august house.' It also speaks of his pure and disinterested virtue, nearly always persecuted by blind Fortune, and of his 'ardent zeal for the true religion, to which he has been so much attached that neither promises nor threats have ever been able to shake his faith.' It is a pity that Melville wrote in French, for his French is very colourless, wholly wanting in individuality; but Sophia herself wrote her memoirs in that language, and our Queen Mary wrote to her likewise in French until told that Sophia would prefer English. 'I might have believed,' said Mary in excusing herself, 'that you had not forgotten English.'

Melville complains more than once of want of due appreciation, and he evidently deemed himself qualified for more important posts than were ever assigned him. It is impossible to say whether or not 'blind Fortune' denied him an opportunity of fully displaying his military abilities. He ought, with his varied experiences, to have been a shrewd judge of character, but his book contains few reflections. It is mostly a narrative without comment, but he may have written thus to please his patroness. The tranquility of which he speaks at the close of his work remained unbroken till his death in 1706. He was buried at Gifhorn, and as he had been for nearly thirty years its *drost* or governor, and *oberhauptmann* of the district, a monument was doubtless erected over his remains; but the church was burnt down in 1744.

J. G. Alger.

Art. II.—THE CANADIAN DOMINION AND AUSTRALIAN 'COMMONWEALTH.'

1. *Proceedings of the Colonial Conference, held at Ottawa, Canada, from 28th June to 9th July*, 1894. Ottawa, 1894.
2. *Parliamentary Procedure and Practice, with a Review of the Origin, Growth and Operation of Parliamentary Institutions in Canada.* By J. G. Bourinot, C.M.G., LL.D., D.C.L. 2nd edit. Montreal, 1894.

3. *Federal Government in Canada.* Johns Hopkins University Studies. By the same. Baltimore, U.S.A., 1889.
4. *Official Report of the National Australasian Convention Debates (with Draft of Commonwealth of Australia Bill.)* Sydney, N.S.W.. 1891.

THE Colonial Conference that was held at Ottawa in the Dominion of Canada, during the summer of 1894, gives us the best possible evidence that colonial statesmanship at the present time has a decided tendency, not towards isolation from the parent State and the establishment of independent nations, but rather towards placing the relations between Great Britain and her colonial possessions on a basis of community of interest. It is also quite certain that so important an assemblage of representatives of the scattered colonies of the Empire must more or less stimulate a deeper interest in the affairs of each other. It was for many reasons a happy idea that this second Colonial Conference—the first having been held in London seven years before—should have met at the political capital of the Canadian Dominion, which occupies a pre-eminent position among the colonial possessions on account of having been the first to carry out successfully a plan of colonial federation. The fact that the Parliament of the Federation was sitting at the time of the conference was a fortunate circumstance from which no doubt the Australasian and South African delegates derived not a little practical benefit. A Federal Parliament, composed of two Houses, in which seven provinces and a vast territory, extending over nearly three million and a quarter of square miles, were represented by upwards of three hundred members, was of itself an object lesson for colonies which still remain politically isolated from each other, and in a very little better position than that occupied by the Canadian provinces thirty years ago, when the Canadians recognised the necessity of close union for commercial and governmental purposes. It is true the federal idea has made some advance in Australasia. A Federal Council has been in existence for a few years for the purpose of enabling the Australian colonies to confer together on various questions of general import; but the experience of the eight years that have passed

since the first meeting of this Council has not been satisfactory in view of the want of co-operation of all the Australian dependencies, and of the very limited scope of its powers. The larger project of a federation, including the whole of the island-continent as well as New Zealand, was fully discussed three years ago in a convention of delegates from all the colonies of Australasia, and a Bill was drafted for the formation of a 'Commonwealth of Australia;' but the measure has not yet been discussed and adopted by the legislatures of the countries interested, although there is no doubt that the scheme is gaining ground among the people, and no great length of time will elapse before we shall see its realization. In South Africa, which has been well described as 'a congeries of British provinces in different stages of dependence, intermixed with protected territories and independent states,' the federal idea has necessarily taken no practical form, and is not likely to do so for many years to come, though something has been gained by the establishment of a customs union between some of the political divisions of a great country with enormous possibilities before it.

No doubt the Australasian and other delegates who visited Canada took away with them some well formed impressions of the value of federal union that will have some effect sooner or later upon the legislation of their respective countries. Travelling, as many of them did, over the Dominion, from the new and flourishing city of Vancouver on the Pacific coast to the ancient capital of Quebec on the St. Lawrence, and even to the old sea-port of Halifax on the Atlantic shores of the maritime provinces, they could not fail to be deeply interested by the great wealth of natural resources and the elements of national strength, which they saw in the rich mineral districts of British Columbia, in the fertile prairies of the North-West, in the cities, towns and agricultural settlements of the premier province of Ontario, in the enterprising and handsome city of Montreal, which illustrates the industrial and commercial enterprise of Canada above all other important centres of population, in the abundant fisheries and mines of the maritime provinces, and in the large facilities that are everywhere given for education, from the common school to the university. But the most instructive fact of Cana-

dian development, in the opinion of statesmen, would be undoubtedly the successful accomplishment of a federal union throughout a vast territory, reaching from ocean to ocean, embracing nearly one-half the Continent of America, inhabited by peoples speaking the languages and professing the religions of England and France, divided by nature into divisions where diverse interests had been created during the century that elapsed between the formation of their separate provincial governments and the establishment of confederation, which has brought them out of their political isolation and given a community of interest to the whole of British North America, except Newfoundland, which has stood selfishly aloof, and is now suffering under conditions of financial and commercial adversity and political embarrassment which could never have occurred had it years ago formed part of the Canadian Federation. Australasian statesmen, who desire to see the federal union of their respective colonies consummated before long, might well reflect that to them the task is much easier of accomplishment than has been the case with Canada, since Australia has not to encounter those national and sectional difficulties which from the outset have always perplexed and hampered Canadian public men.

But it is not the intention of the writer to dwell on this important assemblage of Colonial representatives. His object is to show in this Article some of the sources of the strength of the Canadian federal constitution as well as those elements of weakness which are inherent in every federal union, however carefully devised. Such a review should have some interest not only for Australasians who are halting in the way of federation, especially as it will include a criticism of some features of the constitution of the proposed 'Commonwealth,' but also for Englishmen anxious to study the evidences of colonial development throughout the Empire.

Briefly stated, the strength of the constitutional system of the Canadian Federation depends largely on the following actual conditions:

A permanent and non-elective Executive in the person of the reigning Sovereign of Great Britain who is represented by a Governor-General, appointed for five or six years by the Queen

in Council to preside over the administration of Canadian affairs, and consequently elevated above all popular and provincial influences that might tend to make him less respected and useful in his high position.

The existence of responsible or parliamentary government after the British model.

The careful enumeration of the respective powers of the federal and provincial governments, with the residuum of power expressly placed in the central or general government.

The placing of the appointment of all judges, federal and provincial, in the Dominion Government, and their removal only on the address of the two Houses of the Dominion Parliament, which address can only be passed after full inquiry by a committee into any charges formally laid against a judge.

The reference to the courts of all cases of constitutional conflict or doubt between the Dominion and the Provinces that may arise under the British North America Act of 1867.

These are the fundamental principles on which the security and unity of the federal union of Canada rest; and we shall now proceed to show briefly the reasons for this emphatic opinion.

Canadians have never raised a claim, as some of the Australian colonists have done, that they should be always consulted in the choice by the Sovereign of so important a public functionary as the Governor-General of the dependency. Nor have the Canadians ever demanded the privilege of electing from her own statesmen their Governor-General—a change that was actually pressed by some members of the Australian Convention in 1891. The elective principle has never been applied in the constitutional practice of Canada to administrative, executive, or judicial offices, despite her close neighbourhood to the United States, but has been confined, in accordance with the English system which obtains throughout the Empire, to representatives in parliament or in the municipal councils of the country. Consequently Canadians have been spared the excitement and expense that have followed the adoption of the elective principle in the United States, where the President of the nation, and the Governors of the forty-four States, are elected for short terms of office—the former for four, and the latter from one to four years. Removed

from all political influences, since he does not owe his appointment to Canadian party, exercising his executive powers under the advice of a constitutional ministry, who represent the majority in the legislature, representing what Bagehot called 'the dignified part of the constitution,' the Governor-General is able to evoke the respect and confidence of all classes of the people.

The constitution of Canada, which is known as the British North America Act of 1867, has only enlarged the area of the political sovereignty of the provinces, and given greater scope to their political energy, stimulated for years previously by the influence of responsible government. The federal constitution has left the provinces in the possession of the essential features of that local government which they had fairly won from the parent state since Acadia and Canada were wrested from France, and representative institutions were formally established throughout British North America. In every province there is a Lieutenant-Governor appointed by the Dominion Government, who in this respect occupies that relation to the provinces which was formerly held by the Imperial authorities. This officer is advised by an Executive Council chosen, as for forty years previously, from the majority of the House of Assembly, and only holding office while they retain the confidence of the people's representatives. In the majority of the provinces there is only one House—the elected Assembly. The legislative councils that existed before 1867 have been abolished in all the legislatures except those of Quebec and Nova Scotia, and in the latter the example of the majority will soon be followed. It is questionable, however, whether it would not have been wiser, in view of the too hasty legislation of such purely democratic bodies as the Lower Houses are becoming under the influence of an extended franchise—manhood franchise existing even in the great English province of Ontario—to have continued the English bicameral system, which even the republican neighbours of Canada have insisted on in every stage of their constitutional development as necessary to the legislative machinery of the nation and of every state of the Union. It would have been much better to have created an Upper House, which would be partly elected by the people, and partly appointed by the Crown,

which would be fairly representative of the wealth, industry and culture of the country, the last being insured by university representation. Such a House would, in the opinion of those who have watched the course and tendency of legislation since the abolition of these upper chambers, act more or less as legislative breakwaters against unsound legislation and chimerical schemes. As it was, however, these second chambers had lost ground in the public estimation through their very inherent weakness, representing, as they did too often, merely the favours of government and the demands of party, and hardly a word of dissent was heard against their abolition. No doubt economical considerations also largely prevailed when it was a question of doing away with these chambers. No doubt, too, when these bodies disappeared from the political constitutions of the provinces, importance was given to the suggestion that the veto given by the federal law to the Dominion Government over the legislation of the provinces did away to a large extent with the necessity for a legislative council, for its *raison d'être*, if we may so express it. But, in the practical working of the federal union, the vehement and persistent assertion of 'provincial rights,' and the general trend of the decisions of the courts to whom questions of jurisdiction have been referred, have tended rather to give a weight and power to the provincial communities that was not contemplated by the leading architects of the federal framework; certainly not by the late Sir John Macdonald, who believed in a strong central government dominating the legislation, and even the administration of the provinces whenever necessary for reasons of urgent Dominion policy. But the powers granted in express terms or by necessary implication to the provincial authorities, take so wide a range, and the several provincial governments, from the inception of the union, have been so assertive of what they consider their constitutional rights, that it has not been possible to minimise their position in the federation. The veto of the Dominion is now rarely exercised; in fact, only in cases where an Act is clearly unconstitutional on its face, and any attempt to interfere with provincial legislation on other ground than its unconstitutionality or illegality, would be strenuously resisted by a province. In view then of the position of the veto,

a subject to which we will again refer, it is to be regretted that there is not still in each of the provinces an influential Upper House, able from the nature of its constitution, and the character and ability of its *personnel*, to initiate legislation and exercise useful control over the acts of a Lower House now perfectly untrammelled, except by the Courts when its legislation comes before them in due course of law. The consequences of the present system must soon show themselves one way or the other. We admit that the fears we entertain may be proved to have no foundation as the union works itself out. On the face of it, however, there is a latent peril in a single chamber, elected under most democratic conditions, liable to fluctuations with every demo..stration of the popular will, and left without that opportunity for calm, deliberate second thought that a second chamber of high character would give them at critical times.

In the constitution of the Dominion or Central Government, however, the British North America Act has adhered to the lines of the British system, since it provides for an advisory Council of the Governor-General, chosen from those members of the Privy Council of Canada who have the confidence of the House of Commons; for a Senate of about eighty members, appointed by the Crown from the different provinces; for a House of Commons of two hundred and fifteen * members, elected by the people of the different sections on a basis of population, and on the condition that the number of members given to Quebec by the Constitutional Act shall not be disturbed. The growth of democratic principles is seen in the very liberal Dominion franchise, on the very threshold of manhood suffrage, with limitations of citizenship and residence. The members of the Senate must have a small qualification of personal and real property, and are appointed for life. The remarkably long tenure of power enjoyed by the Conservative party—twenty-three years, since 1867—has enabled it to fill the Upper House with a very large numerical majority of its own friends; and this fact, taken in connection with certain elements of weakness inherent in a

* In the next Parliament the number will be 213, on account of a recent readjustment of representation based on the last census.

chamber which has none of the ancient privileges or prestige of a House of Lords, long associated with the names of great statesmen and the memorable events of English history, has in the course of years created an agitation among the Liberal party for radical changes in its constitution which will bring it more in harmony with the people, give it a more representative character, and at the same time increase its usefulness. This agitation has even proceeded so far as to demand the abolition of the House, but it is questionable if this radical movement is sustained to any extent by the intelligence of the country. On the contrary, public opinion, so far as it has manifested itself, favours the continuation of a second chamber on conditions of larger usefulness in preference to giving complete freedom to the democratic tendencies of an elective body—tendencies, not so apparent at present, but likely to show themselves with the influx of a larger foreign population and the influences of universal suffrage. The Senate, as at present composed, contains many men of ability, and cannot be said to display a spirit of faction despite its preponderance of one party, while for two years back its leaders have seen the necessity of initiating in this chamber a large number of important public measures. The movement for a remodelling of the Senate, however, has not yet taken any definite shape, and is not likely to do so as long as the present Conservative Government remains in power, although the writer is one of those who believe that it ought soon to be strengthened by giving it a more representative character on some such plan as has been suggested in the case of legislative councils in the provinces. Of course no constitutional changes can be made in the body except on an address of the two Houses to the Crown in Parliament.

With experiences of the Canadian Senate and their own legislative councils before them, the framers of the proposed Australian federation have followed the example of the United States and provided for a Senate whose members are elected for six years by the legislatures of the colonies, or parliaments of the Australian States, as they are more ambitiously called in the Bill. The constitutional provisions that govern the House of Lords and Canadian Senate, with respect to the initiation or amendment of taxation, and annual Appropriation Bills are fully

recognised in the Australian draft. Some enlargement of power is, however, given to the proposed Australian Senate in the case of Money Bills, and it is permitted at any stage to return any proposed law, which they may not amend, with a message requesting the omission or amendment of any items or provisions therein. This practice appears to have been followed for some years in South Australia, but in introducing it into their proposed constitution the Convention was very much influenced by a hope that it would give the Upper House larger power and give it some resemblance to the Senate of the United States. But they have forgotten that that great body has long wielded the three elements of authority—executive, legislative and judicial. It goes into executive session on treaties and appointments made by the President, acts as a court of impeachment for the President and high functionaries, and exercises the supreme legislative power of directly amending Money Bills. Until the popular assemblies in Australia are able or willing to give such sovereign powers to an Upper House, it is idle to talk of comparisons with the Senate of the United States.

No doubt the members of the Australian Convention hope that a Senate with a longer tenure of power and an indirect method of popular election, will be to a considerable degree more conservative in its legislation than a more democratic Lower House elected on a short term of three years—one more than the House of Representatives of Congress, and two less than the House of Commons of Canada. Of course some of the Australian colonies have had experience of an elective Upper House, and it is somewhat curious that while they are not prepared to adopt the old system in its entirety in their proposed federal union, the Canadians have returned to an appointed House as preferable to the one they had before 1867,—even so thorough a Radical as the late George Brown, then leader of the Liberal party, earnestly urging the change in the Quebec Convention. When we consider the character of the agitation against Upper Houses, we see that, in the nature of things, Democracy is ever striving to remove what it considers barriers in the way of its power and will. An Upper House, under modern political conditions, is likely to be unpopular with the radical and socialistic

elements of society unless it is elective. As the Australians are obviously admirers of the American federal constitution, from which they copy the constitution of their Upper Chamber, we direct their attention to the fact that an agitation has already commenced in the United States, and indeed has made much headway, to change the present indirect method of electing Senators, and to give their election directly to the people. It says something, however, for the Conservative and English instincts of the Australians that they have not yielded to the full demands of democracy, but have recognised the necessity of an Upper House in any safe system of her Parliamentary Government.

We see, accordingly, in the central and provincial constitutions of Canada the leading principles of the British system—a permanent executive, responsible ministers, and a parliament or legislature, following directly the British model of two Houses in the central government, but varying from all other countries of English institutions in the majority of the provinces. In the enumeration of the legislative powers given to the Dominion and provincial legislatures, an effort was made to avoid the conflicts of jurisdiction that so frequently arose between the national and State governments of the Federal Republic. In the first place, we have a recapitulation of those general or national powers that properly belong to a central authority. On the other hand, the provinces have retained control over municipal institutions, property, and civil rights, and generally 'all matters of a merely local or private nature in the province.' It will be remembered that the national or general Government of the United States is alone one of enumerated powers, whilst the several States have expressly reserved to them the residuum of power not in express terms or by necessary implication taken away from them. In their anxiety to avoid the sectional and State difficulties that arose from these very general provisions, and to strengthen by constitutional enactment the central Government of the Dominion, the framers of the British North America Act placed the residuary power in the Parliament of Canada.

But despite the earnest efforts made by the Canadians to prevent troublesome questions of jurisdiction too constantly arising

between the general and provincial Governments, the Courts have been steadily occupied for a quarter of a century in adjusting the numerous constitutional disputes that have arisen in due course of law under the Union Act. Discussions are frequently arising in the legislative bodies on the varied interpretation that can be given to the constitution on these very points of constitutional procedure and jurisdiction which the framers of the Federal Union thought they had enumerated with great care. But it is in this very reference to the Courts that the strength of a written instrument of a Federal Government lies. In Canada, as in all other countries inheriting English law, there is that great respect for the judiciary which enables the people to accept its decisions, when they would look with suspicion on the Acts of purely political bodies.

Cases involving constitutional questions may be tried in any of the Courts of the provinces, with the right of appeal to the federal Supreme Court, and finally, under certain limitations, to the British Privy Council. The judgments of the Judicial Committee have been always received with the respect due to the learning of so high a Court, and on the whole have given satisfaction, though there have been occasions when the lay, and even the legal, mind has been a little perplexed by somewhat contradictory decisions, apparently arising from the difficulty of some of the judges to comprehend what are largely provincial issues. The tendency of the judgments of the Courts has been decidedly towards strengthening the provincial entities, and minimising to a certain extent the powers of the central authorities. For instance, the Judicial Committee has gone so far as to lay it down most emphatically—

'That when the Imperial Parliament gave the provincial legislatures exclusive authority to make laws on certain subjects enumerated in the Act of Union, it conferred powers not in any sense to be exercised by delegation from, or as agents of, the Imperial Parliament, but authority as plenary and as ample within the limits prescribed by the section (92) as the Imperial Parliament, in the plenitude of its power, possesses or could bestow.'

It is a question whether the Judicial Committee, however ably constituted, would not find its usefulness increased by the

membership of a great colonial lawyer, who would bring to his duties not only legal acumen and judicial fairness, but a comprehension of the nature and methods of government which one does not expect from a European judge, who acts within the narrow path traced for him by ordinary statutes.* As long as the imperial court is composed of men of the highest learning, and it is very rarely this is not the case, it is a positive advantage to the people of Canada, and of all the other dependencies of the Crown, to have its independent decision on constitutional questions of moment. In the Australian Convention, doubts were expressed as to the necessity of this reference when the new federation will have a supreme court of its own, but it would be a serious mistake to ask the Crown to give up entirely the exercise of a prerogative so clearly in the interests of the Empire at large. To quote the apt words of Sir Henry Wrixon:—

'At present it is one of the noblest characteristics of our empire that over the whole of its vast area, every subject, whether he be black or white, has a right of appeal to his Sovereign. That is a grand link for the whole of the British Empire. But it is more than that. It is not, as might be considered, a mere question of sentiment, although I may say that sentiment goes far to make up the life of nations. It is not merely that ; *but the unity of final decision preserves a unity of law over the whole Empire.*'

The words we have given in italics are unanswerable, and it is unfortunate, we think, such arguments did not prevail in the convention to the fullest extent. That body, in this as in other matters, appears to have been largely influenced by a desire to make Australia independent of England as far as practicable, and the majority were only at the last persuaded to adopt a clause providing for a modified reference to the Queen in Council of cases 'in which the public interests of the commonwealth or of any state, or any other part of the Queen's dominions are concerned.' We hope, however, before the constitution is finally adopted, all the limitations on the exercise of this royal prerogative in the dependency will be removed.

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* Professor Bryce in *The American Commonwealth*, Vol. I., p. 339 (1st Edition). See also his remarks on the two literal constructions placed at times on the B.N.A. Act by the Judicial Committee. *Ibid.* P. 509.

When we consider the influence of the courts on the Canadian federal union we can see the wisdom of the provision which places the appointment, payment and removal of the federal as well as provincial judges in the hands of the Dominion Government. It may be said, indeed, that by their appointment and permanency of tenure, all the judges of Canada are practically federal, though the organisation of the provincial courts rests with the provincial governments. The consequence is the provincial judges are removed from all the influences that might weaken them were they mere provincial appointments. In the United States the constitution provides for federal judges, who are appointed by the President with the consent of the Senate. At the present time out of the forty-four states thirty elect the judges and the officers of the courts by a popular vote. The federal judiciary has always held a far higher position in the estimation of the intelligence of the country than the elective judiciary of the States since the mode of appointment, permanency of tenure, and larger scope of duties have attracted the best legal talent. It is admitted by American thinkers and publicists, who are not politicians but can speak their honest opinion, that the system has been most unfavourable to the selection of men of the best ability, and the exhibition of courage and fidelity in the discharge of their important functions. Judicial decisions have been wanting in consistency, and constantly fluctuating and feeble. Men of inferior reputation have been able, by means of political intrigue and most unprofessional conduct, to obtain seats on the bench. Confidence in the impartiality of judges is sensibly lessened when it is the party machine that elects, and professional character and learning count for comparatively little. If the interpretation of the constitution had depended exclusively on this state judiciary, the results would have been probably most unfavourable to the stability of the Union itself, but, happily for its best interests, the men who framed the fundamental law of the republic wisely provided for federal judges, removed from the corrupt and degrading influences of election contests, and made them the chief legal exponents of the written instrument of government.

It is therefore a happy circumstance for Canada that all its

judges are entirely independent of political influences, as well as of the fluctuating conditions of a narrow range of provincialism. As exponents of the constitution the Dominion judiciary has greater elements of strength than the judiciary of the United States, since it is federal from a most important point of view, while that of the latter country is divided between nation and states. In another respect the Canadian government has made a step in advance of their neighbours, with the view of obtaining a reasoned opinion from the higher courts in cases of legal doubt and controversy between the central and provincial governments, and between the provinces themselves. The Governor in Council may refer to the supreme court for hearing and argument, important questions of law or fact touching provincial legislation or any other constitutional matter, and the opinion of the court, although advisory only, is, for all purposes of appeal to Her Majesty in Council, treated as a final judgment between the parties. No such provision exists in the case of the federal judiciary at Washington, which can be called upon only to decide controversies brought before it in a legal form, and is therefore bound to abstain from an extra-judicial opinion upon points of law, even though solemnly requested by the executive. A similar provision exists in Ontario for a reference to the provincial courts, and the question may be fully argued, a provision that does not exist in the few states of the federal republic, where the legislative department has been empowered to call upon the judges for their opinion upon the constitutional validity of a proposed law.

We have dwelt at some length on these carefully devised methods of obtaining a judicial and reasoned opinion on cases of constitutional controversy with the view of showing that they are recognised as the best means of arriving at a satisfactory solution of legal difficulties that cannot be settled on the political arena. The necessity of making the courts in every way possible the arbiters in such cases is clearly shown by the history of the veto given by the British North American Act to the Government of the Dominion over the legislation of the provinces. From its history so far, it is clear that the exercise of this power is viewed with great jealousy and may at any moment

lead to serious complications by creating antagonisms of much gravity between the central and provisional governments. It is now, however, becoming a convention of the constitution that the Dominion authorities should not interfere with any provincial legislation that does not infringe the fundamental law; that the only possible excuse for such interference would be the case of legislation clearly illegal or unconstitutional, on the face of it, unjust to any class or section of the people, or dangerous to the security and integrity of the Dominion or of the Empire. It is now deemed the wisest policy to leave as far as possible all questions of constitutional controversy to the action of the courts by the methods that the law, as we have already shown, provide to meet just such emergencies. In ordinary cases, however, where there is an undoubted conflict with powers belonging to the central government, where the province has stepped beyond its constitutional authority, the veto continues to be exercised with much convenience to all the parties interested. It must be admitted that on the whole the authorities of the Dominion have exercised this sovereign power with discretion, but it must be admitted that it may be at any time a dangerous weapon in the hands of an unscrupulous and reckless central administration when in direct antagonism to a provincial government, and it can hardly be considered one of the elements of strength, but rather a latent source of weakness, in the federal structure.

No doubt the experience of the Canadians in the exercise of the veto power, has convinced the promoters of the proposed federal union of Australia that it would be unwise to incorporate it in their draft constitution, which simply provides that 'when a law of a state is inconsistent with a law of the commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.' The political government of the federation is given no special authority to act under this clause, and declare any 'state' legislation unconstitutional by a proclamation of the Governor General as is done in Canada, but the provision must be simply a direction to the courts, which also, in the proposed 'commonwealth,' are to have all the legitimate authority that is essential to the satisfactory operation of a federal system.

Some of the members of the Australian Convention, however, have seen a means of controlling 'state' legislation in the following provision.

'5. All references or communications, required by the constitution of any state or otherwise to be made by the Governor of the state to the Queen, shall be made through the Governor General, as Her Majesty's representative in the commonwealth, and the Queen's pleasure shall be made known through him.'

This section was severely criticised by the advocates of 'state rights' in the Convention, but it is certainly necessary unless we are to see the strange spectacle presented at all times, of the general and state governments communicating separately with the imperial authorities, who would soon become thoroughly perplexed, while the federation would constantly find itself plunged into difficulties. By means of one channel of intercourse, however, some order will be maintained in the relations between Britain and the proposed federation. It is quite true that the clause does not say, as it was urged by more than one prominent member of the Convention, 'that the executive authority of the commonwealth shall have the right to veto any Bill passed by the different states, or even to recommend Her Majesty to disallow such Bill;' but there is nothing to prevent the Governor-General, as an Imperial officer, from making such comments in his despatches to the Secretary of State for the Colonies as he may deem proper and necessary; indeed, it is his constitutional duty to do so, when he transmits the Acts of the respective 'states' to the Queen in Council for approval or disapproval—also such Acts continuing to be so referred as at present. Of course the Imperial Government is not likely to interfere with strictly local legislation any more than they do now; all they ever do is to disallow colonial legislation that conflicts with imperial acts or imperial obligations. It is quite clear that this provision is for the advantage of the Empire at large, and necessary for the unity and harmony of the federation. Some means must exist for the instruction of the imperial authorities as to the relations between the Central and State Governments, and as to the character and bearing of state legislation; and the Governor-General is bound to avail himself of the opportunity the clause in ques-

tion gives him of promoting the best interests of the Australian union.

When we come to consider the subject of Education—one of the matters placed under the direct control of the provincial Governments—we see again the difficulties that always arise in connection with questions involving religious and sectional considerations. In the formation of the constitution it was necessary to give guarantees to the Roman Catholics or minority of Ontario, and to the Protestants or minority of Quebec, that the sectarian or separate schools, in existence at the union, should not be disturbed by any subsequent legislation of their respective provinces. It is consequently enacted in the fundamental law that, while the legislature of a province may exclusively make laws on the subject of Education, nothing therein shall prejudicially affect any denominational schools in existence before July, 1867. An appeal lies to the Governor-General in Council from any act of the provincial authority affecting any local right or privilege that the Protestant or Roman Catholic minority enjoyed at the time of the union. In case the provincial authorities refuse to act for the due protection of the rights of minorities, in accordance with the constitution, then the Parliament of Canada may provide in this behalf.

As a result of a recent decision of the Judicial Committee of the Privy Council the Government of Manitoba have been called upon by the Dominion Executive to repeal certain legislation which the former body considered an infringement of educational privileges enjoyed before 1890 by the Roman Catholic minority of the province; and the attention of the people of Canada is now turned towards its legislature to see whether they will obey the 'remedial order,' or whether it will be necessary to have recourse to the supreme power of the Canadian parliament in the matter. The question is one of much gravity, inasmuch as it is admitted—the Judicial Committee have so decided—that the Acts of Manitoba on the subject of education are perfectly constitutional. It is a question to be determined only in a spirit of compromise and conciliation. In all such matters involving constitutional issues, the safest policy no doubt is to obey the decisions of the courts, so far as they are consonant with provincial

rights and the best interests of the Dominion. All these questions show some of the difficulties that are likely to impede the satisfactory operation of the Canadian federal system, and the projected Australian federation is fortunate in not having similar intensified differences of race and religion to contend with. Its constitution leaves all educational and purely local matters to the exclusive jurisdiction of the 'States,' and does not make provision for the exercise of that delicate power of remedial legislation which is given to the Canadian parliament to meet conditions of injustice to creed or nationality.

Throughout the structure of the Canadian federation we see the influence of French Canada. The whole tendency of imperial as well as colonial legislation for over a hundred years has been to strengthen this separate national entity, and give it every possible guarantee for the preservation of its own laws and religion. The first step in this direction was the Quebec Act of 1774, which relieved the Roman Catholics of Canada from the political disabilities under which they had suffered since the Conquest. Seventeen years later what is known as the imperial 'Constitutional Act' of 1791 created two provinces, Upper Canada (Ontario) and Lower Canada (Quebec), with the avowed object of separating the two races into two distinct territorial divisions. From 1792 until 1840 there was a 'war of races' in French Canada, and after the revolt of 1837-8 the two provinces were re-united, with the avowed object of weakening French Canadian influence. As a matter of fact, however, the political history of Canada, from 1841 to 1867, shows the strength of a largely and closely welded French Canadian people, jealous of their institutions and their nationality. Eventually government came to a deadlock in consequence of the difficulties between political parties striving for the supremacy. These difficulties, arising from the antagonism of nationalities, led to the federation of all the provinces, and to the giving of additional guarantees for the protection of French Canadian interests. In the Senate, Quebec has a representation equal to that of English Ontario, with nearly double the population, with the condition that each of its twenty-four members shall be chosen from each of the divisions of the province—a

condition intended to insure French Canadian representation to the fullest extent possible. In the adjustment of representation in the House of Commons, from time to time, the proportion of sixty-five members, given by the Union Act to Quebec, cannot be disturbed. The jurisdiction given to the provinces over civil rights and property, and the administration of justice except in criminal matters, was chiefly the work of French Canada, whose people have since 1774 accepted the criminal law of England, but have not been willing to surrender their civil code, based on the *Coutume de Paris*, which they have derived from their French ancestors. Both the French and English languages are used in the debates, records, and journals of the parliament of the Dominion and the legislature of Quebec. It would be difficult to conceive a constitution more clearly framed with the view of protecting the special institutions of one race, and perpetuating its separate existence in the Dominion. Of course the industrial energy of the British people, and the necessity of speaking the language of the British majority, has to a certain extent broken down the barriers that language imposes between nationalities, and it is only in the isolated and distant parishes of Quebec that we find persons who are ignorant of English. The political consequences of the legislation of the past century have been to cement the French Canadian nationality—to make it, so to speak, an *imperium in imperio*, a supreme power at times in the Dominion. It must be admitted that, on the whole, rational and judicious counsels have prevailed among the cultured and ablest statesmen of French Canada at critical times, when rash agitators have attempted to stimulate sectional and racial animosities and passions for purely political ends. The history of the two outbreaks of the half-breeds in the North-west, and of the recent school legislation in Manitoba, so far as it has gone, show the deep interest taken by French Canadians in all matters affecting their compatriots and co-religionists, and the necessity for caution and conciliation in working out the federal union. The federal constitution has been largely moulded in their interest, and the security and happiness of the Canadian Dominion in the future must greatly depend on their determination to adhere to the letter as well as to the spirit of this

important instrument. It is for French Canada, above all other provinces, to maintain the principle of local autonomy and the undoubted legislative rights of a province, whenever an emergency arises in other sections.

When we compare the British North America Act of Canada with the draft of the Bill to constitute the federation of Australia, which was the result of the convention of 1891, we must be impressed by the fact that the former appears more influenced by the spirit of British ideas than the latter, which has copied many of the features of the constitution of the United States. In the preamble of the Canadian Act we find expressly stated, 'the desire of the Canadian provinces to be federally united with a constitution similar in principle to that of the United Kingdom,' while, on the other hand, we read in the draft of the Australian Bill only a bald statement of an agreement 'to unite in one federal Commonwealth under the Crown.' Although the word 'Commonwealth' has a general application to a body politic governed on popular principles, yet the memory of the majority of persons will go back to a trying and unfortunate period of British history. All of us will remember that Professor Bryce, in his elaborate criticism of the *republican* constitution of the United States, could find no more expressive title for his work than the 'American Commonwealth.' When we consider this fact in connection with the word 'State' instead of 'Provinces,' of 'House of Representatives'* instead of House of Commons,' of 'Executive Council' instead of 'Privy Council,' we may well wonder why the Australians, all English by birth, origin, and aspiration, should have departed from the precedents established by Canada, only partly English, with the view of carving ancient historic names on the very

*The present popular house of New Zealand is called a 'House of Representatives,' and this is not strange when we recall the republican principles of Sir George Grey, who is an earnest advocate of elected Governors-General, and other republican practices. But this eccentric colonial statesman does not appear to be responsible for the phraseology of the proposed constitution. The debates of the convention, of which he was a member, show that the majority desired to make their new constitution a copy, as far as practicable, of that of the United States.

front of their political structure. It would be perhaps quite in accord with the ambitious aspirations of Australians were they to substitute 'United Australia' for a word of dubious and even republican significance. In leaving to the 'States' the right of appointing or electing their 'Governors'—not Lieutenant-Governors, as in Canada—we see also the desire to follow the methods of the States of the American Republic; and we may be sure that, when once the Commonwealth is in operation, it will not be long before the heads of the executive authority will be chosen by popular vote, and we shall see the commencement of an extension of the democratic elective principle to all State, administrative, executive, and even judicial, officers, now appointed by the Crown, under the advice of a ministry responsible to Parliament for every appointment, and other act of administrative and executive authority.

We see the same American influence in the provision that 'when a law (*sic*) passed by the Parliament' (*sic*) is presented to the Governor-General 'for the Queen's assent,' he may 'return it to the Parliament (*sic*) with amendments which he may desire to have been made in such law' (*sic*). One cannot understand the reasoning which justifies the giving of such a power to the executive head; it is quite irreconcilable with the principles and practice of responsible government. He must, in all cases affecting the government of the colony, act under the advice of ministers. In this case, however, he is to assume the position held by similar officers before there was a Ministry responsible to him and the two Houses for all legislation. We also humbly inquire how a Bill can become 'a law' before it has received the assent of the Queen, through the Governor-General. When did Parliament mean only the two Houses in any legal or constitutional document? Such loose phraseology might do for common parlance, but not for a proposed statute, where in a former clause Parliament is properly said to 'consist of Her Majesty, a Senate, and a house of representatives.' We think that here, at least, the Australian draftsmen of the Bill might advantageously have copied the correct language of the American Republican Constitution, which never uses 'law' in so incorrect a sense, if they were not prepared to accept the British North American Act as

their model, though it was prepared under so high an authority as Lord Thring.

We see also an imitation of the constitution of the United States in the Australian provisions, making the central Government alone one of enumerated powers, and leaving the residuary power in the 'States.' The word 'parliament' is also generally applied to the legislative bodies of the Federal and State Governments—another illustration of the dominant influence of the colonies—hereafter 'States'— in the proposed constitution. Again, while the Bill provides for a Supreme and other Federal Courts to be appointed and removed by the authorities of the Commonwealth—and the influence of the American example is seen in the very language setting forth the powers of these judicial bodies—the 'State' Governments are to have full jurisdiction over the 'State' Courts. The federal judges can be removed, as in Canada, only by a successful impeachment in Parliament, and an address of the two Houses to the Governor-General in Council, and as long as the present constitution of the Australian colonies remains unchanged, the 'State' judges can be removed only by the action of the 'State Parliaments.' The Canadian constitution in this respect appears to give greater security for an independent and stable judiciary, since a Government operating on a larger sphere of action is likely to make better appointments than a smaller and less influential body within the range of provincial jealousies, rivalries, and factions. Indeed, it is not going too far to suppose that, with the progress of democratic ideas—already rife in Australia—we may have repeated the experience of the United States, and elective judges make their appearance in 'States' at some time when a wave of democracy has swept away all dictates of prudence, and given unbridled license to professional political managers only anxious for the success of party.

As respects any amendment of the constitution after its adoption, the Australians have also practically copied the American constitutional provision that, whenever two-thirds of the House of Congress, or of the legislatures of the several States, shall deem amendment necessary, it shall be submitted to a convention, and form part of the constitution when ratified

by the legislatures, or conventions of three-fourths of the States, as Congress may determine at the time. The Australian Bill permits an amendment to be proposed by an absolute majority of the two Houses of the Parliament of the Commonwealth, and then submitted to conventions of the several States, but it must be ratified by conventions of a majority of States who represent a majority of the people of the federation before it can be submitted to the Governor-General for the Queen's assent. The Canadian constitution may be amended in any particular, where power is not expressly given for that purpose to the parliament or legislatures, by an address of the Canadian Senate and Commons to the Queen—in other words, by the Imperial Parliament that enacted the original act of union—and without any reference whatever to the people voting at an election or assembled in a convention. Of course it may be said that the reference to the imperial authorities will not be much of a restraint on amendment inasmuch as it is not likely that a Parliament, already overburdened by business, will show any desire to interfere with the expression of the wishes of the Canadian Houses on a matter immediately affecting the Canadians themselves. So far there have been only three amendments made by the Imperial Parliament to the British North America Act in twenty-seven years, and these were simply necessary to clear up doubts as to the powers of the Canadian Houses. This fact says much for the satisfactory operation of the Canadian constitution as well as for the discretion of Canadian statesmen. The Canadian constitution in this particular clearly recognises the right of the supreme Parliament of the Empire to act as the arbiter on occasions when independent, impartial action is necessary; to discharge that duty in a legislative capacity which the Judicial Committee of the Privy Council now performs as the supreme court of all the dependencies of the Crown. The Australians propose to make themselves entirely independent of the action of a great parliament which might be useful in some crisis affecting deeply the integrity and unity of Australia, and to give full scope only to the will of democracy expressed in popular conventions. It is quite possible that the system will work smoothly, and even advantageously, though we should have pre-

ferred on the whole to see less readiness on the part of British colonies to reproduce republican ideas and methods of government.

It is an interesting, and to Englishmen everywhere, an encouraging fact that the Canadian people, despite their neighbourhood to a great and prosperous federal commonwealth, should not, even in the most critical and gloomy periods of their history, have shown any disposition to mould their institutions directly on those of the United States and lay the foundation for future political union. Previous to 1840, which was the commencement of a new era in the political history of the provinces, there was a time when discontent prevailed throughout the Canadas, but never did any large body of the people threaten to sever the connection with the parent state. The Act of Confederation was framed under the direct influence of Sir John Macdonald and Sir George Cartier, and although one was an English Canadian and the other a French Canadian, neither yielded to the other in the desire to build up a Dominion on the basis of British institutions in the closest possible connection with the mother country. While the question of union was under consideration, British Liberal statesmen and writers alone predicted that the new federation, with its great extent of territory, its abundant resources, and ambitious people, would eventually form a new nation independent of England. Canadian statesmen never spoke or wrote of separation, but regarded the constitutional change in their political condition as giving them greater weight and strength in the Empire. The influence of Britain on the Canadian Dominion can be seen throughout its governmental machinery, in the system of parliamentary government, in the constitution of the Privy Council and the Houses of Parliament, in an independent judiciary, in appointed officials of every class —in the provincial as well as Dominion system—in a permanent and non-political civil service, and in all elements of sound administration. During the twenty-seven years that have passed since 1867, the attachment of Canada to her British institutions has gained in strength, and it is clear that those predictions of Englishmen, to which we have referred, are completely falsified so far, and the time is not at hand for the separation of Canada

from the Empire. On the contrary, the dominant sentiment is for strengthening the ties that have in some respects become weak in consequence of the enlargement of the political rights of the Dominion, which has assumed the position of a semi-independent Power, since Britain now only retains her imperial Sovereignty by declaring peace or war with foreign nations, by appointing a Governor-General, by controlling Colonial legislation through the Queen in Council and the Queen in Parliament, but not so as to diminish the rights of self-government conceded to the Dominion, and by requiring the making of all treaties with foreign countries through her own Government, while recognising the right of the dependency to be consulted and directly represented on all occasions when its interests are immediately affected. In no respect have the Canadians followed the example of the United States and made their executive entirely separate from the legislative authority. On the contrary, there is no institution which works more admirably in the federation—in the general as well as provincial governments—than the principle of making the ministry responsible to the popular branch of the legislature, and in that way keeping the executive and legislative departments in harmony with one another, and preventing that conflict of authorities which is a distinguishing feature of the very opposite system that prevails in the Federal Republic. If we review the amendments made of late years in the political constitution of the United States, and especially those ratified quite recently in New York, we see in how many respects the Canadian system of government is superior to that of the republic. Of course in the methods of party government we can see in Canada at times attempts to follow the example of the United States, and introduce the party machine with its professional politicians and all those influences that have degraded politics since the days of Jackson and Van Buren. Happily, so far, the people of Canada have shown themselves fully capable of removing those blots that show themselves from time to time on the body politic. Justice has soon seized those men who have betrayed their trust in the administration of public affairs. Although Canadians may, according to their political proclivities, find fault with the

methods of governments, and be carried away at times by political passion beyond the bounds of reason, it is encouraging to find that all are ready to admit the high character of the judiciary for learning, integrity and incorruptibility. The records of Canada do not present a single instance of the successful impeachment or removal of a judge for improper conduct on the bench since the days of responsible government, and the three or four petitions laid before Parliament since 1867, asking for an investigation into vague charges against some judges, have never required a judgment of the Houses. Canadians built wisely when, in the formation of their constitution, they followed the British plan, of having an intimate and invaluable connection between the executive and legislative departments, and of keeping the judiciary practically independent of the other authorities of government. Not only the life and property of the people but the satisfactory working of the whole system of federal government rests more or less on the discretion and integrity of the judges. Canadians are satisfied that the peace and security of the whole Dominion do not depend more on the ability and patriotism of statesmen in the legislative halls than on that principle of the constitution which places the judiciary in an exalted position among all the other authorities of government, and makes law as far as possible the arbiter of their constitutional conflicts. All political systems are very imperfect at the best, legislatures are constantly subject to currents of popular prejudice and passion, statesmanship is too often weak and fluctuating, incapable of appreciating the true tendency of events, and too ready to yield to the force of present circumstances and to dictates of expediency; but law, as worked out on British principles in all the dependencies of the Empire—as understood by Marshall, Story, and Kent, and other great masters of constitutional and legal learning—gives the best possible guarantee for the security of institutions in a country of popular government.

J. G. Bourinot.