CONSTITUTIONAL DEVELOPMENT IN THE ENGLISH-SPEAKING WORLD.¹

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There are questions of Empire and Empire management which give many lawyers and others in Canada much concern. Will it continue and develop, and as it grows, what will be its supporting structure, its constitutional framework, its external protection? What will be the nexus among the nations composing the Empire, or give to them cohesion and under what name — the latter of less importance? For answer there is no sure word of prophecy, no supernatural revelation on which we can depend. Our conclusion must be based upon history's teachings about nations and races and peoples, and about the Anglo-Saxon-Celtic peoples, our own race, if the composite of Canada and the United States can yet be called a race. The Celt is the fundamental element in France. If we knew that those of the present and future generations would but observe and keep the essential laws of their creation and follow the plan according to which they were constructed, and by which they were then expected to live in community as well as individually, laws of sincere worship of their Creator, of kindness and of fairminded justice toward each other, inferences as to the continuance and well-being of the Empire could be drawn with certainty. For the principles of unerring sequence and of cause and effect would apply, but by reason of that "if" there is doubt, hence the concern of many people.

The British Empire Unity.

During the last few years much has been said and done in an effort to have the name British Common-

¹This is the substance of the Presidential Address at the 8th Annual Meeting of the Canadian Bar Association.
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wealth substituted for British Empire, because it is urged the former would catch the popular fancy by suggesting greater freedom in State government for the welfare of all and more unity. They may have the view of Robert Louis Stevenson, who said man is a creature who lives not on bread alone but principally by "catchwords." That great writer must have been in a pessimistic mood when he penned that for the people of the British civilization, even Stevenson’s fellow-countrymen, prefer the substantial loaf to a cream puff. As defined in our best dictionaries the word "commonwealth" will require some stretching and reshaping before it will cover our self-governing British Nations and Great Britain, also Great Britain’s many dependencies and multitudes of people of diverse races and ideals and modes of life of different stages in civilization, many of whom are incapable of State self-government. All those dependencies and peoples are appurtenant to Great Britain, not to Canada or the other like Dominions, but all the same are part of the British Empire. The component units or entities of the British Empire 50 years ago and more are still the same. They have grown, so has the whole, the name of which, the British Empire, identifies to all the world the composite reality. It is a name well-known and loved by all peoples living under the several governments of which King George V. is the acknowledged head and symbol of unity. They know it does not signify an imperium such as was the old Roman Empire, or the empire sought to be established by William II., the fallen Kaiser of Germany. Of him Mr. Bonar Law said during the War "The German Emperor has become a great Empire Builder, but it is not his empire that he is building." Gallantly did the matchless sons of the British Empire, an unnumbered host, fight and die to uphold it. They magnified that name and made it glorious forever. So far as I can ascertain the first time that name was used on this continent in legal literature was by Kent (1830) who said:—
“When the United States formed a component part of the British Empire, our prize law and theirs was the same.”

Then by Lord Durham in his much prized great state-paper (1839) — “I entertain no doubt as to the national character which must be given to lower Canada. It must be that of the British Empire.” In the British North America Act, the name stands written in the preamble which declares that a United Canada would conduce to the welfare of the provinces and promote the interests of the British Empire. That prophecy has had already much fulfilment. Section 132 provides

“132. The Parliament and Government of Canada shall have all powers necessary or proper for performing the obligations of Canada or of any Province thereof, as part of the British Empire, towards foreign countries, arising under treaties between the Empire and such foreign countries.”

The treaty between Great Britain and South Ireland under which the Irish Free State came into being has for its first clause the following:

“1. Ireland shall have the same constitutional status in the Community of Nations known as the British Empire as the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, and the union of South Africa, with a parliament having powers to make laws for the peace, order and good government of Ireland and an Executive responsible to that Parliament, and shall be styled and known as the Irish Free State.”

Ever since it was expressed in his speech on the conciliation of America, Burke’s definition of “Empire” has been accepted.

“The aggregate of many states under one common head whether this head be a Monarch or a presiding republic.”

Yet, what is more to be desired than a name which will indicate unity, however revered and full of hope
or apt that name, is the continued reality of unity. That unity in the aggregation of States and peoples under the British Crown existed in strength before the name "British Commonwealth" was even thought of. Existed not because the people of those States thought such a unity would be to their material interests or common weal, but because with their birth or acquisition of citizenship, they partook of the British Empire spirit and nature. Now that each of those States has become conscious of its self-hood, the same spirit which loves freedom but makes laws against the abuse of it, moves each of those autonomous nations to desire that no government external to it should in any way bind it by decisions or decrees in the forming of which it has no part, and is making to all its appeal that by intercommunion, consultation and conference in respect of matters affecting the interest of more than one or all of them, particularly external affairs, they may have one judgment, a united voice and concerted action. Surely where the people are honest with each other and in earnest some safe solution may be expected. Where there is a will there's a way. Mr. Bonar Law, whose retirement from the British Premiership we all regret, said at the Lord Mayor's banquet last November "In all our policy; we have to think not only of public opinion at home, but have to use every means in our power to make certain that we have the support of public opinion throughout the Empire." That indicated a movement in the desired direction, not a new creation by dislocation but of gradual and natural growth. Some think that patience in awaiting the growth of some suitable constitutional framework to support the unity of those nations, some covering to protect and hold them together, is a policy of drift.

The Drift.

Are the Empire and Canada and the other nations of the Empire drifting? Without reflection most people would unhesitatingly say yes, and after reflection they
may also give the same reply. Though the answers were the same, they would express divergent views according to the different meanings placed upon the word "drifting." One common meaning, which has some biblical backing is a "wavering" as a thing "driven" by the wind and "tossed" or a putting off, a delay; in that sense "driftless," "destitute of intended direction," "purposeless." The other meaning is a strong movement caused by some urgent force or influence and beyond any individual control. Tennyson gives an application of it where inanimate things move and form under the compulsion of known laws—

"The meanings of the homeless sea,
The sound of streams that swift or slow
Draw down Aeonian hills, and sow
The dust of continents to be."

Under an equally controlling power and commanding cause peoples advance or drift. Longfellow has also written how

"—The breath of the Saxons and Celts like the blast
Drifts evermore to the West the scanty smoke of
The wigwams."

The movable tepees are replaced by the more permanent homes of longer tenure. The hunting grounds are bearing rich harvests.

That drifting of the Saxon-Celt to the West and to the heathen inheritance in the uttermost parts of the earth was obedient to the law inherent in the natures of those adventuresome, enterprising and commercial and missionary peoples. Written also in their hearts were the traditions, customs, laws, methods of Government of their ancestors and that love of freedom and fairplay which ever distinguished them. Obviously it was natural for this prepotent people when they set up their own lares et penates to establish in the new lands those institutions, legislative, judicial and executive to which they had been accustomed. The beautiful
apostrophe referring to Israel leaving Egypt might well be applied to the British Spirit directing the migrations of the Anglo-Saxon-Celtic people and their formation into nations (Ps. 80, 8): “Thou has brought a vine out of (England) thou hast cast out the heathen and planted it. Thou preparedst room before it and did cause it to take deep root and it filled the land.” Does not that all show the drift? The forces, almost irresistible forces, which caused it, still moving normally, are operating with unabated vigour and will continue unless checked by the national follies and excesses and impatience of the people or unless some evil spirit, some Eris, throws into the midst of our nations the apple of discord, causing international ruptures and fratricidal conflict. The proverb says “a brother offended is harder to be won than a strong city and their contentions are like the bars of a castle” (Prov. 18, 19). Discord breeds decay. It unbalances an organism or an organization or a community; sets up morbid conditions in which malignant germs are fostered, but accord, with hearty co-operation, makes for growth and health. While in biology, growth means the manufacture of additional living substance, it also means the construction of accessories of development such as the form and supporting framework necessary for its well-being. A study of the constitutional history of our Anglo-Saxon-Celtic communities and of their laws and nations shows that similar principles of growth apply in them. They increase in numbers, they expand in area, they cohere, and for that cohering body a supporting constitutional framework is suitably evolved unhampered by any artificial written law. Wherever those British people have established national government they are holding true to type. The constitutional framework of the United States was made in one respect different from the others by reason of the blow of absolutism, a blow against the authority of the people in Government, the blow which George III. struck the British metal and
spirit of the colonists in America during their process of development as nations under the British Crown. The blow was resented and resisted just as the liberty-loving citizens of the sea-girt isles had for centuries resisted autocratic domination. The victorious colonists could not dethrone the King of England, but they could reject him from their Government, which they did, and in lieu of the British system of a King advised by a people's cabinet or what we call responsible government, they substituted an elective, term-limited, federal President, and State Governors with large, almost autocratic, executive authority and a qualified right to suggest and veto legislation.

Their 10th Amendment is a restatement of the ancient British, or of Anglo-Saxon-Celtic, constitutional birthright, the right and duty of the people to govern themselves locally.

"Article X. The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people."

The last word in constitution-making, the Irish Free State Act, asserts the same thing, and shows the continuity of the drift—

"Article 2. All powers of government, and all authority legislative, executive and judicial in Ireland, are derived from the people of Ireland and the same shall be exercised in the Irish Free State (Saorstát Eireann) through the organizations established by or under, and in accord with, this Constitution."

It is interesting to know that Article 51 of the same Act is—

"The Executive authority of the Irish Free State (Saorstát Eireann) is hereby declared to be vested in the King, and shall be exercisable in accordance with the law, practice and constitutional usage governing the exercise of the Executive
Authority in the case of the Dominion of Canada, by the representative of the Crown . . .”

At times democracy runs to seed and ceases to bring forth good fruit, or becoming intemperate, takes to mob rule, but these excesses carry their own correction—

“There lives within the very flame of love
A kind of wick, or snuff, that will abate it;
For nothing is at a like goodness still;
For goodness, growing to a pleurisy,
Dies in its own too much.”

The younger nations of the Anglo-Saxon-Celtic race are also in their evolution true to type. Branches of the same tree, it would be abnormal if they were not similar or did not produce the same kind of fruit. The framers of the British North America Act knew the great unwritten constitution of England, knew also the great written constitution of the United States and its limitations, and left most of our Canadian constitution unwritten and made it, as the Act states, “Similar in principle to that of the United Kingdom.” Australia, South Africa, and the Irish Free State had before them the English, American and Canadian constitutions; and, speaking generally, fixed in writing more of the English general constitutional principles than Canada did, but fewer than the United States. I do not intend to compare them; that would mean several volumes. May I here commend you to Professor Smith’s “Federalism in North America.” I will, however, refer to a few provisions in the Acts which relate to the Crown’s position in the several national governments and to the unity of the Empire. They are expressions of Unity, not its cause. The respective Acts giving constitution to Canada, Australia, South Africa and the Irish Free State provide in each case that the federal parliament or legislature shall consist of the King, the Senate and a popular elected body variously called House of Commons, House of
Representatives, House of Assembly and House of Deputies.

The Canadian (sec. 9), Australian (sec. 61), South African (sec. 8), and Irish Free State (sec. 51), Constitutional Acts declare that the executive government and authority or power is vested in the King. The New Zealand Act of 1854 is slightly different in that the General Assembly is composed of the Governor-General, Legislative Council and House of Representatives. It does not expressly state that executive authority is vested in the King, but its provisions imply it. All these Acts have the further provision that no vote, resolution, address or bill for the appropriation to any purpose of any revenue or moneys shall be passed unless such appropriation has in the same session been first recommended by a message from the Governor-General, the Crown's representative. (Canadian (sec. 54), Australian (sec. 56), South African (sec. 62), Irish Free State (sec. 37), New Zealand (sec. 54).

As Keith says:

"By this practice the great constitutional principle has been established and maintained that the sovereign having the executive power, is charged with the management of all the revenue of the State and with all payments of the public services."

Those respective Acts also provide that there shall be a session of the federal parliament or legislature once at least in every year. Canadian (sec. 20), Australian (sec. 6), South African (sec. 22), Irish Free State (sec. 24).

Article (1) of the (Great Britain and Irish Free State) Treaty already quoted, gives to the Irish Free State the same status in the British Empire as Canada. Article (2) provides that the "position of the Irish Free State in relation to the Imperial Parliament and Government and otherwise, shall be that of the Dominion of Canada, and the law, practice and constitutional usage governing the relationship of the Crown,
or the representative of the Crown and of the Imperial Parliament to the Dominion of Canada shall govern their relationship to the Irish Free State." Can it be assumed that the Treaty intended the Irish Free State should remain bound by that status and relationship as they existed in Canada at the date of the Treaty, or is it not more reasonable to suppose as Canada evolves constitutionally in respect to the Empire, the Irish Free State will follow accordingly? There are provisions in the British North America Act and in the unwritten Constitution which, if made use of, might embarrass Canada, such as the power of Great Britain to veto Canadian legislation, the supremacy of Imperial legislation and the limitation on Canada's rights to legislate extraterritorially. The reason for their formal abrogation in Canada might not apply with equal cogency to their formal discontinuance in Ireland. As Great Britain and the Irish Free State have paid Canada a fine compliment in accepting it as ideal in the constitutional matters mentioned in the treaty, and as the Irish Free State is likely still to depend upon and follow Canada in its natural evolution in relation to the Empire, should Canada not watch its steps carefully, advance cautiously and act sagaciously? But not only to the Irish Free State should Canada be a brother and wise counsellor but to all the other Dominions, which will naturally look to it. Though Canada claims equality of status with Great Britain—the senior of us all—yet Great Britain is differentiated from the others because of its varied interests, of its dependencies and the multitude of people of all races with whom it deals and to whom it gives orderly government, business organization and protection from enemies. None of the other nations has such dependencies with the consequent privileges and attendant obligations, and some of them do not care to assume a share in those duties which are peculiarly Great Britain's own; but in so far as the burdens and benefits of all are similar, all should con-
scientiously share the one and gladly participate in the other. In this the interest and concern of the United States is almost identical with that of the British nations. The natural affiliation of the United States is with those nations — or if the people of the United States prefer the converse statement — the natural affiliation of the British Empire nations is with the United States. Kinsmen they all are, not entirely by blood descent, but altogether as joint-heirs of the most worthy past that history has ever chronicled of any people, a descent extending back through Magna Charta and beyond, holders in common of their laws, their traditions, their ideals of truth, of justice and of freedom, which through the ages they put into practice.

Such "a fellow feeling makes one wondrous kind." Under its impulse each of these nations should help the other of them, not only to protect itself against external aggression, but against lawlessness and law-breaking within its borders, in so far as one friendly power can, at the request of the other, do so. Where in one nation the law is flouted by the people—the people who make it—then the value and beneficence of democracy ceases and anarchy noses in and soon spreads its infection to the other nations. A cosmic league of nations to prevent war is a fine theory and to the extent it has been tried has shown good result, but by reason of inbred antagonisms among many of its components, will fall short in full attainment—much testing will have to be done before it approaches assured success—but the great combination or association of the Anglo-Saxon-Celtic or British-sprung nations is a natural and sympathetic one, and should exist for mutual protection and progress and for the sake of their own peace and the peace of the world. Those nations are strategically placed to attain that end; some under the North Star, others under the Southern Cross. "World wide apart, and yet akin as showing that the human heart beats on forever as of old."