately of course upon the British North America Act. The original Constitutions of only two Provinces are found in the British North America Act, namely, Ontario and Quebec, this being due to the concurrent division of the old Province of Canada into two. If we look on everything in the British North America Act as part of the Constitution of Canada in the wide sense in which I have suggested the words are popularly known, it includes only two Provincial Constitutions. The Constitutions, if such we can call them, of seven of the Provinces are entirely outside the British North America Act. And so it seems to be clear that those two portions of our Constitution, the law on which our Cabinet system rests, and the Constitution of seven of our Provinces, we have to go outside of the Act of 1867.

Now may I come to a much more important part of our Constitution the mention of which in the British North America Act is so meagre as to be reduced, nearly, although not quite, to the vanishing point, and which is nevertheless, I think, pregnant with the gravest possible problems in the future?

The ordinary functions of government are divided into the Legislative, the Judicial, and the Executive. In these modern days of extending governmental activities it is surely undebateable that the executive power at least does not yield in importance, even if it does not surpass, that of the other two. We have in the British North America Act a good many provisions about the legislative power. We have provisions for the establishment of the judicial power. But did it ever strike you how extremely meagre the references in the British North America Act are to that enormous part of our Constitutional system, the executive power? And what two meagre references there are there to the establishment of the excutive power are simply confirmatory of the common law. Section 9 says that the executive power

in Canada shall continue and be vested in the Queen. I think it is section 12 which says that the command of the military and naval forces in Canada shall continue and be vested in the Queen. That is practically all. And it is here, I think, that we discover that part of our Constitution which rests not upon the British North America Act but upon the common law, and upon that part of it which deals with the King's prerogative. I do not know whether it is necessary to remind you that even the office of Governor-General is not established by the British North America Act. The Governor-General is referred to there, but the office was not created until 1878, by letters patent, by an exercise of the prerogative power of the King. There had been Governors-General appointed from time to time individually as the necessity arose; and there had been Governors-General long before Confederation,—many times. There had been a unity to some extent for executive purposes, because of the position of the King as the executive power throughout all his dominions. I used purposely, a moment ago, the expression "the King's prerogative," or the prerogative power of the King, and I avoided the expression which you so often see, "the prerogative of the Crown." In one of his lectures to his law students on Constitutional history, Professor Maitland warned his hearers against using the expression, "prerogative of the Crown." He said that the Crown was a physical object, not to be found anywhere else than resting in the Tower of London for sight-seers to gaze upon. He insisted upon them thinking of the prerogatives of the King as those of a real living human being, and not as the prerogatives of some merely idealistic institution; and I venture to suggest to you that we in Canada, and particularly in Western Canada, must, in our consideration of Constitutional problems and of our Constitutional difficulties that may be arising in the future, approach more closely in our thoughts to the King and to the Kingship. I think we shall have to look more habitually than we do upon the King and the Kingship as part of our Constitution, as someone and something that belongs to us very intimately and is really part of our Constitutional life. May I give you an example,—two examples,—in which I think with all respect that Canadian Courts appear to have lost the right road because of forgetfulness of, or lack of familiarity with, the King and his prerogatives? I think more than those two could be found. I will mention only two, two cases which no doubt are familiar to you. In the case of *re Cain and Gilhula,* about 1905 or 1906 Appeal Cases, Mr. Justice Anglin, then a Judge of the High Court of Ontario, had to decide, or thought he had to decide, upon the Constitutionality of the Alien Labor Act, by which a Canadian Minister of the Crown was

given power to expel by force an alien brought into Canada under contract. That very learned Judge considered the question, as you will see from his judgment, entirely from the point of view of a problem in physics, that is apparently whether by an Act of expulsive power, force was not being exercised beyond the Canadian boundary, and whether the Parliament of Canada could constitutionally authorise the use of such force. There was an appeal *per saltum* to the Judicial Committee, and they, being a prerogative body themselves, and being therefore more familiar with the King's prerogative, simply settled the matter by saying that the King, by virtue of his prerogative, has power at any time to expel an alien from his realm, and the Canadian Act simply stated by what Minister that power should be exercised and under what conditions they thought it advisable to do so. There, the King's prerogative settled the matter.

Again—and I think I am right in making this reference—in the celebrated companies case, the *Bonanza Creek* mining case, which deals, you will remember, with the right of a province to incorporate companies with a capacity of doing business outside of the province. Viscount Haldane rested a great part of his decision upon a recourse to the ancient prerogative power of the King to grant a charter or letters patent erecting a corporation; and I think this was an aspect of the matter, if I remember correctly, which was almost entirely, if not absolutely, overlooked in the Courts below. These are only two out of a number of instances in which a consideration of the common law of the King's prerogative has already in the past been decisive of Constitutional problems. If I am not mistaken, our Constitutional problems in the future will inevitably centre more and more around the King's prerogative. Did you ever notice how much is contained in Halsbury on this subject? There are 130 pages in Halsbury's Laws of England upon the law of the King's prerogative. Of course quite a little bit of it deals with institutions that exist in England and that do not exist here, but the main part is still our law and our Consitutional law. Now I am again undoubtedly uttering a commonplace when I say that by the common law all executive power is vested in the King. The executive power includes two great branches, first, the control of all internal governmental activities, second, the control of all external governmental activities, that is to say, the control of all dealings with other governments of the world. In the kingdom of Great Britain there was a period, you remember, during which the King struggled to retain personally and without responsibility the control of his own prerogative executive power; but at the Revolution of 1688 the Parliament of Great Britain took, and thereafter retained,

control of the prerogative power by indirect methods well known to all of you from your histories. There was, there and then, no distinction made between the two branches of the prerogative executive power. Parliament took possession of the Kingship in respect of both branches to which I have referred, and the King became what we are accustomed to call a Constitutional Monarch. But in the colonies a different course of events took place. When Canada obtained what is called Responsible Government, what happened was that the Colonial Legislatures obtained control of the common law prerogative executive powers of the King, but only with regard to internal affairs and internal government activities.

You are all well aware of the discussions that are going on in public affairs to-day about "Canada's status." Now do not be alarmed; I am not going to express any opinion (laughter), because I am not a person who should do so. I am simply going to ask you as members of the legal profession to consider a little more closely than perhaps some of you have done what is involved as a matter of constitutional law in the discussions that are going on. There is a great deal of talk about whether Canada is a nation. It would help a good deal if somebody would lay down an authoritative definition of what a nation is.—Or as to whether Canada is a sovereign state. That would require a definition too before we could settle it. But there is no doubt about this, and we can say this with absolute certainty, that Canada is a "*state*" of some kind, that the Dominion of Canada is a politically organised state with governmental institutions. And there is also no doubt about this, that the head of that state, according to the common law part of our constitution, constitutionally is the King. I want to suggest to you that what you see going on now—perhaps just beginning—I do not know whether things that have apparently started will go on any further or not, and I am not here to say whether they should go on or should not, but if they do go on.—the things that are being suggested, or being done even in one or two instances,—these things show that the period upon which we are entering now is a period of a new struggle—perhaps I should not use the word "struggle,"—but, a very kindly, brotherly, gentlemanly hedging or manoeuvering for position over the control of the King's prerogative with respect to our external affairs. The King is far away from us personally; he cannot be in Ottawa at one time and in Wellington another day and in London another day; so we do not get very close to the idea of the King being officially the head of our Government,—and of course he is represented here by someone else. But I want to suggest to you this,—and although I may appear to be going a little closer to public affairs

I am not going to express any opinion as to what ought to be done or what should not;—but what of the common law prerogative power of the King in regard to external affairs, the power to declare war? If you look at the proclamations printed in the Dominion Statutes of 1914, when war was declared, you will find that it was announced that war was declared between his Majesty the King and the German Emperor; it did not say between Great Britain and Germany,—not at first; it did later on. The power of declaring war, the power of making peace, is another of the King's prerogatives. The power of making treaties is another of the King's common law prerogatives. The power of appointing Ambassadors is another of the King's common law prerogatives. Now I understand from the press—I do not know anything more about it except from that—that twice recently there has been a treaty made, as it is said, between Canada and the United States about something or other, about the halibut fisheries and about rum running on the border. I have not read those treaties, nor seen them, but I am quite sure when you read them, if they are drawn up according to constitutional precedence, you will find that they are treaties between his Majesty the King and the United States of America. Now what I want to suggest to you is this, that if the King is controlled in the exercise of that prerogative power in certain things by Dominion Legislatures and Dominion Cabinets, and he makes such a treaty as that and says practically to the foreign government with whom he makes the treaty, "I am making this solely in my capacity as the head of the Canadian State, and on behalf of my Canadian subjects"; and if Australia made a treaty with Japan, between the King as head of the Commonwealth of Australia, and Japan, and the King said, "I am making this treaty with Japan solely in my capacity as head of the Australian Commonwealth and on behalf of my Australian subjects"; or if he appoints an ambassador to the United States, what they call a Canadian ambassador,—and it is his prerogative power to do so,—and sends a gentleman down there to represent him as head of the Dominion of Canada—and I do not see what other form it can take—and says to the government of the United States, "I am sending a gentleman here to represent my Canadian subjects and their interests, in my capacity of head of the Dominion of Canada"—I do not know how far that development is likely to proceed; I have not any suggestion to make as to whether it should go any further or whether it should stop; but if it goes on in the way in which it is apparently beginning I want to suggest to you that we are getting very very near saying that the King has one capacity as head of the Canadian State, the Dominion of Canada, that he has another

capacity as head of the Commonwealth of Australia and another capacity as head of the United Kingdom of Great Britain. And even if you do retain in theory the idea that there is only one crown and one King, you are getting very near saying that there is one man, one King, occupying and fulfilling different capacities—in effect occupying different thrones. I am not going to develop that any further, and I have only referred to it for the purpose of emphasising, if I may, the extreme importance of that part of our Constitution which is not contained in the British North America Act, its extreme importance in the difficult constitutional problems that are going to come up before us in the future.

If I might just add one word: The same thing would apply with regard to another question you sometimes read of, the question of appeals to the Judicial Committee. I am not going to say anything about that; it is a matter of opinion, a matter for the statesman and not for the judge; but there again arises the question of the King's prerogative. Professor Kennedy, in his book, says that these appeals to the Judicial Committee could not be done away with without an Act of the Parliament of Great Britain. I am not suggesting that they ought to be done away with at all; I have not anything to do with that question; but I know that it is discussed, and that is sufficient for my purpose. I venture to suggest to you that the King, if he liked, could say by virtue of his prerogative power, "I am not going to hear these appeals upon advice of my Privy Council in England; I am going to hear them upon advice of another Privy Council of mine, namely, a Privy Council that I have in Canada." The Act of 1843 was permissive only. No Parliament except occasionally an untrained Western Legislature ever says "shall" to the King. Now you may think that is rather strange, but if that should happen, if the King should say what I have mentioned,—and I am not suggesting that it ought to happen—instead of being a new thing, a curiosity, the strange circumstance about it is that it would be another example of the marvellousness of the Constitution of Great Britain and the Colonies. Instead of it being a new thing it would be a reversion to something that was in force for many many years long ago. In the early days of the American Colonies and in the early days of our Canadian Colonies, if you will look at the beginning of the Law Reports of Upper Canada — not Upper Canada only, but you will see it there as an example—you will find appeals being heard by the Governor-in-Council from the highest Court of the Colony, in which Cabinet Ministers and Judges sat, because in those days Judges were members of the Executive Councils; and you will find appeals being

heard by the Governors in Council in other of the old Colonies. In the case of *In re Cambridge*—I cannot give you the citation,—from Prince Edward Island, along in the forties, the Privy Council in England said, "we cannot hear this appeal, we will send it back to the Governor of Prince Edward Island and his Council to exercise the royal prerogative and hear this appeal. If they do not do right, probably the parties can come back to us if they want to." I happen to have heard from a prominent King's Counsel in Alberta that one of the members of the Judicial Committee had himself said, "if you are going to do that—abolish appeals to the Privy Council—the only way to do it is to do it by the exercise of the Royal prerogative, have the Privy Council in England say, "No, we will not advise the King in the exercise of this Royal prerogative of appeals; we will have the King's Privy Council in Canada do it, and it can be done"—I think I am quoting him correctly—"by appointing the members of the Supreme Court of Canada members of the Privy Council of Canada. They need not necessarily be in the Cabinet any more than they are in England, but it would preserve the constitutional theory." I am not suggesting that, please remember, as a thing that *ought* to be done; I am only suggesting it to emphasise again the extreme importance of those parts of our Constitution which are outside the British North America Act.

I wish to conclude by suggesting this, if I may, to the members of the Saskatchewan Bar Association. I do not know whether it is so correct in these latter days, as at one time it was, to say that the Bar is a leader of public opinion, but certainly the Bar ought to be the leader and the educator of lay public opinion upon questions of constitutional law. And I want to suggest to you that no better service could be done by the members of this Bar Association than taking the lead in correcting the impression that the British North America Act contains all our Constitution, in bringing home to the lay mind, to the people of the Province generally, some understanding of the position of the King's prerogative and the place the King holds in our Constitution, and of the importance of the King and his prerogative in the constitutional questions which we are now facing in arranging constitutional relations between the Dominions and the Mother Country.

C. A. STUART.

Edmonton.