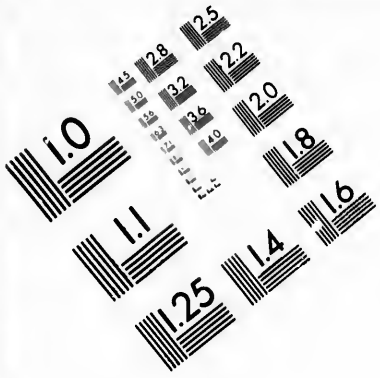

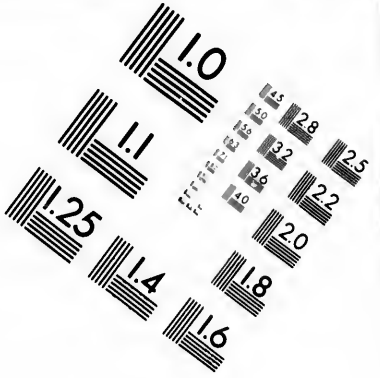

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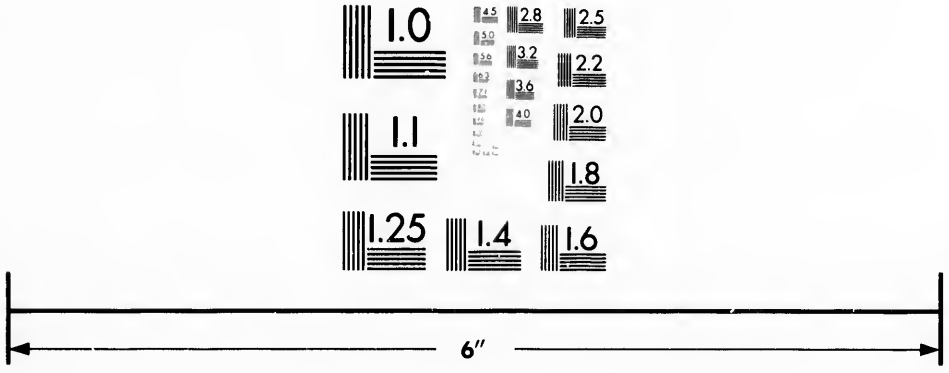

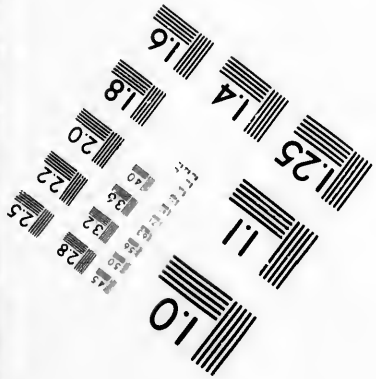

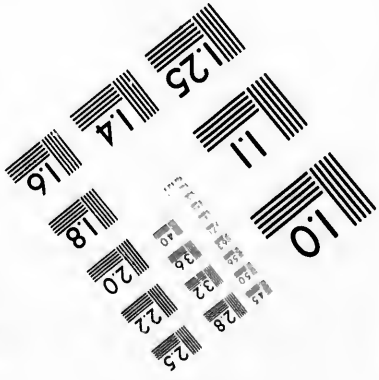

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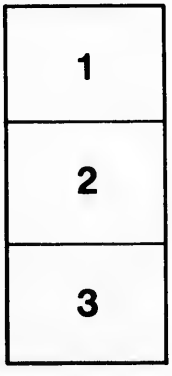

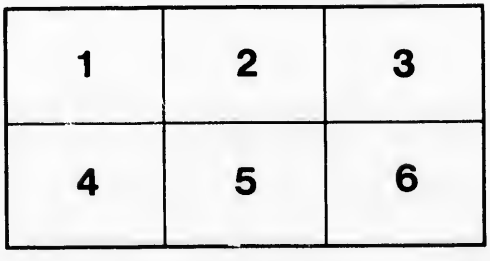

THE ROYAL COMMISSION.

BY

D. GIROUARD.

(From La Revue Critique de Législation et de Jurisprudence.)

1873
(9)

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THE BILL OF OATHS, THE PROROGATION, AND THE ROYAL COMMISSION.

Preliminary Observations.

The disallowance of the Oaths Bill, the recent prorogation of the Dominion Parliament, and the issuing of a Royal Commission to inquire into certain charges relating to what is now commonly designated the "Pacific Scandal," have given rise to several questions of Law of the very highest importance.

These questions have been discussed through the medium of the Press of the entire country, and have afforded the occasion for comments of a nature more or less disinterested, passionate, and vehement.

It is not the mission of "*La Revue Critique*" to serve any political party; its publication was started with the object of pointing out and combating errors and false principles wherever and whenever they were encountered in the domain of Law, and, thus far, its editors have strenuously endeavoured to maintain that object, whether in matters relating to public and international rights or to those involving questions of a more private character.

An honest and impartial public will not object, perhaps, under existing circumstances, that we should submit for its consideration and reflection the result of our labor in the examination of the grave questions of Constitutional Law which have, for some time past, agitated the public mind.

In order to fully comprehend the subject, it is necessary, in the first place, to refresh the reader's memory with a brief recital of the principal facts which gave rise to this celebrated discussion.

On the 2nd of April, 1873, the Hon. L. S. Huntington, M.P. moved the following resolution in the House of Commons:—

"That he, the said Lucius Seth Huntington, is credibly informed and believes that he can establish, by satisfactory evidence, that in anticipation of the legislation of last session, as to the Pacific Railway, an agreement was made between Sir Hugh Allan, acting for himself and several other Canadian promoters, and G. W. McMullen, acting for certain United States capitalists, whereby the latter agreed to furnish all the funds necessary for the construction of the contemplated railway, and give the former a certain per centage of interest

in consideration of their interest and position; the scheme agreed upon being ostensibly that of a Canadian company, with Sir Hugh Allan at its head.

"That the Government were aware that the negotiations were pending between the said parties.

"That subsequently an understanding was come to between the Government and Sir Hugh Allan and Mr. Abbott, one of the members of the Honourable the House of Commons of Canada, that Sir Hugh Allan and his friends should advance a large sum of money for the purpose of aiding the elections of Ministers and their supporters at the ensuing general election, and that he and his friends should receive the contract for the construction of the railway.

"That accordingly Sir Hugh Allan did advance a large sum of money for the purpose mentioned, and at the solicitation and under the pressing instances of Ministers.

"That part of the moneys expended by Sir Hugh Allan in connection with the obtaining of the Act of Incorporation and Charter were paid to him by the said United States capitalists under the agreement with him.

"That a committee of seven members be appointed to enquire into all the circumstances connected with the negotiations for the construction of the Pacific Railway with the legislation of last session on the subject, and with the granting of the charter to Sir Hugh Allan and others, with power to send for persons, papers and records, and with instruction to report in full the evidence taken before, and all proceedings of the said committee."

This resolution was lost by a majority of 35.

On the 8th of the same month, Sir John A. McDonald, the Canadian Premier, moved:

"That a Select Committee of five members (of which Committee the mover shall not be one) be appointed by this House to inquire into, and report upon the several matters contained and stated in a resolution moved on Wednesday, the second day of April instant, by the Honourable Mr. Huntington, member for the County of Shefford, relating to the Canadian Pacific Railway, with power to send for persons, papers and records, to report from time to time, and to report the evidence from time to time, and if need be, to sit after the prorogation of Parliament."

The last resolution was carried unanimously and was followed by the nomination of a special Committee of the House of Commons, which committee was composed of the Hon. A. A. Dorion, the Hon. Edward Blake (two leading members of the Opposition) the Hon. John Hillyard Cameron, Hon. James McDonald, of Pictou, and Hon. G. J. Blanchet, of Lévis—government supporters.

The Hon. Henry Starnes, who was supposed to be in possession of important documents relating to the matter, was summoned to the Bar of the House, and enjoined not to dispossess himself of the said documents until further instructed.

On the 3d of May following, Parliament passed a Bill which provided:

"That whenever any witness or witnesses is or are to be examined by any Committee of the Senate or House of Commons, and the Senate or House of Commons shall have resolved, that it is desirable that such witness or witnesses shall be examined on oath, such witness or witnesses shall be examined upon oath or affirmation, where affirmation is allowed by law."

On the same day, the Hon. J. H. Cameron moved the following resolution, which was carried unanimously:

"That it be an instruction to the said Select Committee to whom was referred the duty of inquiry into the matters mentioned in the statement of the Honourable Mr. Huntington relating to the Canadian Pacific Railway, that the said Committee shall examine the witnesses brought before it upon oath."

On the 25th of May the House adjourned to the 13th of August, to receive *pro formâ* the report of the Committee and prorogue Parliament.

A copy of the Oaths Bill was immediately transmitted to Her Majesty the Queen by the Governor General. The Bill was disallowed, a notice of which disallowance was published in an extra of the *Canada Gazette* on the 1st of July.

On the 2nd of July the Committee of Enquiry met at Montreal; but in consequence of the disallowance of the Oaths Bill the Committee adjourned to the 13th of August with the intention of asking for further instructions from the House, Messrs. Dorion and Blake, however, being of opinion that the Committee should proceed with the investigation without administering the oath to witnesses. They also refused to accept a Royal Commission offered them by Sir John A. McDonald.

On the 4th of July, the Montreal *Herald*—the acknowledged organ of the Opposition at Montreal—published a number of documents purporting to be, as alleged, "copies of some of the papers which were impounded by the Special Committee of Enquiry in the hands of Mr. Starnes." The publication of these documents afforded an opportunity to the Press of arraigning Ministers and others inculpated in the scandal before the bar of public opinion. This *exposé* drew forth statements from Sir Hugh Allan, Mr. McMullen and others.

On the 13th of August, the House of Commons and Senate re-assembled at Ottawa, a number of members of both houses being present. Mr. McKenzie, the leader of the Opposition, had just commenced to address the Speaker of the House of Commons, when the Usher of the Black Rod suddenly appeared and summoned the members of the House to attend in the Senate for the purpose of proroguing Parliament.

In compliance with this summons, those members of the House who usually supported the Government, repaired at once to the Senate Chamber, and, *instanter*, the Governor General delivered his Address from the Throne, and prorogued Parliament, in spite of the numerous petitions which had previously been presented from various parts of the Dominion, and of the protest also of ninety-six Members of the House, eighty of whom, instead of turning to the right, in the direction of the Senate Chamber, proceeded to the Railway Committee Room and held an indignation meeting.

In the course of his Speech from the Throne, His Excellency said: "I have thought it expedient, in the interests of good "government, to order that a Commission should be issued to "enquire into certain matters connected with the Canadian "Pacific Railway, to which the public attention has been directed; "and the evidence should before such commission be taken on "oath. The Commissioners shall be instructed to proceed with "the enquiry with all diligence, and to transmit their Report as "well to the Speakers of the Senate and House of Commons as to "myself. Immediately on receipt of the Report, I shall cause "Parliament to be summoned for despatch of business, to give "you an early opportunity of taking such Report into consider-"ation. Meanwhile, I bid you farewell."

On the 14th of August, a Royal Commission was issued by Her Majesty the Queen to the Honorable Messrs. Day and Polette—two Judges of the Superior Court in the Province of Quebec—and to J. R. Gowan, Esq. one of the County Judges in the Province of Ontario—in which after relating the foregoing facts, and referring more particularly to the charges made by the Hon. Mr. Huntington, the Commission adds:

"And *whereas*, it is in the interests of the good government of Canada not only that full inquiry should be made into the several matters contained and stated in the said above recited resolution of the 8th day of April aforesaid, but that the evidence to be taken on such

inquiry should be taken on oath, in the manner prescribed by the said resolution of the third day of May aforesaid, and the Governor-General in Council has deemed it expedient such inquiry should be made.

"*Now know ye*, that under and by virtue and in pursuance of the Act of the Parliament of Canada, made and passed in the thirty-first year of our reign, intituled "An Act respecting Inquiry into public matters," and of an order of the Governor in Council, made on this thirteenth day of August, in the year of our Lord one thousand eight hundred and seventy-three, we, reposing special trust and confidence in the loyalty and fidelity of you, the said Charles Dewey Day, Antoine Polette and James Robert Gowan, have constituted and appointed you to be our Commissioners for the purpose of making such inquiry as aforesaid, of whom you, the said Charles Dewey Day, shall be chairman. And we do authorize and require you, as such Commissioners, with all convenient despatch, and by and with all lawful ways and means, to enter upon such inquiry, and to collect evidence and to summon before you any parties or witnesses, and to require them to give evidence upon oath or on solemn affirmation, if they be parties entitled to affirm in civil matters, and to produce such documents and things as you may deem requisite to the full investigation, and report of the matters and statements as aforesaid. And we do hereby order and direct that the sittings of you, the said Commissioners, under this our Royal Commission, shall be held at the City of Ottawa, in our Dominion of Canada.

"And we do require you to communicate to us through our Secretary of State of Canada, and also to the Honourable the Speaker of the House of Commons of Canada as well, the said evidence as well as any opinions which you may think fit to express thereupon. And we do strictly charge and command all our officers and all our faithful subjects, and all others, that in their several places, and according to their respective powers and opportunities, they be aiding to you in the execution of this our Commission."

The Commission is signed: "John A. McDonald, Attorney-General of Canada," "J. C. Aikens, Secretary of State," and was published in the *Canada Gazette* on the 23d of August.

The Commissioners are to meet at Ottawa, on the 4th of September; and, on the 21st of August the Hon. Mr. Huntington was requested to supply them "with all convenient diligence, a list of witnesses whom he may wish to examine;" and further he was "requested then and there to proceed with his evidence in the premises."

In reply, on the 26th of August, the Hon. Mr. Huntington declined to acknowledge the jurisdiction of this tribunal, alleging among other reasons, the following:

"I feel that I should do no act which may be construed into an acquiescence in the attempt to remove from the Commons the conduct and control of the enquiry.

"I believe that the creation of the Commission involves a breach of that fundamental principle of the constitution which preserves to the Commons the right and duty of initiating and controlling enquiries into high pelitical offences; that it involves also a breach of that fundamental principle of justice which prevents the accused from creating the tribunal and controlling the procedure for their trial; that it is a Commission without precedent, unknown to the Common law, unsanctioned by the Statute law, providing by an exercise of the prerogative for an enquiry out of the ordinary course of justice into misdemeanors cognizable by the Courts, and consequently illegal and void."

This statement of facts suggests three leading topics for our consideration:—

1st. The Disallowance of the Oaths Bill,

2nd. The Prorogation of Parliament, and

3rd. The issuing of a Royal Commission.

Before entering, however, upon the consideration of these questions, we cannot refrain from recording our condemnation of the course pursued by all concerned in the publication of the impounded documents placed in charge of the Hon. Mr. Starnes. Such conduct, in our opinion, is not only highly reprehensible, but is derogatory to all Parliamentary usage.

Those documents were deemed to be in possession of the House when they were impounded, although not yet read; and one of the elementary principles of Constitutional Law, is, that no person, without violating a Parliamentary privilege (that of secrecy being sometimes of the highest importance) can publish copies of any of its private documents, lest by so doing, prosecutions of accused parties should be removed from the tribunal of the Commons, or of its Committees, to that of public opinion.

Such overturning of jurisdiction is all the more to be regretted in the present instance, considering the gravity of the charges made —charges which seriously compromise not only the honor of a number of our fellow-citizens but also the honor of the country in general. Nothing less than the verdict of a competent tribunal could justify the publication of the documents in question.

We will now pass on to the consideration of the three points of law indicated above.

I. The Disallowance of the Oaths Bill.

Section 56 of the British North America Act, 1867, declares that

"When the Governor General assents to a Bill in the Queen's "name, he shall, by the first convenient opportunity, send an au- "thentic copy of the Act to some one of Her Majesty's principal "Secretaries of State, and if the Queen in Council, within two "years after receipt thereof by the Secretary of State, thinks fit "to disallow the Act, such disallowance (with a certificate of the "Secretary of State of the day on which the Act was received by "him) being signified by the Governor General by speech or "message to the House of Parliament, or by Proclamation, shall "annul the Act from and after the day of such signification."

One cannot believe—if it be permitted to say so *en passant*—that so dangerous a Royal prerogative exists in our Constitution! Such a power places all legislation, whether Federal or Provincial, completely at the mercy of the Colonial Office, or that of its representatives in Canada.

Canadians are said to enjoy sovereign power as to the regulation of their own internal affairs. This may be true; but they do not enjoy that power in virtue of the superiority of their political institutions, but by Her Majesty's good will.

Again, if it be said that the veto power was reserved in order to guard against legislation having a tendency to violate any principle of public or general interest, its introduction into our Constitution might be excused. But the recollection of the passing of the New Brunswick Education Bill (which violates the great principles of liberty of worship and liberty of instruction) a Bill which the Federal Government refused to disallow—is yet too fresh in our memory to permit us to believe for a single moment that Imperial Legislators had any such object in view. Did not our Government authorities, on that memorable occasion, publicly declare that the Veto power had been introduced into the Federal system by which we are ruled, to assure the Constitutionality of the the laws? But is it not in the power of Her Majesty's Privy Council to declare a law to be unconstitutional, notwithstanding its being within the limits of the Constitution? Besides, in virtue of what principle of English public law does the Privy Council possess authority to interpret laws? Then, again, ever since 1867, the ordinary tribunals of the confederated

Provinces have frequently pronounced upon the constitutionality of our laws; and, strange to say not one of these laws has ever been disallowed! This proves clearly that neither the Federal nor Imperial Executives are the guardians of the Constitution of this country. Be that as it may, the Veto power is undeniable; it exists in our Statute Book; and it is to be hoped that it may not be abused in the future any more than it has been in the past—more particularly with reference to the case now under consideration.

The Governor General has been reproached by some persons as having shown extraordinary haste in transmitting a copy of the Oaths Bill to England. The Governor General was bound by the Constitution to act as he did; His Excellency doubtless felt convinced that the Bill in question was unconstitutional, his Prime Minister having moreover so pronounced it on the floor of the House when it was being passed.

The 18th section of the Act of 1867 provides that

"The privileges, immunities and powers to be held, enjoyed "and exercised by the Senate, and by the House of Commons, "and by the members thereof, respectively, shall be such as are "from time to time defined by Act of Parliament of Canada, "but so that the same shall never exceed those at the passing of "this Act held, enjoyed and exercised by the Commons House "of Parliament of the United Kingdom of Great Britain and "Ireland and by the members thereof."

Now, in 1867, the British House of Commons had not the power to administer an oath to witnesses summoned to appear before it or its Committees—with the exception of such as were authorized by statute to examine into contested elections.

It was only by a statute enacted posterior to 1867 that the English House of Commons was authorised to exact an oath from witnesses called to the Bar of the House, or to appear before its Committees, whereas, the House of Lords has exercised that power from time immemorial. Commentators have failed, as yet, to account for this incomprehensible distinction. Hatsell II. 158; Parl. Reg. XIII. 324; May 306, 312, Cushing (No. 956) on this subject, observes: "The House of Commons has "not, at any period, claimed, much less exercised, the right of "administering an oath to witnesses."

It has been stated that the Canadian House of Commons was competent to swear witnesses summoned to appear before it, by

the intervention of Members who might also be Justices of the Peace.

History informs us that during the 18th century the English House of Commons, feeling its weakness in this respect, had recourse to this expedient—"a practice," says May (page 313)—"manifestly irregular, if not illegal." In fact, such a proceeding was positively illegal, seeing that the oath in such a case would be administered in a matter which did not come within the jurisdiction of a Justice of the Peace. May also adds, (page 314) "that since 1757 the most important enquiries have been con-"ducted without any attempt to revive so anomalous and questionable a practice."

Hatsell II. 160; Cushing p. 380, No. 858.

It is evident that the Canadian Commons could not confer upon a Committee of Enquiry a power which it did not itself possess; neither could it call upon Parliament to adopt a Bill which, like the Oaths Bill, was intended to grant privileges which did not exist in the English Commons in 1867. The Oaths Bill passed by the Canadian Parliament is therefore clearly unconstitutional, null and void.

It is to be hoped that the Canadian Government will devise and adopt necessary means, without delay. whereby our Constitution may be modified in this respect.

The laws of Great Britain, civil and criminal, deem an oath as an essential condition in the research of truth.

For more than half a century the guarantee of an oath in Parliamentary investigations has been fully recognised in the United States.

The Imperial Parliament itself has proclaimed this truth, by the Oaths Bill passed for the English House of Commons.

The Canadian Parliament has imitated Great Britain by passing the Oaths Bill which has been disallowed.

What more is wanted to induce the Imperial Authorities to fill up, without delay, the fatal gap which has been found to exist in our Constitution.

II.—The Prorogation.

Legally speaking, there can be no doubt that the Governor-General has the power of proroguing the Parliament of Canada at any time—even while a member may be addressing the House.

"A prorogation," says Blackstone (lib. 1, am. ed. vol. 1, page

144) "is done by Royal authority. Both Houses are necessarily "prorogued at the same time."

"It seems clear," says Chitty, (Prerogatives of the Crown, p. 71) "notwithstanding the opinion of Lord Coke to the contrary, "that a prorogation of one House necessarily and tacitly operates "as a prorogation of the other. This prorogation may be le- "gally made, even at the return of the writ, and before the "meeting of Parliament. Thus the Parliament, after the general "election in the year 1790, was prorogued twice by writ before "it met; and the first Parliament in this reign was prorogued "four times by four writs of Prorogation."

In 1719 the following question was put to an eminent English lawyer: "Whether an Assembly *under adjournment or prorogation* may be prorogued without a meeting, according to such previous adjournment or prorogation?" to which he replied "I am clearly of opinion that it may."—Chalmers Col. Op. vol. 1, p. 232.

Mr. Todd, the distinguished Librarian of our Canadian Parliament, in a work of no small merit, just published on the "Parliamentary Government in England," vol. 1, p. 246, also observes that "the deliberations of Parliament may be cut short "at any moment, by the exercise of the Royal power of Prorogation."

This Royal prerogative is as ancient as the British Constitution. In the 17th century, Parliament was twice dissolved by James the First and Charles the First, before the House had time to pass a single Bill. In 1679 Charles the Second suddenly prorogued the House in order to avoid an enquiry which would have revealed the secret of a dishonorable alliance into which he had entered with a foreign power. In the same year, seeing that the House of Commons would not abandon the Exclusion Bill, this same Sovereign proceeded to the House of Lords, and without even consulting his Cabinet, prorogued the Parliament. In 1685, James the Second closed Parliament, in order to screen a devoted favorite from disgrace. And at a still later period, King William acted in a similar manner without even delivering the Speech from the Throne.

Without approving the modes of procedure noted in the foregoing instances, to which several others might be added, some of which betrayed an abuse of authority of the most revolting character—they nevertheless prove that, in England the prorogu-

ing power dwells in the will of the sovereign, whether it be arbitrary, unjust, or opposed to the will of both Houses of Parliament.

This prerogative, being deemed inherent in the Constitution, the House of Commons, in 1858, rejected an Address to Her Majesty praying that Parliament might be called together in the autumn of each year, so that its prorogation would be assured in the early part of the following summer.

The Governor of a British Colony, as representing Her Majesty, certainly has the power of proroguing and dissolving its Legislature—an opinion held by all writers on Colonial Law—(Clark Colonial Law, p. 30; Chitty, 34; Chalmers, vol. 1, p. 232). The same view is explicitly contained in the Statutes of Canada (C. S. C. ch. 3, sec. 2; Brit. North America Act, 1867, sec. 12). The 31st Vict. ch. 22, 1868, also provides that nothing contained in the above Act, "shall alter or abridge the power of the Crown to prorogue or dissolve the Parliament of Canada."

The exercise of this mighty prerogative is not peculiar to English law. In France, and over the entire Continent, the proroguing power is, generally, the exclusive privilege of the ruler of the nation. The French Constitutional Charter of 1814, Art. 50, says: "Le Roi convoque chaque année les deux chambres; il les proroge et peut dissoudre celle des députés." The Constitution of the Republic of 1848, Art. 46, declares: "Le Président de la République convoque, ajourne, proroge et dissout le corps législatif." Under the Empire a decree from the Emperor proclaimed the close of the session.

Like all Royal prerogatives, the power to prorogue Parliament is absolute. "In the exertion of lawful prerogative,"—says Blackstone, (lib. 1. c. 7, Am. ed. 1849, vol. 1, p. 187)—"the "King is, and ought to be, absolute; that is, so far absolute "that no legal authority can either delay or resist him."

The effect of a prorogation is to make void all pending proceedings. "Every Bill" says May, p. 43, "must be renewed after "a prorogation as if it had never been introduced, though the "prorogation be for no more than a day."—(See also May's Constitutional History of England, vol. 2, p. 390, note 3. Am. ed. 1871.)

Todd, vol. 1, p. 246, says: "The prorogation quashes all proceedings pending at the time, except impeachments by the Commons, Writs of Error and Appeals before the House of

Lords, and trials in progress before Election Committees. By a prorogation, all resolutions, bills and other proceedings pending in either House are naturally terminated, and cease to have any further effect, except in so far as they may be continued in operation under the authority of an Act of Parliament."

Writers who have commented on the British Constitution, claim that it is the balance in which is preserved the just equilibrium of the three branches of the Legislature—the Commons, Lords, and Executive—that is, the People, the Nobility and the Sovereign. But may it not be said that the power possessed by the Sovereign is far greater than that held by the two Houses? If the Sovereign cannot alter the laws of the Kingdom, he can prevent the people from altering them by the exercise of his veto; he may cut short the deliberations of the national Assembly, and even prevent all legislation by the exercise of his proroguing power.

Story states that the power of prorogation exercised by the Crown in the American Colonies, previous to the Declaration of Independence, was cruelly felt by the population. "Under the Colonial Government, he says (Const. of V. S., § 424) "the "undue exercise of the same power by the Royal Governors, con- "stituted a great public grievance, and was one of the numerous "causes of misrule upon which the Declaration of Independence "strenuously relied. It was there solemnly charged against the "King that he dissolved representative bodies for opposing his "invasions of the rights of the people; and, after such dissolution, "he had refused to re-assemble them for a long period of time."

It is true that a similar act of tyranny may not practically be exercised upon any portion of the British Empire; but does it not suffice that it is still possible under the Constitution to amend the same?

Long since, Acts of Parliament have limited the exercise of the perogative alluded to. Parliament should be called together, at least once a year; but the length of each Session depends upon the will of the Sovereign; that is, in theory, the Sovereign may prevent the re-assembling of Parliament for the real and actual despatch of business.

Why may not Englishmen—who are as jealous of political liberties as any nation on the face of the globe—follow the example of the American people, and decree that prorogation shall be exercised through both Houses of Parliament, and that, in the event of disagreement, the preponderating voice of the Sov-

oreign shall decide? Such a mode of proceedure would prove even less dangerous to the Executive of Great Britain or of Canada, than to that of the United States, as the House of Lords and Senate of Canada are created by the Crown itself, and are not elected by the people.

Because the Governor-General, in proroguing Parliament, confined himself within the limits of his powers, is it to be concluded that he acted in a constitutional manner? No. He is further required to exercise the Royal prerogative in a constitutional manner, that is, for the public good. Blackstone lib. 1, ch. 7, Am. ed., vol. 1, p. 188, says: "In the exertion, therefore, of "those prerogatives which the law has given, the King is irresis- "tible and absolute, according to the forms of the Constitution; "and yet, if the consequence of that exertion be manifestly to "the grievance or dishonor of the Kingdom, the Parliament will "call his advisers to a just and severe account. *For prerogative* "*consisting*—as Mr. Locke has well defined it—*in the discretion-* "*ary power of acting for the public good, where the positive* "*laws are silent, if that discretionary power be abused to the* "*public detriment, such prerogative is exercised in an unconstitu-* "*tional manner.*" See also Bacon's Abrid. Vo. Prerogative.

The real point at issue, therefore, is whether in the exercise of the prerogative of Prorogation, the Governor-General has acted for the public good? The prorogation took place without consulting the House of Commons, nearly one-half of whose members (96 out of 200, present or absent) were utterly opposed to any kind of adjournment; it set aside Sir John A. McDonald's resolution, as well as that of the Hon. L. S. Huntington; it dissolved the Committee of Enquiry, which was entrusted with an investigation into the gravest charges ever made against Ministers; it cancelled the order of the House of Commons enjoining upon the Hon. Mr. Starnes not to dispossess himself of certain documents placed in his keeping; it may delay a full investigation into matters highly affecting the dignity of the Crown, the honor of many subjects and the material welfare of the nation. The House of Commons, or both Houses of Parliament, are the only authorities to demand the just and severe account alluded to by Blackstone, and to determine whether the effects of the prorogation tend to the good of the country. These important results involve a mere question of fact, the discussion of which, however interesting to political parties, would be out of place in a law review.

III.—The Royal Commission.

In order to form a correct opinion as to the efficiency of the two modes of enquiry under consideration, *i.e.*, the Parliamentary enquiry, and the enquiry by Royal Commission, the reader should glance at their respective privileges, powers and attributes.

1st. At a Parliamentary enquiry, the House of Commons, or its Committees, enjoy the utmost latitude, whether as to the subject matter or form of the questions put to witnesses; their investigations are in no wise restricted to matters specified in the Resolution appointing them. Cushing, 384; Hans, (2) ix, 493.

On the contrary, an enquiry by Royal Commission is limited to the subjects therein expressed.

In the course of an enquiry concerning the Duke of York, Mr. Whitbread states that "the Committee were not fettered by settled forms or principles of evidence as was the case in the courts below. If once such a limit was imposed upon the investigations of the House of Commons, there was an end to the inquisitorial power of Parliament" And Sir Samuel Romilly said: "The object was very different from that of Courts of Justice, and therefore the House could not be bound by the same ties."

Speaking of Royal Commissions, Todd says, vol. 2, p. 349, "The Sovereign, by a Commission issued under the sign manual, or by patent under the great seal, authorizes certain persons therein named, to enquire into a *specified* subject, and report to the Crown thereon."

2nd. In an enquiry before the House of Commons, a witness cannot refuse to answer under the pretence of rendering himself liable to penalty or to criminal prosecution, or under any other pretence whatsoever. Cushing, 389.

In the exercise of this immense privilege, the House may resort to imprisonment of the unwilling witness during the term of its session. Cushing, 390.

On the contrary, by 31st Vict. ch. 38 (1868), sec. 2, "No party or witness shall be compelled to answer any question, by his answer to which he might render himself liable to a criminal prosecution."

3rd. Witnesses summoned before the House of Commons are protected against the consequences of the disclosures which they

make in their evidence. Cushing observes on this subject, p. 397: "While the law of Parliament thus demands the disclosure of the evidence, it recognizes to the fullest extent the principle upon which the witness is excused from making such disclosure in the ordinary Courts of Justice, and protects him against the consequences which might otherwise result from his testimony; the rule of Parliament being, that no evidence given in either House can be used against the witness in any other place, without the permission of the House, which is never granted, provided the witness testifies truly." Hans (2) xviii, 968–974.

Witnesses summoned before a Royal Commission enjoy no more protection than that afforded to witnesses giving evidence before the ordinary tribunals.

4th. The sittings of the Commons, or of its Committees, are generally open to the public, and when they are not, the parties interested are allowed to be present. Royal Commissioners have the absolute power of regulating the proceedings of their own tribunal, and of admitting or excluding what persons they please from attendance during their sittings. Todd, vol. 2, p. 355.

5th. Finally, a Parliamentary enquiry is not conducted under oath, while that before a Royal Commission is.

The first clause of the 31st Vict. c. 38, declares that "The Governor may, by the Commission in the case, confer upon the Commissioners or persons by whom such enquiry is to be conducted, the power of summoning before them any party or witnesses, and of requiring them to give evidence on oath, orally or in writing, (or on solemn affirmation, if they be parties entitled to affirm in civil matters), and to produce such documents and things as such Commissioners deem requisite to the full investigation of the matters into which they are appointed to examine.

"2. The Commissioner or Commissioners shall then have the same power to enforce the attendance of such witnesses, and to compel them to give evidence, as is vested in any Court of Law in civil cases; and any wilfully false statement made by any such witness on oath or solemn affirmation, shall be a misdemeanor, punishable in the same manner as wilful and corrupt perjury."

It is evident that both modes of investigation—separately or collectively taken—are imperfect, seeing that they fail to secure with any certainty, full and complete enquiry. It is true the

House of Commons possesses extraordinary powers; but it lacks the most essential condition in the research after truth, namely, the sanction of an oath.

If witnesses summoned before the House or its Committees, were subject to the pains and penalties attaching to the crime of perjury (as is the case now in England)—having no claim to privileges of any kind whatever, the system of investigation might be considered perfect; but the known perversity of the human heart, and the difficulties experienced in attempting to elicit truth from the mouth of witnesses in ordinary Courts of Justice, in the daily affairs of life, should convince any one that an enquiry conducted without the administration of an oath —especially in regard to political offences, where political passions predominate over all other considerations—will never educe evidence of a conclusive character.

Meanwhile, until our Constitution is amended in this respect, it becomes not merely *à propos*, but an urgent necessity, in any enquiry affecting the public interests, to resort to a Royal Commission, as an aid to, or completing link in, the Parliamentary investigation.

From this point of view, then, a Royal Commission may be considered of unquestionable advantage, even though it be deemed unconstitutional; for a witness, in most cases, would prefer to take the oath and answer any question put to him, rather than test the constitutionality of the Commission, in the one case, or risk the consequences of a judgment of public opinion in the other.

Before concluding this article, there remains only to consider such cases as would justify the issuing of a Royal Commission.

It has been objected that the Royal Commission is unconstitutional, because the Hon. Judge Polette, one of the Judges of the Superior Court of the Province of Quebec, and holding that office, is one of the Commissioners.

In support of this objection, the 8th clause of the 78th chapter of the Consolidated Statues of Lower Canada is cited, which forbids (justly) any judge of the said Superior Court "*to hold any "place of profit under the Crown so long as he shall be a judge.*" But the position of Royal Commissioner is not essentially "a place of profit"—on the contrary it is usually a gratuitous office.

The most that can be exacted under this Statute, therefore, is, that Judge Polette shall exercise the office of Commissioner gratuitously.

It is also alleged that the Royal Commission violates a great principle in the Bill of Rights of 1689, to wit: "That freedom of speech and the debates and proceedings in Parliament ought not to be impeached or questioned in any Court or place out of Parliament." This privilege of either House has been recognized by legal authorities, in many instances, of which Hallam gives a summary in his Parliamentary History of England. But it cannot be seriously maintained that this maxim of Constitutional Law embraces anything more than full and entire protection of Members of Parliament against all civil or criminal prosecutions on account of their acts on the floor of either House.

This immunity has never had the effect of preventing the Crown from instituting enquiry—whether the matters to be enquired into had been discussed in Parliament or not. For instance, could the assertion be maintained for a moment, that the Governor General could not issue a Royal Commission to enquire into the administration of justice in Lower Canada, because the Hon. Mr. Dorion had attacked the Bench on the floor of the House? The debates and proceedings of the House of Commons, it is said, cannot be questioned in any way, out of Parliament. Then the House of Commons would over-ride the law—would be supreme over the British Constitution by which we are ruled. Have not the tribunals of the Mother Country, as well as those of the Colonies, time and again, maintained a contrary opinion—even claiming their right to decide upon the existence of their privileges?—Stockdale *vs.* Hansard, 7 A. & E. 1; Dill *v.* Murphy, 1 Moore N. S. 487; Kielly *vs.* Carson, 4 Moore, P. C. Cases, 63; Fenton *v.* Hampton, 11 Moore, ibid 347; Doyle & Falconer, 1, L. R. P. C., 328; The Speaker of the Legislative Assembly of Victoria *v.* Glass, L. R. P. C. On the 20th May, 1870, the Superior Court of Newfoundland replied as follows to a Committee of the Legislative Assembly:

"Both Houses of the Assembly possess, as incident to their existence, all rights necessary for the due discharge of their legitimate functions, but the judgment of the Judicial Committee of the Privy Council, in a case which arose in Newfoundland thirty-two years ago, *Kielly v. Carson*, and has been affirmed by several other decisions in the same High Court of Appeal, has denied and for ever set at rest the pretensions which once were raised by Colonial Legislatures, that, under the assumption that the Law of Parliament applied to them, their will was law, and their proceedings were unexaminable by the Superior Courts. It is altogether visionary to imagine that any

Legislature, Assembly, body or power, possess under British rule, supremacy over the law in any particular whatsoever. Even the prototype of Colonial Legislatures does not claim for itself any such power, for in a recent work of no ordinary ability upon Parliamentary Government in England, I find the following passage :

'No mere resolution of either House, or joint resolution of both Houses, will suffice to dispense with the requirements of an Act of Parliament, even although it may relate to something which directly concerns but one Chamber of the Legislature :' Todd's Parliamentary Government, 260." (6 Canada Law Journal.)

And is it true that the Canadian Parliament itself is supreme and sovereign? Are its acts not to be questioned before the ordinary Courts? Have not the tribunals of the Dominion over and over again set aside the statutes of our Legislatures as being unconstitutional? It is, therefore, not correct to say—in the sense proposed—that the debates and proceedings of Parliament cannot be questioned in any way out of Parliament.

Some writers have doubted the power of the Crown to issue Royal Commissions; but it has not been denied for a long time, even in England where it exists under the common law only. In Canada that power is consecrated by the Statutes. As far back as 1846, it was specially recognized by the old Canadian Legislature, in 9 Vict. c. 38, or ch. 13 of C. S. C.; and the provisions of that Statute have been reproduced verbatim by the present Parliament of Canada, 31st Vict. ch. 38, 1868. The first clause provides that: "Whenever the Governor in Council deems it expedient to cause inquiry to be made *into and concerning any matter connected with the good government of Canada, or the conduct of any part of the public business thereof*, AND SUCH ENQUIRY IS NOT REGULATED BY ANY SPECIAL LAW, *the Governor*," &c. &c.

The history of the country affords few precedents where occasion has been given for an interpretation of this Statute; notwithstanding, some instances are to be found. In 1863, when several members of the present Opposition were in power—the Executive including the Hon. Messrs. Dorion, Holton and Huntington—a Royal Commission was issued to enquire into "certain charges of malversation of office," which had been made "against the Joint Clerk of the Peace and Clerk of the Crown at Montreal." In the instructions given to the Commissioners, it was stated among other things, "that one of them (the said parties) had embezzled the Government monies," "That the said . . . .

every time he swore to the correctness of his accounts, committed perjury." A report of the investigation was called for, without giving the Commissioners the option of expressing their opinions thereon.

The learned Judge Aylwin being summoned to appear as a witness before the Commissioners, refused to take the oath, alleging that the issuing of the Commission was unconstitutional. This refusal was allowed to go unpunished.

The question of legality *quoad* the said Commission underwent a lively discussion at the time through the medium of the press, the Government party maintaining that it was issued in strict conformity with the spirit and letter of the Statute, while the party in Opposition—the men who are now in power—insisted upon a different and totally opposite view.

The Superior Court (Monk J.) being called upon to decide the point on a Writ of *quo warranto*, pronounced in favor of the Commission. Mr. Laflamme, Q.C. (the present member of Parliament for the County of Jacques Cartier), represented the Government interest in the case.

Mr. T. K. Ramsay, then an advocate practising at the Montreal Bar, and lately a supplementary Judge of the Superior Court of the Province of Quebec, wrote a vigorous pamphlet on the subject, from which the following is an extract:

"But although admitting to the fullest extent the right of the Crown to appoint commissions of enquiry, it would seem that this power must be so exercised as not to trespass on the rights of individuals, or to enter upon any investigation otherwise provided for by law. The power must be exercised in good faith for the purposes of obtaining information, and not with a view of dividing the responsibility of the executive with persons independent of the direct censure of Parliament. But so understood, this power is a common law right of the Crown, and perfectly independent of the 13th chapter of the Consolidated Statutes of Canada.

"That act may be taken as an exposition of the scope of this common law right, when it enumerates the causes for which commissions of enquiry may be appointed, with power to examine witnesses under *oath;* but it certainly did not originate the right which had been frequently exercised. The only effect then of that statute was to give the Governor power to appoint Commissioners having power to send for persons and papers, to examine witnesses under oath, and to compel them to attend and give evidence. This right of examining under oath, it is hardly necessary to add, the Crown did not possess at common law.

"The true doctrine, therefore, appears to be: 1st, that at common law the Crown has the right to appoint commissioners to inquire into, and concerning any matter connected with the good government of the state, or the conduct of any part of the public business thereof, or the administration of justice therein, when such inquiry is not regulated by any special law.

"2nd. That here the Governor has the further power, under the 13th chapter of the Consolidated Statutes of Canada, to authorize the commissioners so appointed in any of the above mentioned cases, to summon before them "any party or witnesses, and of requiring them to give evidence on oath orally, or in writing, and to produce such documents and things, as such Commissioners deem requisite to the full investigation of the matters into which they are appointed to examine."

"If this exposition of doctrine be correct, it would seem to result, 3dly, that neither by common law, nor by the general statute, does any such power extend to the investigation into anything purely of a private nature, or into the conduct of any person named, or to any accusation of any crimes or offences alleged against any particular person.

"Fortunately we are not obliged to have recourse to abstract reasoning in support of this proposition. In the 12 Coke 31, under the heading of Trin. 5 Jac. 1, we find the following: "Note; commissioners in *English* under the Great Seal directed to divers commissioners within the counties of *Bedford*, *Bucks*, *Huntington*, *Northampton*, *Leicester*, *and Warwick* to enquire of divers articles annexed to it: and the articles were also in *English*, to enquire of depopulation of houses, converting of arable land into pasture, &c. But the commissioners should not have any power to hear and determine the said offences, but only to enquire of them: and by colour of the said commissions the said commissioners took many presentments in *English*, and did return them into the chancery and after, *scil. Trin. 5 Jac.* it was resolved by the two chief Justices, and by *Walmsley*, *Fenner*, *Yelverton*, *Williams*, *Snigg*, *Altham*, and *Foster*, that the said commissions were against the law for three causes:

"1. For this, that they were in English.

"2. For that the offences enquirable were not certain within the commission itself, but in a schedule annexed to it.

"3. For this, that it was only to enquire, which is against law, for by this a man may be unjustly accused by perjury, and he shall not have any remedy.

"For this, that it is not within the statute of 5 Eliz., &c.

"Also the party may be defamed, and shall not have any traverse to it.

"Such a commission may be only to enquire of *Treason*, felony committed, &c. And no such commission ever was seen to enquire only (i. e. of crimes)."

"This *dictum* then of Lord Coke fully supports our 3rd proposition. The commissions to the persons in these different counties, were commissions of enquiry only, as to offences, and as to *persons* "by whom" they were committed, and as Lord Coke says, "no such commission ever was seen." And this *dictum* is confirmed by *Hale & Hawkins.*

"But commissions for more than enquiry, that is to hear and determine, could not be addressed to commissioners, but to the judges of assize, for in *Magna Charta*, cap. xii., we find, "We, or if we be out of the realm, our Chief Justicer, shall send our Justices through every county once in the year, who, with the knights of the shires, shall take the aforesaid assizes in the counties." And the famous chap. xxix, declares: "No freeman shall be taken or imprisoned, or be disseised of his freehold, or his liberties, or free customs, or be outlawed or exiled, or *in any other wise destroyed*, nor will we pass upon him nor condemn him unless by the lawful judgment of his peers, or by the law of the land." And Coke interprets this to mean, "no man shall be condemned at the King's suit, either before the King in his Bench, where the pleas are *coram rege* (and so are the words *nec super eum ibimus* to be understood) nor before any other commissioner or judge whatever (and so are the words *nec super eum mittemus* to be understood.) And so the 16th Car. 1, cap. 10, which abolished the Star Chamber, declares "that from henceforth no Court, council, or place of judicature, shall be erected, ordained, constituted, or appointed within this realm or dominion of Wales, which shall have, use or exercise the same or the like jurisdiction as is or hath been used, practised or exercised in the said Court of Star Chamber." And the Bill of Rights establishes that all commissions and Courts, of a like nature to the late Court of Commisioners for ecclesiastical purposes, are "illegal and pernicious."

"It is therefore not only the positive law, but the very basis of all of that policy, of which British subjects are so justly proud, that no one shall be affected in his liberty, or in his goods, or in his character, but in the regular course of law.

"This proposition will be readily admitted. Indeed it would be no easy task to find any one bold enough openly to controvert it; and yet we find the principle it involves flagrantly contravened, without almost attracting a passing remark."

There is no doubt that the accusations made against the Minister charge them with perjury, corruption and malfeasance of office, and also with corrupt practices at elections, contrary to the explicit provisions of our statutory law; and it is well known that whosoever violates a statute commits a misdemeanor. The Commissioners are even authorized to appraise the evidence, *and to express any opinion they may think fit thereon.* (See also Pleas of the Crown, vol. 2, p. 21; 2 Rol. Ab. 164, p. 14; Comyn's Digest, vo. Prorogative D. 29; Bowyer's Const. Law, 496.

There is still another and perhaps a better reason for nullifying the Commission. According to all the leading authorities, the House of Commons, as the grand inquest of the nation, is fully and alone competent to investigate every case of ministerial abuse or misconduct. Nearly two centuries ago, Hales, J., said: "The Court of Parliament is the highest court, and hath more privilege than any other court of the Realm. Trewiniard's Case, 36 H. 8, D. 60."—Hales on Parliament, p. 75. Elsewhere, p. 14, the same learned Judge observes: "It is *lex and consuetudo Parliamenti* that all *weighty* matters in any Parliament, moved concerning the Peers or Commons in Parliament, ought to be discussed, determined and adjudged by the course of Parliament, and not by any other law used in any inferior court, which was so declared to be *secundum legem et consuetudinem Parliamenti*, concerning the Peers of the Realm by the King and all the Lords, *pari ratione* for the Commons for anything done or moved in the House of Commons."

In 1775, in a work of high standing published by de Lolme, on the *Constitution of England*, these remarks are to be found: "The Constitution has besides supplied the Commons with the means of immediate opposition to the misconduct of government, by giving them a right to impeach the ministers. . . . . .

"If, for example, the public money has been employed in a manner contrary to the declared intention of those who granted it, an impeachment may be brought against those who had the management of it. If any abuse of power is committed, or in general anything done contrary to the public weal, they prosecute those who have been either the instruments or the advisers of the measure. . . . . .

"But who shall be the judges to decide in such a case? What tribunal will flatter itself that it can give an impartial decision, when it shall see, appearing at its bar, the government itself as the accused, and the representatives of the people as the accusers?

"It is before the House of Peers that the law has directed the Commons to carry their accusation." De Lolme, pp. 110-112.

It was likewise in this sense that the Commons thus answered a *quœre* from the Lords in 1692:

"They thought it a strange and foreign supposition that a great and guilty Minister, finding himself liable to an impeachment in the next session of Parliament, should by his power procure himself to be tried

and acquitted by an inquest of persons appointed on purpose, and then by a plea of *autrefois acquit* prevent a second and true examination of his crimes in Parliament.

"There is no example of this kind; and if such an *unheard of proceeding* should happen, it is left to consideration whether a Parliament *would not vindicate the Kingdom against so gross and fraudulent a contrivance.*"

No precedent, in fact, can be found to justify the issuing of a Royal Commission in such cases. Parliamentary history does not furnish a single instance of bribery and corruption against a whole administration; it simply makes mention of a few trials of that description against one or two ministers, and they were all brought up before Parliament.—De Lolme, p. 92; Judge Hales, p. 195.

Referring again to the subject of Royal Commissions, Todd, vol. 2, p. 348, observes: "*It would be unconstitutional to refer to a Royal Commission subjects which are connected with the elementary duties of the Executive Government and with its relations to Parliament; or to appoint a Commission with a view to evade the responsibility of ministers in any matter,* or to do the work of existing departments of State, who possess all needful facilities for obtaining information upon questions of detail, *and who are directly responsible to Parliament, or to inquire into crimes and offences committed by particular individuals,* and which are cognizable by the ordinary courts of law. *Neither should a Commission be appointed unless the Government are prepared to give definite instructions to the Commissioners.*"

Todd refers to Hans Deb., vol. clxx, pp. 915-949; Ibid. M. Gladstone, vol. clxxv., pp. 1208, 1219; Toulmin—Smith on Commissions, pp. 150, 159.

The proof of the charges made being still, in part at least, held by the Hon. Mr. Huntington, it is not clear that Government can give the Commissioners any definite instructions in the matter. It is also evident that a common law exists which reaches the abuses of the Executive, so that the Statute does not apply here. In short, a Royal Commission can only issue to enquire into abuses committed outside of the Executive—the expression in the Statute: "the good government of Canada" being applicable only to certain relations of the Executive with the exterior of Parliament.

The Parliament of Canada possesses all the immunities and powers held by the House of Commons in England at the time

of the Confederation Act of 1867 (B. N. A. Act, 1867, s. 18; Stat. of Canada, 1868, 31 Vict. c. 23), but it does not enjoy the privileges of the House of Lords. Therefore no impeachment against ministers can be brought before either branch of the Parliament of Canada. The House of Commons may investigate the whole subject of complaint, pass a vote of censure or want of confidence, and after the formation of a new ministry, it may, perhaps, direct the Attorney-General to indict them before the ordinary criminal courts for malfeasance of office and corrupt practices at elections; but it has no more powers in this respect under the Constitution of Canada.

And now what is to result from this Royal Commission? Will the Hon. Mr. Huntington be summoned to appear as a witness? Will his presence be enforced by means which the law places at the command of the Commissioners? *i. e.* a commitment. It is not probable that recourse will be had to rigorous measures, the effect of which would be to place the Hon. gentleman in the position of a martyr to the people's rights and the national assembly; and yet, ordinary tribunals are the only authorities competent to decide whether the Royal Commission is constitutional or not. The House of Commons, although sole judge of its privileges, has no jurisdiction to declare that the Commission is *ultrà vires* and beyond the provisions of the common law and of the Canadian Statute respecting inquiries concerning public matters (St. of Can. 1868, ch. 38). Was it not, therefore, the duty of the Hon. Mr. Huntington as private prosecutor, to raise the point on a writ of *quo warranto*, or *Habeas Corpus* by appearing before the Commission and there refusing to take the oath?

Whatever the future may develope, whether the Ministers are guilty or not, and we sincerely hope that they are not, the honor of the country imperatively demands that this Pacific Scandal be eradicated from our midst as speedily as possible. The friends and enemies alike of the Government earnestly desire to see the truth or falsity of the charges made, brought to the light of day. Let justice be done to Canada, and let the world know that she can at least give security for her honesty to capitalists who are anxiously solicited to invest their means in the vast undertakings of the country—the construction of Canals and Railways.

One word more in conclusion. This Pacific Scandal has demonstrated beyond the shadow of a doubt, that the ordinary pecuniary

means of Candidates are insufficient to meet the requirements of electoral constituencies; and that recourse is had to millionaires more or less interested in the greatest enterprises of the country —such as Canals and Railways. It is evident that a great evil is spreading over the entire area of our young Dominion, which can only be checked by an electoral law of a more repressive character than that now in force. It is true that several good measures have been proposed through the medium of the press and on the floor of the House with a view to remedy this state of things; and we sincerely hope that Parliament will at the earliest opportunity not only adopt them, but that it will proceed even further: 1st. Every elector should be compelled by law to cast his vote, and, 2nd. he should be prohibited from conveying any other elector to the polls; the whole inforced by distress or by imprisonment. It may be objected that such a law would violate the principle of personal liberty. True, as long as the present system of nomination is continued; but with the abolition of this formality, obligatory voting would only enforce the duty devolving upon all citizens to exercise their franchise at every election. Under such a law, Conventions might be held and candidates nominated by political parties, while every elector would be at liberty to vote for either one of the candidates so selected, or any other individual of his own choice.

D. GIROUARD.

Montreal, 1st Sept., 1873.