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SOME ASPECTS OF CANADIAN CONSTITUTIONALISM*

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The descent of formal British political organization in what is now Canada traces back to the middle of the eighteenth century. In 1763 the territory then called Quebec, embracing the greater part of the present provinces of Ontario and Quebec, by the Treaty of Paris, was ceded by France to the United Kingdom; 1758 and 1784 saw Nova Scotia and New Brunswick respectively assume provincial status. These contiguous areas became the nucleus of the later Dominion to which have been added the then wildernesses, plains and mountain areas extending from Labrador to the Pacific Ocean, and northward into the Arctic, as well as the islands of Prince Edward and Newfoundland.

From 1783 onward the governments of these lands and of the United States have followed parallel courses, one in the elaboration of republican independence and the other in a progressive growth from colony to nationhood through the gradual devolution of legislative and executive power from Great Britain. Today they meet, in substance, in equal sovereignty. Each in its course has passed through periods of storm and stress; in the United States, the violence of internal war, in Canada, rebellious and

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political strife. We might ask whether, weighing all factors and considerations, measured against the swift and turbulent welling of human vitality and genius, which has been yours, there has been any compensatory benefit in the slower and much more limited progress that was held more closely to continuity and tradition? Whatever the answer, there can be no doubt of one fact: the triumph of secession acknowledged in 1783 not only set aflame the spirit and released the energies of a vigorous people; it signalized the ascension of reasoned government over autocracy and realized, as never before in history, the dreams of those who believed that men free in the mass could govern themselves. This citadel of emancipated man, the United States of America, through moral and material power, is today called upon to bear the main burden of preserving priceless values won by the struggles of centuries which in two world cataclysms, through its action, have been saved from destruction. The commitment and preservation during the war of an original of Magna Carta in the security of the Congressional library portrays this in unique symbolism. The declaration of 1776 changed the course of history and marked the advent of a new dimension in man's social life and government.

Here where, as de Tocqueville observed, every question of political controversy becomes, sooner or later, an issue of law, you have long since become mature in the elaboration of constitutional dialectics, though debate throughout the field goes on with sustained intensity. In speaking of the scene in Canada I shall limit myself to a skeletal treatment, somewhat descriptive, of its total constitutional organization and its development through the past one hundred years, with only incidental excursions beyond that. The interest for you, apart perhaps from the external evolution within the Commonwealth, may lie largely in the modes by which, seeking similar ends but with material differences in structure, we have been able to draw implicit judicial support for some part at least of those fundamental rules and principles that with you are constitutionally explicit. We are at an early stage in the formulation of answers to questions which today in a legal aspect reach to the conditions of social cohesion, to the solidarity of free men under the Rule of Law.

Through a succession of surrenders from the Quebec Act of 1774 to the statute of Westminster of 1931, what was a tightly bound domain of colonialism has emerged as a free nation in a unique framework of relations, internal and external. Prior to

1840 the administration of the provinces of Upper Canada, (now Ontario), Lower Canada, (now Quebec),New Brunswick and Nova Scotia, was by means of Governors, Legislative Councils and popular Assemblies. The executive heads of departments, acting, also, as the advisers of the Governor, were independent of the Assemblies and, with the Governors, remained under the direction of the Colonial office in London. The attitude of that administration toward the colonial territories, despite the experience of 1776, through the canker of "family compacts" in Upper Canada, New Brunswick and Nova Scotia, and the "Chateau clique" in Lower Canada, led in 1837 to outbreaks of violence in both the Canadas. Following a report on the conditions in the latter provinces by Lord Durham, they were, in 1840, united in a legislative union as the Province of Canada.

But the direction of affairs from London continued and the same attitudes prevailed. Finally the demands of self-government under the pressures of mounting agitation and administrative frustration forced the concession of what is called Responsible Government, that is, executive government by ministers accountable to the popular Assembly and bound to retire from office when the support of that body is lost. This convention involves, ultimately, action by the Sovereign or his representative in accordance with the advice of his executive, the essence of constitutional monarchy.

The new arrangement failed to meet the requirements of the situation, particularly in the province of Canada. Government under a legislative union of two racial groups each occupying predominately a separate section of the country with its own language, religion, customs, laws and traditions would, in the most favourable conditions of flexibility and understanding, be difficult; with less than that, and economic stagnation in the offing, virtual political and legislative deadlock would be almost inescapable and so the event proved.

In this emergency a broader scheme appeared which held both the promise of local autonomy and the prospect of creating a nation occupying the entire continent, excepting Alaska, lying north of the international boundary. Through conciliatory compromise and statesmanship, the leading representatives of the three provinces in 1866 agreed upon a federal union on terms contained in The British North America Act (1867) of the British Parliament, the first establishment of federal government within the British Empire; and this statute, with that of Westminster

(1931), embodies today a written constitution among other things establishing parliamentary government throughout the country and distributing legislative power between the Parliament of Canada and the legislatures of the provinces.

The political relations between Great Britain and the self-governing colonies now termed, generally, Dominions, have, from time to time, been examined by meetings of representatives of the governments concerned, to which the name Imperial Conference has been given. Held frequently since the beginning of this century, (though replaced since 1937 by conferences of Prime Ministers), their resolutions have declared or affirmed broad conceptions and principles underlying the relations between the Dominions and the United Kingdom and have given formal recognition to *de facto* constitutional advances then attained. Strictly avoided has been any attempt to weld the association into any form of legislative or political union: the independent and individual development of the Dominions was, at least by Canada, viewed as and asserted to be the guarantee, so far as that was possible, of an enduring community. In the light of the transformation, during the past fifty years, of world conditions and relations, inevitably working changes in the outlook and functional necessities of the Dominions, that policy can fairly be said to have been vindicated; the unity has not, basically, been weakened; rather has it expanded in numbers and in breadth of conception, until it stands today in some degree an exemplar of unity and an instrument of peace in a strife-ridden humanity.

By resolutions of a Conference held in London in 1926 a new era in the life of that community was opened. The First World War had seen the participation, in Europe and elsewhere, of armies from Australia, New Zealand, South Africa and Canada, the identity of which had been substantially maintained; and these independent roles carried over to the execution of the treaties of peace: with their membership in the League of Nations, the Dominions had come formally of age.

The resolutions crystallized that fact and declared its recognition by Great Britain. The language used was clear, unambiguous and definitive: "They are autonomous communities within the British Empire equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown and freely associated as members of the British Commonwealth of Nations". An observation by Lord Balfour expressed with accuracy the influences

giving cohesion to the association: "a common interest in loyalty, in freedom, in ideals—that is the bond of Empire. If that is not enough nothing else is enough".[1] These affirmations, unmistakable in import, through their acceptance by Great Britain, evidenced an understanding by its representatives of realities and the foresight of what was unavoidable.

Confirmed by the Conference of 1930 the resolutions in their legal aspects issued in the statute of Westminster (1931). To Canada its provisions were immediately applicable, and were of the highest political as of legal significance. Reciting that the delegates of His Majesty's Governments of the United Kingdom, Canada, Australia, New Zealand, South Africa, the Irish Free State and Newfoundland, had concurred in the resolutions; that with the Crown as the symbol of the free association of the members of the British Commonwealth of Nations, united by a common allegiance, it would be in accord with the established constitutional position of all the members in relation to one another that any alteration in the law touching the Succession to the Throne or the Royal Style and Titles should hereafter require the assent of the Parliaments of all the Dominions as of the British Parliament; that it was in accord with the same position that no law thereafter made by the British Parliament should extend to any one of the Dominions as part of its law otherwise than at the request and with the consent of the Dominion; and that the associated Dominions had severally requested and consented to the submission of a measure to the British Parliament making provision for such matters; the statute proceeded to remove the remaining restrictions on Canada's legislative freedom by so far repealing the Colonial Laws Validity Act of 1865; by providing in section 4 that no British legislation would thereafter be applicable (to Canada) unless it contained a statement to the effect that it was enacted at the request and with the consent of the (Canadian Parliament); and by declaring the jurisdiction of that Parliament to enact extra-territorial legislation.

The passing of the statute had probably less immediate impact on the public mind of Canada than might have been expected by foreign observers. By that time Canada had reached such control of her affairs generally that the legislation was viewed simply as what in fact it was, the formal confirmation of the substance of the existing state of things. But from crises and happenings since

[1] Mansergh, Documents and Speeches on British Commonwealth Affairs (1931-1952), Vol. 1, Intr., p. XXXVII.

1931, its importance has become more deeply sensed; the expanded activities both internal and external in which Canada has become engaged, her participation in the Second Great War, the acceptance of responsibility for her own security, her independent participation in the treaties of peace and in the United Nations, and her extended international relations, have brought her to a realization of the actualities of her national standing. What had been adumbrated in 1926, and formulated in the Westminster statute and in collateral constitutional conventions, had come to swift fruition. By that enactment legislation in Canada became as free as that of the British Parliament except toward the provisions of the Act of 1867 itself. The scope of power conferred by the latter was capable of the expansion which the removal of the limitations permitted; but the legislative jurisdictions of the Dominion and the provinces and the provisions generally of that Act were to remain as they were until the British parliament, acting on the request of the Dominion, should alter them, or should enable their alteration by Canadian enactment in a mode to be agreed upon.

Direct formal communication, in a constitutional sense, between Canada and the Sovereign is through the Governor General of the Dominion, the personal representative of the Sovereign in Canada. A request for amendment to the Act of 1867, according to constitutional practice, is by way of resolution passed by the Senate and House of Commons and forwarded, through the Canadian High Commissioner in London, to the British Government. Notwithstanding the recognition of the Sovereign's executive and legislative presence in the provinces, there is no such communication open to the latter: by the Act of 1867, the Lieutenant Governor of a province is appointed and is removable by the Dominion government; reservation by him of a bill passed by the provincial legislature is to the Dominion executive and not to the Sovereign; and every Act passed by the provincial legislature is subject to disallowance by the Dominion executive. Although the provincial executive power is exercised in the name of the Sovereign, within the limits of the Act of 1867 the Lieutenant Governor is restricted to action in Canada. As a constitutional officer, his relation is with the Dominion executive upon which the former authority of the Imperial executive toward him and his office has been conferred.

The individual participation of Canada in treaties of peace both before and after 1931, involves a *de facto* assertion and ac-

knowledgment of a new status. By section 132 of the Act of 1867, the Parliament and government of Canada as delegates of the Imperial Parliament and Executive were invested with powers proper to the performance of obligations in respect of Canada arising under treaties between the United Kingdom and foreign countries. This section was enacted in the constitutional setting of a colony within the sovereignty of that Kingdom. But the sense of the language there used of Canada, "as part of the Empire", in which the signatory to treaties, the United Kingdom, acted in that sovereignty, can no longer be given the section. Canada, as will appear later, in the right of the Dominion, acts now within her own sovereignty characterized by an individual allegiance; and with her unrestricted power to legislate for Defence as well as under the residual investment of legislative authority, the removal of legislative limitations renders her free to engage in any course of action necessary to preserve her existence as an independent state. This scope of power would be obvious in the case of a defeated Canada and it cannot be different in other situations. It would be anomalous to say that the Canadian Government is to be charged with responsibility for maintaining the security of the country but is powerless to enter into conventions providing against or ending hostile action. Conflict between the terms of a treaty and provincial law would not arise in matters ordinarily dealt with. Citizenship, Aliens and Naturalization are all within the exclusive domain of the Dominion Parliament and it is not to be assumed that a treaty would directly encroach upon provincial jurisdiction by derogating provisions "in relation to" vital local matters such as Education or the official standing of the French or English languages. The Dominion, in admitting foreigners to citizenship by naturalization, extends the application of civil rights within the provinces, but special privileges to foreigners infringing rights of nationals are not, except conceivably coerced in peace treaties, the subject of treaty provisions. Apprehension of terms of this sort, exceeding the limits of probability, becomes much the same as the concern in the United States over treaty provisions in conflict with the federal and state constitutions, the late anxiety over which and the drafting of proposed amendments are still fresh in mind.

In the Reference on the International Convention (1927) of Radio[2] (to which Canada was a party in her own right), the Judicial Committee speaking through Lord Dunedin in 1932 used

[2] [1932] A.C. 304.

this language, "though agreeing that the convention was not such a treaty as is defined in section 132, their Lordships think that it comes to the same thing: . . . It is Canada as a whole which is amenable to the other powers for the proper carrying out of the Convention; and to prevent individuals in Canada infringing the stipulations of the Convention, it is necessary that the Dominion should possess legislation which should apply to all the dwellers in Canada." On the other hand certain international labour conventions, arising out of the peace treaties of 1919-20 were held in 1937 to require implementation by provincial legislation.[3] In treaties other than of peace, or of matters within the Dominion's legislative powers, encroachment, beyond incidentals, on provincial areas calls for further examination.

Under the Act of 1867 there is necessarily implied by section 132 the specific reservation by the United Kingdom of executive and legislative jurisdiction over treaties as between sovereign states, an example of which is the Migratory Birds Conservation Convention of 1916 between the United Kingdom and the United States affecting only Canada as part of the Empire. But the exclusive executive capacity, in its full sense, of the Dominion to enter into treaties in the sovereignty of Canada is now beyond challenge. By what means has this come about? It has come either as a transmission from the United Kingdom, the corollary of enactments of the British Parliament and accepted constitutional concomitants; or as an inherent faculty of a community brought into political independence through the renunciation of all external legislative suzerainty over its land and people. In the legislative field of implementing treaties, however, difficulties have arisen; and this must be distinguished from what appears to be becoming a constitutional practice of requiring legislative approval of a treaty as a condition of its effectiveness. The treaties concluding the late war were so approved by the Dominion Parliament; but what we are concerned with is their fulfillment, where required, in legislative action.

That legislative power likewise has been transmitted or has arisen as an inherent faculty of an independent state. The legislative competence of the provinces is limited to specific subjects enumerated in section 92 of the Act of 1867 together with a general class embracing Local and Private matters. As treaties do not fall within this general clause, we can say that as distinct legislative subject-matter they find no place in any provincial

[3] *A.-G. of Canada* v. *A.-G. of Ontario et al.*, [1937] A.C. 326.

category. But the relation of treaty to province arises from another question which is this: is legislation which implements a treaty, legislation "in relation to" the treaty or in relation to the specific matters with which the treaty deals? By the retention of treaty-making and implementation in the British Government and Parliament and its delegation of performance to the Dominion by section 132, the totality of treaty-making action was treated as being a discrete and entire subject-matter; can legislation of such a nature then be other than "in relation to" treaty-matter, that is matter in a treaty aspect? I cannnot agree that it is possible to eliminate treaty character from legislation accomplishing its terms. The contrary view, separating the matter from the treaty-making, reduces itself to this, that legislative action on treaty is to be looked upon as belonging to the jurisdiction which could legislate to the same effect in the absence of treaty. This would suggest a divided treaty power and the introduction of treaty-making with all its incidents to the provinces, for which admittedly there is no constitutional basis. In such a view the power of veto vested in a province besides sterilizing national action would invert the underlying scheme of Dominion and provincial relations. Assuming treaty-making to be an entirety as legislative matter, the transmission or originated faculty finds its only place of reception in the residual power of the Dominion; to attribute any role to the province would require a statutory enlargement of provincial capacity. Every consideration of policy leads to the continued association of the treaty executive with its own legislative organ: with each of ten provinces able to nullify a treaty touching a local matter—as for example, a new convention on migratory birds which would regulate local hunting—vital international action might be completely frustrated. That particular matter, international bird conservation, although regulating local hunting, would clearly fall within the residue; but every treaty would possess an equally Dominion interest regardless of the area of its operation.

To some extent local matters have been affected by rules of international law accepted generally by Western countries. The immunity from taxation of property belonging to a foreign power and invited into Canada has been recognized as underlying general local taxation laws.[4] In the particular issue it was unnecessary to decide whether the province could override the exemption, but such a proposition appears to me to be quite untenable. The

[4] *Municipality of the City and County of St. John* v. *Fraser-Brace Corp. et al.*, [1958] S.C.R. 263.

field of External Affairs belongs to the Dominion; and no conclusive distinction can be drawn between such an exemption and the effects of treaties. Of peace treaties it may be added that the power conferred on the Canadian Government under the War Measures Act of 1914 enables it to supersede virtually the whole field of provincial legislative power.

The resolutions of 1926 and 1930, and the enactment of Westminster 1931 have had other significant constitutional effects. By the Act of 1867 executive power remained vested in the Queen in right of the sovereignty of Great Britain; acting according to the then constitutional practice, the Ministers whose advice she would carry out, were those of the British Government. On that advice, the Governor General of Canada would be appointed, the Letters Patent for which would issue on the counter-signature of a British Minister. The prerogative of Mercy was reserved and on the same advice directions would be given for its administration; the prerogative of Honour was likewise retained and this, so far as it was not personal to the Sovereign, continued to lie within the same executive action, although in giving that advice or exercising that prerogative the wishes of Canada expressed by a resolution of the House of Commons would be respected.

In this relation, the resolutions and the Act of 1931 have worked a radical change. The single sovereignty of Great Britain has become resolved into a several sovereignty of the United Kingdom and of each Dominion; when Her Majesty acts in matters of Canadian concern she does so upon the advice of her Canadian Council or more precisely her ministers, members of the Cabinet or Goverment. This is exemplified by the issue of Letters Patent appointing the Governor General, countersigned now by the Prime Minister of Canada. The direct and immediate relation between Sovereign and Council so established ends the constitutional course followed previously in London; in appropriate language when so acting Her Majesty is now described as the Queen of Canada and the legislative and executive power of the country is exercised exclusively on and in accordance with the advice of Canadian Ministers. The Governor General represents the Sovereign directly and not through the British Government.

The word "sovereignty" as I use it means the power capable of being expressed between equal and independent states in international relations; it is to be distinguished from the mere finality or definitiveness of legislative power which, in a federal organization, is found distributed between component units.

Legislatively, a unique situation has been created. The British Parliament has in effect become a bare legislative trustee for the Dominion; the constitutional organ for altering the provisions of the Canadian constitution contained in the Act of 1867 remains so far the British Parliament; but the political direction resides in the Parliament of the Dominion; the former has conceded its residue of legislative power vis-à-vis Canada, to be no more than means for effecting the will of Canada. It might happen, although it is most unlikely, that the British Parliament should demur to a request for a legislative amendment, as, for example, involving important legislative effects not concurred in by one or more of the provinces; but that amounts to no more than saying that the Canadian people would not yet have agreed on the mode of modifying their internal constitutional relations. Once that means has been agreed upon, legislative independence, not only in substance but in form, will have been attained.

In 1949 an important amendment was enacted by the British Parliament at the request of Canada by which the Dominion Parliament was endowed with authority, by its own enactment, to legislate, as it is expressed, in relation to "The amendment from time to time of the Constitution of Canada, except as regards matters coming within the classes of subjects by this Act (the Act of 1867) assigned exclusively to the Legislatures of the provinces, or as regards rights or privileges by this or any other Constitutional Act granted or secured to the Legislature or the Government of a province, or to any class of persons with respect to schools or as regards the use of the English or the French language or as regards the requirements that there shall be a session of the Parliament of Canada at least once each year, and that no House of Commons shall continue for more than five years from the day of the return of the Writs for choosing the House; provided, however, that a House of Commons may in time of real or apprehended war, invasion or insurrection be continued by the Parliament of Canada if such continuation is not opposed by the votes of more than one-third of the members of such House." Apart from those entrenched exceptions the Canadian Parliament is now as supreme in relation to the same subject-matters of the Act of 1867 as was its imperial predecessor.

These modifications, in a number of respects, have had a repercussion on the relations with the associated Dominions. The original expression, British Empire, gave way to that of British Commonwealth. The members were conceived to hold a common

several allegiance to the Sovereign with a resulting common and several primary status in their people of subject to Sovereign, that of a British subject; with that as a base each elaborated a citizenship likewise distinct and several. Similarly new nationalities arose. Other characteristics of an independent state, with their implications, attributable to Canada in external matters toward the other dominions and foreign states, remained and remain today to be developed under legislation of the Dominion Parliament.

The dissolution of bonds, political and legislative, reached finally to judicature. Through the residue of judicial powers exercised for upwards of seven centuries by the Sovereign acting in his Council, the Judicial Committee of the Privy Council, under the authority of legislation enacted in 1833, remained until 1949 the final court of appeal for Canada as for other Dominions and colonial possessions of the United Kingdom. In that year, by an Act of the Canadian Parliament, under the provisions of section 101 of the federal Act empowering Parliament to create a general court of appeal for Canada, fortified by the legislative freedom derived from the statute of 1931, the last link was severed by the abolition of appeals to the Judicial Committee and the vesting in the Supreme Court of Canada, in substance, and in relation to Canada, the appellate jurisdiction formerly exercised by that Committee. Similar action was taken by Ireland in 1933, by India in 1949, by South Africa in 1950, and by Pakistan in 1950. By the Commonwealth of Australia Constitution Act of 1900, certain appeals to the Committee were placed within the leave or certification of the High Court of Australia, and authority was given to the Commonwealth Parliament to limit the matters in which special leave could be granted by the Judicial Committee to appeal from the High Court, but legislation to that effect was to be reserved by the Governor General for the Sovereign's pleasure.

One aspect of the relations between the members of the British Commonwealth, as it was up to the last ten years or so, is indicated by the statement in the House of Commons of Mr. Gordon Walker, then Secretary of State for Commonwealth Relations, on June 7th, 1953: "We must make quite clear the distinction between the grant of responsible self-government within the Commonwealth, which is a matter for the United Kingdom Government and the territory concerned and for them alone, and the question of becoming a full member of the Commonwealth,

which is of course a matter for all members of the Commonwealth." Undoubtedly the endowment of a territory with the political and legislative status of a Dominion or lesser rank, is, as stated, a matter between the United Kingdom and the territory; the words to be examined are "a full member of the Commonwealth". The word "Dominion" as used in the Act of Westminster 1931 is limited to the Dominions expressly named, Canada, Australia, New Zealand, South Africa, Irish Free State and Newfoundland. Newly created Dominions, unless it is otherwise declared, remain subject to the legislative limitations mentioned as having been removed by that Act; they do not become "independent" or "full" members of the Commonwealth and their national status is qualified. Toward them in relation to reserved powers and limitations, the Sovereign acts under the advice of the British Government.

But a new element has been introduced. Acting from Dominion status, India, in 1950, by a unilateral declaration, proclaimed her independence. So far was this withdrawal accepted by Great Britain that by the India (Consequential Provision) Act of 1949, the British Parliament, by anticipation, continued the operation of existing laws relating to India as it would have been had India remained a Dominion until they might thereafter be abrogated or modified. Similar legislation was passed by New Zealand. The same mode of withdrawal had been taken by the Irish Free State in 1937 with similar acquiescence by Great Britain and analogous legislation effecting a degree of reciprocity in citizenship rights and privileges.

This was followed by the most striking act of all in the acceptance of the Republic of India as a member of what has since been denominated the Commonwealth. A new conception of association was evolved in which the Sovereign of the autonomous Dominions became the Head of the Commonwealth containing a member acknowledging no allegiance to the Head; an act by which the legal or constitutional bondlessness of full association in the British Commonwealth is put beyond question in the Commonwealth. What has happened is that language has caught up with actualities and by the significant adherence of India the character of the association through a community of interest in peace, attitudes and ideals is demonstrated.

The text of the Accession Proclamation of the United Kingdom of February, 1952, spoke of "Queen Elizabeth the Second, by the grace of God Queen of this Realm and all her other Realms

and territories, head of the Commonwealth". On May 2nd, 1949 the then Rt. Hon. Clement Atlee, Prime Minister, in the House of Commons, replying to a question, treated the expressions "British Empire", "British Commonwealth", and "Commonwealth" as interchangeable; but this, in the strictly constitutional sense, seems to be an unsound view. The sovereignty of the United Kingdom extends to many territories described generally as colonial possessions and, as a member of the Commonwealth, the United Kingdom is to be conceived as representing that train of dependencies; while this relation remains, to them, whatever the scope of their self-government, the language of the Conference of 1926 "autonomous communities within the British Empire, etc.," is inapplicable. As within the sovereignty of the United Kingdom they are, under her representation, within the Commonwealth; "full membership" implies an individual sovereignty; and until that is attained these subordinate organizations do not possess such a status.

The Commonwealth is thus seen, by a course of empirical modifications, to have exemplified the basic method of common-law development; distrusting logic it has left to experiential reason the task of giving formulation to accommodations sensed to be desirable in the interests of higher and overriding considerations: friendship, mutual respect and a transcending allegiance to the spirit of newly arisen conceptions of civilization. Certain ideas have been removed from the conscious and subconscious mind such as that between independent states hostility is inherent; others have emerged as that in this age of self-consciousness and the dissolution of past assumptions, the strongest cohesive force is the recognition of and respect for unique individuality, of the necessity and feasibility of unity in diversity, and a deepening awareness of the compulsive supremacy of intelligence. As self-contained peoples the members face each other; that any one of them should presume to dictate or resist the course of action of another becomes not a question of political ascendancy but a matter of good constitutional manners; together they form a community of free minds placed beyond the line of deception. On policies pursued by individual members there may be reservations, expressed or unexpressed disapprovals; even expulsion may not wholly be ruled out; but as between themselves, in council chamber or elsewhere, peace is assumed and certain actions have become interdicted.

The question may be raised of the political and legal force of

resolutions passed by Imperial Conferences and confirmed by legislation. It cannot, in my view, be less than this: that they are to be treated as creating constitutional commitments of a permanent nature, which once approved and entered upon become irrevocable as self-executing conventions, placed, by that fact, beyond repudiation. They have not become the subject of juridical examination but that might happen. Should, for example, the British Parliament, of its own initiative, purport to repeal the Act of 1931 what would be the position of Canadian legislation and of Canadian courts? The answer must be that the purported repeal would not be recognized. Once such fundamental agreements have been reached, certainly when embodied in legislation, they become as executed treaties between peoples to be modified only by the agreement of the parties to them; and they bind equally discretionary action by the Sovereign.[5] They are definitive surrenders of political and constitutional powers analogous to the exhaustion of executive power over a subordinate territory: by the grant of self-government, apart from express or necessarily implied reservation, the executive authority is so far spent. The acceptance of the convention concludes resort to conflicting statutory power; if that were not so, the bonds of colonial relation embodied in statutes could never constitutionally be dissolved, there could be no termination of statutory enactment, a link of that nature would be perpetual; even express renunciation could be revoked. Actual or constructive revolution would then be the only means of establishing a status of independence. But treaties can effect finalities in the transfer of titles or the recognition of sovereignty; and there is nothing in the nature of such a convention that prevents a similar result in the creation of a constitutional title to independence by which a status is created the modification of which is withdrawn from future parliamentary competence. The relation between kingdom and colony is founded on the idea of ultimate evolution to independence; and the statutory removal of legislative subordination becomes a formal renunciation of suzerainty; the disappearance of paramountcy becomes the recognition and investment of sovereign power. Similarly the legislative competence conferred in 1949 on Canada to amend the Act of 1867 is an irrevocable power; and with provision made for amendment of the remaining provisions of that Act, the powers so conferred will enable Canada to determine her constitution as she sees fit in a manner binding in its

[5] *British Coal Corporation* v. *The King*, [1935] A.C. 500.

prescribed mode of enactment. In that respect it is to be contrasted with the absolute power of amendment given Parliament in 1949.

The right of secession will, if not now, then in the future, be deemed a badge of strength in the association, the exercise of which will be interpreted as according to strict constitutional procedure. In the sovereignty of Canada, Her Majesty exercises legislative power as advised by her Canadian Ministers. Beyond that several allegiance and its implications, binding constitutional relations, in substance, have abated. The direct bond between Sovereign and the Canadian people is in the right of the Dominion as distinguished from province and I think it clear that by the legislation of the Canadian Parliament, including the assent of Her Majesty, that allegiance could be dissolved.

While the power of the Canadian Parliament remains only that of amendment of an Imperial statute bearing a paramount character, it is subject to the conditions imposed upon its exercise. As that restrictive legislative authorization was enacted in the presence of a special relation to the paramount sovereignty, in this case, the tie of a common allegiance, would the latter's disappearance carry with it the efficacy of executed Imperial legislation? I think we can say that the Act of 1867 has become fixed upon Canada by renunciation and acceptance regardless of any subsequent Act of the British Parliament, and there would be no power in the Canadian Parliament to re-enact its provisions as an Act of its own. Such a measure, if effective, would transmute the constitutional organism into a total parliamentary supremacy. There would be no objection to such a re-enactment constitutionally in the conditions of a single legislative sovereignty, where no question of internal divided jurisdiction was involved. To enable the amendment of that consitution in respects not now allowed and not otherwise provided, the Dominion would require conditions to be laid down by a constituent assembly. In any other view, the dissolution of allegiance would call for agreement by such an assembly on a new constitution.

These conclusions on relations within the Commonwealth are not intended to do more than to elaborate what appears to be dictated by its accepted terms of membership. Canada views the association as wholly desirable and of high import to her interests; apart altogether from the bonds of sentiment and common ideals, in its depth and expansion of good will, its unity in the face of dangers, its sense of justice, and the lack, in its relations, of that

tinge of foreignness which colours those of most of mankind, in that mature community, she finds general accord in ends and means and a fellowship of civilized living which she would regretfully lose. Dissent may appear from these deductions; but Canada resents suzerainty, and there can be little doubt that the future will confirm them; it is in their ultimate form, inescapable as I think, that I have stated them. This follows the course generally of colonial evolution.

The internal distribution of legislative jurisdiction made by the Act of 1867 between Parliament and provincial legislatures is in the manner of a primary investment in Parliament of power to legislate generally for the Peace, Order and Good Government of Canada, subject to specific items as well as the generality of local matters conferred exclusively on the provinces, which in turn have withdrawn from them so far as breadth of language might be taken to include them within provincial competence, any of a number of specific items expressly declared to be paramount and exclusive, allocated to Parliament. From this endowment and distribution it can be seen that residual powers vest in the Dominion Parliament. The interlacing of this distribution clearly appears between such classes as Trade and Commerce, Navigation and Shipping, Interest, Promissory Notes and Bills of Exchange, Banking, Currency & Coinage, and Bankruptcy, within the Dominion field, and Property and Civil Rights, Local Works and matters generally of a Local or Private nature, allocated to the provinces. Legislation may reflect different aspects of subject-matter, as for example the local law of the distribution of assets seized in execution of judgments against debtors as a matter of Property and Civil Rights, in contrast to a similar distribution under bankruptcy legislation. In the overlapping of this nature, Dominion legislation in its application supersedes the local law which is to that extent suspended from operation; the field is said to be "occupied" by the paramount law; in the absence of the latter, provincial law operates in *proprio vigore.*

The test of the class of subject in which any statute or law affecting any matter lies becomes a question of the true nature of the statute or law: is it, as the Act of 1867 puts it, "in relation to" a matter within a class of subject allocated to the one or other jurisdiction? and that determination, when in doubt, is aided by seeking the aspect in which the matter is found to be dealt with, in which, ordinarily, its immediate purpose is most clearly indicated. As aids to the interpretation of the language of the Act

of 1867 in its application to the realities of 1959, metaphors have been suggested such a tree growing in organic expansion, a ship of water-tight compartments. The latter, if intended to do more than indicate the exclusiveness of jurisdiction, once the real nature of legislation is found, results from a preoccupation with the language of the statute, confining interpretation in substance to the unaided text, a somewhat arid and unrealistic conceptualism. Conditions and consequences have been taken into account[6] but that enlargement of considerations so significant to the interpretation of a fundamental instrument, does not seem as yet to have been pressed as it might have been.

Within the past two decades a number of questions arising for the first time have called for judicial thinking on basic ideas not expressly provided for by but underlying the fundamental statute. The courts have been faced with issues of free speech, religious profession and propagation, and cognate matters which had not before been brought within juridical action. In 1937 an attempt was made by Alberta to regulate newspapers by way of a compulsory publication of prescribed matter. Duff C.J., examining the Act of 1867 in both its opening words, "Whereas the Provinces of Canada, Nova Scotia and New Brunswick have expressed their desire to be federally united into one Dominion under the Crown of Great Britain and Ireland with a Constitution similar in principle to that of the United Kingdom" and in the provision of parliament and legislatures as the permanent institutions for the enactment of laws, found a necessary implication, an embodiment in the terms themselves, of all activities called for by that form of political and social organization.[7] Central to these was freedom of public debate and discussion.

This view was strengthened in a prosecution for seditious libel based on a highly provocative and denunciatory reply to a campaign of outrageous treatment in Quebec of the Worshippers of Jehovah.[8] The liberations in the 19th century of parliamentary institutions and the fundamental change of view toward government and community life generally, opened discussion on all matter of social, religious, and political interest, and the broadest range was seen to be the necessary concomitant of democratic government. That the writing on which the prosecution was based tended to disturb beliefs, was violently objected to as an

[6] *Att.-Gen. for Alberta* v. *Att.-Gen. for Canada*, [1939] A.C. 117.
[7] *Reference re an Act to Ensure the Publication of Accurate Ideas and Information*, [1938] S.C.R. 100.
[8] *Boucher* v. *The King*, [1951] S.C.R. 265.

invasion by heretical doctrine, and had aroused the deep resentment of adherents of orthodox opinion and institutions, amounting in fact to a state of group hostilities, was held not to bring it within the range of seditious utterance. Difference of this nature must be tolerated and adsorbed, to become part of the environment to which we adjust ourselves.

A cursory examination makes it evident that debate and discussion must be untrammelled to the boundary lines of strictly civil rights or local matters and public wrongs. The latter indeed are open to legislative action by the Dominion but how far criminal law may trench upon discussion is a question for the future. That specific subject lies within the Dominion Parliament's exclusive power; and the weighing of considerations in the balance with constitutional implications presents a judicial problem analogous to that with which the courts of the United States have long been familiar.

A similar issue would arise also if a province were to attempt in any manner to limit or restrain speech or writing. The controlling question would be whether the true character of the legislation was in relation to a personal wrong or a local regulation or to the restriction, as a measure of good order, of criticism. This was exemplified by a by-law of the city of Quebec requiring the approval of the Chief of Police before the distribution, in the particular case, of religious pamphlets would be permitted, a requirement which was held to be beyond provincial power.[9] At the time a pre-Confederation statute secured generally the free profession of religion, and on this the judgment of one member of the Supreme Court was based; four others held the by-law invalid as an invasion of free speech, and the remaining four judgments in dissent went on the view that the regulation was one of highways and local in nature. Although the question is not wholly free from doubt, it would seem that such a restraint of discussion by provincial legislation on any question of public interest would be invalid.

In the litigation the constitutional position of religion was examined historically. By the Quebec Act of 1774, there was reserved to the French inhabitants of the territory then called Quebec, in addition to their laws and customs of Property and Civil Rights, the free profession of the Roman Catholic religion, extending to a modification of the oath under the law of England to be taken on admission to public office. In the Act of 1867 no reference is

[9] *Saumur* v. *Quebec*, [1953] 2 S.C.R. 299.

made directly to the subject. For the provinces of Ontario and Quebec, there are preserved existing rights of Roman Catholic and Protestant minorities to conduct their own schools; since then similar reservations have been made in the terms under which other provinces have been admitted to the Dominion. If civil rights should be held to extend to religion a province by forbidding either religious denomination from professing its doctrines in effect could nullify the guaranteed school rights which were the subject of tenacious insistence in the formulation of the terms of union. The bans on Roman Catholics in Great Britain had been abrogated or altered to meet the conditions in the new land; and that the omission of specific mention in the Act of 1867 was not designed to place religion within the scope of provincial authority, appears to be too obvious for debate. The contrary view, moreover, ignores the nature of a "civil right", that it is the creation of positive law, to be distinguished from those freedoms that remain within the residue of unregulated conduct, fundamental, even "natural" freedoms because they are not, so far, circumscribed by law. In the Act of 1774 "Civil Rights" were obviously those involved in private controversy and in no respect did they touch the public law of England made effective in Quebec by the transfer of sovereignty.

The question was further considered in proceedings arising out of an attempt by by-law to compel all stores for the sale of goods in the city of Montreal to be closed on certain Holy Days.[10] The ruling was that on the analogy of jurisdiction over activities on Sunday, previously declared to be a matter of criminal law within exclusive Dominion authority,[11] the regulation of Holy Days, being of cognate character, was beyond provincial competence. In minority concurring judgments, the by-law amounted also to the imposition of a form of religious observance prescribed by a church on persons who rejected its doctrines.

Confirmation of views on the freedom of speech expressed in that adjudication is given by the judgment of the Supreme Court[12] on the validity of a provincial statute which enabled the Attorney General of the province, on information satisfactory to him that a building was being used for the propagation of "communism or bolshevism", to place the premises under lock and key for the period of one year, with conditions that do not affect the question

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[10] *Henry Birks & Sons Ltd.* v. *Montreal*, [1955] S.C.R. 799.
[11] *Att.-Gen. of Ontario* v. *Hamilton Street Railway*, [1903] A.C. 524.
[12] *Switzman* v. *Elbling*, [1957] S.C.R. 285.

under examination here. Literature found was to be confiscated and, upon the order of the Attorney General, destroyed, and penalties were provided. No definition of "Communism" was given and the order could be made without a hearing. A seizure and confiscation resulted in proceedings that came before the Supreme Court in 1957, by which the statute *in toto* was declared *ultra vires*. The claim that the legislation was in relation to Property and Civil Rights was rejected as was that of its being related to a Local matter. The majority viewed it as criminal law legislation but three members of the court founded themselves on the incompetency of the province to curtail the dissemination of information.

These exemptions, as I take them to be, from provincial regulation are seen to be deductions from the language of the constitutional instrument: the definitions of the fixed institutions of partliament and legislature postulate them as corollaries. It is well to remind ourselves that the freedoms constitute at the same time essential attributes of man, his modes of self-expression; without the world of ideas, feelings, instincts and will with their communications, human beings would be of another order in the animal kingdom; and it is the aggregate of visible and invisible environment, including the manifestation of all man's faculties, that constitutes not only the milieu in which we live but the condition of our being what we are. Around such a being societal laws are drawn; and the freedoms serve the necessities of individual realization as well as of the political community.

The national body of Canada, as a Dominion, is a territory and a people constituting a state; in 1867 the conception of citizenship was in terms of allegiance; men were subjects, foreigners or denizens of a country and "citizen" a more or less derogatory term reminiscent of the French revolution. But whatever the elements of the status of "subject" might be, citizenship was necessarily embraced within the scope of the name Dominion as connoting the legislative creation of an organized self-governing community. Today citizenship is a status of complexity and importance; and not being expressly enumerated as a provincial or Dominion matter, falls within the residual powers of the Dominion Parliament.

Being the totality of personal relations between the individual and the state, questions may arise of its constituent attributes and incidents. A citizen moves across the Canadian territory in a

dimension free of provincial boundaries;[13] he is entitled to enter provincial courts; he would not, I venture to say, as a resident be subject to discrimination by provincial legislation related to, for instance, his place of birth, or his racial origin; a departure on any such case would be in derogation of constituent elements of citizenship. These examples are sufficient to indicate the distinction between such features and incidents. A judgment of the Judicial Committee[14] furnishes a close analogy. It was there decided that a corporate body created under Dominion legislation could not be deprived of its capacity to sue in a provincial court through failure to pay a provincial tax: that capacity, created by the Dominion, was beyond provincial nullification. *A fortiori*, citizenship status equally within that legislative power would likewise be beyond divesting by local authority. No doubt the right to sue and be sued in provincial courts, or the inability to enter into contracts based on recognized disabilities, may be determined by general provincial laws operating on all persons alike; but to single out particular persons for discriminatory action on grounds that trench upon an indivisible status, is to infringe the status.

The principle of the rule of law as an implication of a constitution "similar in principle to that of the United Kingdom", as the Act of 1867 puts it, was exemplified in an action brought against the Premier and the Attorney General of the Province of Quebec.[15] He had arrogated to himself dictation to a liquor licensing Board to the extent of directing the cancellation of a licence held for many years by a well-known restaurateur on the ground that the licences had furnished bail to a large number of Worshippers of Jehovah charged under city by-laws with peddling wares in the form of religious publications without permit. The revocation, as can be imagined, destroyed the business. The judgment found the authority of neither Premier nor Attorney General to extend to what had been done and that it was an act without legal justification, the cancellation of a privilege in the termination of which the Board itself would have been bound to act on reasonable grounds which were not present, and when brought about by a stranger to the Board was *a fortiori* wrongful.

A questionable course of interpretation is met in the Regulation of Trade and Commerce. This class of subject is within the paramount and exclusive power of the Dominion Parliament: but

[13] *Winner* v. *S.M.T. (Eastern) Limited*, [1951] S.C.R. 887.
[14] *John Deere Plow Company, Limited* v. *Theodore F. Wharton et al*, [1915] A.C. 330.
[15] *Roncarelli* v. *Duplessis*, [1959] S.C.R. 121.

the generality of the language was early taken to be such that unless the scope to which its literal meaning was susceptible was restricted it would materially curtail, if not extinguish, provincial powers in local matters intended to be conferred;[16] but that limiting factor has not always been observed. In the result, that important class of subject was confined strictly to extraprovincial trade plus possible general regulations affecting all trade; any dealing with particular trades within a province except such as was "necessarily incidental", as it was put, to extraprovincial trade, was ruled out.

This furnished the provinces with a measure of exclusive intraprovincial trade. Marketing schemes appeared regulating both local and extraprovincial exchanges in particular commodities which for effective administration were inseparable; but they were held to be beyond the competence of both legislature[17] and Parliament[18] acting singly; each jurisdiction was restricted to activity within its territorial bounds regardless of the degree of involvement of that activity in the body of the particular trade sought to be regulated.

Entangled within these rulings were questions of taxation and licences: provincial taxation must be direct and to raise revenue for provincial purposes; fees for licences by the province may be imposed for revenue for similar public purposes. Was equalization of returns from marketing a product such as milk sold in different forms, fluid or processed, a tax at all? Was it an indirect tax? Was it for raising revenue for public purposes?[19] Embarrassment in the application of the conceptions behind the rulings made reached its height in the regulation of undifferentiated trade, where initial purchases of a commodity were at that moment unrelated to local or national trade: could they, in any manner be regulated?

A similar difficulty was exemplified in the storage and elevation of grain; extra-provincial and local grain would be stored in a local elevator and the question arose of the authority to legislate for the disposal of overages. The effect of the judgment[20] was that neither possessed it. This situation was relieved by

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[16] *Citizen's Insurance Co. of Canada* v. *Parsons* (1881), 7 A.C. 96.
[17] *Lawson* v. *Interior Tree Fruit Committee and Attorney General of Canada*, [1931] S.C.R. 357.
[18] *Attorney General for British Columbia* v. *Attorney General of Canada*, [1937] A.C. 377.
[19] *Lower Mainland Dairy Committee* v. *Crystal Dairy Limited*, [1933] A.C. 168.
[20] *The King* v. *Eastern Terminal Elevator Co.*, [1925] S.C.R. 434.

resorting to an unusual power of the Dominion Parliament to declare such a provincial work, among others, as an elevator to be a work for the general advantage of Canada whereupon the exclusive jurisdiction of Parliament attached.

But no such remedy was available to ordinary trade and commerce. What has so far emerged is the device of cooperative regulation of marketing by a single Board appointed by both Dominion and province; how far this will prove satisfactory remains to be seen.[21]

The weakness of an interpretation leading to such results is that it ignores the entirety both of the actual body of matter dealt with and its regulation, and the virtual impossibility of a several administration of it. Such a scheme as an entirety, where not expressly limited to transactions beginning and ending in the province, constitutes a distinct subject-matter of legislation, neither local nor extra-provincial, which could properly be held to be within the exclusive power given the Dominion: and the necessity for a greater centralized control over the national economy is becoming more evident each day. A tendency toward relaxation from this idealistic delineation of jurisdictional boundaries is evidenced by recent decisions of the Supreme Court.[22] What is to be appreciated is that the language of the instrument being interpreted was well designed to meet the demands of a developing federalism.

Social conditions, certainly in some aspects, have been served by Parliament's exclusive authority over Marriage and Divorce. There has been no attempt to force divorce laws on any province; in Quebec and Newfoundland none exists and proceedings for divorce follow the mode in England before the Divorce Act of 1857, that is by means of an act of Parliament. Private bills are introduced into the Senate; a committee of that house hears evidence and makes its finding and recommendation; and the bill goes through the usual stages of legislation. Marriage and its legal termination so confined to one jurisdiction present few, if any, of the anomalies created by conflict in the recognition of the status of parties to divorce. Solemnization of Marriage, as

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[21] *Reference re Ontario Farm Products Marketing Act*, [1957] S.C.R. 198; *Prince Edward Island Marketing Board* v. *H. B. Willis Inc., and the Attorney General of Canada*, [1952] 2 S.C.R. 392.

[22] *Reference re Ontario Farm Products Marketing Act, ibid.; Murphy* v. *Canadian Pacific Railway Company*, [1958] S.C.R. 626; *Wm. Crawford et al.* v. *The Attorney General of British Columbia et al.* (not yet reported, judgment delivered February 17th, 1960.); Laskin, Provincial Marketing Levies (1959), 13 U. of T.L.J. 1.

distinguished from elements of capacity, has been committed to the provinces; but in view of the uniform substantive law, the relation of the requirements of solemnization to the validity of marriage within Canada does not seem to offer situations in which there would be similar conflict.

Many questions of private law await consideration by the courts. As an instance, since the provinces are limited to Property and Civil Rights "within the Province", the power of determining or destroying contractual rights between persons living in different provinces may occasionally be brought in issue. Such a situation arose in the purported seizure by a province under a special statute of moneys paid by subscribers to a bond issue guaranteed by the province and their diversion from the original purpose.[23] The ultimate view taken was that as the subscribers were in a position to assert their claim to a return of the moneys against a bank holding the credit in the province, by proceedings taken outside the province, as on a failure of the object for which they were paid, the act of confiscation was not a dealing with such matters "within the Province" and was, accordingly, *ultra vires*. The question might arise whether the Dominion, under its residual competence, could legislate for such a purpose.

Each province is charged with the general administration of justice, carried out primarily in provincial courts, under all law in force in the provinces whether Dominion or provincial. As a safeguard for the general interest, the judges of the provincial superior and county courts are appointed and paid by the Dominion. For purposes of Dominion law, Parliament may provide additional courts of which those of the Exchequer and Bankruptcy are examples.

The scope of residual powers presents a fertile field for judicial cultivation. It was early conceded that matters of local concern might grow to dimensions affecting the Dominion as a whole and become subjects for Parliamentary legislation. Such a conception seems to be behind a ruling which upheld a Temperance Act of Parliament prohibiting local sale of liquor in such counties throughout the provinces as might adopt it. Although not strictly criminal law it partook in some degree of its nature; and designed to curtail the evils of intemperance generally, undoubtedly a Dominion interest, it was found not to be within exclusive provincial powers. After a shuttling of conflicting reasons to support

[23] *Royal Bank of Canada* v. *Attorney General of Alberta*, [1913] A.C. 283.

the judgment which reached to a constructive assumption of a national emergency in intemperance, a re-affirmation in 1946[24] of its original basis was again discountenanced as late as 1950.[25] These divergencies evidence a fluid area where judgment has not crystallized and presents an opportunity for fresh consideration of residual resources.

The Supreme Court has not, since 1949, faced directly the question of *stare decisis*. The Judicial Committee which set the law for Canada was not bound by that rule; and as the Supreme Court has succeeded in substance to the role and position vis-à-vis Canada of its predecessor, that court would seem to be equally free from such a constraint. Absoluteness in the rule is not, in any case, present; exceptions exist even in the House of Lords as the highest court of law for the United Kingdom, though they are specific and few. But English conditions do not face the Supreme Court. The interpretation of a written constitution limiting jurisdictions within a federal union, with more or less elaborate formalities for amendment, does not permit of the perpetuation of unsound judgments; constitutional amendments are of a different order from statutory amendments; as related to individual determinations, that is, whether specific matter is within the one or other jurisdiction, they are inappropriate and impracticable. In matters of private or ordinary public law the question is somewhat different; but however desirable certainty and uniformity undoubtedly are, the occasional resort to subtleties of distinction or bland disregard, in one form or other, of incompatible rulings, does not add to the stature of judicial process.

The absence of express constitutional limitations to legislative action has not remitted the individual to the sometimes precarious and sluggish security of public opinion and legislation. The matrix of legislation in a common law parliamentary sovereignty is instinct with the paramount purpose of sustaining democratic institutions toward which the judicial process of interpretation should be both responsive and resourceful. The urgency for their effective assertion comes into play in times of stress and danger; it is then, in the confusion of fear, distrust and fanaticism, that voices uttering the deep postulates of feee men should be heard and felt. Reason and judgment in the popular mind may be overwhelmed by passion, but their stronghold, the courts, should be

[24] *Attorney General of Ontario* v. *Canada Temperance Federation*, [1946] A.C. 193.

[25] *Canadian Federation of Agriculture* v. *Attorney General of Quebec*, [1950] A.C. 179.

their last entrenchment. Notwithstanding the means for subversion in the differentiated and massive interdependent functions of today, the integrity of men seems to be relatively maintained; and in the present stage at least, it is loyalty to these profound ideas upon which modern democratic societies must rely for their cohesion and security. Whether free appetites, passions, minds and wills may ultimately prove incompatible with sustained order, and modern democracy in stress be found to be inherently unstable, can be revealed only by the future. The present period is one of heterogeneous society in adjustment. We must believe that the resources of men under intelligent leadership are adequate to the demands now being made upon them; but their employment must, I think, be in the direction of a consolidation of a society that senses, in humility, generosity, freedom and responsibility the conditions of peace and stability.

But the preservation of these values cannot be confined to the courts. In this the duty of educational institutions becomes of the highest importance. May I be permitted to recall several incidents in the modern history of this University which have given it an added lustre: the academic attitude that enabled two members of the faculty of law—in opposition to the public finding of the then president as a member of an investigating commission —to protest a failure of justice in the courts of this Commonwealth; the refusal of the University to participate in the Nazi commemoration of the founding of one of Germany's historic seats of learning; and the answer of President Conant to the proposal of bartering academic independence for financial assistance from alumni. This stronghold of Truth cannot afford to lessen in the slightest degree the intensity of its light that serves as a beacon not only to North America but to the entire world. Dangers that threaten freedom of expression abound in all directions; that ideas and their utterance should not be boundless is an affront to the intellectual grandeur which has brought man to his present powers, and an offence to his innate self-respect; and if a guest as well as one who claims this university as alma mater, may presume to say so, it is Harvard's special obligation as a trustee of Western civilization to abate not a jot of its loyalty to such standards.

To speak freely on any subject has been assailed from many quarters; institutional, community and group pressures operating through social and economic sanctions are producing a miasma of apprehension and distrust, and men are seeking safety in silence. Radical, critical speech is a sign of intellectual vitality which saves

us from a suffocating mediocrity; and low-spoken satirical exchanges between scholars within the shelters of cloisters are not enough. There are outbursts, indeed, of protests, but at times they remind one of Macaulay's jibe at the "periodical fits of morality" of England. The freedoms we enjoy were won by men prepared at the risk of life and liberty, to beard the brief authority sitting in judgment upon them; but are the Lilburns today guarding the ramparts to challenge those who would straight-jacket us into conformity? Must the individual be left to be crushed by these pressures? The social tyranny of extorting recantation, of ostracism and virtual outlawry as the new means of coercing the man out of line, is the negation of democracy. Much of present Western society demonstrates the truth of the saying, that wolves fight in packs but the lion fights alone; corporate power in too many departments of life has become dominant and for security we are tending to look to some such guardianship.

Notwithstanding, in other circumstances, its reality and supreme value, to hungry and improverished man political liberty may become a meaningless symbol, a song addressed to "the ears of the dead". The many national courses now under way may well turn into parallel parades of competition in the production of gadgetry, and the inner resources prove to have neither depth nor permanence. But, whatever the future may bring forth, as the condition of realizing the possibilities of general government by intelligence, mankind must be reconciled within itself. In the Commonwealth that bore Emerson, his words may with benefit be recalled: "There is no great and no small to the soul that knoweth all; and where it cometh all things are, and it cometh everywhere". As Justice Holmes expressed it, repose is not the destiny of man; in the grip of unrelenting strife with tempting and negating forces, he must achieve that reconciliation or risk extinction.