

THE CROWN AND THE CONSTITUTION

By EUGENE FORSEY

IN 1943, two moribund provincial Legislatures, Ontario and Saskatchewan, prolonged their own lives, in the teeth of Opposition protests; and an Ontario court ruled (beyond doubt, correctly) that the courts are powerless to intervene. In other words, any provincial Legislature in Canada can postpone general elections as often and as long as it pleases, can, indeed, suppress them altogether; and any attempt to have the legislation set aside by the courts is just waste of time.

This is clearly a grave threat to democratic government. Yet, as Mr. Justice Hope pointed out in 1943, the provincial constitutions provide only one means of protection: the reserve power of the Crown to refuse assent to such bills, or to force dissolution, bring on a general election.

Many people will object that there is no reserve power; that the Crown is just a rubber stamp for the Cabinet, or that if it isn't it ought to be.

The first objection is nonsense. The Crown undoubtedly has some power to refuse a Cabinet's advice. It has done it, often. The most conspicuous, example is in relation to requests by Cabinets for dissolution of Parliament, that is, for a fresh general election. Fifty-one such requests have been refused by the Crown or its representatives, in almost every part of the British Commonwealth, and many of the cases are recent. The only Canadian case (Dominion) was in 1926, the only South African case in 1939. Of the thirty-six Australian cases, exactly half (including the three Commonwealth cases) occurred in the present century, one as recently as 1928. There were refusals in the old Province of Canada in 1858, in Nova Scotia in 1860, in Quebec in 1879, in New Brunswick in 1883, in Prince Edward Island in 1891, and in British Columbia in 1903.

Moreover, the rubber stamp theory has been decisively repudiated by statesmen of all parties, notably Wellington, Peel, Aberdeen, Russell, Derby, Disraeli, Gladstone, Salisbury, Courtney, Asquith, Lloyd George, Simon, Churchill and Atlee in Britain, and by Macdonald, Mackenzie, Blake, Cartwright, Laurier, Meighen and King in Canada. Mr. Churchill's and Mr. Attlee's statements are particularly noteworthy. On March 29, 1944, a Labour member, Mr. Price, accused Mr. Churchill

of "claiming for the Executive now to dissolve Parliament and go to the country." Mr. Churchill replied: "I never said anything of the sort. I must make it absolutely clear that it does not rest with the Prime Minister to dissolve Parliament." Mr. Price attempted to brush this aside with: "That, of course, is the law, but in actual fact the advice comes from the Prime Minister." Mr. Churchill replied: "This is one of the exceptional occasions when the Prerogative of the Crown comes into play and where in doubtful circumstances the Crown would refer to other advisers. It has been done on several occasions. I must make it absolutely clear that it does not rest with the Government of the day. It would be most improper on my part to use any language which suggested that I have the power to make such a decision." Mr. Attlee, in February 1952, in an article on the death of King George VI, was equally clear and emphatic: "The monarch has the right to grant or refuse a Prime Minister's request for a dissolution of Parliament which involves a general election. This is a very real power. It means that there is always someone other than a party leader who is available to take action in critical times."

Nor is this just theory. Lord Newton and Lord Fisher both say that in November, 1910, King George V at first refused Mr. Asquith's request for dissolution, and Sir Almeric Fitzroy, Clerk of the Privy Council, certainly implies it. Mr. Harold Nicholson, in his recent official biography, says this is "incorrect." But two other cases he discusses make it perfectly clear that, in the United Kingdom, the power to refuse is by no means dead.

In December 1916, Mr. Asquith resigned. The King sent for Mr. Bonar Law. He thought Mr. Law might decline to take office unless he was granted an immediate dissolution. The King asked Lord Haldane, a former Liberal, and later Labour, Lord Chancellor, whether he could constitutionally refuse. Lord Haldane replied: "The Sovereign, before acting on advice to dissolve, ought to weigh that advice. His Majesty may, instead of accepting it, dismiss the Minister who gives it, or receive his resignation. This is the only alternative to taking his advice. It follows that the Sovereign cannot entertain any bargain for a Dissolution merely with a possible Prime Minister before the latter is fully installed. The Sovereign cannot, before that event, properly weigh the general situation and the Parliamentary position of the Ministry as formed." Mr. Nicholson adds: "Fortified by such expert judgment, the

King informed Mr. Bonar Law that he would refuse, if asked, to accord him a dissolution."

Still more striking is the story of 1924. Mr. Baldwin had secured a dissolution, November 16, 1923. He emerged from the election with 258 seats, against Labour's 191 and the Liberal's 158. He met the new House, which defeated him, January 21, 1924. He at once resigned. The King sent for Mr. Ramsay MacDonald, who formed a Government and carried on for over eight months. On October 8, he was defeated on a motion of censure. Next morning he asked for dissolution, and got it.

Professor Keith, in 1928, said this ought to have been "conclusive" in Canada in the very different circumstances of June 1926. Mr. MacDonald had not had the previous dissolution; Mr. King had. Mr. MacDonald had secured Supply; Mr. King had not. Mr. MacDonald had not tried to prevent the House from pronouncing judgment on his Government—he asked for dissolution only after the motion of censure had been passed; Mr. King had tried to prevent the House from pronouncing at all—he asked while the motion of censure was still under debate. None the less, Professor Keith insisted, Lord Byng ought to have granted Mr. King's request because the King had granted Mr. MacDonald's, "immediately," and "without even considering whether the Government could be carried on without a dissolution." But now it turns out that the King did nothing of the sort. Even before Mr. MacDonald's defeat, he had sent his private secretary to see whether Mr. Baldwin or Mr. Asquith would accept office. "Neither," says Mr. Nicholson, "showed any desire either to assume office or to enter a coalition"; and he sums up: "The King did not agree 'immediately': he agreed with the utmost reluctance and only after he had ascertained from the leaders of the Conservative and Labour" (this is clearly a misprint for "Liberal") "parties that they themselves were unable or unwilling to form an Administration". So, instead of the 1924 case being a "conclusive" precedent for the rubber stamp theory, or anything like it, it is just the opposite.

It is often assumed that Mr. Mackenzie King supported the rubber stamp theory. But he didn't. In 1926, once in the House of Commons, and twice in his opening campaign speech he declared that there could be circumstances in which the Crown would be justified in refusing dissolution. In the House of Commons, he even went so far as to say that if Mr. Meighen's temporary Government were defeated in the House, and did not resign, the Governor-General should dismiss it, and he

would take responsibility for the dismissal. This is about as far from the rubber stamp theory as anyone could get.

Among writers on the Constitution, Austin, Hearn, Todd, Dicey, Anson, Low, Marriott, Keith and Ramsay Muir have all emphatically asserted the existence of a reserve power; Keith, indeed, devoted a large part of his later work to discussing it, and elaborating his celebrated theory of the Crown as guardian of the Constitution. Lowell, Jenks, Jennings, Chalmers and Asquith, and even Laski, all admit a greater or less degree of such power. Dr. Evatt, who speaks with particular authority, as a former judge of the Australian High Court, a former Commonwealth Minister of External Affairs and Attorney-General, as the present Leader of the Australian Labour Party, and as a distinguished writer on the Constitution, has devoted a whole book to explaining the nature and necessity of the reserve power.

Unquestionably, then, the power exists. Unquestionably also, it is a power to be exercised only in very special circumstances. Ordinarily, the Crown does, and must, follow the advice of the Cabinet in office. Many eminent statesmen, and most writers on the Constitution, have considered that there were occasions when it ought not to do so. But many ordinary people feel there must be no exceptions whatsoever; that the only safe rule is to insist that the Crown shall invariably accept the advice of the Cabinet in office, regardless of circumstances.

Is this in fact a safe doctrine? What might its consequences be? A few concrete examples may help to make things clear.

(1) Suppose the present Dominion Government gets a dissolution in 1954. Suppose the election gives the CCF a clear majority. Suppose the Liberal Government then advises the Governor-General to fill all vacancies in the Senate and on the Bench, thus depriving the prospective CCF Government of any representation in the Upper House and packing the Bench with hostile judges. Would it be the duty of the Governor-General to accept such advice, setting the verdict of the electorate at defiance?

It couldn't happen? But it did. In July 1896, Sir Charles Tupper's Conservative Government, decisively defeated at the polls, tendered precisely this advice to Lord Aberdeen. Aberdeen refused to accept it. Tupper resigned, and Laurier took office, thus accepting responsibility for Aberdeen's exercise of the reserve power.

But there's no chance of a CCF Government? Suppose

there isn't. Suppose it's the Progressive Conservatives who win the election. Even if the defeated Liberal Government filled all the vacancies in the Senate and on the Bench, it wouldn't be depriving the prospective Conservative Government of any representation in the Upper House or on the Bench. There are still eight Conservative Senators, and a few Conservative judges, and some of them will probably survive till 1954. All right. But suppose the Liberals win in 1954 (or whenever the next election comes), and then lose to the Progressive Conservatives in, say, 1958. By that time there may well be no Conservative Senators left, and few if any Conservative judges.

In either case, the new Government could get eight extra Senators appointed under section 26 of the British North America Act; but it would then be unable to appoint any Senators in the ordinary way till the total had fallen below the ordinary maximum of 102. It would labour under a severe, and wholly illegitimate, handicap, imposed by a former Government which had been repudiated by the electors.

This question of appointments by a defeated Government is even more important now than it was in 1896, for the Governor-General himself is now appointed by the Dominion Government. Acceptance of the rubber stamp theory would mean that a Government defeated at the polls could advise the Queen to appoint one of its own partisans Governor-General, and that the Queen would have to do it. True, the new Government could advise her to dismiss the Governor appointed by the defeated Government and appoint a new one, and she would have to do that. But the new Government might well shrink from bringing about such an unedifying spectacle, and might feel it had to put up with a partisan opponent at Rideau Hall till he showed himself so glaringly unsuitable that there would be general agreement that he must be removed.

(2) Suppose the present Dominion Government, or any of the present provincial Governments, gets a dissolution and fails to get a majority at the polls. Suppose the Government then announces it considers this result unsatisfactory, and that it has accordingly advised the Governor-General to dissolve Parliament again forthwith, before the Parliament just elected can even meet. On the rubber stamp theory, the Governor-General is bound to accept the advice. If the result of the second election is unsatisfactory, he is bound to accept that advice also, and so on, indefinitely, till the electorate has been

lied, bullied or wearied into giving the Government a majority, or, in desperation, has decided that the only remedy is to shoot the lot.

But no Governemnt would ever dream of offering such advice? No. In the Parliament of 1921, the Liberal Party started off with 117 members, to 50 Conservatives and 68 Progressive, Labourites and Independents. It ended up with 116, to the Conservatives' 51 and the others' 68. On September 5, 1925, Mr. Mackenzie King got a dissolution. Three days later, with the ink scarcely dry on the dissolution Proclamation, he declared, at Erindale, Ontario: "If we were again faced with the situation that confronted us in the last four years, I should ask for another dissolution of Parliament to get this matter straightened out, until we got a majority sufficient to meet the country's needs". On the most charitable interpretation, this can only mean that Mr. King considered himself free to go on asking for fresh elections (and he plainly thought it was a case of, "Ask and ye shall receive") till somebody got a majority big enough to govern effectively. This statement must be one of the most extraordinary by any political leader outside the totalitarian states. Certainly no Prime Minister in any British country had ever said anything like it before, and no authority on the Constitution had ever given the slightest countenance to any such motion.

If the Erindale speech stood alone, it might be waved aside as just a bit of heady rhetoric, tossed off in the heat of an election campaign, but it does not stand alone. On October 29, 1925, the election returned 116 Conservatives, 101 Liberals, 24 Progressives, two Labourites and two Independents. One week later, on November 5, 1925, one month and two days before the new Parliament's existence could legally begin, Mr. King issued an official statement boldly claiming the right to advise an "immediate" second dissolution, again with the clear implication that to ask was to get. This was not said in the heat of the campaign, nor in the first flush of anger at defeat. It was said after the election was over, and after a week's reflection on the results; and Mr. King repeated it to the House of Commons more than a year later, with every appearance of pride and satisfaction. So it must be taken to have been his considered opinion.

British Columbia, in the Summer of 1952, may have come very near reaping the fruits of this extraordinary theory. An election, early in June, had overwhelmingly defeated the Liberal Government. That much was clear at once. But it was some

weeks before anything else was clear. When it appeared that Social Credit had elected 19 members, the CCF 18, the Liberals six, the Progressive Conservatives four and Labour one, the Liberal Government resigned, and Social Credit took office. A few weeks later, stories appeared in the newspapers that Mr. Bennett, the Social Credit Premier, proposed to ask the Lieutenant-Governor to dissolve the new House without even allowing it to meet. As it turned out, he didn't; but the mere fact that it could be seriously suggested he was thinking of it is bad enough. For a request for dissolution in such circumstances would be a scandalous and immoral violation of the basic principles of parliamentary government. A legislature is elected to transact public business. If it has any rights at all, if it is to serve any purpose at all, it must at least have the right to meet and see whether it can do what it was elected to do. Only if it cannot elect a Speaker (as in Prince Edward Island in 1859, and Newfoundland in 1909), and is therefore paralyzed and impotent, is the Government entitled to a fresh dissolution. If Mr. King in November, 1925, or Mr. Bennett in August, 1952, had asked for dissolution, before the new House meet, he would have been guilty of a brazen contempt of Parliament, an inexcusable outrage, committed against the public at the public's expense. Yet the only safeguard against such conduct is the reserve power of the Crown to refuse dissolution. On the rubber stamp theory, the public is helpless to protect itself.

(3) Suppose the Government gets a dissolution, and no one gets a clear majority. The Government retains office and meets the new Parliament (as it has a perfect right to do), hoping to pick up enough votes from the third party to keep it in power. But the new Parliament defeats it. It declines to resign (Governments don't resign automatically on defeat). Instead, it asks for a second dissolution, and, upon a further defeat in the ensuing Parliament, a third, and so on, till the electors give in or revolt. Is the Governor-General bound to acquiesce in this game of constitutional ping-pong: from electorate to Parliament, from Parliament to electorate again, back and forth interminably?

But nothing like this could happen! Couldn't it? After the 1925 election, Mr. King, as we have just seen, claimed he could have another election forthwith, without even letting Parliament meet. But he graciously added that he did not propose to exercise this right. He "felt it was not in the interests of the country to occasion the turmoil and expense of another

general election until at least Parliament has been summoned and the people's representatives in Parliament had been afforded an opportunity of giving expression to their views". The House of Commons was to be allowed "to disclose its attitude upon division". Parliament, that is, would meet not of right, but of his grace. So Parliament met, in January, 1926. In June, it defeated Mr. King's Government. The Government did not resign. It asked for dissolution instead. The Governor-General refused, and Mr. King then resigned. But, on the rubber stamp theory, the Governor-General couldn't have refused. Mr. King would have got his second dissolution; and, by the same token, he could have got a third, a fourth, any number.

This, again, was no mere momentary aberration. In the 1926 election campaign, Mr. King laid down the general principle that "it was for Parliament to decide" which party should govern, "if Parliament were in a position so to do; when Parliament ceased to be in a position to make a satisfactory decision, then it was for the people to decide". On the rubber stamp theory, this leaves the whole thing to the uncontrolled, sovereign discretion of the Cabinet in office, even if that Cabinet has been defeated at the polls and in the House. Parliament will decide, if, as and when the Cabinet sees fit to let it decide; but when, in the opinion of the Cabinet, Parliament ceases to be in a position to make a decision "satisfactory" to the Cabinet, the Cabinet can dissolve Parliament and appeal to the people. This is a "heads I win, tails you lose" theory of the Constitution. It bears not the faintest resemblance to parliamentary government. Yet on the rubber stamp theory of the Crown's powers there is no escape from it, no protection against the Cabinet dictatorship it would rivet upon the country.

(4) If a Government gets a dissolution, and the Opposition gets a clear majority in the election, the defeated Government might simply decide to postpone the meeting of Parliament indefinitely. On the rubber stamp theory, the Governor-General would have to acquiesce.

It may be objected that these dangers are illusory; that we have sufficient safeguards against them in (a) the statutory requirement that Parliament and the Legislatures must meet at least once a year, and (b) the necessity of an annual grant of Supply.

But both these safeguards are a good deal less substantial than they look.

(i) The Dominion Parliament, on January 25, 1940, held a session lasting less than five hours. There can be no doubt that for the purposes of the British North America Act this was a real session, and the Government was not legally obliged to summon Parliament again till January 24, 1941, when it could have repeated exactly the same proceedings. The same thing could happen in any province, and neither in the Dominion nor in the provinces would there be any recourse to the courts.

(ii) Any provincial Legislature can abolish the requirement of an annual session.

(iii) Parliament or any Legislature could vote Supply for more than one year.

(iv) The requirement of an annual session is subject to the Crown's overriding power to dissolve at any time. In Quebec, the first session of the seventh Legislature was prorogued on December 30, 1950; dissolution followed shortly afterwards; and the first session of the new Legislature opened on April 26, 1952. Despite the express "twelve months" of the statute, almost sixteen months intervened between sessions. The legality of this proceeding seems never to have been seriously challenged.

(v) In the Dominion and in every province, when Parliament or the Legislature is not in session, the Governor-General or Lieutenant-Governor has power to issue warrants for the expenditure of public money without a vote by Parliament or the Legislature, on the certificate of the Ministers concerned that the necessity is urgent and has not been provided for by Parliament or the Legislature. This provision of the law has been used at least four times in the Dominion (1896, 1911, 1926 and 1940), at least once in Quebec (1936), and once in Ontario (1945), to cover all ordinary Government expenditures for a period of months, when dissolution had prevented Parliament or the Legislature from voting the necessary Supply. In some of these cases, the Government could, and should, have tried to get Supply voted before dissolution; in some, it did try, and was balked by obstruction. But in none of them was the Government guilty of any gross impropriety. But, on the rubber stamp theory, this power could be used, with perfect legality, to subvert the Constitution. The Governor-General or Lieutenant-Governor would, on the theory, have no choice but to sign the warrants, even if they were being used to enable the Government to rule without meeting Parliament at all (except, perhaps, for "token" or "shadow" sessions à la 1940).

(5) Suppose that in a nicely balanced House the Opposition moves a vote of censure on the Government for misconduct.

Highly inconvenient facts begin to come to light, and the Government scents danger of defeat. While debate is still in progress, and before a vote can be taken, the Prime Minister asks the Governor-General for dissolution. To grant the request is to confer on the Cabinet power to choke and strangle Parliament at will, to reduce the House of Commons to a nullity, and to make the Crown an accomplice in the destruction of parliamentary institutions. All this would, undoubtedly, be completely beyond the power of the courts to prevent, control or punish. On the rubber stamp theory, it would also be beyond the power of the Crown or the people; for, as we have seen, that theory enables a Cabinet to defy both Parliament and the electors.

It must be emphasized that what is here in question is a totally different thing from allowing a Government against which a motion of censure has been *passed* to appeal to the people. It is proper, in certain circumstances, to allow a man *convicted* by a lower court to appeal to a higher. It is never proper to allow a man *on trial* in a lower court to appeal to a higher court *while the trial is in progress*. Plenty of Governments in the British Commonwealth have appealed from conviction passed by the House. Only one, Mr. King's in 1926, has ever tried to escape conviction by dissolving Parliament before it could pronounce judgment.

"Of course," says Dr. Evatt, "in one sense, every appeal to the people, whatever circumstances exist when it takes place, represents an attempt to get a decision from the political sovereign. In this sense a series of repeated dissolutions of the Parliament may be said to represent the 'triumph' of the people as political sovereign. In actual fact, however, by means of defamation and intimation and the deliberate inculcation of disillusion and disgust, a series of repeated dissolutions would probably be the very means of first delaying and ultimately defeating the true popular will, and so represent a triumph over, and not a triumph of, the electorate." It may be added that even without defamation, intimidation and so forth, the same result may follow if the people are obliged to vote in ignorance of the essential facts which might have been uncovered by prior parliamentary debate. In other words, an "appeal to the people" is not necessarily democratic. It may be merely demagogic, pseudo-democratic, even anti-democratic.

In Lord Balfour's phrase, "No Constitution can stand a diet of dissolutions."

The fact is that one of the biggest threats to parliamentary

democracy in Canada is the *Winnipeg Free Press* dogma that any Government, regardless of circumstances, always has a dissolution in its pocket; that an appeal to the people is always proper. Anyone who ventures to question this is a "reactionary" and "anti-democratic." Anyone who argues that the Crown and its representatives have a reserve power to refuse dissolution, is just "colonial-minded." Precedents and authorities from Britain and the other Dominions are brushed aside as irrelevant, out-of-date, part of a tradition we have outgrown.

Very well. Let us for a moment forget that we are British, forget the Crown, forget about tradition. Let us look at some ultra-modern, purely republican Constitutions.

First, Ireland. Ireland has deliberately left the Commonwealth, and Mr. de Valera can certainly not be accused of overweening reverence for things British. The Irish Free State Constitution of 1922, had virtually prohibited dissolution to a Government defeated in the House. Mr. de Valera, in the republican Constitution of 1937, removed this prohibition. But he did not replace it by the *Free Press* dogma. On the contrary, the new Constitution explicitly provided that "the President may in his absolute discretion refuse to dissolve Dail Eireann on the advice of a Prime Minister who has ceased to retain a majority in Dail Eireann." And Mr. de Valera was perfectly clear about what it meant and why: "There are certain circumstances in which . . . a government should not be given a dissolution but there are circumstances in which they should. In order to try and distinguish between these two cases, we bring a third person, so to speak, as arbiter. He will give his decision and grant a dissolution or refuse it, at his own discretion." The President, Mr. de Valera said, might say to a defeated Prime Minister: "I cannot give you a dissolution; the circumstances under which you have been defeated are such that I do not think there is any question which should be put to the people." "What that simply means," Mr. de Valera summed up, "is that we are making provision in the Constitution for the possibility of referring a question of prime importance, on which the Government has been defeated, to the people for a decision." No one argued that a defeated Government had a right to a dissolution on demand. The Opposition argued it had no right at all. Mr. de Valera insisted that there are cases, the exception rather than the rule, in which dissolution to a defeated Government is proper: when there is a great question of public policy at issue. This is precisely the classic

British doctrine, set forth by Peel, Russell and Gladstone. Ireland, under a leader who rejects the Crown and the whole British tradition, has deliberately adopted this doctrine simply as a matter of common sense; has deliberately given its President power, as someone said in the same debate "to guard the people's rights and . . . the Constitution." Mr. de Valera is not "anti-democratic"; he owes no loyalty except to Ireland; he is no "Englishman", he is the leader of a successful revolution against the Crown and the Commonwealth. But he uses his brains, instead of just repeating a jingle about the Head of the State being always obliged to accept the advice of his Ministers.

France also is a republic. France also has no Crown, no British tradition. France has long experience of a Constitution which virtually prohibited any dissolution of Parliament before the end of its maximum term. France, after the last war, deliberately adopted a new Constitution which allowed a Government defeated in the Assembly to appeal to the people. But France also surrounded this right with safeguards designed to protect the Assembly from frivolous or arbitrary dissolutions. The appeal can take place only after the fall of two Ministers within eighteen months, and only with the concurrence of the President of the Assembly.

Germany under the Weimar Republic had plenty of experience of the theory and practice that any Government can have a dissolution at any time. The results were the reverse of democratic. Indeed there never was a more complete demonstration of Lord Balfour's dictum. The new West German Republic, accordingly, provides that the President can dissolve Parliament only if it denies the Chancellor a vote of confidence, and even then Parliament can prevent its own dissolution by electing a new Chancellor.

Here again, no Crown, no British tradition, here again a recognition that a general election is necessary when a great question of public policy is at issue, or the utility of a particular Parliament is exhausted before its maximum term has expired. But here again the determination to prevent a Government from bludgeoning Parliament into submission by repeated dissolutions or threats of dissolution.

Most remarkable of all are the provisions for dissolution which Mr. T. K. Finletter has suggested should be inserted in the American Constitution. The Americans made very sure that their Congress could never be dissolved. The Senate and the House of Representatives are elected for fixed terms. So

is the President; the Senate for six years, the House for two, the President for four. If the President's measures are defeated by Congress, he can't appeal to the people in a general election. If Congress loses confidence in the President, it can't turn him out and put in a new one, except by impeachment, which is virtually impossible. Both must wait till the appointed times, when the electors may return Houses still at loggerheads with the President and perhaps with each other.

The result, of course, is often deadlock and near-paralysis. Mr. Finletter accordingly suggests amending the Constitution to give the President power to dissolve both Houses and order a new election of President, Senators and Representatives "whenever a deadlock arises between Congress and the Joint Cabinet" (which he has proposed to be made up of nine members appointed by Congress and nine by the President). "If it became clear that relations between the Executive and the Congress had reached an impasse which was seriously affecting the interests of the nation, the President could issue an executive order calling for a new election of the entire House, Senate, and Presidency". This proposal recognizes the value of the power of dissolution; but it does not provide for dissolution whenever the President feels like it. On the contrary, the power could be used only in case of deadlock, "only if there were a real difference of conviction on matters of major importance between Congress and the Executive, and then only when all attempts to reconcile the difference had failed and the government accordingly could no longer function. . . . It would of course be possible to provide by constitutional amendment that a dissolution could be called only on a vote of the Joint Cabinet, or on the demand of the President and the vote of both Houses. But this would only incorporate formally in the Constitution what would necessarily be the unwritten practice".

Mr. Finletter is no royalist; he cannot invoke any British tradition; and his proposal differs widely from anything in our Commonwealth. But sheer weight of experience has forced him to recognize the usefulness of dissolution; and, equally, it has forced him to recognize the dangers of the power and to surround it with safeguards to prevent its being used to choke and strangle Congress and reduce it to a mere creature of the Executive.

The Irish, the French, the Germans, and this distinguished American, all see and face, and try to provide against, the terrible dangers of an unlimited power of dissolution. Our

“Liberals” can’t, or won’t. The Irish, the French and the Germans, wanting genuine parliamentary democracy, but lacking the reserve power of the Crown, have been compelled to create something to take its place. Mr. Finletter would have the Americans do the same. Our “Liberals” want to throw out of our Constitution just the kind of thing these other countries have now put, or talk of putting, into theirs. Others can learn from British experience. We mustn’t. It doesn’t lessen their independence. But it would ours. It strengthens their democracy. But it would destroy ours. And anyone who protests against their idiocy is an old fogey, a Tory die-hard! It would be hard to find a more beautiful illustration of the utter irrationality of “Liberal” constitutional doctrine in this country, a more perfect example of how epithets have taken the place of argument, and invincible ignorance blinded people to plain facts.

(6) The final and most flagrant example of the results of the rubber stamp theory is, of course, the one we began with: a moribund Legislature prolonging its own life without any mandate and despite the protests of the Opposition. Evatt calls such action “an impudent attempt to thwart the people’s will”, “a coup d’état under the forms of law”. Yet against such “acts of tyranny and usurpation” (his phrase again) neither the courts nor (on the rubber stamp theory) the Crown can offer any protection, and the people are helpless to protect themselves.

True, the Dominion Government could disallow the provincial Act prolonging the life of the Legislature. But recent history suggests that it would be most unsafe to count on this. Besides, unless the disallowance was practically instantaneous, the Legislature could re-pass the Extension Act, and this process could go on indefinitely.

In every one of the cases described, the rubber stamp theory is an affront to common sense and results in a monstrous perversion of democratic government. Yet some people persist in maintaining that exercise of the reserve power in such cases would be “undemocratic”. It is perfectly “democratic” to appeal to an appointed judge to use a power he does not possess to prevent frustration of the people’s will. But it is “undemocratic” to appeal to an appointed Governor-General or Lieutenant Governor to use a power he does possess for the same purpose.

As both Dicey and Lord Oxford have pointed out, the reserve power cannot be used arbitrarily or against the will of the

people. The Crown cannot act without the advice of Ministers. If it refuses the advice of the Ministers in office, and they refuse to back down, it must find other Ministers who will take responsibility for the refusal; and the new Ministers must secure the support either of the existing Parliament or of a new Parliament.

The reserve power is, indeed, under our Constitution, an absolutely essential safeguard of democracy. It takes the place of the legal and judicial safeguards provided in the United States by written Constitutions, enforceable in the courts. The Americans do not allow the President or a State Governor to dissolve Congress or a State Legislature at all. They positively forbid Congress and the Legislatures to prolong their own lives. Any citizen can secure the observance of these constitutional provisions in the courts. The disadvantage of this, of course, is that there are times when the public interest requires that the electorate should be consulted before the maximum legal term of the legislative body has run out; times when it is highly desirable that there should be an appeal from the verdict of the legislature to the electors; times when the public interest requires (as in Britain during the second world war) that Parliament's life should be prolonged beyond the maximum term specified in the existing law.

The Canadian Constitution, for the most part, regulates these matters by convention, custom, usage, unenforceable in the courts. It very sensibly allows Governments to appeal from Parliament to the people, and the provincial Legislatures to prolong their own lives, when the public interest so requires. But it does not follow that it provides no means of protecting fundamental democratic rights against abuse of these powers. It does; and the means is the reserve power of the Crown as guardian of the Constitution.

It is the rubber stamp theory which is undemocratic. *It makes existing governments irremovable except by their own consent.* Such a doctrine is a travesty of democracy. It delivers every Opposition gagged and bound into the hands of its opponents. It delivers the people gagged and bound into the hands of any jack-in-office. The jack-in-office may, of course, loosen the gag and the ropes. He may loosen them so much that we don't realize they're there. But he can tighten them again whenever he pleases, and as tight as he pleases. This is not democracy. It is despotism; more or less benevolent, perhaps, for the moment; but despotism none the less.

We inherited from Britain the parliamentary responsible

government which is the essence of our Constitution. When we framed our written Constitution, the British North America Act, we didn't write into it one syllable about the Government being responsible to Parliament. We contented ourselves with saying, in the preamble, that Canada was to be "one Dominion, under the Crown of the United Kingdom, with a Constitution similar in principle to that of the United Kingdom". That was the basis of the whole thing, the foundation on which all the superstructure set up by the Act rested, and without which the superstructure would collapse. A *Dominion of the Crown*; a Dominion of the *British Crown*; a Constitution founded on the *British Constitution*. That was all; it was enough; and it was essential. Without it, there would have been no Canada. Without it, there can be no Canada, just a blurred, faint, unmeaning carbon copy of some other country; a thing without character and without honour.

Some people, however, say that even if all this is true it's no use talking about it now. In Canada, the reserve power of the Crown is gone. The election of 1926 abolished it. When Mr. King won that election, his version of the Constitution was the one the people chose. Good, bad or indifferent, that is what we've got, and it's a Constitution in which the Crown must always follow the advice of the Government in office, even if that Government has lost the support of Parliament and the people. "The struggle naught availeth, the labour and the wounds are vain."

This is not so.

In the first place, even Mr. King was not prepared to say that a single election necessarily settled a question like this. True, he said this election had settled this question. But he added, characteristically, that if the election had gone the other way, the question would have been "far from settled."

Second, even supposing an election could settle such a question, what, precisely, is this one supposed to have settled? That we should throw overboard the British Constitution? But Mr. King himself, in his opening campaign speech, insisted that "The British Constitution . . . is the constitution by which the Liberal party in Canada stands; and for which it is prepared to fight today." That the Governor-General has no right to refuse a dissolution. Mr. King didn't think so; he said the opposite three times. The Progressives didn't think so; their memorandum for Mr. Forke, drawn up just after the refusal said: "We are in agreement . . . that no dissolution should

take place until . . . the commission (of inquiry) has finished its investigation." Even Mr. Bourassa, who played a leading part in Quebec, didn't think so. He explicitly acknowledged, several times, that there were circumstances in which refusal might be proper, and said at least once that it was "not demonstrated that Mr. King was right in wanting to have the House dissolved at that precise moment." Was the main issue the refusal of dissolution or the constitutionality of Mr. Meighen's temporary Government? The election resulted not from any challenge to the Governor-General's right to refuse dissolution (no such challenge was made by any motion), but from the Robb motion, which challenged only the constitutionality of the temporary Government. Mr. King was therefore perfectly logical when he said that the issue of refusal "pales into relative insignificance" in comparison with the issue of the temporary Government. But the issue of the temporary Government is now of only antiquarian interest. It could never arise again because the law which made it necessary was repealed in 1931. If any constitutional issue was settled, what was it? The answer is anything but clear.

Third, the report of the Imperial Conference of 1926, after the election, laid it down that in all essential respects the practice in the Dominions is the same as in Britain. But after Mr. Churchill's and Mr. Attlee's statements, there can now be no question about British practice. In short, there is excellent reason for considering the Imperial Conference Report not as endorsing but as repudiating Mr. King's view, and endorsing Lord Byng's and Mr. Meighen's. And there can be no question that the Report, accepted by all parties, cancels the effect (if any) of any prior contrary verdict by the Canadian electorate.

Fourth, the verdict of the election, whatever it was, was gained partly by a double fraud: by a thoroughly misleading statement on a vital point, and by the concealment of a material fact.

The misleading statement had to do with the duty of Ministers, when they resign, to hold office till their successors are appointed. This duty Mr. King and his Ministers did not perform. They left the country with "no Prime Minister" and "no Government," an unconstitutional and irresponsible act without precedent in the history of British countries. But when Mr. Cahan, in the last hours of the session, taxed Mr. King with this, Mr. King denied it: "I distinctly stated, and stated it in writing, that I was prepared, if His Excellency so desired

and should ask me, to keep my resignation in abeyance until he had the opportunity to take such further steps as he might wish to take." When Mr. Cahan said: "Unfortunately His Excellency cannot be present to give his testimony," Mr. King replied: "Fortunately I have a copy of the letter in which I tendered my resignation." What does that letter say? "In our recent conversations relative to a dissolution, I have on each occasion suggested, . . . as I have again urged this morning, that . . . you should . . . cable the Secretary of State for the Dominions, asking the British Government, from whom you have come to Canada under instructions, what, in the opinion of the Secretary of State for the Dominions, your course should be in the event of the Prime Minister presenting you with an Order in Council having reference to a dissolution. . . I . . . shall be pleased to have my resignation withheld at Your Excellency's request pending the time it may be necessary for your Excellency to communicate with the Secretary of State for the Dominions." So what Mr. King ought to have told Mr. Cahan was: "I stated in writing that if His Excellency would take my unconstitutional advice to ask the British Government for orders, I was prepared to keep my resignation in abeyance till the orders arrived." This is not the same thing at all. This would have been true; the other was false.

Is it of any importance? Most decidedly. One of the main points in Mr. Bourassa's very influential speeches in Quebec was that Lord Byng's refusal of dissolution was unconstitutional because he had not asked Mr. King to carry on till his successors were appointed, and because he had actually refused Mr. King's offer to do so. He harped on this again and again, insisting also that it was Lord Byng's failure to accept Mr. King's offer which had led to the whole business of the temporary Government, which he roundly condemned. Had Mr. Bourassa known the truth, which came out only after Mr. Cahan pressed for the correspondence in the new Parliament, it is inconceivable that he would have said what he did.

The second fraud is even worse. Mr. Bourassa also made much of what he alleged was Downing Street interference, Downing Street instructions to Lord Byng. A denial by the Under-Secretary for the Dominions he brushed aside with the remark that "English Ministers, just like our own, know how to lie when they think it's the best policy." But, again, it is inconceivable that Mr. Bourassa would have said what he did had Mr. King come out and said: "I repeatedly advised Lord Byng to get his orders from Downing Street, but he steadfastly re-

fused." Moreover, Mr. King himself during the campaign, stated that the issue was "whether Canada is still to be regarded as possessing the status of a Crown colony." But this nonsense could have deceived no one if he had revealed what he had asked Lord Byng to do, and what Lord Byng had refused to do. The only danger to Canada's autonomy in the whole affair, the only danger of our being reduced to anything like the status of a Crown colony, came from Mr. King himself when he proffered this outrageous advice.

But even apart from all this, the whole notion that a people can vote away its liberties is nonsense. It is not democracy but a monstrous demagogic heresy. It is treason to democracy.

The electors have a right to change the Constitution. But in this case they were not even asked to change it; and if they had been, a vote for Mr. King's theory would have been a vote not to change but to destroy, a vote to abolish parliamentary government, to fling away the very essence of our whole constitutional heritage. This no electorate can do, even for itself, let alone for posterity. Least of all can it do it under the impression that it is doing the very opposite. Democracy is not just a matter of majority vote. Hitler and Mussolini had that. So had Stalin. Democracy is the rule of the people, self-rule *within a constitutional structure which makes it possible*. Destroy the structure and the self-rule is gone. To say that a single election, or any number of elections, can destroy that structure is to say that the people can destroy itself, that self-rule and self-destruction are convertible terms.

If the election of 1926 gave us Mr. King's Constitution, then our freedom is gone. The Houses may still meet; laws may still, in name, be enacted by the Crown, the Senate and the Commons; the ancient pageantry, the time-honoured forms, may still be preserved. But the breath will have departed. All that will be left will be a lifeless image, a puppet dancing at the end of strings held by the Prime Minister. This is the consequence of the theory that the election of 1926 settled our form of government.

But the theory is false. The British Constitution is ours still. Nothing but our own folly and weakness can take it from us so long as we remain "conscious of our mighty heritage, proud of the imperial fountain of our freedom and of the flag that floats above us, worthy of those ideals of British liberty and justice which have sent their light forth and their truth among all races of men."