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MEIGHEN PAPERS, Series 6 (M.G. 26, I, Volume 222)

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MEIGHEN PAPERS

Series 6

(M.G. 26, I, Volume 222)

MEIGHEN PAPERS, Series 6 (M.G. 26, I, Volume 222)

PUBLIC ARCHIVES
ARCHIVES PUBLIQUES
CANADA

144311

520 Bay Street, Toronto,
January 19, 1943.

Dr. E. A. Forsey,
574 Piccadilly Ave.,
Ottawa, Ontario.

My dear Eugene:

I feel very contrite at having asked you to go to the trouble of giving me a report as to the actual facts connected with the present strike situation. It should have been plain to me from the beginning that this would be quite extensive and that you were an exceedingly busy man.

All I can say now is that I am very grateful to you indeed for the tremendous trouble you have gone to. Please do not overwork yourself, and never do anything at my suggestion unless you feel you can do it without overwork.

I will not make any extensive comments on the report you prepared. Needless to say I have read it with a great deal of care. What worries me most in the whole situation is the position of our farmers and other primary producers. The average wage, while perhaps not greatly, if any, over the statistical Federal figures of living requirements of a family of five, are certainly very greatly over what the farmer of Canada receives for what undoubtedly amounts to very much longer hours, and, through a considerable part of the time, just as heavy work. However, that is not just the point at the present time and I am sure I understand the situation far better now than I did before.

Yours very truly,

AM/E.

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The phrasing of King's offer was characteristic!

E.A.F.

144312

Canadian Congress of Labour,
230 Laurier Avenue West,
Ottawa, January 20, 1943.

The Editor,
The Globe and Mail,
Toronto, Ontario

Sir,

Your editorial of this morning on the steel strike contains two points which appear to rest on misapprehensions which I am sure you would wish to have corrected.

(1) You say that the Government's offer (a) constituted "acceptance of the two main points in the Gordon report, a basic rate of 55 cents an hour", etc., and (b) went "nearly all the way in meeting the demands of the men".

What the men asked, and the Gordon report recommended, was a basic rate of 55 cents an hour exclusive of cost of living bonus, and equalization of the bonus at the two plants; in other words, equalization of both basic rates and bonus. What the Government offered was 55 cents an hour inclusive of bonus, and no change in the bonus; in other words, a doubling of the differential in basic wage rates and maintenance of the existing large differential in bonus.

Or, putting it another way: what the men asked at Algoma was a 9½ cent increase in basic wage rate and a 4 cent increase in bonus; what the Government offered was a 4½ cent increase in basic wage rate and no change in the bonus; that is, exactly one-third of what the union asked for. What the men asked at Sydney was an 11½ cent increase in basic wage rate; what the Government offered was a 2½ cent increase in basic wage rate; that is, between a quarter and a fifth of what the men asked.

This is hardly going "nearly all the way"!

(2) You observe: "We have stated on many occasions that we have no use for labour agitators who come in to cause trouble, especially in wartime." The only outsiders who have "come in" on this occasion are two international union officials who were called in by the Government to avert trouble.

Yours truly,

Eugene Forsey
Director of Research,
Canadian Congress of Labour

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144313

374 Piccadilly Avenue,
Ottawa, January 22, 1943.

Dear Mr. Meighen,

Things at the moment look more hopeful for a settlement in steel. I am, however, sending you for your information, two or three of the union exhibits before the Commission. There is no need to return them.

It was a pleasure to do the memorandum for you, and helped to crystallize my own ideas. It was also part of my duty in my present position. My heart-rending remarks about loss of sleep were only meant as an explanation of my tardiness in getting the document off to you! It is more than kind of you to urge me not to overwork in undertaking anything you ask me to do. I do not think there is any danger.

I fully agree that the farmers are having, and still more have had, a very thin time of it. I think all labour people are anxious to see farmers get a fair deal. I wish there were more direct contact between the two groups; it would be to their mutual benefit.

I am off on Monday to Quebec City for a few days, on

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business for the Brotherhood of Railway Employees. Should you have any occasion to write me (which I should think unlikely), a line to the Chateau Frontenac would find me.

I suppose you have seen Dr. Thompson's impudent statements in Halifax? I find it difficult to believe that he is consciously lying; but the alternative seems to be to believe that he is so simple-minded as to be a fit subject for restraint in some institution. Or perhaps it is just the blinding effect of partisanship, which seems to be capable of making otherwise decent and intelligent people totally impervious to reason. Whatever it is, it is lamentable, and also alarming; and for my part I think all you said at Winnipeg was justified to the hilt, and this stuff of Thompson's is just eyewash.

Yours sincerely,

Eugene Forsey

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144315

520 Bay Street, Toronto,
January 25, 1943.

Dr. Eugene Forsey,
574 Piccadilly Ave.,
Ottawa, Ontario.

My dear Eugene:

Thanks very much for your letter of 22nd with enclosure of Union exhibits before the Commission.

I do not doubt for a moment but that the Labour people are anxious to see the farmers get better returns, and certainly I know that you are. The point is, though, that the continual pressure for higher wages, resulting in a very largely increased level over the years, inevitably comes out of the farmers in the main, and for the very manifest reason that there is nowhere else it can come from. The level of wages determines the level of sale price--either that, or that level decides that the Company quits business. There is no major element in the nation except the industrial workers and the primary producers. True, there are the plant owners, but their share of the national income is necessarily very small. Their share can only be the difference between gains and losses, after, of course, all expenses, and that difference, statistically, is but a very small proportion of the national income. There are also, of course, the intermediaries--the small merchants, etc. Their average, taking into account bankruptcies, etc., is also very small, not only relatively but actually. Of course, it is the relative portion alone that counts.

I do not know whether I ever handed you the enclosed pamphlet or not. It is somewhat out of date at the present time, but only a few months ago I wrote Peterson and asked him to check over the figures and see if there were any that required change. He replied that there were none. He is a very careful student and a man of ability.

(over)

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144316

In a competitive world (which this is and which it will certainly continue to be) the contest cannot, it seems to me, be other than a contest between the primary producer and the industrial owner. I do not mean that nothing else intervenes, but I do mean that nothing else of important consequence intervenes.

You are very busy and I do not want you to reply until you are under less pressure, but I would be glad indeed to have your reflections.

Yours very truly,

AM/E.
Encl.

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144317

Part of the minutes of a conference of steel workers (Local Unions of Kitchener, Oshawa, Bowmanville, Whitby, Montreal, Toronto, Hamilton, Hespeler and Sault Ste. Marie), Toronto, June 14, 1942.

Resolved that: Immediately upon receiving a guarantee to the full exercise of collective bargaining, the Canadian officers of the United Steelworkers of America are authorized to publicly pledge on behalf of the Canadian membership that for the duration of the war no stoppage, caused by strikes, will occur, providing the proper machinery for conciliation and arbitration is established.

Part of minutes of a conference of steel workers (Local Unions of Sydney, Trenton and Amherst, Nova Scotia), Sydney, August 6 and 7, 1942.

Resolved that: Immediately upon receiving satisfactory wage rates and a guarantee to the full exercise of collective bargaining, the Canadian officers of the United Steelworkers of America are authorized to pledge on behalf of the Canadian membership that for the duration of the war no stoppage caused by strikes will occur, providing proper machinery for conciliation and arbitration that is acceptable to organized labour in the steel industry is established.

(These two resolutions cover all the Canadian membership; all Locals were represented at one or the other meeting. In addition, however, delegates to the National Conference of Steelworkers, Ottawa, September 13, 1942, passed the [illegible] a resolution identical with the second of the two above.)

Part of a resolution passed by delegates from the Sydney, Trenton, Hamilton and Sault Ste. Marie Locals, Ottawa, [illegible] November 4 and 5, 1939:

Therefore be it resolved that we urge the Dominion [illegible] Department of Labour to call into conference with them representatives of management and labour; the purpose of this conference being to stabilize efficient production, promote satisfactory labour relations in the steel industry and enable common and competitive problems to be solved.

The item in the last "News" on "The Run-Around in Steel" is accurate, except that there is some overtime in Sydney for over 48 hours in the week (in departments working a regular six-day week), but none at all at Algoma. The men wanted overtime for the seventh day for everybody in both plants.

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144318

374 Piccadilly Avenue,
Ottawa, March 24, 1943.

Dear Mr. Meighen,

The book is out! The first copy (the only one I've received so far) arrived Tuesday, while I was on my way home from Nova Scotia. It looks very nice. I hope you will feel, when you see it, that the result repays all the time you spent criticizing the original drafts. Harriet says the one thing she finds disappointing about it is the fact that the preface couldn't contain an acknowledgment of your help. Needless to say, I feel the same way. But I have no doubt that your advice on this point was sound.

Now we should have some fun! Do you think it would be worth while for me to subscribe to a press-cutting agency or anything of the sort so that I'd see whatever came out about the thing? Or can we keep track pretty well ourselves of what comes out in the more important papers and periodicals?

I presume you have already dropped hints to the Montreal Gazette and other papers that this is not a "subversive" work? You were kind enough to say that you would do something of the sort. Incidentally, when you see the book you will find that the jacket describes me as an

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144319

Associate Editor of the Canadian Forum. This should, of course, be in the past tense. I fancy the Forum will be rather annoyed about it!

In haste,

E. A. F.

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CANADA

144320

320 Bay Street, Toronto,
March 24, 1945.

Oxford University Press,
University Ave.,
Toronto, Ont.

Dear Sirs:

I am enclosing herewith cheque for $150.00 to make payment of the first instalment of Eugene Forsey's book.

Would you mind sending a couple of the books to me, and hold the others in your office to be mailed as per a list of names and addresses I will send you later.

Yours very truly,

AM/E. Arthur Meighen.

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144321

320 Bay Street, Toronto,
March 25, 1945.

Dr. Eugene Forsey,
574 Piccadilly Avenue,
Ottawa, Ontario.

My dear Eugene:

Yes, the book is out. I have not received a copy yet, but John Stevenson has and is delighted with it. I sent a cheque yesterday for the first thirty which I am taking, and without any doubt will need a good many more.

Yes, I have written to John Bassett and will be writing some others with books as they go out.

I would think you could get all the clippings through the Oxford Press. They no doubt have a system for following up comments on their publications. If I can get Mr. Clarke before this letter goes out, I will find out and advise you definitely.

Too bad about the Forum. If they will govern themselves by intelligence instead of prejudice, they will be very proud to have it said that the author of this book is on their staff.

With kindest regards,

Yours sincerely,

AM/E.

P.S.—I just had a talk with Mr. Irwin (Mr. Clarke is out of the city) of the Oxford Press. He tells me that they have their own system of collecting reviews and criticisms in Canada and that their organization in the States will attend to any there and they have also one in England which will do

(over)

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144322

do the same. He also said they would take care to see that you get them.

P.P.S.—Do you know where Lady Byng is just now. I want to send her a copy.

A. M.

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CANADA

144323

520 Bay Street, Toronto,
March 30, 1943.

Oxford University Press,
480 University Ave.,
Toronto, Ont.

Dear Sirs: Attention Mr. John C. Irwin.

Please send, from the volumes purchased by me, a copy of "Dissolution of Parliament" by Dr. Eugene Forsey to those named in the attached list.

Cards to accompany same are enclosed.

Additional names will be sent to you shortly.

Yours very truly,

AM/E.
Encl.

Arthur Meighen.

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144324

MAILING LIST

"DISSOLUTION OF PARLIAMENT"
By Dr. Eugene Forsey

.....

Hon. C. H. Cahan, P. C.,	1921	Chateau Apts., Sherbrooke St. W	Montreal, Que.
Mrs. R. W. Reford,	3510	Drummond St.,	" "
Hon. John Bracken	c/o	Chateau Laurier	Ottawa, Ont.
Grattan O'Leary	c/o	"The Ottawa Journal Queen Street	Ottawa, Ont.
General J. A. Clark, K. C.,	475	Howe Street	Vancouver, B. C.
M. E. Nichols, Editor,		"The Vancouver Province,"	Vancouver, B. C.
Hon. W. H. Dennis,	c/o	"The Halifax Herald"	Halifax, N. S.
Captain T. R. Meighen	10	Newton Ave.,	Halifax, N. S.
Wilbur C. Cochrane	255	Roxborough St. E.	Toronto, Ont.
Charles Gordon, Barrister	c/o	Kilmer, Landrian & Gordon, 10 Adelaide St. E.,	Toronto, Ont.
J. Stanley McLean		"Bayview"	" "
Prof. M. W. Wallace	91	Walmer Road	" "
Sir Henry L. Drayton	9	Dale Ave.,	" "
Hon. Mr. Justice P. H. Gordon,	c/o	Park Plaza Hotel	" "
C. H. Hale,		"Orillia Packet and Times"	Orillia, Ont.
A. E. Naylor	77	Baby Point Road	Toronto, Ont.
Rt. Hon. The Lord Queenborough, G. B. E.,		Camfield Place, Hatfield, Herts.,	England.
Rt. Hon. The Viscount Bennett,		House of Lords	Westminster, England.
Matthew F. Fairlie	6	Shorncliffe Ave.,	Toronto, Ont.
Charles B. Smith, K. C.,	c/o	Stewart, Smith, MacKeen & Rogers, Roy Building,	Halifax, N. S.
Mr. Gordon F. Perry	30	Dale Ave.,	Toronto
Mr. Lawrence Hunt	c/o	Hurd, Hamlin & Hubbell 60 Broadway,	New York, N. Y.

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144325

320 Bay Street, Toronto,
March 30, 1943.

Dr. Eugene Forsey,
574 Piccadilly Ave.,
Ottawa, Ontario.

My dear Eugene:

Though I have been down to Montreal since receipt of your book, I have already completed reading it and can hardly express to you my admiration and gratitude for the work you have done. The treatment of the 1926 crisis is superb. Sometimes I think it was a mistake to entitle the book simply "Dissolution of Parliament." Quite plainly the whole work revolves around the crisis of '26, and if the title of Chapter 5 had been the title of the book, I am disposed to think the public demand would have been a great deal wider and more spontaneous. However, as the reviews come out, the public will realize what is the central theme of interest. The work you did was nothing less than stupendous. The case you have made is impressive, devastating and unanswerable. One waits with some curiosity to see how the perverted senses of the Manitoba Free Press coterie will react to this assault.

King is not only left in the position of having been hopelessly wrong but having acted as an unprincipled cad from beginning to end. As for Keith, one just stands aghast and wonders what he can say. How he ever managed to gain attention as an authority passes my powers of comprehension. He is a muddle-head. His sentences are turgid and tangled. The only thing he ever makes clear is his prejudice. You have pilloried him properly for his impudent comment on Asquith. One revolts at the thought of a man with such a miniature mind referring to H. H. Asquith in '25 as "in a condition of decayed mental power." His own mental powers have not decayed, but they are in the same condition as if they had.

Perhaps I might make one or two specific comments which may or may not be worth considering in the event of a second edition:

Page 152:—It is my view that King's Ministry certainly was defeated both technically and in substance. The situation is different when there is a substantial third

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Party, as there was on this occasion. Without a question King got Woodsworth to move the amendment he did, and, no doubt at all framed the Woodsworth amendment. However, that cannot be asserted as a matter of history. A Motion, however, in the form of an amendment is made to Parliament, which elminates the element of censure on the Government itself from the main Motion. The Prime Minister announces his Government's support of this amendment. The amendment then goes to a vote and is defeated. There could be no more direct defeat than that. If the fact that someone else, and not a member of the Government, moved the amendment absolves the Government from the penalty, then no dangerous Motions would ever be made by a member of a Government.

Page 153:—Referring to the last paragraph—if the King Government was not in difficulties, and if its Parliamentary position was secure, and if, as King afterwards boasted, he enjoyed fully the confidence of the House, then why did he ask for dissolution? It is amazing the glorious abandon with which that man could lie!

Page 181:—It occurred to me as I read this page that another point might have been advanced, viz., that the electorate was entitled as well to the judgment of Parliament on the issue.

Page 207:—I do not quite understand why you have included "Lord Byng's refusal" as being without precedent.

Page 245:—You do bring out the point, but I would have liked to have seen it more strongly emphasized, that the very nature of the Resolution passed by Parliament against us put it out of the power of Parliament itself and of all those Members who supported the Resolution, to complain about our declining to perform any subsequent act of Government. According to the terms of this Resolution, not only had we no right to transact any business in Parliament, but we had no right to transact any business anywhere as a Government. Of course, King's talk about what we should have done and what he intended to do in the event of his having obtained dissolution, is the most blatant and transparent hypocrisy.

You have brought out with a clearness that I never appreciated before the scandalous conduct of King in walking out of office and leaving the country without a Government. I did not expose this rude and petulant conduct at the time as I should have done. No doubt it would be unprecedented. One could not conceive of any public man with a sense of decency doing such a thing. He added to the boorishness of his conduct by refusing to confer with me as to finishing the work of the Session.

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While in Montreal I saw Mr. Cahan. He is delighted that the book is out. I am sending him one of quite a number that I have already ordered. Certainly I will order a good many more.

You have placed me under an obligation to you which is quite beyond repay.

Very sincerely yours,

AM/E.

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CANADA

144328

320 Bay Street, Toronto,
March 30, 1945.

Mr. M. E. Nichols,
Vancouver Province,
Vancouver, B. C.

Dear Mr. Nichols:

I am having sent you a copy of a book just published by Dr. Eugene Forsey, entitled "Dissolution of Parliament." Probably a better title would have been "The Constitutional Crisis of 1926."

Do not omit the first hundred and thirty pages, though they may seem a little difficult. From that on you won't be able to stop until you are through. Forsey has certainly dug to the bottom of this subject and has done a great service to Parliaments in all parts of the Empire. Whatever position it leaves Mr. King in, there can certainly be no allegation that Forsey has been unfair.

It might be added that Dr. Forsey is one of the C. C. F.

Yours very truly,

AM/E.

Arthur Meighen.

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CANADA

144329

320 Bay Street, Toronto,
March 30, 1945.

Mr. Grattan O'Leary,
The Ottawa Journal,
Ottawa, Ontario.

Dear Grattans

I am having sent you a copy of a book just published by Dr. Eugene Forsey, entitled "Dissolution of Parliament." Probably a better title would have been "The Constitutional Crisis of 1926."

Do not omit the first hundred and thirty pages, though they may seem a little difficult. From that on you won't be able to stop until you are through. Forsey has certainly dug to the bottom of this subject and has done a great service to Parliaments in all parts of the Empire. Whatever position it leaves Mr. King in, there can certainly be no allegation that Forsey has been unfair.

It might be added that Dr. Forsey is one of the C. C. F.

Yours very truly,

AH/E.

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CANADA

144330

520 Bay Street, Toronto,
March 30, 1943.

The Rt. Hon. the Viscount Bennett, P. C.,
House of Lords,
Westminster,
England.

My dear R. B.:

I am sending you now a copy of Forsey's book and I do hope it escapes the perils of the seas.

You may find the first one hundred and thirty pages a little difficult, but at that point he starts the discussion of the 1926 episode and from there on the account is absorbing. King's conduct is almost too shameful for exposure, but still I do not suppose it was any worse in that crisis than it was in any other.

Forsey certainly has got through a huge amount of work to put him in a position to write this volume, but he has made a contribution to the whole subject that will live.

If anything could be done over there toward getting the book well reviewed, it would certainly be appreciated by me.

Yours very truly,

AM/E.

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144331

320 Bay Street, Toronto,
March 30, 1943.

General J. A. Clark, K. C.,
475 Howe Street,
Vancouver, B. C.

Dear Arthur:

I am having sent you a copy of a book just published by Dr. Eugene Forsey, entitled "Dissolution of Parliament." Probably a better title would have been "The Constitutional Crisis of 1926."

Do not omit the first hundred and thirty pages, though they may seem a little difficult. From that on you won't be able to stop until you are through. Forsey has certainly dug to the bottom of this subject and has done a great service to Parliaments in all parts of the Empire. Whatever position it leaves Mr. King in, there can certainly be no allegation that Forsey has been unfair.

It might be added that Dr. Forsey is one of the C. C. F.

Yours very truly,

AM/E.

MEIGHEN PAPERS, Series 6 (M.G. 26, I, Volume 222)

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CANADA

144332

320 Bay Street, Toronto,
April 1, 1943.

Dr. Eugene Forsey,
3 Lakeview Terrace,
Ottawa, Ontario.

My dear Eugene:

I omitted something from my letter of Tuesday.

You will want to send your book around to some of your friends. If you will let me have their names and addresses, along with your card to be inserted in each book, I will be very glad--and indeed, seek the privilege--of procuring and sending the books; and do not feel yourself restricted at all.

I may add that I have sent around quite a number, including Lady Byng, Hon. C. H. Cahan and Lawrence Hunt. I mention these just for fear you might be thinking of sending one to any of them.

Very sincerely yours,

AM/E.

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PUBLIC ARCHIVES
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144333

3 Lakeview Terrace,
Ottawa, April 2, 1943.

Rt. Hon. Arthur Meighen, P.C., K.C.
320 Bay Street
Toronto, Ontario

Dear Mr. Meighen,

I need hardly say what a pleasure it was to see you again yesterday. Your letter was waiting for me when I got back. Nothing about the book pleases me so much as your pleasure in it. Please do not speak of "gratitude" to me for it; the gratitude is all the other way about. I only hope that the book will do something to answer the disgusting lies with which you have so long been bespattered.

I am very glad to have your detailed comments on certain passages, and shall take due note of them for any possible second edition, though I hardly think there is much chance of that.

My aunt telephoned me this morning that she had again been talking with Mr. Pereira of the G.-G.'s office. He said that both he and Sir Shuldham had now read the whole thing, and were immensely impressed. They are getting a further copy for perusal in a higher quarter. They are disgusted that the Parliamentary Library has only two copies, and say it must get more! I hear Eden took a copy away with him!

I have a list of about a dozen people or institutions I should be glad to have you send copies to on my behalf. Some you may already have dealt with yourself, e.g., Lawrence Hunt. I shall pick up some cards when I am home at lunch, and enclose them, and the list, with this. If you think the number exorbitant, just say so frankly, and I shall buy some extra copies (I get a one-third reduction, with, of course, a dozen copies of my own free).

I have seen the ballot in the Montraal Tramways strike, and it is as I described it.

Yours sincerely,

Eugene Forsey

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CANADA

144334

320 Bay Street, Toronto,
April 2, 1945.

Oxford University Press,
480 University Ave.,
Toronto, Ont.

Dear Sirs: Attention Mr. Irwin

Enclosed is another list of those to whom I would like copy of Dr. Forsey's book sent.

Cards are enclosed.

Yours very truly,

AM/E. Arthur Meighen.

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Apr 2/43

2nd List

"DISSOLUTION OF PARLIAMENT"
By Dr. Eugene Forsey.

144335

.....

Sp. Letter The Viscountess Byng of Vimy, P. O. Box 156, Nassau, Bahamas, B. W. I.

Sir Allan Lascelles, Assistant Private Secretary to His Majesty, The King, Buckingham Palace, England.

Lr.	William M. Dickson,	57 Linden Terrace,	Ottawa, Ontario.	✓
	Col. Alan Cockeram	52 Elderwood Drive	Toronto, Ont.	✓
x	Dr. Clarence Webster	- - - - - - -	Shediac, N. B.	
Lr.	Mr. Balmer Watt	c/o Edmonton Journal	Edmonton, Alta.	✓
	Arthur G. Penny	c/o Quebec Chronicle-Telegraph	27 Buade St., Quebec, P. Q.	✓
x	John W. Dafoe	c/o Winnipeg Free Press	Winnipeg, Man.	
	Mr. R. V. LeSueur	Imperial Oil Co. Ltd.,	King & Church Sts., Toronto.	✓
	Mr. M. A. Sanderson	c/o Reliable Exterminators,	64 Wellington W., "	✓
x	R.N. Barrington Ward	Editor, "The London Times" Printing House Square,	London, England.	
	J. B. Kenrick	128 Roxborough St. West,	Toronto. (on 2nd list)	

x - Special cards attached

11

MEIGHEN PAPERS, Series 6 (M.G. 26, I, Volume 222)

PUBLIC ARCHIVES
ARCHIVES PUBLIQUES
CANADA

144336

520 Bay Street, Toronto,
April 2, 1943.

Dr. Clarence Webster,
Shediac, N. B.

Dear Dr. Webster:

At the request of John Stevenson I am having sent you a copy of a book just published by Dr. Eugene Forsey, entitled "Dissolution of Parliament." Probably a better title would have been "The Constitutional Crisis of 1926."

Do not omit the first hundred and thirty pages, though they may seem a little difficult. From that on you won't be able to stop until you are through. Forsey has certainly dug to the bottom of this subject and has done a great service to Parliaments in all parts of the Empire. Whatever position he leaves Mr. King in, there can certainly be no allegation that Forsey has been unfair.

It might be added that Dr. Forsey is one of the C. C. F.

Yours very truly,

AM/E.

Arthur Meighen.

MEIGHEN PAPERS, Series 6 (M.G. 26, I, Volume 222)

PUBLIC ARCHIVES
ARCHIVES PUBLIQUES
CANADA

144337

Personal.

House of Commons
Canada
THE PRESS GALLERY

Apl.3.1943.

Dear Mr.Meighen:

I have just been talking to Eugene Forsey about a review of his book for the Herald. When I heard it was out I wrote Dennis on no account to let Dr.H.L. Stewart , who is on our staff, do the job, because altho he poses as a great scholar and commentator, he is always most cannily on the side of the angels, prizing as he does his spot on C.B.C programs which he holds by virtue of his talent for diplomacy. My own suggestion was that we ask Mr.Cahan to do it, since he was on the scene at the time and has considerable knowledge of constitutional matters. Forsey thinks C.would do a good job; if he does, we may be able to get a number of other papers to reproduce his effort. You may be sure the brain trust here will be assembled in hot haste to dope out some propaganda to offset this terrible example of lese majeste. Already there is a great furore about it, and the lightnings will be unloosed at any moment around poor Forsey's head. My spies inform me that Mr.Eden carried away a copy with him when he left yesterday and several of the ministers including Mr.St.Laurent are reading it. You might pass this along to J.S. who as you know is greatly interested. I am expecting J.will be interned when his time comes. I shall have to bake him a cake with a file in it.

With kindest personal regards, I am

Yours sincerely,

Evelyn S.Tufts.

E. S. Tufts

MEIGHEN PAPERS, Series 6 (M.G. 26, I, Volume 222)

PUBLIC ARCHIVES
ARCHIVES PUBLIQUES
CANADA

144338

320 Bay Street, Toronto,
April 5, 1945.

Mrs. E. S. Tufts,
Press Gallery,
House of Commons,
Ottawa, Ontario.

Dear Mrs. Tufts:

Thanks ever so much for your letter of 3rd.

I need hardly say that Mr. Forsey's book brought me a great deal of real pleasure and satisfaction. I have waited a long time for something like this.

The work Forsey did was tremendous. One can think of nothing in the way of authority he did not exhaust and no cranny into which he did not peer. There certainly cannot be produced an effective answer to the book. Many a reader will find it hard to express the disgust which will well up in his mind.

The stock answer will be that the election decides the issue. As well might an election decide the problems with which our Law Courts wrestle day by day!

Certainly Mr. Cahan can do an excellent review, and I feel sure he would be glad to take it on.

Yours very truly,

AM/E.

MEIGHEN PAPERS, Series 6 (M.G. 26, I, Volume 222)

PUBLIC ARCHIVES
ARCHIVES PUBLIQUES
CANADA

144339

320 Bay Street, Toronto,
April 5, 1943.

Mr. Balmer Watt,
c/o The Edmonton Journal,
Edmonton, Alberta.

Dear Balmer:

I am having sent you a copy of a book just published by Dr. Eugene Forsey, entitled "Dissolution of Parliament." Probably a better title would have been "The Constitutional Crisis of 1926."

Do not omit the first hundred and thirty pages, though they may seem a little difficult. From that on you won't be able to stop until you are through. Forsey has certainly dug to the bottom of this subject and has done a great service to Parliaments in all parts of the Empire. Whatever position he leaves Mr. King in, there can certainly be no allegation that Forsey has been unfair.

It might be added that Dr. Forsey is one of the C. C. F.

Yours very truly,

AM/E.

MEIGHEN PAPERS, Series 6 (M.G. 26, I, Volume 222)

PUBLIC ARCHIVES
ARCHIVES PUBLIQUES
CANADA

144340

520 Bay Street, Toronto,
April 5, 1943.

Mr. William M. Dickson,
57 Linden Terrace,
Ottawa, Ontario.

Dear Will:

I am having sent you a copy of a book just published by Dr. Eugene Forsey, entitled "Dissolution of Parliament." Probably a better title would have been "The Constitutional Crisis of 1926."

Do not omit the first hundred and thirty pages, though they may seem a little difficult. From that on you won't be able to stop until you are through. Forsey has certainly dug to the bottom of this subject and has done a great service to Parliaments in all parts of the Empire. Whatever position it leaves Mr. King in, there can certainly be no allegation that Forsey has been unfair.

It might be added that Dr. Forsey is one of the C. C. F.

Yours very truly,

AM/E.

MEIGHEN PAPERS, Series 6 (M.G. 26, I, Volume 222)

PUBLIC ARCHIVES
ARCHIVES PUBLIQUES
CANADA

144341

320 BAY STREET
TORONTO

April 5th, 1943.

Dear Mr. Meighen,

I had a very pleasant day yesterday reading Doctor Forsey's book, and I thank you very much for sending it to me.

There can be no doubt that Lord Byng was perfectly right in his action, and I notice that McAree points this out in the 'Globe & Mail' this morning.

Again with many thanks and best wishes,

I remain,
Yours sincerely,

Eugene A. Forsey

The Right Honourable Arthur Meighen, P.C., K.C.,
320 Bay Street,
Toronto, Ontario.

MEIGHEN PAPERS, Series 6 (M.G. 26, I, Volume 222)

PUBLIC ARCHIVES
ARCHIVES PUBLIQUES
CANADA

144342

April 5, 1945.

Dear Lady Byng:

At last Dr. Forsey's book is out. Its title is "The Royal Power of Dissolution of Parliament in the British Commonwealth."

My own opinion would be that he would have been better advised to have chosen as his title "The Constitutional Crisis of 1926." However, one could not ask for a more thorough-going, masterly review of that crisis than appears in the book.

As soon as it was out I had the Oxford Press send you a copy, and do sincerely hope that it will survive the perils of the sea and reach you at an early date. My one great lamentation is that your distinguished husband is no longer with us and able to read the magnificent vindication of his character and conduct which this book makes once and for all. It has many times been my personal regret that I allowed myself to turn in disgust from the scene after the election of 1926, and did not earlier undertake a compendium of the subject myself. My thought at the time was that the public would not look upon me as an unprejudiced author, and this, of course, was correct.

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PUBLIC ARCHIVES
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CANADA

144343

Mr. King put it out of his mouth to say that I should have asked for adjournment until I and the Ministers would be elected. He definitely denied in the House that I had a right to such adjournment, in his interruption to Drayton.

I do sincerely hope that you are enjoying good health and will be back with us in Canada again ere long.

Very sincerely yours,

The Viscountess Byng of Vimy,
P O. Box 156,
Nassau,
Bahamas, B. W. I.

The long wait, however, for such an author to appear resulted in Lord Byng failing to find a competent defender in his own day.

Years have only added strength to the conviction that Lord Byng's conduct was scrupulously correct and honourable from beginning to end.

Permit me to refer to one feature of this work and enlarge a little upon it.

My acceptance of Lord Byng's request that I form a Government implied a belief, or, if one caresto put it so, an assurance on my part that I had reasonable prospects of being able to carry on in the then Parliament. It surely could never be taken to mean that I felt I had reasonable prospects of carrying on while not in the House myself to give leadership to the Government and to make my appeal to that Parliament. It surely was not implied that I felt I could carry on by proxy. This, Mr. King took upon himself to insist, was my definite obligation. Further, Mr. King insisted that not only must I be able to carry on in absentia, but that I must be able to carry on with the portfolios filled and, therefore, all Ministers absent. This claim of his amounted to an assertion that his Government should never be supplanted no matter what its fate in the House or no matter what the occasion on which he seeks to destroy the Parliament which is withdrawing its support— must never be supplanted unless another Government can carry on with over sixteen of a dependable majority. How can reasonable people even tolerate such a contention?

MEIGHEN PAPERS, Series 6 (M.G. 26, I, Volume 222)

PUBLIC ARCHIVES
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CANADA

144344

320 Bay Street, Toronto,
April 5, 1943.

Dr. Eugene Forsey,
5 Lakeview Terrace,
Ottawa, Ontario.

Dear Eugene:

I have your letter of 2nd.

First of all, in my previous letter I omitted another reference I had fully intended making. It is to a sentence on page 152 which reads as follows:

> "Mr. King's Ministry may not have been 'technically defeated', but it is overstating the case to say that it was 'no longer sure of a majority'"

Either my thinking is bad or there is a negative omitted here. Should you not have said "not overstating the case."

You call attention very aptly in the book to a feature which the public and the critics also seem hitherto to have missed and certainly which I did not at the time emphasize as strongly as I should have. It is this:—

True enough, my acceptance of Lord Byng's request that I form a Government implied a belief, or if you care to put it so, an assurance on my part that I had reasonable prospects of being able to carry on in the then Parliament. It surely could never be taken to mean that I felt I had reasonable prospects of carrying on while not in the House myself to give leadership to the Government and to make my appeal to that Parliament. It surely was not implied that I felt I could carry on by proxy. This, Mr. King took upon himself to insist, was my definite obligation. Further, Mr. King insisted that not only must I be able to carry on in absentia, but that I must be able to carry on with the portfolios filled and, therefore, all Ministers absent. This claim of his amounted to an assertion that his Government should never be supplanted no matter what its fate in the House or no matter what the occasion on which he seeks to destroy the Parliament which was withdrawing its support—must never be supplanted unless another Government can carry on with over sixteen of a dependable majority. How can reasonable people even tolerate such a contention?

No. 1191

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CANADA

Mr. King put it out of his mouth to say that I should have asked for adjournment until I and the Ministers would be elected. He definitely denied in the House that I had a right to such adjournment, in his reply to Drayton.

I probably had the right to such adjournment; in fact, I fully believe I had, but was endeavouring to avoid the consequences to Members of the House, especially those from a distance and especially those occupied as farmers, and, one might say, especially the Progressives, and this in the circumstances that there was only a very small amount of work to complete before prorogation.

I mention the above only with the thought that the view which is obviously unanswerable might be further emphasized in a second edition.

I will gladly send copies to the names you suggest, but think there is no use sending it to MacKay, as certainly Dalhousie University will be getting a copy. I will send one to Smuts and will put my own card in. Keith will get a copy. Do not worry about him. The McGill Library will be getting a copy and we do not need to send one there.

Yesterday Colonel Hugh Clark and I called on Mr. and Mrs. Hector Charlesworth. I told him I was sending him a copy but he said he already had one and was looking forward to reading it with great eagerness. I did not know that he knew you so well.

I have a letter from Mrs. Tufts of the Halifax Herald today. She tells me that Mr. Eden took a copy away with him and that there is indeed quite a furore over the book at Ottawa. She adds that several of the Ministers are reading it, including Mr. St. Laurent.

A very good review appeared today by Mr. McAree in the Toronto Globe and Mail. I am told that Mr. Blair Fraser who reviewed the book in the "Gazette" used the words "ex parte." This is an utterly indefensible thing to say about the book and I am going to say so to Mr. Bassett as soon as I read the review myself.

Yes, Mr. Cahan ought to do a very good job indeed, and I know he will be glad to try.

Yours sincerely,

AM/E.

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PUBLIC ARCHIVES
ARCHIVES PUBLIQUES
CANADA

144346

320 Bay Street, Toronto,
April 6, 1945.

Oxford University Press,
480 University Avenue,
Toronto, Ontario.

Dear Sirs: Attention Mr. J. C. Irwin

Enclosed is further mailing list re Dr. Forsey's book. This more than takes up the number already purchased by me, but I shall send another cheque shortly.

Cards are also enclosed. My own are to go just to those marked "x" on the list, and Dr. Forsey's to the remainder.

Yours very truly,

AM/E.
Encl.

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CANADA

Apr 6/43

Third List

144347

"DISSOLUTION OF PARLIAMENTS"
By Eugene Forsey

.....

✓ Sir Francis Wylie, Wootton Ridge, Boar's Hill, Oxford, England.

✓ The Librarian, Balliol College, Oxford, England.

✓ H. J. Laski, Professor of Political Science, London School of Economics, Houghton Street, Aldwych, W. C. 1, London, England.

✓ R. Bassett, c/o The Macmillan Company, London, England.

✓ Rt. Hon. H. V. Evatt, Minister of External Affairs, Canberra, Australia.

✓ Hon. J. H. Hofmeyr, Minister of Finance, Cape Town, South Africa.

✓ Leif Egeland, M. P., House of Assembly, Cape Town, South Africa.

X Rt. Hon. Jan Smuts, Prime Minister of South Africa, Pretoria, South Africa

✓ The Librarian, Littauer Center, Harvard University, Cambridge, Mass.

✓ E. A. James, Librarian, Harvard Law School, Cambridge, Mass.

✓ John Lederle, Department of Political Science, Brown University, Providence, R. I.

✓ Col. Gordon S. Harrington, K. C., Halifax, N. S.

✓ John C. Farthing, Bishop's College School, Lennoxville, P. Q.

X J. B. Kenrick 128 Roxborough St. West, Toronto.

✓ John MacCormac c/o Washington Bureau of New York Times, Washington, D. C.

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PUBLIC ARCHIVES
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CANADA

144348

320 Bay Street, Toronto,
April 7, 1943.

Dr. Eugene Forsey,
5 Lakeview Terrace,
Ottawa, Ontario.

My dear Eugene

I am enclosing a manuscript which will probably be published shortly. You, of course, have not the least idea who wrote it.

In case you find any mistake in it, let me know, and in any event, I shall be glad to have your comments, and please return.

I suppose you saw Mr. McAree's review in the "Globe and Mail" of last Monday.

Yours sincerely,

AM/E.
Encl.

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PUBLIC ARCHIVES
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CANADA

144349

320 Bay Street, Toronto,
April 7, 1943.

Private Secretary,
Mr. C. O. Knowles,
c/o The Telegram,
Toronto, Ont.

Dear Madam:

In the manuscript headed "The Royal Power of Dissolution of Parliament in the British Commonwealth" handed to Mr. Knowles by Mr. Meighen today, I find one error.

In the quotation which appears near the end of page 4, the words "abrupt debate close" appear in the fifth last line. The word "debate" should be erased. Please see that this is done.

Yours very truly,

E. Private Secretary.

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London, England.
Dr. Clarence Webster,
Shediac, N. B.
Mr. John W. Dafoe,
c/o Winnipeg Free Press, Winnipeg, Man.
Mr. R.N. Barrington Ward,
Editor, The London Times,
Printing House Square, London, England.

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c/o Reliable Exterminators,
64 Wellington West,
Toronto, Ontario.

Mr. R.V. LeSueur, Imperial Oil Co. Ltd.,
King and Church Sts., Toronto, Ont.

Mr. Arthur G. Penny,
c/o Quebec Chronicle-Telegraph,
27 Buade St., Quebec, P.Q.

Mr. Balmer Watt, c/o Edmonton Journal, Edmonton,Alta

Col. Alan Cockeram, 32 Elderwood Drive, Toronto.

Mr. William M. Dickson, 37 Linden Terrace, Ottawa.

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PUBLIC ARCHIVES
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CANADA

144356

3 Lakeview Terrace,
Ottawa, April 7, 1943.

Dear Mr. Meighen,

Of course you are quite right about the "not" being omitted on p. 152. It was in the ms., but got left out in proof, and the omission escaped the O.P. proof-reader, my mother and me. It is very provoking. I can only hope that the context makes the point clear, and/or that people will take it for irony!

Undoubtedly you had a right to an adjournment; equally undoubtedly, if your Government had tried to get it, King would have added another to his numerous outrages on the Constitution by refusing it. In this case, however, he would have had a few dubious and dishon - ourable precederts, if my memory serves.

Am delighted to hear that my friends the Charlesworths have the book. I was best man at their daughter's wedding. She married Louis MacKay, who, you may recall, trounced the Canadian Forum for its comments on my letters about you last winter. I have not seen either Mr. or Mrs. Charlesworth for some time, though I have thought of them often, and meant to write them or look them up on

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PUBLIC ARCHIVES
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one of my flying visits to Toronto.

I thought you would be annoyed about that remark of Blair Fraser's, and possibly about others as well. Fortunately I do not intend to be unduly distressed about newspaper comments. I am much more concerned by the fact that, as far as I can discover, there are no copies of the book in any of the Ottawa book stores. I propose to take steps, quietly, to find out why this is, and have it remedied, if possible. Perhaps the Ministers have bought up the lot! On the other hand, it is not beyond the bounds of possibility that King has arranged the matter, especially as I suspect that two of the chief booksellers are Liberals, and am sure the third is.

I feel very guilty about having sent you such a long list of names, but it's not much use saying that now. I hope you are not beggaring yourself over the thing. Incidentally, I heard the other day that our friend C.H.C. is dreadfully hard up: only $600 a year left, or something of the sort. It sounds exaggerated, though I know he has had financial reverses.

Yours sincerely,

Eugene Forsey

Mc Arei's review was excellent. My cinds are locked up awaiting services of a locksmith! E.F.

MEIGHEN PAPERS, Series 6 (M.G. 26, I, Volume 222)

PUBLIC ARCHIVES
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CANADA

144358

520 Bay Street, Toronto,
April 8, 1945.

Dr. Eugene Forsey,
5 Lakeview Terrace,
Ottawa, Ontario.

My dear Eugene:

After receipt of yours of 7th, I could not refrain from calling up Oxford Press to see about the dearth of the books at Ottawa. Mr. Irwin told me he would look into the matter and let me know. He said they had sent out about a thousand circulars.

By the way, John Stevenson has 'phoned me today that there is a review of the book in "Saturday Night" by B. K. Sandwell, and that it is favourable. This is amazing!

I was talking to Collingwood Reade about the book the other day. After his own experience he thinks it rather strange that you have not been called upon by the Mounted Police.

Yours sincerely,

AM/E.

MEIGHEN PAPERS, Series 6 (M.G. 26, I, Volume 222)

PUBLIC ARCHIVES
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CANADA

144359

520 Bay Street, Toronto,
April 9, 1943.

Oxford University Press,
480 University Ave.,
Toronto, Ontario.

Dear Sirs:

I have ordered from you one copy of Forsey's "Dissolution of Parliament" to be sent to each of the names in the attached list. Those marked "x" to be accompanied by Dr. Forsey's card, with which you have been supplied, and the others to be accompanied by my card, with which you have been supplied.

I have also ordered two copies for myself and you have sent four, one being sent immediately after my first order went in and three more being received today.

I will now ask you to send one addressed as follows, accompanied by Dr. Forsey's card. This I have not here yet, but will send it as soon as received.

John Lederle, Esq.,
Department of Political Science,
Brown University,
Providence, R. I.

This makes a total of 49 books, which at $5.00 each, less 1/3 discount as per Mr. Irwin's advice to my Secretary, amounts to $163.33. I have already remitted to you $150.00, and enclose herewith my cheque for $13.33, the balance, which settles the account up to date, you having just the one book now to despatch.

If I should pay the postage, kindly let me know and I will gladly do so.

I expect to be sending more orders later.

Very truly yours,

Arthur Meighen.

AM/E.
Encl.

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Bassett, R.	" "
Bennett, Rt. Hon. the Viscount	" "
Bracken, Hon. John	Ottawa, Ont.
Byng, The Viscountess	Nassau, Bahamas
Cahan, Hon. C. H., K. C.,	Montreal, Que.
Clark, General J. A., K. C.,	Vancouver, B. C.
Cochrane, Wilbur C.	Toronto, Ont.
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Dafoe, John W.	Winnipeg, Man.
Dennis, Hon. W. H.	Halifax, N. S.
Dickson, Wm. M.	Ottawa, Ont.
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Evatt, Rt. Hon. H. V.	Canberra, Australia.
Fairlie, Matthew	Toronto, Ont.
Gordon, Charles	Toronto "
Gordon, Hon. Mr. Justice P. H.	" "
Hale, C. H.	Orillia "
Harrington, Col. Gordon S., K. C.,	Halifax, N. S.
Hofmeyr, Hon. J. H.	Cape Town, South Africa
Hunt, Lawrence	New York, N. Y.
Kenrick, J. B.	Toronto, Ont.
Lascelles, Hon. Allan	London, England.
Laski, Prof. H. J.	" "
LeSueur, R. V.	Toronto, Ont.
MacCormac, John	Washington, D. C.
McLean, J. S.	Toronto, Ont.
~~Meighen, Rt. Hon. Arthur (2 copies)~~	~~Toronto~~
Meighen, T. R. (Capt.)	Halifax, N. S.
Naylor, A. E.	Toronto
Nichols, M. E.	Vancouver, B. C.
O'Leary, Grattan	Ottawa, Ont.
Penny, Arthur G.	Quebec, P. Q.
Perry, Gordon	Toronto, Ont.
Queenborough, Rt. Hon. the Lord	Hatfield, England.
Reford, Mrs. R. W.	Montreal, Que.
Sanderson, M. A.	Toronto, Ont.
Smith, Charles B., K. C.,	Halifax, N. S.
Smuts, Rt. Hon. Jan C.	Pretoria, South Africa.
Wallace, Prof. M. W.	Toronto
Watts, Balmer	Edmonton, Alta.
Webster, Dr. Clarence	Shediac, N. B.
Wylie, Sir Francis	Oxford, England.

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Sir Francis Wylie, Worton Ridge, Boar's Hill, Oxford, England
John C. Farthing, Bishop's College School, Lennoxville, P.Q.
The Librarian, Balliol College, Oxford, England
no The Librarian, McGill University, Montreal, P.Q.
—The Librarian, Littauer Center, Harvard University, Cambridge, Mass.
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Col. Gordon S. Harrington, K.C., Halifax, Nova Scotia
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Hon. J.H. Hofmeyr, Minister of Finance, Cape Town, South Africa
Leif Egeland, M.P., House of Assembly, Cape Town, South Africa
Could be omitted. no → R.A. MacKay, Professor of Political Science, Dalhousie University, Halifax, Nova Scotia
H.J. Laski, Professor of Political Science, London School of Economics, Houghton Street, Aldwych, London, W.C.1, England
R. Bassett, c/o the Macmillan Company, London, England
John Cedarleaf, Department of Political Science, Brown University, Providence, R.I.

(13)

I don't want to send one with my card to Keith, but I think he should get a copy.

Would Smuts be interested?

I presume MacGregor Dawson will get a review copy; and the Oxford Press is presumably sending a copy to Marriott (I shall check on this).

I am sending copies to Morine and Jennings and Coldwell, as well as various relatives and close personal friends, and the Guggenheim Foundation.

I should perhaps explain that R. Bassett, in the list above, is the author of a very good short book on parliamentary government, whose exact title I forget. I think he will warmly appreciate a work which provides additional backing for his own views. I used to know him slightly at Oxford.

E.A.F.

The card I gave you Thursday was for John MacCormac. c/o Washington Bureau, New York Times
Most of my cards are locked in my desk, which simply won't open! I am sending these to start with.

Did you see the Gazette review, Saturday? Very friendly, but utterly incompetent. I believe Eaton is to do the Halifax Herald review.

E. A-F.

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DR. J. C. WEBSTER
SHEDIAC, N. B.
CANADA

144362

April 9,1943.

Right Hon. Arthur Meighen,

Thanks for your letter of the 2nd ins, in which you say that you are sending me a copy of Forney's "Dissolution of Parliament". It has not yet arrived. The title is suggestive and gives me an indication of the contents. I shall read it with great care,for I have been thinking much of late on the changes in our supposedly democratic way of life brought about by those now in power.

I give close attention to procedures across the border and am amazed at the freedom of criticism of President, Congress and bureaucrats indulged in by Press and Radio,and none of the critics are arrested for endangering the safety of the realm.

Here it is very different. We seem to be cowed and scared by the Dictators in Ottawa. However, The Globe stands up bravely and Judith Robinson hammers away.

Sincerely yours,

J. C. Webster

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3 Lakeview Terrace,
Ottawa, April 11, 1943.

Dear Mr. Meighen,

The review is a masterpiece. It makes the book look amateurish by comparison, and the references to me really make me blush.

As you invite my comments, I venture to call attention to a few slips of the typewriter and one or two other points.

P. 1, third paragraph from Marriott, last line: I think the word should be "ground".

P. 3, line 21: the "with" doesn't seem to fit the construction of the first part of the sentence.

Farther down on the same page: wasn't the title of the bill the "Parliament Bill"?

P. 7, line 13: the first word should be "on", shouldn't it?

P. 6: The constitutionality of some of the Governments of Ministers without portfolio was questioned, notably the New South Wales Government of 1856, and, I think, the Queensland Government of 1866.

Pp. 6-7: I feel a trifle dubious about the argument that you could hardly have been expected to carry on by proxy. After all, when the Governor called on you, you knew that King would not engage in a conference; it can surely be argued that in agreeing to take office, and in forming your temporary Government, you gave an implied assurance that you had a reasonable chance of carrying on for the remaining few days of the Session even though you could not be in the House yourself. Actually, the temporary Government did so carry on for some days, and but for Bird's action would almost certainly have finished out the Session. My own feeling is that this part of the reviewer's argument isn't necessary to your case, and is open to attack. Anyhow, I didn't intend to make such an argument in the book, as I consider your case absolutely impregnable without it.

P. 7, line 6: I wonder whether it mightn't be well to say, explicitly, again, "sworn as Ministers of departments"? I notice that Sandwell, in an otherwise excellent review, is foggy on this point.

I hope these comments don't seem ungracious. I need hardly say again how much I admire the review; it was more than kind of you to send it.

I am sorry you had the bother of calling the Oxford Press again. I must be more careful what I write you. I constantly fail to reckon with your unbounded kindness and generosity, and let slip some observation which you feel it necessary to act on. Please don't take so much trouble. I found out, after I wrote you the other day, that one of the book stores here had two copies of the book! I gather circulars have been sent to all M.P.s.

I trust you have seen Sandwell's review. He spread himself for nearly a whole page. McAree's review was also excellent. I think I have been very fortunate; and these favourable reviews at the outset will make it all the

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harder for the Free Press and Co. to squash the thing. I am looking forward eagerly to the blasts from that direction.

I understand one of my friends in Montreal intends to use quotations from my book to introduce a forthcoming article of his in "Culture" (the Franciscans' paper), and he is urging me to do an article for "Relations" (the Jesuit paper). So we may even get some favourable publicity among the French-Canadians, which is more than I ever ventured to hope for.

I don't know the history of Collingwood Reade's encounter with the Mounted Police, but can understand his feeling. Possibly, having made a nuisance of themselves to my father-in-law after I went to Cambridge, wanting to know where I was, and having been compelled to apologize, they are not anxious to try conclusions with me again!

I return the review herewith.

Yours sincerely,

Eugene Forsey

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THE ROYAL POWER OF DISSOLUTION OF PARLIAMENT
IN THE BRITISH COMMONWEALTH
By Eugene A. Forsey, M. A., (Oxon.) Ph.D.
Published by Oxford University Press.

.....

This is a book which will be welcomed and eagerly studied in Canada by all earnest students of our Parliamentary system and of public affairs.

The author, after a brilliant career at McGill University, had an equally good record as a Rhodes Scholar at Oxford. Subsequently, Dr. Forsey became a member of the staff of the Department of Political Economy at McGill and was later awarded one of the Guggenheim Fellowships, a distinction bestowed only on scholars of high academic attainments. In this book he proves himself a political student of a quality too rare in Canada and has contributed a very valuable public service by turning the revealing searchlight of truthful illumination upon what future historians can hardly fail to regard as a very unsavoury chapter in our national annals.

Sir John Marriott, the great British authority on constitutional problems, has seen fit, after reading the volume carefully, to give it his blessing in a foreword of unusual commendation. Sir John, as is well known, was for a long time Professor of Constitutional Law at Oxford, and, as well, had the advantage of being Member of the British House of Commons.

> "I hoped and felt sure," writes Sir John, "that no one would embark upon so difficult and laborious a task as that essayed by Mr. Forsey unless he was a close and conscientious student of the constitutional practice of Great and Greater Britain, and unless he was convinced of the importance of elucidating its mysteries, in the interest not merely of the academic students of political theory, but of the statesmen and jurists of the British Commonwealth of Nations.
>
> "My assurance has been completely justified, my hope has been more than fulfilled.
>
> "By this exhaustive treatise Mr. Forsey has placed Constitutional historians and commentators as well as practical politicians under a deep debt of gratitude. His work is essentially a monograph. The author concentrates attention upon a single point: the power of the Head of the State, King, Governor, or Lieutenant-Governor, to dissolve Parliament proprio motu, or to grant or refuse a dissolution to his responsible advisers. Never before has this point been tackled so thoroughly, nor can it ever be necessary again to go over the grounds covered down to 1939."

Again he says:

> "it is his (Forsey's) conspicuous superiority to partisanship, not less than his conscientious scholarship and profound research that embolden me to recommend without hesitation a work original in conception and execution, and, as I judge, well calculated both to enlighten scholars and afford guidance to statesmen."

It is quite true, as Marriott says, that Dr. Forsey handles his subject in thorough and masterly fashion. He maintains his reader's interest to the close. The earlier chapters are devoted to an exhaustive review of precedents right up to 1939 in Great Britain, in the British Dominions, States and Provinces, and as well of the highest authorities in all these countries, whether in academic circles or in the field of statesmanship. It is, however, the fifth and sixth chapters which Canadian readers will find of the most absorbing importance. These are wholly devoted to a most elaborate analysis and appraisement of the famous Constitutional crisis of 1926, which arose through Lord Byng's refusal of a dissolution to Mr. King, and his grant, after Parliament had sat and sustained Mr. Meighen's Government for some days, of a dissolution to Mr. King's successor. Dr. Forsey relies for his facts solely on the records. While it is true that the main surface features have long been familiar to many, it is quite certain that never before have the circumstances and developments of the crisis been examined with anything like such meticulous care. It will be difficult for readers, no matter what might have been their preconceptions, to escape the conclusion that the author has made out a complete and irrefutable vindication of the conduct of the Governor-General of that day. He has made good his own statement in the preface—"Lord Byng's course from start to finish was not only entirely constitutional but essential to the preservation of constitutional liberty."

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Those who, as a result of representations made by a number of prominent people at the time, felt that the Governor-General had behaved in an undemocratic and unconstitutional fashion, will hardly be able now to avoid the conviction that at long last belated justice has been done him by the publication of this book. The vindication of Mr. Meighen's course throughout the crisis is, of course, as complete as is the vindication of Lord Byng himself.

The events which form the basis of this treatise were, in brief, as follows:

In the Parliament dissolved in 1925, in a House of 235 Members Mr. King had 117 followers, the Conservatives 50, Progressives, Labour and Independents, 68.

After the election on October 29th, Mr. King had 101 Members in a House of 245, the Conservatives 116, Progressives, Labour and Independents, 28. The Prime Minister himself and eight other Ministers had lost their seats.

Mr. King on November 5th announced that he had the right to take any one of three courses--to resign at once; to meet the new House of Commons, or to advise an immediate second dissolution.

The House met on January 7, 1926. Government majorities, up to and including June 25th, were 5, 10, 10, 1, 7, 8, 11, 15, 6, 9, 15, 15, 15, 1, 6, 8, minus 2.

On June 25th the House had debated for considerable time a motion of Mr. Stevens, Member for Centre Vancouver, in which it was declared that the conduct of the Prime Minister and the Government in respect of the administration of the Department of Customs was "wholly indefensible" and that the conduct of the Minister of Customs was "utterly unjustifiable." To this a sub-amendment had been moved in which the words censuring the Prime Minister and members of the Government were deleted, but in which others were censured and a demand made for continuance of the investigation. Mr. King announced that the Government would support this sub-amendment deleting censure. A vote was taken and the sub-amendment supported by the Government was defeated by a majority of two.

After this defeat on June 25th, Mr. King advised immediate dissolution. The Governor-General refused on the ground that before a second dissolution all reasonable expedients should be tried and an opportunity to carry on the business of Parliament should be given the Leader of the then Opposition.

Mr. King thereupon (Monday June 28th) resigned, and at once announced to Parliament that there was no Prime Minister and no Government. He refused a request from the Opposition Leader to confer as to disposing of the unfinished Sessional business. This deliberate failure to continue in office until a new Government could be constituted was without precedent in British Parliamentary history.

The Governor-General then sent for Mr. Meighen and made request that he form a Government. Mr. Meighen accepted, and, with the single object of finishing what remained of Sessional business and avoiding an adjournment of five or six weeks highly inconvenient to Members from a distance and especially to farmer Members at that time of year, constituted a temporary Government with himself as Prime Minister and six Ministers. These were duly sworn as Privy Councillors, and for the few remaining days of the Session were assigned to the several Departments as acting Ministers. Mr. Meighen himself, being unable to avoid accepting a "position of emolument" as Prime Minister, automatically vacated his seat. The others did not.

Had Mr. Meighen constituted then a Cabinet of the customary numbers, each with portfolio and salary, all would have vacated their seats, thus reducing his strength in the House by no less than sixteen.

Mr. King denied that the new Prime Minister had any right to an adjournment pending re-election of Ministers.

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From June 29th to July 1st inclusive, the incoming Government carried on against repeated challenges on a variety of motions, including want-of-confidence. Its majorities were 12, 10, 10, 7.

Late on July 1st a vote was taken on a subtly worded amendment, in effect declaring that the Meighen Government was "unconstitutional." A Progressive Member who had been paired voted "yea" in error against his pair, but the vote could not be rescinded under the rules and the Government was defeated by one. All these debates and divisions, of course, took place in Mr. Meighen's enforced absence from the floor of the House.

Mr. Meighen then requested dissolution and his request was granted. An election took place on the issue; the country was harangued against "Downing Street domination" and the Government was defeated.

Even if nothing but true and honest representations had been made to the electorate, it could scarcely be argued that the merits of an issue such as this could be justly decided by a popular vote. As well might the thousands of questions daily reviewed by our Law Courts be decided by a counting of ballots.

Dr. Forsey's book discusses fully and clearly the merits of Lord Byng's refusal of dissolution until an alternative Government had been tried, and also with the merits of his granting of dissolution after such alternative Government had been tried, and failed. Not only does he deal with the powers of the Governor-General but very definitely with the duties of the Governor-General, and establishes, if ever anything was established, that Lord Byng was fully within his powers at all times and, as well, was at all times strictly performing his duty to the Parliament and people of Canada.

It is difficult to compress the very succinct and strongly-supported case which the author presents. All his fortifying data are relevant. There is nothing irrelevant in these pages. But, to try to summarise—Mr. King, on June 28th, made his protest in Parliament in the following words:

> "For a hundred years in Great Britain there is not a single instance of a Prime Minister having asked for a dissolution and having been refused it. Since this Dominion was formed there is not a single instance where a Prime Minister has advised a dissolution and been refused it."

Here was an unqualified statement of fact, and Dr. Forsey has no difficulty in demonstrating that it was wholly wrong. He proves by chapter and verse that on November 11, 1910, the Hon. H. H. Asquith, then Prime Minister of Great Britain, when a crisis had arisen over the Parliament Bill, submitted a request for dissolution to King George V. His request was refused. True, it was later granted when Mr. Asquith complied with conditions which the King had meanwhile laid down. The fact of the refusal, however, is supported by a long array of authorities who certainly would know. Sir Almeric Fitzroy, Clerk of the Privy Council, was in the thick of the crisis. He noted in his diary:—

> "November 16: (The Liberals are) attempting to force a dissolution.....without having a technical case to claim from the Crown the exercise of its prerogative in that regard. Lord Morley, in discussing the matter this morning, was perfectly frank that the King's position in reference to Mr. Asquith's request was a very strong one, and that of the Government, 'so far as it was at present developed', very weak. The surprising thing is that a statesman of Asquith's experience and resource should have committed himself to a demand which constitutional practice and the dignity of the Crown obliged the King to refuse."

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Lord Newton's Life of Lord Lansdowne, then Leader of the Conservative Party in the Lords, confirms Sir Almeric Fitzroy. Lord Esher, a confidential adviser of more than one Sovereign, states that the King refused. Indeed, the official Life of Lord Oxford and Asquith itself corroborates the account of the refusal.

Dr. Forsey also shows that since Confederation there have been three refusals of dissolution in Canada:—in Quebec in 1879, New Brunswick in 1883 and British Columbia, 1903. Still more important, he is able to cite no less than forty refusals between 1867 and 1926 in other parts of the Empire, including Dominions. There was also the well-known case in the Dominion of South Africa as late as 1939, though this, of course, was long after the controversy of 1926.

That the right, and what is more, the duty, of refusal in proper cases still exists is supported by practically unanimous authority not only in the nature of precedents but in the pages of text writers and in pronouncements of distinguished Parliamentarians of Britain. The latter include Mr. Gladstone, Mr. Disraeli, Lord Aberdeen, Mr. Asquith (speaking as recently as December 18, 1923), Mr. Lloyd George and Sir John Simon. One definite conclusion is that (unless at least a new major issue of public policy has arisen) it is the duty of the Governor-General to refuse a dissolution to a Prime Minister who has had the last dissolution and who, finding it difficult to carry on, seeks another soon after, provided always another Leader can be found able and willing to constitute a Government with what he believes reasonable chances of Parliamentary support. In 1926 Mr. King had had the previous dissolution less than ten months before. Certainly no new issue of public policy had arisen. Lord Byng, therefore,

/ +

Had he acted otherwise, he would have given sanction to a practice which would enable a Prime Minister so disposed to snap his fingers at one electoral verdict after another until he got one to suit him.

[illegible] the words of censure from the Stevens' motion, and supported officially by the Government, had just been rejected by the House. The grant of dissolution, therefore, meant that the debate on this motion of censure had to die and that the vote could never be taken. The country was not to know what was the judgment of Parliament after debate on grave charges of maladministration. Dr. Forsey finds that neither in Britain nor in any British Dominion, nor in any Province nor any State nor any Colony, has the King, Governor or Lieutenant-Governor ever so much as been asked for dissolution under such a circumstance. "No Government in this position," he says, "has ever been refused dissolution. No Government in this position has ever asked for dissolution. The refusal was unprecedented—so was the request." Nor has it ever so much as been claimed that any Prime Minister, except Mr. King, has at any time in history dared to ask for the dismissal of the jury before which he was being tried. To quote:

> "A Cabinet condemned by the High Court of Parliament is certainly entitled in some circumstances to appeal to the electorate, just as a prisoner condemned in a lower court of Justice is entitled in some circumstances to appeal to a higher court. But no prisoner under trial in a lower court is ever allowed, while his trial is proceeding and before the lower court has a chance to pronounce its verdict, to bring the proceedings to an abrupt close by appealing to the higher court. Why should a Cabinet while its trial before the House of Commons is proceeding and before the House has had a chance to pronounce its verdict be allowed to bring the proceedings to an abrupt ~~debate~~ close by appealing to the electorate.....Of a request for dissolution made and granted while a motion of censure was under debate neither Mr. King nor anyone else has ever produced a single instance in Britain or the Dominions or the Colonies."

The country had an absolute right to the judgment of Parliament on a motion censuring a Government for misconduct.

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But the most astonishing feature of Mr. King's conduct still remains. It will be noted that the Stevens' motion censuring the Government was still under debate and undecided when the Prime Minister requested dissolution. It will be noted also that a sub-amendment expressly deleting the words of censure from the Stevens' motion, and supported officially by the Government, had just been rejected by the House. The grant of dissolution, therefore, meant that the debate on this motion of censure had to die and that the vote could never be taken. The country was not to know what was the judgment of Parliament after debate on grave charges of maladministration. Dr. Forsey finds that neither in Britain nor in any British Dominion, nor in any Province nor any State nor any Colony, has the King, Governor or Lieutenant-Governor ever so much as been asked for dissolution under such a circumstance. "No Government in this position," he says, "has ever been refused dissolution. No Government in this position has ever asked for dissolution. The refusal was unprecedented—so was the request." Nor has it ever so much as been claimed that any Prime Minister, except Mr. King, has at any time in history dared to ask for the dismissal of the jury before which he was being tried. To quote:

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"No Prime Minister," says Dr.Forsey, "can ever justify denying the country that right. No Prime Minister except Mr. King ever ventured to try. Moreover this is one right of Parliament and the people which the Crown alone can protect. If the Crown fails to do so, Parliament and the people are quite helpless to protect themselves."

The cold truth is that Mr. King tried to use the Crown's Representative as an agency for destroying the High Court of the Nation, because (judging from the adverse vote on the sub-amendment) it was ready to convict his Government of misconduct. That the adverse vote correctly indicated the opinion of the Commons was later established when, after Mr. King's resignation and while the Meighen Government was in office, the Stevens' vote of censure was carried by ten majority. Dr. Forsey quotes with approval the statement of principle made by Mr. Meighen at the time in the following words:

"To demand such a right (of dissolution) is not to plead for responsible government: it is to plead for irresponsible government: to demand such a right is not to uphold our parliamentary institutions: it is really to stifle those institutions: to demand such a right is not to plead the cause of parliament: it is in effect to choke and strangle and prevent parliament from expressing its will.....The plain duty of the Governor- General is not to weaken responsible government, not to undermine the rights of parliament....it is to make sure that the rights of parliament are respected, that the still higher rights of the people are held sacred."

The author has been able to find no instance where the soundness of this reasoning has been disputed.

Strange as it may seem to anyone who knows the meaning of the words "indefensible conduct" and "unjustifiable conduct" Mr. King afterwards declared that there had been no motion of censure before the House.

said Mr. King,

"No vote which could be termed a vote of censure in the parliamentary sense of that term was under debate at the time dissolution was requested."

That is to say, a motion which declares a Government's conduct to have been "wholly indefensible" and "utterly unjustifiable" is not a motion of censure!

Mr. King's dilemma is clearly unenviable when one reads the disclosures which follow.

Dr. Forsey shows that in the debate on the Stevens' motion Mr. King himself declared ~~think~~ it to be a motion of censure no less than five times. He was describing it as a motion of censure by way of ground for his appeal to his followers to defeat it. These were his words:

"The amendment moved by the honorable member for Vancouver Centre.....is largely confined to a vote of censure on Ministers of the Crown.....The amendment of the honorable member for Vancouver Centre was aimed primarily at passing censure on the Prime Minister and members of the Government, at passing censure on the Honourable Mr. Boivin.....charges in the form of censure against myself and members of the administration.....in the nature of a vote of censure."

Besides, the Minister of Customs, who was specially censured, used the same language. He described it as "the motion of censure contained in the amendment moved by my honourable friend from Vancouver Centre."

Further, the Minister of Agriculture said:—"What is the charge? It is that this government is subject to censure."

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It is inconceivable that Mr. King would have gone to the incredible length of impeaching the propriety of his own words if he had not known that no right to ask for dissolution existed while a motion of censure was under debate. The author of this book has not only found no precedent but he has found no instance where any authority on the subject has gone so far as to say that he was justified in asking for dissolution in the middle of a debate on censure.

That Mr. Meighen had, on June 28th, justifiable reason for believing that his alternative Government could carry on is supported by the fact that it did carry on. It carried four divisions by majorities which averaged more than had the majorities of Mr. King. There is the further fact that it was defeated on a vote cast in error and in Mr. Meighen's enforced absence from the House and consequent inability to direct his forces and make his own appeal. Once, however, the defeat came, the situation, Dr. Forsey says, was clearly different from that in which Mr. King requested dissolution. The House then had failed to support either of the stronger Parties. Mr. Meighen had had no previous dissolution. Every reasonable expedient had been tried. The result, due though it was to a false vote and to defection of the Progressives from their declared intentions, nevertheless showed that an election was necessary. The grant to Mr. Meighen was in every way supported by authority and could not by any sensible reasoning have any ex post facto effect on the soundness of Lord Byng's decision, on June 28th, to deny dissolution to Mr. King. Further, and more important still, Mr. Meighen had not asked for dissolution while there was any motion of censure of his Government before the House. The only motion of censure had been decided and had gone in his favour and against Mr. King.

The author is especially convincing on the subject of the Constitutionality of Mr. Meighen's temporary Government. On this point Mr. King, in his stampede for the votes of Progressives, was particularly extravagant and reckless. The new Government was, he said, "a group of gentlemen not one of whom was a Minister of the Crown."....."There is not a single contract signed by honourable gentlemen opposite which will stand for an hour in a Court of Law."....."There are no Ministers opposite." "We have reached a condition in this country that threatens Constitutional liberty, freedom and right in all parts of the world."

Dr. Forsey shows, first, that a man becomes a Minister of a Government by being sworn of the Privy Council and then being invited by the Prime Minister to be a member of the Committee of the Privy Council which is called the Government. All Mr. Meighen's Ministers were so sworn and so invited. The status of a Minister of the Crown is not in the least altered by his becoming as well a Minister of any Department. No added virtue comes to him merely because he is entitled to salary. There were produced the unequivocal opinions of the Deputy Minister of Justice and of the Clerk of the Privy Council, who would seem to be the highest authorities on the question. These were that the appointment of every Minister was perfectly legal, regular and Constitutional. The author washes out Mr. King's breast-beating contentions by reciting a long line of cases, in Canada and other portions of the Empire, where Governments have been similarly constituted, some in which only one Minister (as in Mr. Meighen's case) was a Minister with portfolio, and indeed, produces cases where the entire Government were Ministers without portfolio. The constitutionality of none of these Administrations was ever so much as questioned. In one instance the Government of Great Britain was constituted by two Ministers alone, and these remained the sole Government for three weeks and one day. The devastating answer to Mr. King's pretentions closes with a proof that if Mr. Meighen's Government was "unconstitutional" so had been all Governments of Canada for fifty out of the seventy-five years of its existence, and so is Mr. King's present Administration.

The diatribes of Mr. King and Mr. John S. Ewart appear now in a strange light. These men roved the country or bespattered the press with declarations that Mr. Meighen never had any justification for his belief that he could carry on in the Parliament of 1926. Dr. Forsey makes it plain that he could hardly have been expected to carry on, after Mr. King by rudely abandoning his functions and leaving the seats of Government vacant against all precedent made it necessary for his successor to lead his Administration by proxy until the Session was finished. Mr. King categorically

(over)

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denied that Mr. Meighen had any right to adjournment in order to re-elect himself and his Ministers. He, therefore, insisted that unless the incoming Prime Minister could command a majority in a Parliament from which he must himself be absent and which he could not lead, he had no right to express his belief to the Governor-General that he could carry on. Still more, by demanding that all Ministers must be sworn and the portfolios filled, he put himself in the position of proclaiming that the incoming Prime Minister must not only be able to lead his forces by proxy but that he must be able to command a majority in the absence of fifteen of his colleagues. Surely no reasonable person could read such an undertaking into the implied assurance given by Mr. Meighen when he undertook to form a Government. The honourable and proper thing for Mr. King to have done was to have conferred, as requested, on arrangements for the closing of the Session and the saving of the Session's work, and then would have come the time for the incoming Prime Minister and his Cabinet colleagues to seek re-election. His contrary, perverse and unworthy conduct may have brought upon his head the halo of political "astuteness" but it is a sorry story under the steady and abiding light of history.

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Oxford University Press

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144372

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320 Bay Street,
Toronto, Ontario.

9/393

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1	Royal Power of Dissolution of Parliament-Forsey	5.00	D	Postpaid.

Sent to - John Lederle, Esq.,
Dept. of Political Science,
Brown University,
Providence, R.I., U.S.A.

(Include Forsey Compliments card)

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144374

520 Bay Street, Toronto,
April 13, 1943.

Dr. Eugene Forsey,
5 Lakeview Terrace,
Ottawa, Ontario.

My dear Eugene:

I just returned from Montreal and find your letter of April 11th. Really when I read it over, I cannot see how I was so careless in the review. Of course, you are right on every single point. I have no excuse at all because my work was completed five days before the printing. The "with" on page 3, which is the really bad English, happened this way. I had started out with the words "Dr. Forsey's book deals with the merits" and consequently the "with" in the third line was correct. When I changed "deals with" to "discusses" I forgot to follow the consequence.

You are quite right in being dubious about that sentence at the end of page 6. I did not express it correctly. It is just a matter of not putting sufficient time on something which was well worth it. What I should have said was something like this:—that the task of carrying on was made vastly more difficult by M. King's rude and unprecedented conduct in abandoning office, and by his equally rude refusal to assist in any way in finishing the meagre amount of work remaining, to arrive at prorogation.

I had not observed that there had been any question of the constitutionality of the New South Wales Government of 1856 and the Queensland Government of 1866. Surely they could not have been questioned merely because the Ministers were without portfolio. I did not think they had Parliamentary bounders of that variety in other assemblies.

Yes, I wish I had used the words "sworn as Ministers of Departments" on page 7 instead of "sworn and the portfolios filled."

(over)

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I read Sandwell's review and was indeed surprised at the very favourable views to which he gave expression. He has always been a strong Liberal and King man, and I had a very unpleasant run-in with him in 1935, out of which he emerged rather badly. I do not at all agree with him in his intimation that the charge of unconstitutionality could not have been laid if I had had the Ministers appointed as Ministers with a provision that there be no salary. Having them appointed without portfolio was simply another way of doing the same thing. It resulted in a situation against which there could be no substance to an indictment. One cannot do more than that. There can be a hot-air indictment against anything.

I am very glad indeed about the article which is to appear in "Culture" and that you are writing for "Relations."

With very kindest regards,

Yours very truly

AM/E.

I - P.S.—Besides, the plan I adopted followed the precedents.

A. M.

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144376

3 Lakeview Terrace,
Ottawa, April 16, 1943.

Dear Mr. Meighen,

The "Telegram" certainly went to town on my book! A friend in Toronto sent mother the copy. Then, last night, when I saw Lou Golden in the station in Toronto, between trains, he told me about the cartoon. Of course I promptly bought a copy of that issue. Lou says he is trying to get the original of the cartoon for me. His own review was very good, I thought.

This week's "Financial Post" has a good short review, which practically invites King to issue a reply (it offers the same invitation to Keith). I rather hope he may! Judith Robinson says I have got King in his tenderest spot, "right in the history".

Sandwell is anxious for me to do two articles on the Crown, and I propose to do so almost at once. What his idea is in this I don't know; but I see no reason to refuse. I recall your account of the run-in in 1933; you may recall that I had a bit of a run-in with him myself, more recently. However, I am quite willing to use his paper to spread a true idea of the place of the Crown, whatever his past shortcomings.

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Of course Sandwell's remarks about the temporary Government are feeble. That is the one place, I think, where he allows his feeling about you to appear.

You may be interested to know that David Lewis, National Secretary of the C.C.F., called up the other day, very anxious to have me present a copy to the C.C.F. National Office. I was a trifle amused. I told him I was all out of copies now; added that if I'd thought they'd be interested, I should have set a copy aside for them at the outset, but that I'd supposed they'd hardly be interested. He said that on the contrary they were most interested; that the subject was of the greatest importance, and might crop up again as a practical issue after the next election; and that it was really essential for the C.C.F. office to have a copy. He told me, and Coldwell himself told me, that Coldwell had read the whole thing and was immensely impressed. Another of the C.C.F. Members of the House has also read it and seems equally impressed. As I had been very doubtful of the reception it would get in that quarter, I am much pleased.

Please excuse the bad typing. I didn't sleep well on the train, and this is the result.

Yours sincerely,

Eugene Forsey

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144378

P.O. Box I36
Nassau N.P.
Bahamas.

April I7th

My dear Mr Meighen,

Very many thanks for your letter, and also for saying you have most kindly told the Oxford Press to send me a copy of Dr Forsey's book which- naturally- I am most eager to read. I hope it will survive the trip out.

Yes- I too wish Julian could have lived to see this vindication of his actions, though you knew him well enough I think- to realise that he was a man who followed his own views of right and troubled no further about results, for his own conscience was clear. And so he had put all that dirty job behind him and rarely gave it another thought. He loved Canada and Canadians as much as I did, and because one was a mean, little double-crosser/it didnt affect his affection for the reat of the people, I am glad to say. For myself I neither forgave nor forgot what happened- and the offender knows that every time he sees me, with the result that I have NEVER seen anybody so uncomfortable as he is on those occasions!! I confess that it gives me infinite satisfaction to add to that discomfort, whenever I can do so, without its being obvious to other people. You can trust a woman to be able to this sub-rosa for, of torture. We are I feaf, as a sex, of that sadistic turn of mind which impels small boys to pull the wings off flies, and to enjoy the poor fly's helplessness.

I think you were quite right in feeling that had you put pen to paper in old days it wouldnt have carried the proper weight, because feelings were high at the moment, and then judgements are always in abeyance and faulty. So even though Julian hasnt lived to see this vindication it may carry more weight to the public at large after this long passage of time, and written by a man who had nothing whatsoever to do with the issue.

Both you and "R.B." have I know always felt that perhaps something more could and should have been done at the time- but frankly I dont see what was possible

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then. I know " R.B." once said to me- after he came into office-that though he had always known it was " a dirty piece of work" he had never realised HOW dirty till all the papers came into his hands. One person who did realise it from the outset,was that queer old fellow Senator Murphy,and I remember the vindictiveness that animated him right up to the end about it all and which led to his issuing that sort of monograph which he scattered abroad to those who he thought might some day rise up in vidication of my husband. I believe Dr. Forsey managed to get hold of that flaming piece of vitriol. In life the wheel generally comes full turn in course of time and perhaps the present revelations- or whatever you like to call them- may bring repercussions when the next general election comes along.

DO let's meet when I am back in Ottawa,at the grubby old Roxborough,where I am returning early in June- flying from here to New York and on via Montreal. It's nearly three years since I came out and we have never managed to meet. Better luck perhaps when I am back now. It would be good to have a talk and to chuckle over old days.

This is a comic place,and politics here are also of the doublecrossing variety, so that the present Governor hasnt an easy time and I must say- though I do not hold a brief for most things he has done-that he has worked hard and well in a thankless task.

Yours very sincerely

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144380

520 Bay Street, Toronto,
April 19, 1943.

Dr. Eugene Forsey,
5 Lakeview Terrace,
Ottawa, Ontario.

My dear Eugene:

I received yours of 16th and also a further note this morning. The cards will now be enclosed with the books and the remainder of those to whom you requested them sent will receive them shortly.

Yes, the Financial Post article was very good. It is rather astonishing that the Gazette should be about the only paper to have a very poor review.

The Financial Post will not, I think, succeed in getting Mr. King to make any defence. I would rather expect Keith would try. On the other hand, he knows that you are on the ground here and that you know the job better than he does, and he may have developed some discretion in later years.

I am glad you are doing the two articles on the Crown for Saturday Night.

Mr. Lewis of the C. C. F. is absolutely right. We have got into a situation in Canada where the powers and duties of the Governor-General become of very practical importance.

I am enclosing a news report, accompanied by an editorial on same, from the Globe and Mail. Am wondering if Mr. Justice Hope, whom I know very well, has read your book. He very probably will get one when he peruses this editorial. I am doubtful about the use of that word "powerful" as applied to Berriedale Keith. I think he sold that fancy name of his at a high price.

Yours very truly,

AM/E.

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144381

520 Bay Street, Toronto,
April 19, 1943.

Oxford University Press,
480 University Ave.,
Toronto, Ont.

Dear Sirs: Attention Mr. J. C. Irwin

Further to Mr. Meighen's letter of 9th instant, I am enclosing herewith Dr. Forsey's card for the copy of "Dissolution of Parliament" which is to be sent to John Lederle, Department of Political Science, Brown University, Providence, R. I.

It may be that you have already sent the volume with your card marked "Compliments of Dr. Forsey" and if so, kindly disregard this letter.

Yours very truly,

E.
Encl.

Private Secretary.

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144382

320 Bay Street, Toronto,
April 21, 1943.

Dr. Eugene Forsey,
3 Lakeview Terrace,
Ottawa, Ontario.

My dear Eugene:

Rather than bother making a copy, I am taking the liberty of sending you the original of a letter received today from General Clark. The correspondence will be very interesting to you indeed. Please return.

Yours very truly,

AM/E.
Encl.

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The locksmith opened my desk yesterday, and here is a by-product of his efforts. I don't know whether they are now of any use.

I hear that the Parliamentary Library now has three copies of the book, all out in the hands of Members. Hanson asked me to autograph his copy, and wants me to show him all the reviews!

E. A. J.

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144384

3 Lakeview Terrace,
Ottawa, April 24, 1943.

Dear Mr. Meighen,

Thank you very much for sending me General Clark's letter and its enclosure, which I am returning herewith. It is not only very interesting but very cheering. I am particularly delighted to know that Mr. Nichols is doing a review. His wife's parents, Senator and Mrs. Wood, were very old and dear friends of my family, of three generations' standing. I hope Colonel Urquhart will write the Province. The more publicity this matter gets, the better for the country. Of course I am not displeased to have my work favourably commented on! But that is a very minor point indeed.

I wonder how long it will be before some of King's claque are roused to attempt a defence, or even (what is more probable) a burst of personal abuse against me.

Curiously enough, the same mail which brought your letter brought one from Cahan, in which he had a good deal to say about 1940. He wishes very much that we could get the record of what went on between King and Tweedsmuir then. So do I. But I rather fancy King has taken care to see that every bit of the record he can lay his hands on has been destroyed.

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I hope that Colonel Urquhart has read the book itself, and not just the Gazette review. I have no doubt that if he hasn't, he will.

By the way, I wonder if E.J. Garland will see it? I fancy someone will draw it to his attention. Perhaps it will shake his faith in old Ewart!

Yours sincerely,

Eugene Forsey

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144386

320 Bay Street, Toronto,
April 24, 1943.

Dr. Eugene Forsey,
5 Lakeview Terrace,
Ottawa, Ontario.

My dear Eugene:

I always get something worthwhile out of your letters, and certainly your interview with the C. C. F. M. P. was most illuminating. I feel like sending copy of this paragraph, without the name of the author, to the Editor of the "Star." However, maybe they would imagine who the author was, and I will not do so without your authority.

In the issue of "The Round Table" of March '43, on page 163, the writer has quite a paragraph about myself. In it he has the usual intelligentsia co ment as a sort of a postscript subtraction from any claim to greatness. He says that I made many mistakes for which I paid heavily.

What "The Round Table" has in mind is 1926. At that time John Stevenson was their representative at Ottawa. He wrote an account of the controversy. No doubt under some instigation they refused to publish it until it was submitted for review to Vincent Massey. What it became after that, it was just too bad. I wrote them a letter vigorously taking them to task for their conduct and the account of the affair they ultimately published.

I intend to see that a copy of your book gets to them and will ask them to read their own treatment of the subject and the correspondence with myself after they get through reading Eugene Forsey.

Have not seen the review in the Montreal "Star" and hardly think I can get a copy here. May be you could send it down to be returned.

Yours sincerely,

AM/E.

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144387

3 Lakeview Terrace,
Ottawa, April 26, 1943.

Dear Mr. Meighen,

I don't wonder you feel as you do about sending that paragraph to the Star. But as it was a matter of private conversation, and as I specifically told the gentleman in question that I'd be telling ~~MM~~ you about it, I have no doubt that it would be traced at once. So I think it had better remain private, though it is a pity that such a gem should not appear.

I must look up the Round Table article in the last issue. I am very interested indeed in what you tell me of the article they had in 1926. I read it some time ago, and, as I thought John was doing their Canadian stuff at that time, was mystified by its badness, and still more by its very peculiar type of badness. Really, the behaviour of supposedly reputable journals in such matters is sometimes absolutely inexcusable. I hope when the Editor (who, unless the editorship has been changed recently, is an old friend of mine, of Balliol days) reads my book he will realize just how he or his predecessor was bamboozled. If you get any word from him, and his name turns out to be H.V. Hodson, please let me know, as I may then want to take a hand in the game myself. It is time that people

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outside this country as well as in it were made aware of the fact that you are the most lied-about man in Canadian ~~XXXXXX~~ history. Hodson might pay some attention to me, as he knows very well that I am not a Conservative, and indeed probably considers my views much more "Left" than in fact they are, or ever have been. However, if it is Hodson, and he reads the book, further comment from me should be superfluous.

The Montreal Star review was really not worth reading, but I shall send it to you as soon as it comes back from Saint John. My wife has sent all the reviews down there for her ~~XXXX~~ parents to see. The bundle should be back in a few days.

Am in the throes of composing my articles for Saturday Night, a hideous process, which always leaves me like a wet dish-rag for about two days afterwards. I hope my typing is going to improve as the day wears on; this is atrocious.

Yours sincerely,

Eugene Forsey

I wonder who is doing the Round Table stuff now. Doubtless one of the numerous muddle-headed Liberals or ex-Liberals who infest the landscape and are so largely responsible for the present condition of public opinion in Canada.

E.F.

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144389

320 Bay Street, Toronto,
April 26, 1943.

Dr. Eugene Forsey,
3 Lakeview Terrace,
Ottawa, Ontario.

My dear Eugene:

Thanks for returning Clark's letter, etc. I noticed just after my last went away, that I had forgotten to answer the portion wanting to know something about the recent Judgment by Mr. Justice Hope.

This Judgment was on an action brought by way of quo warranto for a declaration that Members of the House had no power to extend a single Parliament and that the regular term having expired they were no longer Members. Certain named defendants made a motion to have the action struck out as vexatious and frivolous. Mr. Justice Hope ruled in their favour, claiming that the Courts had no authority in the premises.

I examined his Judgment this morning. It is very lengthy—nineteen pages. I am making the following quotations therefrom:

1. "It should not be overlooked that, aside from the reservation of the Crown prerogatives and the power of the Lieutenant-Governor, from the operation of the 1942 Act, and in the light of any further possible extensions, which may be sought by the Legislative Assembly hereafter, there always exists as a safeguard against unwarranted prolongation the right of the Lieutenant-Governor in his exercise of the Royal Prerogative to refuse assent to the enactment."

2. "Any unwarranted extension of the Sovereign power of the Legislature for ulterior or party political purposes can well be prevented by the withholding of the necessary assent by the Lieutenant-Governor to any Bill for such purpose."

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Dr. Eugene Forsey,
Ottawa, Ontario.

5. "In such an eventuality the power of the Crown to force dissolution may well be one of the few safeguards against a dictatorship and a forced dissolution would be the only possible Constitutional means of preserving the rights of the people."

You will observe in the above that Mr. Justice Hope affirms the existence of the Lieutenant-Governor's prerogative(a) to refuse assent to Bills and (b) to dissolve the Legislature, as a practical safeguard of the people's rights. I have not given close study to this phase of the subject, but I very much question if Mr. Justice Hope is right in either case. I am afraid the right to refuse assent to Bills has Constitutionally died of obsolescence. I am also at least doubtful of the power of the Lieutenant- Governor to dissolve a Legislature without advice. He could, of course, dismiss his Ministers and then procure dissolution, if he could get others ready and willing to give the advice.

Would be glad to have your comments.

I am sending Colonel Urquhart a copy of your book and also a copy of the review in the "Telegram" and of the "Telegram" editorial.

I am very interested in Mr. Cahan's curiosity about 1940. He will never be able to find out a thing. When Lord Tweedsmuir read the Speech from the Throne dissolving Parliament in 1940, he seemed to me to be in a distressed and despairing mood. I can never believe that he did not agree to perform his part of the function most reluctantly. There won't be a single line on record, or at least not a line that anyone will ever be able to reach.

John Stevenson tells me today that he had a talk with Grattan O'Leary and that Grattan is writing a review of the book himself for the Ottawa Journal. He thinks they are in a bad way over the book in Ottawa, and without a doubt they are.

(over)

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I don't suppose E. J. Garland will see the book, and I would not desire to send him one. You may definitely assure yourself that he knew what he was doing all right in July 1926. He was quite able to comprehend the trickery and I would not be sure he was not a party to it.

Yours very truly,

AM/E.

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144392

320 Bay Street, Toronto,
April 27, 1943.

Editor,
The Round Table,
Rhodes House,
Waterloo Place,
London, England.

D ar Sir:

You may have heard of a book entitled "Dissolution of Parliament" by Dr. Eugene Forsey, recently of the Faculty of McGill University. This book has been published by Oxford University Press.

I am sending you a copy, knowing that it will prove of exceeding interest and value—particularly the portion thereof which deals very thoroughly and effectively with what has become known as the Canadian Constitutional crisis of 1926.

At the same time I recall your attention to an article on this subject which appeared in "The Round Table" at the time of the General Election in Canada of that year, and to a l tter which I wrote the Editor complaining earnestly, and I think forcibly, of the character of that article.

You will find this book very illuminating on the points in issue. It has been in circulation now in Canada for several weeks and has enjoyed very widespread attention at the hands of the press. As yet I have seen no attempt at refutation of the findings arrived at by Dr. Forsey and would be very interested indeed if one would appear.

Yours very truly,

AM/E.

Arthur Meighen.

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144393

3 Lakeview Terrace,
Ottawa, April 28, 1943.

Dear Mr. Meighen,

Very many thanks for the extracts from Mr. Justice Hope's judgment. They are intensely interesting, and most useful to me in the articles on which I am now engaged.

It had not occurred to me that Mr. Justice Hope meant to suggest that the Lieutenant-Governor could dissolve without advice. If he did, I think he is, as you suggest, certainly wrong. I had supposed he meant what you suggest as the proper course: that the Lieutenant-Governor, if he is unable to persuade his present Ministers to advise dissolution, can dismiss them and find others who will tender such advice. This was the procedure in New Brunswick in 1856. Of his power to do this there can, I think, be no doubt.

As for refusal of assent: I think broadly the same holds good for that. I should say that the Lieutenant-Governor has certainly no constitutional right to refuse assent except on advice; but, again, in such circumstances as Mr. Justice Hope is discussing, I should think he clearly has the right to dismiss his Ministers and find others who will advise refusal of assent.

There appear to have been 25 cases of outright refusal of assent in Canadian provinces since Confederation: New Brunswick 9, Ontario 8, Nova Scotia 5, Prince Edward Island 2, Quebec 1. The New Brunswick cases all antedated Sir John Macdonald's famous Minute of Council of 1882; so did three of the Nova Scotia cases. All the remaining 13 cases occurred since 1882. One of the Ontario refusals was in 1906, one in 1908, two were in 1909. The single Quebec refusal was in 1914. The two Prince Edward Island cases were in 1920 and 1924. In all these except the last (1924), the Lieutenant-Governor seems to have acted on the advice of his Ministers in office at the time. In the 1924 case, the Lieutenant-Governor refused assent to the United Church Bill, apparently on his own initiative, and Mr. King's Government ticked him off for it, quoting the Macdonald Minute of 1882. But even in this case, I should say, the Ministers must be considered to have assumed responsibility.

My recollection is that Bonar Law, and some others of standing, in 1913 asserted that the King could refuse assent to the Home Rule Bill. I have not the references at hand at the moment, but could easily look them up if necessary. I should think it is hardly worth while; for if the power of dismissal and forced dissolution is admitted, the power of refusing assent becomes of slight importance.

It is very interesting to note how the proximity of the United States inclines Canadians, when their constitutional rights are invaded, to seek redress through the Courts even when the Courts are manifestly powerless to grant it. The misunderstanding of the position of the Crown has prevented them from realizing where redress can be given and where it should be sought. The petitioners who approached Mr. Justice Hope ought, in my judgment, to have gone to the Lieutenant-Governor. Had I had any idea that Conant would proceed with the legislation in the

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teeth of Drew's (and other) opposition, I should myself have set to work to get this done. A Court action was simply waste of time, and anyone who understands our Constitution would have known it.

I am delighted to hear that Grattan O'Leary is to do the review in the Journal. I observe that the Free Press and the Toronto Star have so far kept mum. I wonder if they have been instructed to do so.

I feel exactly as you do about sending Garland a copy of my book. None the less, I can't help hoping that he will ultimately see it. I understand, by the way, that his former colleagues in the C.C.F. feel rather bitter about the way he behaved in abruptly leaving them for this job in Ireland. Personally, I always liked Garland very much, and should be sorry to think he acted otherwise than conscientiously. In the 1926 case, however, the alternative is to assume that he was temporarily deprived of the use of his wits!

Yours sincerely,

Eugene Forsey

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144395

April 29, 1943.

My dear Lady Byng:

I was simply delighted to receive your letter of .

Strangely enough, R. B. never said a thing to me about the '26 crisis. I am very glad he had access to the full data, because, as you may remember, he was absent in the West during the fatal days when I was compulsorily absent from the House. My impression received from others at the time was that he was inclined to be somewhat critical. Of course, I knew that even a brief examination of what occurred would immediately convince R. B. By the way, I saw a great deal of him when he was out last, and very much enjoyed three long sessions of conversation.

The Forsey book has had very wide notice, and though it has been out for about six weeks I think, I have not seen one unfavourable review. No attempt has been made to answer it, and this is probably good judgment on the part of Mr. King. One review which appeared in the Toronto "Telegram" and an editorial from that paper are enclosed.

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144396

Dr. Forsey is ready if King or anyone attempts an attack on the book. I do hope you have received your copy before this. Will be most happy to learn that it has arrived, and will certainly make a point to see you after your return to Canada.

Very sincerely yours,

The Viscountess Byng of Vimy,
P. O. Box 136,
Nassau,
Bahamas, B. W. I.

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144397

520 Bay Street, Toronto,
April 29, 1945.

Dr. Eugene Forsey,
3 Lakeview Terrace,
Ottawa, Ontario.

My dear Eugene:

I just received today a letter from Lady Byng, and really it is so good that I cannot refrain from sending you a copy. You will immediately see, though, how necessary it is that it be absolutely confidential.

With kindest regards,

Yours sincerely,

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THURSDAY, APRIL 29, 1943

A MEMORY AND A REPUTATION VINDICATED

144398

Much water has flowed through the Rideau Canal since the Byng-King constitutional controversy convulsed Ottawa in 1926 and precipitated a general election that proved the turning point in the career of the present Prime Minister. Indeed, in a reverse sense, it also proved the turning point in the career of Rt. Hon. Arthur Meighen who was decisively defeated and never managed to stage a successful "come-back" thereafter. We venture to say that those days are now completely forgotten or ignored by most Canadians and that even those who recall them have many more recent and more urgent matters of concern on their minds. Yet they retain their interest for those who played a part in them, be it large or small, direct or indirect, and that interest, of course, grows only the keener for the historian and student of history as time goes on. At any rate, this old controversy is brought to the fore anew by a book recently published which has for its title, "The Royal Power of Dissolution of Parliament in the British Commonwealth," and is the work of Dr. Eugene A. Forsey, Director of Research for the Canadian Congress of Labor and a former Professor of Economics and Political Science at McGill University.

The Canadian people, it is to be feared, know little and care less about Constitutional Law and its niceties—which is one of the reasons why the British Parliamentary system has deteriorated progressively in this country. Even in 1926, when it was a matter of actuality, it was impossible to convince the people of the real importance of the Royal Power of Dissolution of Parliament; their attitude towards the most learned, the most authoritative expositions being one of "So what?" On the other hand, their prejudices were very strongly aroused by the purely political plea made by Mr. King that the Governor-General had illegally refused to act on the advice of his Ministers, so as to discriminate in favor of Mr. Meighen and the Conservative Party against the Liberal Party and himself. As a consequence, the electorate decisively upheld Mr. King against Lord Byng, Mr. Meighen and his brief-lived "Shadow" Government were ousted from office and the Royal Power of Dissolution became a dead issue in this Dominion, in practice if not in theory, for all time to come, whatever its status may still be elsewhere in the British Commonwealth. In the face of the popular verdict of 1926 we cannot imagine any representative of the Crown in Canada either dissolving a legislature or refusing to dissolve one contrary to the will of his constitutional advisers, even with Dr. Forsey's able work to support him.

* * *

So much must be said in order to establish a proper sense of proportion in our approach to what is really a monumental book for the political scientist, the constitutional lawyer and the historian. For a number of public men, past and present, it will have a lively attraction and the political observer should not overlook its later chapters at least. We ourself rejoice that it has been written if for no other reason than that it has conclusively vindicated the memory of Lord Byng and the reputation of Arthur Meighen, both of which have been scurvily besmirched by unscrupulous opportunists who did not hesitate to "hit below the belt" in order to win. With chapter and verse Dr. Forsey proves once and for all what some of us labored unavailingly to convince our fellow-citizens all those years ago; namely that Lord Byng was acting with perfect constitutional correctitude in refusing to dissolve Parliament at Mr. King's instance; that his refusal was based on solicitude for the interests of Parliament, of impartial justice as between parties and for precedents of proper procedure.

* * *

In fairness it should be said that although the Canadian people ought to have known the man with whom they had to deal, as early as 1926, they were entitled to accept any public statement of fact made by the Prime Minister of the Dominion as being beyond question. Dragging the Crown into the cockpit of partisan controversy, in order to gain his own ends, regardless of the fact that its then representative was one of the heroes of World War I and a former beloved leader of the Canadian Expeditionary Force, Mr. King maintained that a dissolution was never refused to a Prime Minister. He declared categorically from his seat in the House of Commons: "For a hundred years in Great Britain there is not a single instance of a Prime Minister having asked for a dissolution and having been refused it. Since this Dominion was formed, there is not a single instance where a Prime Minister has advised a dissolution and been refused it." If this were indeed the case, the popular vote of 1926 was the only one that could have been given by a free electorate but we shall examine in a further article the evidence produced by Dr. Forsey which indicates that Mr. King was either speaking at random in a manner altogether unworthy of his office and responsibilities, or else that he was deliberately deceiving Parliament and people in a manner that the reader may qualify for himself.

MEIGHEN P… …2)

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CANADA

AN ELECTORAL MISCARRIAGE IN 1925
RETROSPECT 1443

Yesterday in discussing Dr. Eugene Forsey's new book, "The Royal Power of Dissolution of Parliament in the British Commonwealth," we recalled how in 1926 to put the then Governor General Lord Byng in the wrong and to win electoral support for himself by an appeal to prejudice, Mr. W. L. Mackenzie King falsely claimed from his seat in the House of Commons that no British Minister had been refused a dissolution in a hundred years and that no Canadian Minister had been refused one since the beginning of Confederation. At the time, in the heat of controversy and the stress of a political campaign, there was not much opportunity for an exhaustive search of precedents and Mr. King successfully got away with what Dr. Forsey is now able to prove to have been a gross misrepresentation of the facts. And although the man in the street has no knowledge of constitutional law, it is evident from the stress laid upon length of time that Mr. King was seeking not only to stir up the groundlings but also to bring his position into line with the axiom of constitutional law that powers, rights and privileges that go unexercised or unasserted for many years eventually lapse, even although they have not been formally rescinded.

For a British precedent, Mr. King had to go no farther back than 1910 when Mr. Asquith as Prime Minister asked the King for a dissolution and was refused. More recently, in good measure, more than a score of cases of similar refusal in Australia and New Zealand are cited, running all the way from 1856 to 1928. It is true that the point never arose in the Dominion Parliament before 1926 but, in spite of Mr. King, Dr. Forsey is able to produce three instances of refusal in Canada since the beginning of Confederation: the first here in Quebec in 1879, the second in New Brunswick in 1883 and the third in British Columbia in 1903. Of course, it might have been argued instead that the Power of the Crown had been exercised so infrequently as to admit of challenge or, again, that owing to changed conditions it was no longer desirable that the Crown should possess this power in Canada. But Mr. King was in very poor plight to base his case on such grounds in view of the fact that when he requested Lord Byng to dissolve Parliament it was under imminent threat of a vote of want of confidence in the House of Commons over the notorious Customs scandals that directly involved his Administration.

* * *

At this point it is timely to recall that there had been general elections only a year before from which neither the Liberals nor the Conservative emerged with a working majority, the balance of power being held by a Progressive group led by Hon. Robert Forke. This in itself created a constitutional problem and although no definite evidence has yet been produced, there is said to have been an understanding that Mr. King should endeavor to carry on the Government but that if he proved to be unable to do it, Mr. Meighen should be given his chance. Even so, Mr. King, whose mental processes are very subtle, might have considered that this understanding would lapse if and when he was able to meet the House and transact business. Actually, he did this and carried on with Progressive support for some six months, nor was it on general policy but on a question of scandal that his Administration was placed in danger.

Before a motion of want of confidence could be dealt with in the House of Commons, Mr. King applied to Lord Byng to dissolve Parliament in order that he might take his case to the people—in other words, change the tribunal while the trial was already in progress. The Governor General refused, on the ground that it would be improper under such circumstances to bring on fresh general elections at an interval of less than a year if any alternative Administration was possible. Thereupon, Mr. Meighen, who had resigned office in protest, Mr. Meighen, approached, thought he had reason to believe he would receive a fair chance from the Progressives; thought, too, that it was his constitutional duty to act on the summons from the Governor General; and so undertook to form a Government. If a private Member of Parliament becomes a Minister of the Crown, he must seek popular confirmation by re-election but as it would be inconvenient to say the least, for an entire Cabinet to follow this procedure while Parliament was in Session, Mr. Meighen adopted the expedient of forming a temporary "Shadow" Cabinet of Ministers without portfolio who should act until the necessary elections could be held.

* * *

Mr. King now cried to high Heaven that the new Government was illegal and that its illegality afforded further proof Lord Byng had acted wrongly. He claimed the "Shadow" Ministers were without authority and that their administrative actions were invalid. Keith, a recognized constitutional expert, says of the expedient, that "it was probably unique in the annals of the Empire." Dr. Forsey, however, says that "in fact there were at least 16 precedents. In 13, the whole Cabinet, including the Prime Minister were Ministers without Portfolio; so that if there were any ground for considering Mr. Meighen's temporary Cabinet unconstitutional, these other Cabinets, most of which held office much longer, would have been even more unconstitutional." Be this how it may, Mr. King brought the Progressive group to his way of thinking and, between them, they quickly subjected the Government to defeat in the House.

Mr. King now had a fresh grievance, that Lord Byng granted Mr. Meighen the dissolution that had been refused to him, although obviously the Governor General no longer had

an y choice in the matter: Mr. Forke could not form an Administration and it was impossible for him to call Mr. King back under the circumstances. In the election campaign that followed, however, the Customs scandal was overshadowed by the constitutional issue on which the electors were misled into siding with Mr. King against the Governor General and Mr. Meighen without understanding its real merits in the light of the evidence Dr. Forsey now brings forward.

* * *

Even now, the reader may say, "supposing Lord Byng and Mr. Meighen were within the rules what importance has it? If the representative of the Crown is supposed to act on the advice of his Ministers, why should he be allowed to dissolve Parliament or refuse to dissolve it contrary to their advice?" Well, it has so much importance that Mr. King's complaint of the rules being broken decided the elections of 1925, cast a blight over Lord Byng's regime and determined the whole subsequent careers both of Mr. King and Mr. Meighen. Constitutional rules are simply the product of experience, equity and commonsense and they are important because it is impossible to have any ordered, orderly society without them.

The Crown has its useful functions under the Constitution and one of these has been to act as an umpire between the party leaders under exceptional circumstances, such as those arising from the elections of 1925. Because Mr. King wrested that power from the Crown in order to further the interests of his party and himself, not merely the parliamentary system but Democracy itself are weaker, rather than stronger in Canada. If no one else cares, Mr. Meighen at least must take the utmost moral satisfaction from this belated yet conclusive vindication of his statesmanship and for thinking Canadians who are concerned over the future, Dr. Forsey's book offers food for serious thought. Now more than ever Democracy needs to be jealously safeguarded!

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144400

520 Bay Street, Toronto,
May 1, 1945.

Dr. Eugene Forsey,
5 Lakeview Terrace,
Ottawa, Ontario.

Dear Eugene:

I have just read a review of your book in what I regard as Canada's best weekly— The Orillia Packet and Times, edited by C. H. Hale. Same is enclosed herewith.

Yours very truly,

AH/E.

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144401

3 Lakeview Terrace,
Ottawa, May 4, 1943.

Dear Mr. Meighen,

Thanks very much for your letter and its spicy enclosure. I had a very similar communication from that quarter over a year ago. I hope I may some day meet the writer.

I thought you would be interested in the enclosed. It is a bit confused in places, and of course I wholly disagree with the opinion that the Crown's power is now dead in this country. I have just finished a great blast on the subject for Saturday Night, and am about to do another for the Canadian Forum. Whether they will get printed remains to be seen; but I think they will.

I should be glad if you'd return the [redacted] Chronicle-Telegraph editorials when convenient. For the next two weeks I shall be at the Glace Bay Hotel, Glace Bay, Nova Scotia.

Returned May 15/43 Jean G.

The Toronto Star had a review of the book after all: the same day as the Gazette. It was very brief, and gave no indication of my opinions. The Winnipeg Tribune had an even shorter notice, of much the same kind. The only comment it contained was a commendation of my "scrupulously non-controversial tone". As I may have told you, I heard from Nichols of the Vancouver Province, that their D.A. MacGregor had done "a very good review, which will appear shortly".

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144402

I think it just possible that if articles of mine appear in Saturday Night, Relations and the Canadian Forum, on this subject, they may rouse Mr. King and his cohorts even more effectively than the book, because they will reach a wider and more popular audience. The Saturday Night article necessarily leaves out a good deal; but I count on being able to supplement it by letters answering various protests!.

Yours sincerely,

Eugene Forsey

Packet - Times review just arrived. Very good.

E.F.

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144403

320 Bay Street, Toronto,
May 11, 1943.

Dr. Eugene Forsey,
3 Lakeview Terrace,
Ottawa, Ontario.

My dear Eugene:

I have just heard from John Stevenson that at last a reply has come to your book. The Winnipeg Free Press of yesterday has devoted about half the editorial page to a special article which he says, judging from the style, etc., is no doubt John W. Dafoe's.

I ought to get the paper tomorrow morningand you will be able to locate it about the same time and I fancy you will be able to handle Mr. Dafoe the way he needs badly to be handled.

Kindest regards,

Yours very truly,

AM/E.

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144404

3 Lakeview Terrace, Ottawa
May 13, 1943

Rt. Hon. Arthur Meighen
320 Bay Street
T o r o n t o

Dear Mr. Meighen:

I am enclosing the report --I mean, review -- by the MONTREAL STAR of Eugene's book. I am sorry it has been so long reaching you. The delay is my fault, because I had forgotten which review you hadn't seen, and had to write Eugene, who was down in Nova Scotia. (He will be back this Saturday at noon.)

Yours very truly,

Harriet R. Forsey

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144405

320 Bay Street, Toronto,
May 13, 1943.

Mr. M. E. Nichols,
Editor,
The Vancouver Province,
Vancouver, B. C.

Dear Mr. Nichols:

I received today the issue of the "Province" with D. A. McGregor's review of Forsey's book.

I am very grateful indeed to the "Province" for having gone to the trouble of having this review prepared and published. The first part of it is particularly good--indeed, I think it is the best introduction to a review that I have read. Of course, the book itself makes a much stronger case than does any of the commentators.

Have not yet been able to get the issue of the Free Press in which I am told Mr. Dafoe has a reply. The information I get is that it is pretty thin and ineffective. Unless he misrepresents, omits or misstates the facts, it could not be anything else, for there is no answer to Forsey's book and never can be. I am told he tries to make out that it is an ex-parte or partisan argument. As everyone knows, Forsey is a very strong C. C. F. man and has been definitely associated with them for years. Further, Marriott in the introduction emphasizes particularly the entire freedom from partisanship of the whole volume.

Yours very truly,

AM/E.

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144406

320 Bay Street, Toronto,
May 15, 1943.

Dr. Eugene Forsey,
5 Lakeview Terrace,
Ottawa, Ontario.

My dear Eugene:

I have not seen the first of the Free Press effusions, or rather John Dafoe's effusions, but I have read the second. It is, of course, the only reply that could be made to your book—a conglomeration of rather clever Billingsgate tied skilfully in with a malodorous accumulation of mendacity. It is distinctly Dafoe-like from beginning to end.

After you have completely established, by a thorough study of all authorities and all precedents, the utter nonsense of John S. Ewart's pronunciamentos, Dafoe solemnly quotes them without even an attempt to test them in the light of truth and history and just because they sound good in the ears of the groundlings.

Dafoe's lifelong habits will now never change. Everything he dislikes is the product of Toronto Toryism, and he undertakes to throw out of the window a really great study of a very great issue, on the ground that Eugene Forsey is a Toronto Tory.

Do not be discouraged from smashing this man as he deserves. I know it will be difficult, out of this heap of tangled twaddle, to put your hand on something concrete and sufficiently near to common sense to give you a chance for a common sense reply.

Yours very truly,

AM/E.

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144407

3 Lakeview Terrace,
Ottawa, May 18, 1943.

My dear Mr. Meighen,

Thank you very much for your two letters. I should have answered sooner had I not been rather swamped with work on my return from Glace Bay, Saturday.

King's jackal has done his work in a manner worthy of his master. I have never seen a more unprincipled production, except some of the attacks on you, during the South York by-election and at other times. It is perfectly clear that, as I told some friends to-day, when the interests of the Liberal party are at stake, this man, like his master, is just an ordinary, common liar and crook, "a man without character and without honour", to use a phrase of your own.

I enclose copy of my reply. You will probably be disappointed that it is so brief. But a full reply would have needed a whole issue of the Free Press. As I have said to you before, I think, it is easy to get a lie into ten words; the refutation will ordinarily need at least a hundred. I know the Free Press won't publish much, if anything, that I send; so I think it is a waste of time to go into the matter at greater length. The only thing that is even faintly near worth it is that rubbish about the election settling everything. That, however, needs an article or pamphlet by itself, which I shall probably have the opportunity of writing when my articles in Saturday Night and the Forum have stirred up the Liberals afresh. Sandwell, by the way, has accepted my two articles for his paper with enthusiasm. He confided the other day, to a mutual friend, that in 1926 he had thought King was right, but had now changed his mind, or words to that effect! Which, incidentally, just goes to show the value of the argument that a single verdict of the electors in a single election can overturn the whole of British constitutional practice: if Sandwell has changed his mind, what about other electors?

Really, I get more and more impatient with the behaviour of supposedly educated and intelligent people when their prejudices are at stake. I lunched to-day with an old friend, until recently head of a large secondary school, and an ex-professor history in a Canadian university. He had not read my book, or even any reviews of it; he admitted that he knew nothing about the subject; he then went on to assert that the 1926 election had settled the whole matter; that precedents, authorities and common sense didn't matter; that it didn't matter whether the people were right or wrong, that the only thing that mattered was whether they felt a certain way; that the people in 1926 felt that voting for King was a way of asserting that Canada was now "grown up"; and, finally, that it was really impossible to prove anything on these subjects anyhow. I felt as if I were arguing with a flat earth enthusiast, and it was all I could do to refrain from hitting him over the head with a dinner plate. I must say I am glad to think that this man has now left the field of education, and is exercising his talents in a position of comparative innocuousness in the Army. Incidentally, he informed me, in reverential tones, that John S. Ewart had written a "Constitutional History of Canada", which had never been published (nothing surprising about that!) but was in the Dominion Archives, in ms. I promptly gave him, and two others, Wartime Information Board officials, my opinion of John S. Ewart and his ranting nonsense, and in no uncertain terms. Unfortunately there was not enough time to do justice to the subject. I should imagine this precious work must hold the world's championship for malicious nonsense and

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unreadability.

One bit of Dafoe's concoctions gave me great delight. I suppose you noticed he went out of his way to take a slash at a particular editorial in the Canadian Forum. I am morally certain that the editorial in question was written by Underhill, who is, in certain respects, an enthusiastic member of the Ewart-Dafoe cult! I hope he will see what "Canada's first citizen" (as I saw Dafoe called not long ago) says about one of his disciples.

One of the lunch party to-day observed that this was the longest piece of writing Dafoe had done for a very long time, and added that the old man only struck out like this when he felt the Liberal party was "seriously endangered". I think there is no doubt that I have got these gentry badly rattled. They were, I suspect, looking forward to trying the 1926 game after the next election, and they see now that it will not be by any means as easy as they had supposed. Also, this book has undoubtedly revived their fears that you will return to lay the lash to their backs.

I enclose copies of both Free Press articles, and of the Vancouver Province review. I have others, so if these are of any use to you, keep them. If you don't want them yourself, you may know someone else who would be interested in seeing them. I enclose also notes I got from one of our C.C.F. and union people, with copies he sent me of the Dafoe stuff. These notes I should like to have back.

I expect to be in Toronto about the 26th. or 27th., and hope to see you; though after seeing what a vicious character I am ("a radical of the radicals", and a "Toronto Tory") you may feel that you can't associate with me any further!

The copy of my letter to the Free Press you need not bother to return; the copy of my Saturday Night Articles I should like to have back when convenient.

I am sorry this is so badly typed. I am evidently tired. But I didn't want to put off any longer writing you about this whole business.

Yours sincerely,

Eugene Forsey

A friend, applying to-day at the Pol. Library for my book, was told "The B.-B. had it!

Have been briefing C.C.F. Members on extension of Legislatures. I hope they'll do a good job on it. It makes me itch to be there & do it myself!

Shall send copy of Journ article later; have none now.

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Copy for Mr. Meighen

144409

3 Lakeview Terrace,
Ottawa, May 18, 1943.

The Editor,
Winnipeg Free Press,
Winnipeg, Manitoba.

Sir,

Your review (May 10 and 11) of my book on dissolution of Parliament is compounded of about equal parts of misrepresentation and abuse. Anything in it which bears any resemblance to argument is already answered in the book itself. Of the abuse, I need only say that most of it would form a very suitable description of the review. Of the misrepresentation, I think your readers are entitled to a few of the more glaring examples.

(1) Your rebiewer asks at what date the Governor-General's position became assimilated to that of the King; observes that "Mr. Keith, in one of his books, puts the date at 1911 and in another at 1916"; and then says: "Mr. Forsey makes great play with this shift in opinion." The book does not contain a single reference to this "shift in opinion".

(2) Your reviewer also says that I made "copious quotations from Todd's writings", and that "Todd's book bears a title which reveals its inapplicability to the matter under debate: 'Parliamentary Government in the British Colonies'". Todd wrote two books: "Parliamentary Government in the British Colonies" and "Parliamentary Government in England". My "copious quotations" amount to exactly 186 words in a book of 316 pages. Of the 186 words, 133 are from "Parliamentary Government in England", and another five refer exclusively to England. Besides direct quotations, there are eighteen references to, or citations from, Todd's works; of these, eleven are from "Parliamentary Government in England". The total space devoted to Todd's writings is about two pages; about three-quarters of the two pages are concerned exclusively with "Parliamentary Government in England".

(3) Your reviewer states that "Mr. Forsey goes warily with respect to" the famous "pledge" of Mr. King to Lord Byng that he "would resign if the House rejected his government". He notes Mr. King's denial of any such "pledge", and proceeds: "In place of making a firm stand on this slippery ground, Mr. Forsey prefers to make his chief attack along these lines: Mr. King was not entitled to ask for dissolution; Lord Byng did right in refusing it;" etc., etc. My book contains no reference whatever to this "pledge", for the excellent reason that, apart from all other considerations, it is from a constitutional point of view completely irrelevant.

(4) Your reviewer says that "Mr. Forsey's indignation over Mr. King's temerity in seeking two dissolutions within a year knows no bounds. But Mr. King did not ask for two dissolutions in the sense in which Mr. Forsey here uses the word. The dissolution of September, 1925 . . . was a 'normal' dissolution, as Keith says in a statement quoted by Mr. Forsey. To represent Mr. King as twice making special demands upon the Governor-General in the matter of dissolution is thoroughly dishonest, and is thus in keeping with the rest of Mr. Forsey's discussion." Anyone who reads my book will see that I use the words

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"yes" and "dissolutions" in their ordinary, dictionary sense, and no other. Mr. King asked for one dissolution on September 5, 1925. He asked for a second on June 26-28, 1926. One and one make two. One request was normal and proper, the other was abnormal and improper. Of course the dissolution of September, 1925 was "normal". I never even thought anything else, let alone said it, and there is not one syllable in my book, from start to finish, to suggest that I did. Your reviewer's remarks on this subject are pure invention.

I leave it to your readers to decide who is "thoroughly dishonest".

Yours truly,

Eugene Forsey

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144411

320 Bay Street, Toronto,
May 20, 1943.

Dr. Eugene Forsey,
3 Lakeview Terrace,
Ottawa, Ontario.

My dear Eugene:

I opened my mail this morning and was so delighted to have a letter from you, and certainly far more so after reading the contents and enclosures.

First of all, your article for Saturday Night is really a masterpiece. It is the best piece of work you have ever done. This country is very fortunate indeed that you have appeared on the scene, ready to devote the powers of your exceptional mind to a subject long neglected, misunderstood and deliberately befuddled. I don't wonder Mr. Sandwell was enthusiastic when he read this fine production.

I mention only one point. It is near the bottom of page 10. You quite correctly recall the principle laid down by Sir Robert Borden. I remember the occasion well. The succeeding sentence it seems to me is also sound, though the subject matter of it had not previously had any specific study in my mind. It is the sentence which follows that puzzles me a little:

"It is the principle.....followed by Sir Robert Borden himself in 1916 and '17."

My recollection is that Parliament was extended in 1916, but by unanimous consent--that is, by the consent of both parties. From memory I do not think there was any objection. In 1917, of course, it was not extended, the clear intention having been announced as the basis of the formation of Union Government that an election would be held. Consequently I cannot see that Sir Robert Borden's conduct in either '16 or '17 is any illustration of the principle enunciated in the sentence "That principle applies.....objects)."

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Your reply to Dafoe is also excellent and just as lengthy as his screed merits. Be ready to send this to some other paper if the Free Press refuses to publish it. I think you should use then both the Winnipeg Tribune and the Toronto Globe and Mail or the Toronto Telegram, whichever you prefer. The Telegram gave rather the better attention to your book and its editor very firmly agrees with your argument throughout. I am sure Mr. McCullagh does also, though I have not discussed the subject much with him, he having been away.

Dafoe's interminable scurrility has all the characteristics of an angry fishwife attacking Newton's Principia. There is one thing I intended to emphasize in my last letter, and omitted. Dafoe says that the argument about King avoiding a verdict on a vote of censure has no force because it was not used by Lord Byng. Lord Byng did not adduce and present arguments to the public. That was not his function nor appropriate to his office. He gave merely his conclusion. In any event, though, the omission of reasons in a Judgment in no way invalidates or removes the reasons. Many a verdict in Court is upheld in appeal on reasons wholly omitted in the Judgment.

If you will give me Underhill's address, I will see that Dafoe's stuff is sent him from Toronto, and marked.

I was very interested in Mr. Chappell's humorous comment.

I am returning, as requested, the copy of your article in Saturday Night and Mr. Chappell's notes.

Yours very truly,

AM/E.

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144413

320 Bay Street, Toronto,
May 21, 1943.

Dr. Eugene Forsey,
3 Lakeview Terrace,
Ottawa, Ontario.

Dear Eugene:

I learned this morning the most interesting news you could imagine. Dafoe did not write the Free Press articles at all; they were written by one of King's secretaries. I have not his name yet, but he is a Professor, or so-called, and is paid, of course, by the State. It seems only right that in the case of a man "obviously well-intentioned, moderate in action and in speech, considerate and co rteous in his relations both with friends and opponents" the taxpayers should be glad and proud to put up the money to make these virtues known to the Nation.

Privately, my informant is W. J. Lucas who is quite a personal friend of Mr. Cahan. He got the information from Mr. Cahan and he says Cahan absolutely knows. Further, he says Cahan's own review has been sent down to the Halifax Herald and should have appeared by this time. He says the last paragraph is a terrific denunciation.

Yours very truly,

AM/E.

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144414

520 Bay Street, Toronto,
May 21, 1943.

Mr. Gustave Monette, K. C.,
Monette, Filion and Meighen,
159 Craig St. West,
Montreal, Quebec.

Dear Mr. Monette:

As promised, I am sending you a copy of Dr. Eugene Forsey's book entitled "Dissolution of Parliament." Probably a better title would have been "The Constitutional Crisis of 1926."

Do not omit the first hundred and thirty pages, though they may seem a little difficult. From that on you won't be able to stop until you are through. Forsey has certainly dug to the bottom of this subject and has done a great service to Parliaments in all parts of the Empire. Whatever position it leaves Mr. King in, there can certainly be no allegation that Forsey has been unfair.

It might be added that Dr. Forsey is one of the C. C. F.

Yours very truly,

AM/E.

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144415

320 Bay Street, Toronto,
May 21, 1943.

A. L. Smith, Esq., K. C.,
Lancaster Building,
Calgary, Alberta.

Dear Art.:

I am sending you by concurrent mail a copy of a book recently published by Dr. Eugene Forsey, entitled "Dissolution of Parliament." Probably a better title would have been "The Constitutional Crisis of 1926."

Do not omit the first hundred and thirty pages, though they may seem a little difficult. From that on you won't be able to stop until you are through. Forsey has certainly dug to the bottom of this subject and has done a great service to Parliaments in all parts of the Empire. Whatever position it leaves Mr. King in, there can certainly be no allegation that Forsey has been unfair.

It might be added that Dr. Forsey is one of the C. C. F.

Yours very truly,

AM/E.

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144416

Toronto, May 24. 1943.
(en route to Hamilton)
(meeting of Can. Pol. Science Assn. & McMaster University).

Dear Mr. Meighen,

Many thanks for your letters.

I shall be in Toronto on Wednesday, and hope you will be able to spare me time, as I want to consult you on several points, notably the advisability of a more extended reply to the Free Press, e.g. by a pamphlet. I was against this at first, but am beginning to wonder.

Comment on your letters I shall leave till I see you, or till I have time for a proper letter. My train leaves in 20 minutes!

Yours.
Eugene Forsey

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144417

3 Lakeview Terrace,
Ottawa, May 28, 1943.

Dear Mr. Meighen,

The Free Press published my letter, May 22, with a typical short editorial comment. I do not think I shall waste my time replying. When I have shown the copy to my wife, I shall send it to you for your perusal. I shall send you also copy of two Free Press editorials, one really backing my position on the right of dismissal, the other maundering at some length about Saturday Night's editorial. I am really too busy to pay any further attention to this wretched, feeble stuff, though I shall certainly have a go at the election question in some place where I can discuss it adequately. There would obviously not be space in a letter to the Free Press.

See below.

One of the things I have to do in the next few days is an article on the Crown for "Relations". I shall of course send you a copy.

I expect to write Cahan later to-day, and shall send you a copy of that.

Had a long and interesting conversation with McCullagh Wednesday afternoon.

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By the way, of course you know that Hansard for 1896 contains Cahan's denial of that story of Borden's about the libel on Sir Charles Tupper. Weldon, Dean of Law at Dalhousie, and a Conservative M.P., was also involved, and read Cahan's and his own denials in the House. I believe Tupper later invited Cahan to join his Government, so he must have been satisfied with the denials.

With thanks again for your kindness,

Yours sincerely,

Eugene Forsey

Have changed my mind about J. P., after talk with Tommy Douglas. Shall let them have it, both barrels, on every point. It will be too long to publish, & as they'll say, but I'll then hand it to The Telegram, etc! I shall do a short letter, attaching the reply to points.

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Copy

144419

3 Lakeview Terrace,
Ottawa, May 30, 1942.

Dear Mr. Cahan,

When I was in Toronto a few days ago, I saw Mr. Meighen, who, as you know, is a very old friend. In the course of a conversation on other matters, I told him the story of the $200,000 fund which you were told had been raised for him after he took the leadership in 1941. His reply was exactly what I expected. He declared most positively that the whole thing was completely untrue. He had not been hard up when he took the leadership in 1941, nor for years before. He had no need of any such fund, and there never was any such fund, either for himself or the party. "There was never two hundred thousand dollars, nor two hundred thousand cents, nor twenty cents. Nothing of the sort was ever even suggested. If I had done a thing like that I ought to be put in jail." There was a small fund for the South York by-election, made up mainly of small contributions; but of this fund Meighen never received one copper. On the contrary, he paid a considerable part of the by-election expenses out of his own pocket. There was no other fund of any kind or description. Nothing could have been more emphatic, more indignant, more sweeping or more categorical than Meighen's denials; and he clearly felt that the story, if true, would be a monstrous stain on his honour and would "blacken his name forever".

He said he was sure you would not have mentioned the story to me, one of his friends, unless you had it on what you believed to be unimpeachable authority. He is very anxious to find out who your informant was, so that he can confront him and thrash the whole thing out. Indeed he said he was "resolved" to go to Montreal and take me with him, asking you to produce your informant then and there. I said I thought this would be unnecessary, as I had understood your informant was in Toronto, where he could confront him without going to any such trouble. However, there is not the slightest question that he is determined to get to the bottom of this thing, one way or another; so I told him I would write you and tell you what he said.

Yours sincerely,

Eugene Forsey

Harriet and the baby both took heavy colds on the week end, so I haven't yet finished with the Free Press, but expect to do so to-day.

The Forum has published my article on the Crerar. Shall send copy soon.

I hope you will not do anything further about Cahan without letting me know. He is a very old friend, to whom I am

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under great obligations, and his health is precarious. So I don't want him to be hurt through me. I fancy he'll produce the cheque at once, and you can then deal with the whole matter right there in Toronto.

Yours sincerely,

E. C. G.

Dear Mr. Gwyn,

When I was in Toronto a few days ago, I saw Mr. Meighen, who, as you know, is a very old friend. In the course of a conversation on other matters, I told him the story of the $200,000 fund which you were said had been raised for him after he took the leadership in 1941. His reply was exactly what I expected. He declared most positively that the whole thing was completely untrue. He had not been hard up when he took the leadership in 1941, nor for years before. He had no need of any such fund, and there never was any such fund, either for himself or the party. "There was never two hundred thousand dollars, nor two hundred thousand cents, nor twenty cents. Nothing of the sort was ever even suggested. If I had done a thing like that I ought to be put in jail." There was a small fund for the South York by-election, made up mainly of small contributions, but of this fund Meighen never received one copper. On the contrary, he paid a considerable part of the by-election expenses out of his own pocket. There was no other fund of any kind or description. Nothing could have been more strenuous, more indignant, more sweeping or more categorical than Meighen's denial and he clearly felt that the story, if true, would be a monstrous stain on his honour and would "blacken his name forever".

He said he was sure you would not have mentioned the story to me, one of his friends, unless you had it on what you believed to be unimpeachable authority. He is very anxious to find out who your informant was, so that he can confront him and thrash the whole thing out. Indeed he said he was "received" to go to Montreal and take me with him, asking you to produce your informant then and there. I said I thought this would be unnecessary, as I had understood your informant was in Toronto, where he could confront his without going to any such trouble. However, there is not the slightest question that he is determined to get to the bottom of this thing, one way or another, so I told him I would write you and tell you what he said.

Yours sincerely,

Eugene Forsey

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3 Lakeview Terrace,
Ottawa, June 3, 1943.

144421

Dear Mr. Meighen,

Enclosed is a copy of my Forum article, parts of which will no doubt make you writhe! It is, of course, written with the deliberate object of showing the C. C. F. just where the Free Press doctrine would land it. This is, I think, worth while even from the point of view of Conservatives.

I have nearly finished my long reply to the Free Press, delayed by the illness at home. I should be able to send it off to-morrow, when I shall also send a copy to you.

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No word from Eaton as yet. I hope my letter didn't give him a heart attack.

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Yours sincerely,
Eugene Forsey.

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144423

Competition for Manpower

Editorial

► Successful ending of the North African campaign, and prospect of an early European invasion in which Canadian ground troops will almost certainly be engaged, have revived discussion of the size, composition and use of Canada's overseas army.

Added point is given these considerations by the acknowledged shortage of manpower in other and vitally important branches of our war effort. The emergency situation in coal mining, especially, has focussed attention on our allotment of manpower to the various combatant and productive services.

Canadians had been familiarized with the idea that our army overseas was being designed as a moderate-sized and cohesive striking force, specially trained in the kind of tactics needed for assault on Hitler's European fortress. From being the bulwark of defense against an expected Nazi invasion of Britain during the dark days after Dunkirk, it was to become the spearhead of an attack on Europe when the moment came. The "reconnaissance in force" at Dieppe was generally regarded as part of the preparation for that ultimate task. Offers of separate units of the Canadian army for use in other campaigns, notably in North Africa, were rejected by the British authorities—not, in all probability (as some critics now maintain), because they came too late, but because it was deemed more fitting to continue organizing and training our army as a unified instrument of attack. By all accounts, including those of General McNaughton, this training task was being successfully carried out.

But all along, the "big army" zealots in Canada had been pressing for an expansion of our overseas force, regardless of the manpower needs of our rapidly expanding productive establishment. As a consequence, the Canadian Corps was re-organized into a two-corps Army, with large bodies of those mysterious "ancillary troops" as part of its growing establishment. Gloomy predictions about a prospective shortage of replacements and reinforcements filled with shrill warnings that section of our press which had always regarded Canada's productive effort as secondary in importance to its military aggrandizement. We must have conscription, they cried, in order to obtain sufficient men for the army.

But meanwhile the need for more manpower in agriculture and the war industries was growing. Government assurances that we were getting "all the men we need" were accompanied by frantic efforts to comb more eligibles out of civilian pursuits for the armed forces, and to dragoon those called up under the Mobilization Act into overseas service. Competition between the military authorities and National Selective Service for available manpower increased. While statements of the ultimate needs of the army remained delightfully vague, deferment of call-ups had to be fought for by farmers trying to meet urgent demands for more food production with inadequate help. Industry was at its wits' end for skilled and semi-skilled manpower. The "big army" people amongst our industrial magnates were on the spot.

Then suddenly we were told that Canada was approaching over-production of certain kinds of weapons and munitions, and large numbers of workers would have to be laid off. Promises that these would be switched to other forms of war production were dragged from Mr. Howe, but it was apparent that no plans had been made to meet such a contingency. Rosy pictures of what we intend to do in shipbuilding and expanded airplane manufature will not, unfortunately, compensate for lack of planning to make this quickly possible.

And now we are forced to comb the armed services and industry for miners to meet the serious shortage of coal upon which a good deal of our industrial effort depends. According to Labor Minister Mitchell, about 7,000 miners have been absorbed by the armed forces and industry, and by the end of April, our coal mines were short some 2,300 men. It is proposed to abrogate the child labor laws to make boys of 16 and girls of 18 eligible for surface coal mine work. Yet it is only now that any restriction has been placed on coal miners going into the armed services. "There has been a falling off in the production of coal for a long time past," exclaimed Mr. King plaintively on May 17th, as if this were an act of God, and not something that might have been foreseen and provided for long ago. Indeed, repeated warnings about just such an emergency had been given in the House by Clairie Gillis, member for Cape Breton, but had fallen on deaf ears.

Col. Ralston's first reaction to the announcement of labor layoff plans in certain munitions factories was that "some of these men can now be spared to go into the armed services." As for agriculture, according to Col. Ralston it was "the one vocation in the whole country specifically mentioned as being entitled to postponement under certain conditions. I don't think anything could have been fairer to agriculture." It does not seem to occur to the military mind that it is not a question of fairness, but of providing the necessary manpower to do a vitally necessary job.

Now the hitherto "big army" industrialist press wants the Canadian army overseas broken up and fed piecemeal into the fray under British commanders, on the plea that it couldn't possibly be any good as a unit in combat until its components had had actual battle experience. Strange how the tune can change when the shoe begins to pinch! This move would greatly lessen the personnel requirements of our land forces, but it would throw away every advantage gained by unified training during the long months of waiting. Much better go back to a single corps, and carry on as a unit.

The need is not for "conscription," under any name, but a release from non-essential pursuits of men and women who could be used in various kinds of war production, and a ban on their entry into the armed forces if they were needed elsewhere. If this were done, they would gravitate naturally to the only positions open to them—that of essential war work. Against this kind of compulsion there could be no objection. With a halt called on army expansion, we could then be assured of enough reinforcements for the army we have.

What we really need is a confession that this country of 11,500,000 people made a mistake when it went in for all-out effort in all directions at once, refusing to plan its manpower requirements so that its first and most imperative duty to its fighting men and its allies—production of food and supplies—could be carried out fully and without risk of curtailment. Even now it is not too late to set such objectives. And we might well increase our manpower as well as our material "pool" by concentrating or eliminating those industries producing non-essential civilian goods. Mr. Gordon talked bravely about this last fall, but we have heard nothing of it since. It seems our "total" war effort must be carried on with as little "dislocation" as possible.

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The Crown, the Constitution and the C.C.F.

Eugene Forsey

► WITHIN the last two months, two moribund provincial legislatures have prolonged their own lives in the teeth of Opposition protests, and an Ontario Court has ruled (beyond doubt correctly) that the Courts are powerless to intervene. In other words, any provincial legislature in Canada can postpone general elections as long and as often 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 very grave threat to democratic government. It is an even graver threat to the C.C.F., whose opponents hold power in every provincial legislature in the country. Yet as Mr. Justice Hope has pointed out, 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.

Many people will object 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 just nonsense. The Crown undoubtedly has some power to refuse advice. There are fifty-one cases of refusal of dissolution alone, in almost every part of the British Commonwealth, and many of them are recent. The only United Kingdom case occurred in 1910, the only Canadian (Dominion) case in 1926, the only South African case in 1939. Of the thirty-six Australian cases, exactly half (including of course the three Commonwealth cases) have occurred in the present century, one as recently as 1928. Dismissals of cabinets have been much rarer, but there have been five in Canadian provinces since Confederation, and one in New South Wales as recently as 1932. 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 and Simon in England, and Macdonald, Mackenzie, Blake, Cartwright, Laurier and Meighen in Canada. Mr. Mackenzie King, in 1926, even asserted that it was the duty of the Governor-General to refuse dissolution to Mr. Meighen's temporary government and to dismiss it. 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, and Lowell, Jenks, Jennings, Chalmers and Cyril Asquith, and even Laski, all admit a greater or less degree of such power. Evatt, who as a distinguished writer on the Constitution, a former Judge of the Australian High Court, and a prominent member of the present Australian Labour Government, ~~who~~ speaks with peculiar authority, especially for members of the C.C.F., 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 that there must be no exceptions whatsoever; that the only safe rule, especially for the C.C.F., is to insist that the Crown shall invariably accept the advice of the cabinet in office.

Is this in fact a safe doctrine for any democratic party? Is it a safe doctrine for the C.C.F.? What might be the consequences for the C.C.F. if it adopted the rubber stamp theory as its official policy? A few concrete examples may help to make the matter clear.

(1) Suppose a capitalist government at Ottawa dissolves Parliament and the C.C.F. gets a clear majority. The Government then advises the Governor-General to fill all vacancies in the Senate and on the Bench, thus depriving the prospective C.C.F. 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?

We shall perhaps be told that such a situation could never arise. But it has arisen. In July, 1896, Sir Charles Tupper's Conservative Government tendered precisely this advice to Lord Aberdeen. Aberdeen refused to accept it. Tupper resigned, and Laurier took office, accepting responsibility for Aberdeen's exercise of the reserve power.

The point is of even greater importance now than it was in 1896, for the Governor-General himself is now appointed on the advice of the Dominion Cabinet. Acceptance of the rubber stamp theory would involve the consequence that a government defeated at the polls might advise the King to appoint one of its own partisans Governor-General, and that the King would be obliged to do so.

(2) Suppose a capitalist government, in the Dominion or one of the provinces, dissolves Parliament, and the C.C.F. gets a clear majority. Suppose the Government then announces that it feels sure the electors do not really want a C.C.F. Government, and are horrified by the unintended result of their votes; that it feels they should at once be afforded an opportunity to register their "sober, second thought"; 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 is bound to accept the advice; and if the result of the second election is also unsatisfactory, and the Government advises a third dissolution, 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 government would ever dream of offering such advice. No? On September 5, 1925, Mr. Mackenzie King secured a dissolution. The election, October 29, returned 116 Conservatives, 101 Liberals and 28 Progressives, Laborites and Independents. On November 5, one week after the election, and one month and two days before the new parliament could even enter on its legal existence, Mr. King boldly claimed the right to advise an "immediate" second dissolution, graciously adding, however, that he did not propose to exercise this right, but would give Parliament a chance to "express its views."

(3) Suppose a capitalist government dissolves Parliament, the C.C.F. gets a clear majority, and the existing government decides to meet the new parliament, as it has a technical right to do. The new parliament defeats it. It then advises a second dissolution, and, upon a further defeat in the ensuing parliament, a third dissolution, and so on till the electors give in or revolt. Is the Governor bound to acquiesce in this game of constitutional ping-pong: from electorate to Parliament, from Parliament to electorate again, back and forth interminably?

But of course nothing like this could ever happen. Could it not? In the 1926 election campaign, Mr. Mackenzie King said that " it was for Parliament to decide" which party should govern, "if Parliament were in a position so to do;

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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. In practice it can only mean that Parliament will decide if, as and when the Government sees fit to let it decide; but that when, in the opinion of the Government, Parliament ceases to be in a position to make a decision "satisfactory" to the Government, the Government will dissolve Parliament and appeal to the people. This is simply a "heads I win, tails you lose" theory of the Constitution. Yet on the rubber stamp theory of the Crown's powers there is no escape from it.

(4) If a capitalist government gets a dissolution and the C.C.F. gets a clear majority, the capitalist government might simply decide to postpone the meeting of Parliament indefinitely. On the rubber stamp theory, the Governor 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 the provinces would there be any recourse in 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 a 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, 1890; dissolution followed shortly afterwards; and the first session of the new legislature opened on April 26, 1892. 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 is not in session, the Governor-General or Lieutenant-Governor has power to issue special warrants for the expenditure of public money without a vote by Parliament, on the certificate of the ministers concerned that the necessity is urgent and has not been provided for by Parliament. This provision of the law has been used on a large scale at least four times in the Dominion (1896, 1911, 1926 and 1940), and at least once in Quebec (1936), in every case quite properly. But on the rubber stamp theory it could also be used quite improperly, though with perfect legality, and the Governor-General or Lieutenant-Governor would 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 a C.C.F. 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 the vote can be taken, it asks the Governor for dissolution. To grant the request is to confer on the Cabinet the 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 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 and of the people; for, as we have seen, that theory enables a cabinet to defy both Parliament and the electorate.

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 person *convicted* by a lower court to appeal to a higher. It is never proper to allow a person *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.

(6) The final and most flagrant example of the results of the rubber stamp theory is, of course, that with which we began: a moribund legislature prolonging its own life without any mandate and despite the protests of the Opposition. Evatt has described such action as 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" neither the Courts nor (on the rubber stamp theory) the Crown can offer any protection, and the people are helpless to protect themselves.

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 to use a power he does possess for the same purpose!

As Dicey and Asquith 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, it must find others 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 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 by action in the courts. The Canadian Constitution, for the most part, regulates these matters by convention, 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.

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It is perfectly suicidal for the C.C.F. For every existing government in Canada is an anti-C.C.F. government, and the rubber stamp theory gives every one of them an absolute veto upon the C.C.F.'s ever taking office. The cold truth is that unless the C.C.F. is prepared, in appropriate circumstances, to take responsibility for the use of the reserve power, as Laurier did in 1896 and Meighen in 1926, it may never have a chance to get into power at all. The rubber stamp theory will deliver it gagged and bound into the hands of its opponents.

Romancing on German Cartels

Martin Dell

►IF A MAN postulates: red is a color and green is a color, therefore red and green are the same thing — we call the man mentally deficient. If a man postulates: the essence of cartel monopoly is centralized planning and the essence of socialism is centralized planning, therefore cartel monopoly and socialism are the same thing — we call the man Thurman Arnold.

Mr. Arnold makes that assertion in the introduction he has written to a book by Messrs. Joseph Borkin and Charles A. Welsh: *Germany's Master Plan, the Story of Industrial Offensive**. There exists no book which offers such a wealth of material on this all-important subject. And there exist few books on any subject which are so helpless in evaluating the information they contain. But the merit of the book remains great in that it provides an unsurpassed vantage point for discussion. The following shall be a contribution to that discussion.

Mr. Arnold, in the introduction, describes how Germany, completely dominated by cartels before Hitler's advent to power, was driven into economic chaos. "There was an irreducible minimum of 7,000,000 unemployed." The figure of 7,000,000 unemployed was never reached, though it was approached, in Germany. Obviously, what never was a maximum cannot be called an irreducible minimum. But Mr. Arnold wants to prove a point that cannot be proved. Accuracy, even where it does no harm, is a hindrance in such a case.

What is true, however, is that Germany was cartel-ridden and that there was economic chaos on account of this fact. Says Mr. Arnold: "In this stage the writers and thinkers of a socialistic tinge flood into Government . . . But, unfortunately for socialistic dreamers, the techniques of acquiring and holding power in times of economic chaos require individuals of a tougher and less humanitarian mould." The German government of the critical time was that of Dr. Bruening. It did not contain a single socialist.

The authors say: "1926 — not 1933 — was the year which really foreshadowed this generation's 'rendezvous with destiny.' In 1926 the German army formed an Economic High Command." Hitler came to power on January 30, 1933. (In some other place the authors say it was in 1934. They are not sure of this important date.)

Only Hitler was able to "consolidate a position of power" out of the economic collapse brought about by the cartels, says Mr. Arnold; no government which was less tough and more humanitarian could have done it. What about that Economic High Command, then? Was it not power — consolidated seven years before Hitler? The point is well realized by the authors.

Why does Mr. Arnold not take up the point? We do not know. But we do know that Dr. Bruening is a professor of government in a great American university, and that influential circles have earmarked him as the man to "consolidate a position of power" out of the chaos Hitler is wreaking in Germany. Those circles want to break German aggressiveness by the same means by which Mr. Arnold thinks he can break the power of cartel monopoly: namely, by turning the screw of economic development back by half a turn. Dr. Bruening, too, was a virtuoso at that half-turn as long as he was in office in Germany. The consequence was Hitler insofar as he came to power on account of economic causes which he did to the extent of ninety-nine per cent.

German cartels made international agreements with the cartels of other countries. According to the authors, the purpose of these agreements was to restrict the output of materials essential for waging modern war in countries which were Germany's prospective enemies. The gist of the agreements was always the same: German cartels produced certain materials and sold them exclusively to their foreign partners. The partners refrained from producing those materials for export, and in exchange the Germans refrained from competing in the markets for other materials which the partners were producing. Thus, when war broke out the countries of the United Nations would have no adequate capacity for manufacturing those essential materials for which German cartels had retained the sole rights of export. I. G. Farben, the German dyestuffs trust, was directly or indirectly a partner to the vast majority of those agreements.

These facts, which are painstakingly expounded by the authors, are indisputable. What is their meaning?

The authors see a German master plan in them. "The first World War should have taught democratic nations that Germany used international cartels as the spearhead of aggression," they say. In another place: "Cartels were protegés of the Reich — precursors of conquest." But they also identify their opinion with that expressed by a man whom they quote thus: "Industrial Germany was in control of imperial Germany." Who, then, is the aggressor? "Germany," using the cartels for aggression? Or the cartels, using "Germany" for aggression? The authors want to have it both ways, and thus are not able to give an answer to this essential question.

But let us go on. There was the German master plan. How did Germany set about its execution? By first driving its economy into collapse through the cartels, says Mr. Arnold. This seems to be a queer way to start world conquest, but Mr. Arnold says it is what happened. The authors say: "Nazis were chosen jointly by the generals and industrial barons at a time when the framework of war economy had been completed." But according to Mr. Arnold, Hitler came to power when the German economy had just collapsed and there was an irreducible minimum of 7,000,000 unemployed. In other words, the framework of Germany's war economy was completed when her national economy was in chaos. Is it possible that Mr. Arnold has read the book? Is it possible that the authors have read his introduction? Is it possible that the three gentlemen between them want to confuse the minds of their readers on the subject of cartels?

*(Collins) Duell, Sloan and Pearce; pp. 339; $3.50.

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144427

320 Bay Street, Toronto,
June 4, 1943.

Dr. Eugene Forsey,
3 Lakeview Terrace,
Ottawa, Ontario.

Dear Eugene:

I just received your letter of 3rd and have read the article in the "Forum." It did not make me writhe in the least; in fact, I agree with every line of it.

Naturally, I had to smile over the fear of continued usurpation by a "capitalist" Government. As one who has not been particularly impressed by the long struggle to cast odium on the word "capitalist," I might venture to predict that if the C. C. F. are returned, there will still be a capitalist Government in Canada, and indeed, there always will be, that is, unless we are to become a bunch of morons.

Yours sincerely,

AM/E.

P.S.—I am getting worried about delay re Cahan. This man may pass away any time. If he has not answered upon receipt of this letter, please let me know at once and I will write him advising him of the day I am going down, and will let you know as well.

A. M.

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144423

3 Lakeview Terrace,
Ottawa, June 4, 1943.

The Editor,
Winnipeg Free Press,
Winnipeg, Manitoba.

Sir,

You say that I found it "advisable to duck" your "more serious censures" on my book on dissolution of Parliament. Attached are replies to every remaining point I can find in your review. If you can find any others, I am ready to reply to those also. Meanwhile perhaps you can find space for this letter and for one or more of the fifteen points set out below.

Yours truly,

Eugene Forsey

1. You say that my purpose in writing the book was "to attack Mr. Mackenzie King, in the spirit of the political pamphleteer, for the course which he followed" in 1926. The purpose of the book is clearly stated in the Preface: "to set forth the constitutional principles governing the exercise of the power of dissolution of Parliament". If Mr. King's course in 1926 provides the most conspicuous example in British history of an attempt to violate those principles, that is his fault, not mine.

2. You suggest that I attempted to "deposit in the mind of the unwary reader the thought that ~~[illegible]~~ since Lord So-and-So, governor of some petty colony in the middle of the nineteenth century, refused dissolution, and since this was but one of many such exercises of this prerogative, Lord Byng was free to take similar action." You "find it advisable to duck" the facts that of the 51 refusals of dissolution, only seven took place anywhere near the middle of the nineteenth century; that 24 of the 51 have occurred since January 1, 1900, and 18 of the 36 Australian cases in the present century; and that the only South African case occurred in 1939.

3. You say that my book "is, in fact, a campaign document, apparently planned to appear at the moment when Mr. Meighen, re-emerging from the shades . . . would take belated vengeance." My book was finished, except for condensation and minor revisions, on April 19, 1941. (This can be verified by the McGill University Library and Faculty of Graduate Studies.) The first word I heard of Mr. Meighen's returning to public life was in the press and radio announcements about the beginning of December 1941, by which date my book had been in the hands of the publishers for about five months.

4. Your quotations from General Smuts and Sir Robert Borden on Dominion status are completely irrelevant. Of course the Governor-General in 1926 was "in an analogous position to the King in Great Britain", with "duties and powers . . . practically the same as those appertaining to the Crown in the British Islands". As far as the power of dissolution is concerned, he had been in that position for many years, and so had other Governors-General, Governors and Lieutenant-Governors throughout the Empire. My book, to anyone who is capable of understanding it, makes that abundantly clear (see especially pp. 66-70 and 243-250). I notice that you are careful not to mention who it was who repeatedly advised Lord Byng to apply

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to the British Government to tell him what he ought to do.

5. Your claim that the result of the 1926 election settled it that the Governor-General could not refuse dissolution except in what you call "inconceivable" circumstances, is untenable, for the following reasons:

(a) An election can undoubtedly bring about a change in the Constitution, but only by giving a Government a distinct mandate for that purpose. Mr. King never asked for any such mandate. The Constitution of Canada therefore remained after the 1926 election precisely what it had been before.

(b) Presumably you would reply that no change was necessary; that the reserve power to refuse dissolution was already non-existent, and the electorate merely made an authoritative declaration of the true and pre-existent constitutional position. But it is at least doubtful whether a single election can settle disputed points of constitutional doctrine. I knew of no writer on the Constitution who asserts that it can, and Evatt clearly implies the contrary. Mr. King himself, after the 1926 election, stated emphatically that if the election had gone the other way, the question would have been "very far from settled" (Hansard, 1926-27, p. 1652).

(c) Assuming that the 1926 election settled any constitutional point, however, it most certainly did not settle it that the Governor-General could not refuse dissolution, even in circumstances falling far short of your notion of the "inconceivable". Mr. King formally challenged the constitutionality of the temporary Government. He never challenged the power and right of the Governor-General to refuse dissolution in appropriate circumstances. On the contrary, he twice ~~MX~~ explicitly admitted that right. In the House, after the change of Government, he said: "The present Prime Minister took the responsibility of being able to carry on . . . without a dissolution. . . . I believe that His Excellency sincerely believed that the present Prime Minister would be able to carry on the government . . . in accordance with British traditions, in a manner that would accord with the recognised principles of responsible government. . . . Now if the right honourable gentleman can demonstrate to the country, if he has demonstrated to this House, . . . that he is able to do that, . . . then I say that His Excellency's judgment in the matter has been sound and right, and there is no criticism to offer. But . . . if . . . it should appear that we are to have another day of the character we have had to-day, when government can only be carried on by Ministers not one of whom has taken an oath of office, then . . . it would be time for His Excellency to ask himself . . . whether the right honourable gentleman has carried out his undertaking" (Hansard, 1926, pp. 5189-5225). In this passage Mr. King plainly admits that if Mr. Meighen could form an alternative Government in the ordinary way and carry on without a dissolution, Lord Byng's refusal of dissolution on June 28 was perfectly constitutional; in other words, the whole question of the constitutionality ~~of XXXXXXXX~~ the refusal is made to hinge on the constitutionality or otherwise of the temporary Government. Similarly, in his policy speech of July 23, 1926, as reported by Keith, Mr. King said: "I am prepared to say that there may be circumstances in which a Governor-General might find subsequent justification for a refusal to grant a dissolution of Parliament. Such might be the case, where Parliament is in session and the leader of another party having accepted the responsibility ~~XXXXXXXXXXXXX~~ of the refusal, demonstrates after compliance with all constitutional obligations that he is able to carry on the business of Parliament by the majority he is in a position to command in the House of Commons." This is the constitutional doctrine for which Mr. King sought the support of the electors, a doctrine which asserts very clearly that the Governor-General may constitutionally refuse dissolution if an effective, constitutional alternative Government is available. Mr. King's sole claim was that Mr. Meighen's temporary Ministry was not such a Government, and that therefore the conditions which would

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render refusal of dissolution constitutional were not present. Moreover, in his speech of July 23, he stated that he was "unable to admit that . . . the granting of dissolution . . . to Mr. Meighen was . . . constitutional", a statement which unquestionably recognizes that the Governor-General has a right to refuse a request for dissolution, even if the request fulfils your one "indispensable condition": that it "is asked for by the Prime Minister speaking on behalf of his colleagues and his party".

It should be noted also that the election of 1926 resulted not from any challenge to the Governor-General's right to refuse dissolution, but from the direct challenge, in the Robb motion, to the temporary Government's constitutionality. Mr. King himself said (and, from his point of view, with irrefutable logic) that the issue of the Governor-General's action "paled into relative ~~insignificance~~ insignificance" compared with the issue raised by the formation of the temporary Government (speech of July 23).

If the election of 1926 settled any constitutional question, therefore, it was the issue of the temporary Government, an issue which, since the abolition of ministerial by-elections in ~~1930~~ 1931, has ceased to have any but academic significance.

(d) The verdict of the electorate in 1926 was gained in part by ~~the~~ concealment of a material fact: Mr. King's repeated advice to the Governor-General to ask Downing Street to tell him what he ought to do, and Lord Byng's steadfast refusal thus to reduce Canada to the status of a colony. This alone is enough to invalidate any decision on any constitutional point which the electorate may have been capable of rendering.

(e) In spite of a widespread assumption to the contrary, the Report of the Imperial Conference of 1926 did not endorse Mr. King's view ~~of~~ either of British constitutional practice or of the constitutionality of Lord Byng's action. All it says is that in all essential respects the practice in the Dominions is the same as in Britain. But Mr. Meighen certainly never questioned this, and there is no evidence that Lord Byng did either. On the contrary, as even Keith admits, Mr. Meighen's position was that, in similar circumstances, the King would have acted precisely as Lord Byng did. There are no substantial grounds for Mr. King's view of British practice. There are numerous and very substantial grounds (fully set forth in my book) for Mr. Meighen's. In other words, there is excellent reason for considering the Report not as endorsing but as repudiating Mr. King's views, and as vindicating 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 verdict of the Canadian electorate contrary to its terms.

6. You assert that precedents from the Australian States and Canadian provinces are inapplicable. This contention has been fully answered by Evatt, in passages quoted in my book. It is, in any event, contrary to common sense.

7. For the statement that King George V in November 1910 refused dissolution to Mr. Asquith till after the Parliament Bill had, at the King's insistence, been introduced in the Lords, my authorities are Sir Almeric Fitzroy, then Clerk of the Privy Council; Lord Newton, the biographer of Lord Lansdowne; and Lord Esher. All these authorities are given in detail in my book. You make no attempt to challenge them. All you do is to refer to Mr. Spender, whose account in no way contradicts those given by Fitzroy and Newton, and to drag in a great deal of extraneous matter which, as far as I can see, has no relevance whatever.

8. You quote Mr. Ewart to the effect that "no British King will ever

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risk his Crown by an attack ~~XXXXXXX~~ upon the well-established principles of responsible government and ministerial responsibility." This has about as much relevance to the 1926 crisis as most of Mr. Ewart's statements, that is, none at all. Lord Byng made no "attack upon the well-established principles of responsible government and ministerial responsibility"; on the contrary, he intervened to protect responsible government, and Mr. Meighen, according to the principle of ministerial responsibility, accepted responsibility for his action. Your readers will, I hope, note that Mr. Ewart says in one breath that ~~XXXXXX

did not enter in the slightest measure into Lord Byng's consideration." It is perfectly true that Lord Byng's letters to Mr. King do not mention the motion of censure. But it is equally true that ~~[illegible]~~ the fact that such a motion was under ~~[illegible]~~ debate was unmistakably one of the reasons which induced Mr. Meighen to accept responsibility for the refusal of dissolution. The question is therefore just as relevant as if Lord Byng had mentioned it a dozen times. As for the ingenious plea that this was "a political, not a constitutional issue", I need only refer your readers to Edward Blake's language about the prorogation of 1873, which merely postponed decision on a motion of ~~[illegible]~~ censure, where Mr. King's dissolution would have prevented it altogether. The quotation will be found in my book at p. 184. Blake did not share your view that the freedom of Parliament to debate, and pronounce judgment on, the conduct of a Government is not a "constitutional" question. No one with any common sense could share your view.

15. You say that "In the last 33 years there have been two cases of two forced dissolutions being given in Great Britain with but a year separating them --- Asquith's elections of 1909 and 1910; and the Conservative elections of 1922 (Law) and 1923 (Baldwin). Like most of the precedents upon which Mr. Forsey relies, the two-dissolution argument has become mythical." Your use of the ~~[illegible]~~ term "forced dissolution" is, I venture to say, new to constitutional law. In the accepted terminology, a "forced dissolution" is one brought on by the insistence of the Crown, backed, if need be, by the threat of dismissal. There may be some ground for applying the term to the dissolution of 1909; there is none for applying it to the dissolutions of 1910, 1922 and 1923. What you mean by "the two-dissolution ~~[illegible]~~ argument" I do not know. The only meaning I can attach to it is that no Government can have two successive dissolutions, or at least two successive dissolutions out of the normal course. But my book contains not the smallest suggestion of either ~~[illegible]~~ of these views, which, of course, would be in flagrant contradiction not only with the cases you cite but with many others. What I have argued, with numerous precedents and authorities to support the argument, is that while in certain defined circumstances an appeal to the people is constitutional and proper, in certain other defined circumstances it is unconstitutional and improper. This seems a simple enough proposition. But as long ago as 1930, discussion at a meeting of the Canadian Political Science Association revealed to me that it was far too abstruse for Mr. John S. Ewart. I see now that it is also too abstruse for his disciples. There are some states of mind which can only be described as "invincible ignorance".

Eugene Forsey

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3 Lakeview Terrace,
Ottawa, June 5, 1943.
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Dear Mr. Meighen,

The Free Press is running for me as hard as ever, or harder. Get John Stevenson to let you see the editorial page for June 3. I am very pleased to see that I have now forced them to pour scorn on Edward Blake!

Yours,
E. A. D.

Cahan has been ill. Shall write more fully

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or that matter later.

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E. A. D.

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Please keep. E.A.J.

144435

3 Lakeview Terrace,
Ottawa, June 6, 1943.

Dear Mr. Cahan,

Thank you very much for your letter. I am very sorry to hear you have had grippe and lumbago. They are not only painful but disabling, and are apt to take a while to recover from completely.

I am delighted to hear that the Herald will be printing your review, and trust the delay will not be long. I suppose you saw my short reply to the Winnipeg Free Press, and their spiteful note on it. I have replied to that with a much longer document, which I have no doubt they will not print, but which ought to give Dafoe something to think over. Now, before my second reply can reach them, they have come out with another blast on the editorial page, containing, astonishing as it may seem, some new misrepresentations. However, I have pushed them into a position where they must needs pour scorn not only on Asquith but on Edward Blake! That is worth something, and I propose to write them again, pointing the moral and adorning the tale.

Of course you are quite right about the subject I dealt with in Saturday Night requiring a more profound study. I hope I may be able to do something in that direction before many months elapse. But what would be far more valuable would be for you, with your thorough knowledge of the subject, and your unrivalled experience, to do the more profound study; and I am sure Sandwell would jump at the chance of printing it (that is, a summary of the full-length treatment which the subject should have, and which you could give it).

About that business of the story about Mr. Meighen and the $200,000: This tale, in one form or another has now been going the rounds for some time. Sometimes it is $100,000, sometimes $150,000, sometimes $175,000, sometimes $200,000; sometimes it is cash, sometimes securities; sometimes it was given as a consideration for resigning from the Senate; sometimes it was a sort of endowment for the leadership; sometimes the person who tells the story knows the precise securities which were transferred; sometimes he knows the number and names of the contributors. The worst of it is that every effort to track it to its source fails. Meighen has naturally been very deeply wounded by it, and I think especially wounded that such a tale should have reached the ears of an old colleague like yourself; equally, naturally, he is exceedingly anxious to find out where on earth the thing came from. I think I know him pretty well, and I have known him for a pretty long time; I knew no one more utterly incapable of such a transaction than he is. I should as soon believe such a story about you as about him. I wish I had said this more emphatically and fully and clearly at the time when you told me what you had heard; but I told you what he said about the version of the story which had reached Stitt's ears, and I was so flabbergasted by this new version that I couldn't for the moment collect my faculties to say what I should have.

Meighen has, I think, been more lied about than any living Canadian public man. As long as the lies are merely street gossip, or incidents of a political campaign, he is (as far as I have been able to judge) quite indifferent about them, indeed, in my opinion, too much so. But when it comes to things of this sort retailed to people like Stitt, and still more to you, it is a different matter, and it becomes for him a matter of urgency that he should clear his name. I hope very much that you will find it possible to give him some idea of where this tale started. I am sure that if the positions were reversed he would be more than glad to do as much for you.

Yours sincerely
Eugene Forsey

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3 Lakeview Terrace,
Ottawa, June 6, 1943.

Dear Mr. Meighen,

Thank you for your letter. I am relieved to hear that you liked the Forum article. I hasten to assure you that I used the word "capitalist" without any intention of casting odium on it. My only intention was to indicate that a Liberal or a Progressive Conservative Government would be one which would uphold the capitalist system, using that word as economists use it. I fancy you prefer "free enterprise". I think that a less exact term, but have no particular objection to substituting it for capitalist in this context. Whether you are right in surmising that the C.C.F. will ultimately cease to be socialist, time will tell!

What with the book and the various articles, I seem to have really frightened the Free Press. I shall, of course, reply briefly to their latest, and send you a copy. I have been too busy with domestic affairs over the week end to make it possible, as yet.

I enclose copy of a letter I have just written to Cahan, which I hope may produce some results. His letter to me, which arrived yesterday, was marked "personal", so I cannot tell you just what he said; but it was rather inconclusive. Frankly, I doubt whether you will get anything out of him by going down, at least unless you have first prepared the ground by correspondence. I should myself like to see what my letter of to-day will produce, before taking any further steps. As far as I am concerned, it will be impossible for me to get leave from my office during the week. I could go to Montreal only at the week end. We are simply swamped with work at the moment, and my superiors would have a fit if I suggested going to Montreal for this purpose even for part of a day. I am not at all sure that I can even get up to Toronto for the 16th. and 17th., for the United Church Commission on the Church, the Nation, and World Order, though that, as dealing with post-war problems, comes within the scope of my regular work.

I hope the whole business can be settled without too much unpleasantness. Both you and Cahan are such old friends of mine, and I am under such deep obligations to both of you, that it all distresses me very deeply, and has several times almost made me ill. However, clearly the matter must be cleared up if at all possible.

Yours sincerely,

Eugene Forsey

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144437

320 Bay Street, Toronto,
June 7, 1943.

Dr. Eugene Forsey,
5 Lakeview Terrace,
Ottawa, Ontario.

My dear Eugene:

I truly got great enjoyment today out of your letter of June 4th replying to the Free Press. Their two screeds did not deserve any such respectful rejoinder as you have made, but you have done it well and thoroughly. I will get from John Stevenson their issue of 3rd. You will have some conception now of what I had to put up with for many years with that paper. It was, of course, the more difficult because undoubtedly Dafoe is an able writer.

I am waiting anxiously re Cahan.

Yours sincerely,

AM/E.

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CANADA

144438

320 Bay Street, Toronto,
June 8, 1915.

Oxford University Press,
480 University Avenue,
Toronto, Ontario.

Dear Sirs: Attention Mr. J. C. Irwin

Mr. Meighen has now disposed of the eleven extra copies of "Dissolution of Parliament," which were sent to him in error on April 12th, and has asked me to send you the enclosed cheque for $36.67 in payment thereof.

Yours very truly,

E. Private Secretary.

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CANADA

144439

520 Bay Street, Toronto,
June 8, 1943.

Dr. Eugene Forsey,
5 Lakeview Terrace,
Ottawa, Ontario.

My dear Eugene:

I have your letter of 6th June and thank you very much for sending me copy of your letter to Mr. Cahan. I am not at all surprised that his letter to you was "inconclusive." It is my business now to make his position conclusive. Am enclosing herewith copy of letter I have written him today.

Yours very truly,

AM/E.
Encl.

MEIGHEN PAPERS, Series 6 (M.G. 26, I, Volume 222)

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CANADA

144440

3 Lakeview Terrace,
Ottawa, June 9, 1943.

The Editor,
Winnipeg Free Press,
Winnipeg, Manitoba.

Sir,

I had thought that in your previous articles about my book, you had exhausted the possibilities of misrepresenting my position. Your article of June 3, "Mr. Forsey and the C.C.F.", shows that I underestimated your powers.

Never have I said that "Parliament should not be dissolved if an alternative government is possible", nor do I know of anyone who has. The possibility of an alternative Government is (except perhaps in the very special circumstances contemplated by Lord Balfour in April 1910) an indispensable condition for refusal of dissolution; it is not a sufficient reason for refusal. Even if an alternative Government is possible, there may be conclusive reason for granting dissolution: for example, there may be a great question of public policy at issue, or the Parliament may be nearing the end of its maximum term. My book makes all this perfectly clear. Your remarks on the point are therefore without a shadow of excuse.

Your argument that, on my principles, the Opposition could always prevent dissolution by putting on the order paper a succession of motions of censure is another inexcusable misrepresentation. Of course a Government is not debarred from getting a dissolution merely because a motion of censure is on the order paper. I never said it was. What I did say was that a Government is not entitled to a dissolution while a motion of censure is under debate, a totally different matter.

It is a considerable consolation to me that I share your censures with Lord Oxford and Edward Blake, two of the greatest constitutional authorities, and greatest Liberals, the British Commonwealth has ever produced. Your remarks about both are quite in character. For you, on this subject, precedent is nothing, authority is nothing, common sense is nothing; you cheerfully consign to the dust-bin Australia, New Zealand, South Africa and all the provinces of Canada, and Peel, Russell, Gladstone, Dicey, Jennings, Evatt and a host of others, Conservative, Liberal and Labour. Who are these, what is history itself, to weigh in the balance against such giants as Mr. John S. Ewart and the Editor of the Winnipeg Free Press? But would it not have saved time and ink if you had simply announced at the outset that the Winnipeg Free Press, speaking ex cathedra on a constitutional question, is infallible?

Yours truly,

Eugene Forsey

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144441

320 Bay Street, Toronto,
June 12, 1945.

Dr. Eugene Forsey,
3 Lakeview Terrace,
Ottawa, Ontario.

My dear Eugene:

Have just read your letter of 9th to the Free Press. Really it is priceless. If you had the Editor on even terms say across the floor of the House, I can imagine what would happen to him.

About the Free Press idea that a dissolution could be prevented by sticking a lot of motions of censure on the Order Paper, your answer is, of course, conclusive. It could also be said that anything apparently frivolous or with an ulterior purpose is in a very different category from a Motion which has been hours under debate, which has been repeatedly appealed against because it is a motion of censure, and which has every evidence of being carried, and is literally poles apart from the ridiculous instance conjured up by the Free Press.

Do not know yet whether the Free Press published your second reply or not. I do hope they did. Will find out from John probably today.

Yours very truly,

AM/E.

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144442

320 Bay Street, Toronto,
June 12, 1945.

Dr. Eugene Forsey,
3 Lakeview Terrace,
Ottawa, Ontario.

Dear Eugene:

I have a letter from Hon. C. H. Cahan today which is marked "Personal." I regret very much that it is so marked, and frankly do not think it should have been. Mine to him had no such restriction. All I feel justified in saying to you is that it is a complete and emphatic disavowal of having made any statement to anyone to the effect that I had been paid money or anything in respect of my acceptance of Leadership or resignation from the Senate, for such purpose, or indeed for any personal purpose connected with my political life.

Yours very truly,

AM/E.

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144443

3 Lakeview Terrace,
Ottawa, June 12, 1943.

Dear Mr. Meighen,

I have been so rushed for the last few days that I have had no opportunity to answer your last letters, nor to comment on those you sent Mr. Cahan, of which you were kind enough to send me copies.

To-day's mail brought me a copy of his letter to you. I at once sent him the reply of which I now enclose a copy.

I am at a loss to understand how I can have received the impression I did from what he says he intended to convey. His description of the rest of the conversation, as contained in the last three paragraphs of page 1 and the first two paragraphs of page 2 of his letter, fully accords with my own recollection. I should also add that it struck me at the time that he did not seem to think what he said was derogatory to you.

Incidentally, Mr. Cahan certainly never mentioned securities; that was part of the story Stitt had heard. I am very sorry if you got the impression that I said it occurred also in this other, as I certainly did not mean to say so.

I have no doubt that Mr. Cahan will have nothing further to do with me. I dare say you may feel the same way. I can only say that I told you what I did in good faith, believing it to be an accurate account of that part of the conversation to which I referred.

I need only add that I much prefer to take any blame which may attach to me rather than impugn, in the slightest degree, the honour of my and my father's old friend.

As this may be the last time I shall be writing you, I should like to say how very deeply I appreciate your many kindnesses, which I can never repay, and how sorry I am that I should have been in any way an occasion of trouble to you.

Yours sincerely,

Eugene Forsey

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144444

3 Lisgar Terrace,
Ottawa, June 15, 1918.

Dear Mr. Cahan,

I have just received your letter. I hasten to say that I am very sorry indeed that I misunderstood you, and very glad to know that you did not intend to convey the impression which I received.

Yours sincerely,

Eugene Forsey

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CANADA

144445

320 Bay Street, Toronto,
June 14, 1945.

Dr. Eugene Forsey,
5 Lakeview Terrace,
Ottawa, Ontario.

My dear Eugene:

I just received your letter of 12th and hasten to write you. Do not think for a minute that anything that has occurred alters in the least my friendly relations with yourself and my admiration of your talents and your work.

Coming immediately, as it did, on your recital to Hon. Mr. Cahan of the story which came from Mr. Stitt, it was quite inevitable, unless very specific, differentiating language were used, that you would take from Mr. Cahan's words just what you related to me. I know positively that you spoke to me in absolute good faith.

What you say in your fourth paragraph is quite correct. You did not mention to me anything about securities, but I just included them in my letter of denial in order that everything possible would be covered.

Yours sincerely,

AM/E.

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144446

320 Bay Street, Toronto,
June 14, 1943.

Dr. Eugene Forsey,
5 Lakeview Terrace,
Ottawa, Ontario.

My dear Eugene:

Yesterday at a social event I ran across Clifford Sifton, and the subject of your book came up. He told me most definitely that John W. Dafoe had written the review in the Free Press and was writing the replies. He said Dafoe had taken the book and spent all sorts of time studying it, etc., etc., etc., and was going to continue the controversy as long as you were ready to continue it. I told him that was all right as a state of mind but it would never be implemented in action. I reminded him that about two years ago I had a controversy with the Free Press over a most glaring misrepresentation of my words, and made up my mind to continue it until closed off by the Free Press itself, and that I had done so. He expressed great surprise and said he could hardly believe that the Free Press had refused to publish anything of mine by way of reply, as he felt sure they would not so refuse. I told him to look up the paper and he would see that they notified me in their last rejoinder (in which they indulged in a new and most palpable misrepresentation) that they would publish no further correspondence from me on the subject.

One reason why I relate this so circumstantially is again to reiterate the advice that you follow them right up to the end until they shut you off. Without a doubt they will shut you off and may have done so already, but do not let them be in a position to say that you give up. If you do, they will never cease to remind you of the fact. You have them in a corner and you can pummel them blow after blow and never let them escape.

Again with very best wishes,

Yours sincerely,

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144447

320 Bay Street, Toronto,
June 14, 1945.

Dr. Eugene Forsey,
3 Lakeview Terrace,
Ottawa, Ontario.

My dear Eugene:

I have now read Mr. Cahan's review in the Halifax Herald. It is hardly a review but it is exceedingly interesting and the introductory narrative is very well done indeed. I am enclosing copy of a letter I have written Mr. Cahan today.

Yours very truly,

AM/E.
Encl.

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520 Bay Street, Toronto,
May 8, 1943.

Mr. Edward Meighen,
Portage la Prairie, Man.

Dear Ed:

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144448

3 Lakeview Terrace,
Ottawa, June 16, 1943.

The Editor,
Winnipeg Free Press,
Winnipeg, Manitoba.

Sir,

Your latest blast (June 12) against my book, articles and letters, is the usual mixture of misrepresentation and abuse, again attributing to me all the literary malpractices of which you yourself have been guilty in this discussion. There are only five points on which I feel it necessary to comment.

1. You say that I "place great reliance upon a rhetorical passage from Burke, but overlook the counter-declaration, made in the same discussion, by William Pitt." The "discussion" in question took place June 14, 1784. It is recorded in the Parliamentary History, vol. XXIV, pp. 943-975. It consists of Burke's motion and speech, followed by a note that Windham seconded the motion, "which was negatived without a division". There is not one syllable by Pitt from start to finish.

2. You say that Mr. King says he was "in no danger of being censured" in 1926. If that were true, why did he not wait for the vote on the Stevens motion? Why did he assert, in his policy speech of July 23, 1926, that that motion was not a motion of censure at all, though in the debate on it he had ~~XXXXX~~ himself five times called it so (Hansard, 1926, pp. 5132, 5135)?

You conveniently overlook the facts which perhaps may count a little even against Mr. King's disinterested assurances: (a) that the House had already, when he asked for dissolution, defeated, by a majority of two votes, an attempt to have the words of censure struck out of the Stevens motion; and (b) that after the change of Government the censure was carried by a majority of 10. These votes are recorded in the Journals and Debates.

3. You say that if I were a "bona fide scholar", I would "give Mr. King's explanatory statement" about his "suggestion" that Lord Byng should ask Downing Street what his course should be. The "explanatory statement" is not only given in my book, but discussed at some length (pp. 247-249).

In this connection you quote Keith as saying that Mr. King acted with "much common sense" in making his suggestion. The quotation is correct. In the original text of my book (on file in the McGill Library) I quoted, and discussed very fully, not only this statement but another of Keith's supporting Mr. King on this point. But as Keith appears to have abandoned the position taken in these two statements, I decided to omit them from the published book. However, here they are, with the relevant introductory paragraph and my comments, all word for word as they originally appeared in the text. (I presume the owners of the copyright of Keith's works will have no objection to your printing the quotations therefrom.)

"It is worth noting here that Mr. King was not simply suggesting that Lord Byng should seek the ~~XXXXX~~ expert opinion of the Secretary of State for the Dominions. He was suggesting "asking the <u>British Government, from whom you have come to Canada under instructions</u>, what, in the opinion of the Secretary of

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State . . . . your course should be.' To be sure, it was the opinion of the Secretary of State which was asked for, but it was the British Government which was asked to furnish that opinion.

"Keith, in his 'Letters on Imperial Relations', says: 'No one could deny that Lord Byng was an Imperial officer subject to the royal instructions conveyed through the Secretary of State. The point at issue was, What did those instructions enjoin . . . where a Prime Minister asked for a dissolution . . . ? Was it Lord Byng's duty to investigate the political situation for himself, and decide on his own responsibility what was best for Canada? Or could he follow the British practice ---recently signally illustrated by the immediate acceptance . . . of Mr. Ramsay MacDonald's advice in 1924 ---and act on the advice of his Ministers? . . . Lord Byng was without political experience, and it appears to me that Mr. King acted with much common sense in advising him ~~XX~~. . . . to ask the Secretary of State what the royal instructions really meant." (P. 67; italics mine.)

"This seems to mean that Lord Byng was bound to act, in a purely internal matter as an ~~XXXXXXXXXXXXXX~~ Imperial officer under "royal instructions conveyed through the Secretary of State'. But if so, Canada was clearly inferior in status to Great Britain. This Mr. King, Mr. Meighen and Lord Byng all denied. Mr. King did not ask the Secretary of State or the British Government 'what the royal instructions really meant' or 'enjoined' (a very strong word), and it is at least very doubtful whether he or anyone else in Canada would have accepted the statement that this was 'the point at issue'. Nor is the choice confronting Lord Byng stated in precise enough terms. He certainly had no roving commission to 'decide on his own responsibility' whether a dissolution was 'best for Canada'. The question was, had he a duty to decide whether a grant of dissolution in the circumstances would be in accordance with constitutional usage (British and/or Dominion). Keith's statement, in this passage, of 'the British practice' is also open to objection. It contradicts his own statements elsewhere and also the opinions of many other authorities at least equally eminent.

"The passage in the 'Letters' was written in 1927. In the 1928 edition of 'Responsible Government ~~XXXXX~~ in the Dominions', pp. xxi-xxii, Keith returned to the subject: 'Mr. King had suggested to the Governor-General that he might do well . . . to ascertain the views of the Secretary of State for the Dominions as to his constitutional position. . . . Mr. King's action was entirely constitutional. Lord Byng, a gallant soldier without political experience, was confronted with a difficult position, and, as wholly unversed in constitutional usage, nothing was more natural than to advise him to inquire from the head of the department officially charged with recording constitutional precedents what was in such a case the constitutional duty of a Governor-General, i.e., whether he was to be guided by the practice of the Crown in the United Kingdom or should exercise a personal discretion. That the Secretary of State should never interfere in such issues is obvious; that he should refuse to advise if asked would be absurd, and surely there could be nothing undignified in a Governor-General consulting an expert instead of relying on the advice of a private secretary or on his own interpretation of the dicta of the writers of text-books.'

"This is a very different statement of the position, but scarcely more satisfactory. Like the other passage it ignores the fact that Mr. King explicitly brought the British Government into his 'suggestion'. Like the other passage, too, it begs the question by assuming that 'the practice in the United Kingdom' and the exercise of 'personal discretion' are mutually exclusive, which Keith himself elsewhere denies. But there the resemblance between the two passages ends. There is now no mention of Lord Byng's position as 'an Imperial officer;

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an mention of 'the royal instructions' or what they 'enjoin'. It is now a question of getting the expert advice of the Secretary of State on 'the constitutional duty of a Governor-General', advice for which Mr. King's phrasing would clearly have made the whole British Government responsible. Of course there would have been 'nothing unlawful' in Lord Byng's enabling the Secretary of State. But that is beside the point. The question is, would such action have violated the principle of equality of status? This question Keith does not answer, except by the flat assertion that Mr. King's suggestion was 'unconstitutional'.

"It may be added that, as there appears to be no precedent for Mr. King's request for dissolution, the fact that the Secretary of State was 'head of the department officially charged with recording constitutional precedents' would in itself hardly have qualified him to give expert advice the more so as the 'precedents' which in his department was 'officially charged with recording' were not United Kingdom precedents but only those of the dominions, which Keith seems to have considered inapplicable."

4. Both Mr. Amery in 1926, and Keith in 1949, declared that such consultation with the British Government as Mr. King suggested would be unconstitutional and improper. The quotations are given in my book, p. 318.

5. Your latest article contains numerous assertions that I have "shifted my ground", "abandoned" this, "yielded" that, "retreated" or "hedged" the other thing. All this, to anyone who will read my book and my subsequent statements without a closed mind will see for himself, is the product of your own lively imagination and nothing else. I have not yielded a sixteenth of an inch on any point whatever.

Yours truly,

Eugene Forsey

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144451

3 Lakeview Terrace,
Ottawa, June 17, 1943.

Dear Mr. Meighen,

I need hardly say how pleased I was to get your letters yesterday. I had put in a rather uncomfortable week end. Mr. Cahan's letter simply staggered and baffled me. I began to wonder whether I was taking leave of my wits, or whether you would decide that I was just a common liar, and a trouble-making liar at that.

I am beginning to think that perhaps Mr. Cahan is showing some signs of age (though this is of course a remark I should not care to have passed on to anyone). Monday evening, my aunt called me up in a great state of agitation. She and Mother had received a copy of the Halifax Herald review, and Mother found the part about my Father full of mistakes. Father never had T.B. or anything like it; it was heart trouble. Mr. Cahan had only a minor share, if any, in the arrangements for the funeral (though he did attend). There were at least four Protestant churches in Mexico City, of one of which my parents were members. The funeral was conducted by the minister of the Methodist Episcopal Church South, and was the usual religious service. Mr. Cahan was indeed wonderfully kind, but these particular recollections are at fault. Actually, what he did was to advance Mother a good-sized sum for her trip north with me after Father died, and to refuse every attempt at repayment.

I have received from Mr. Cahan a copy of the review, but as there was no covering letter I gather that my surmise about how he would feel toward me henceforth was correct. I shall write him again shortly, and hope I may be able to ease his feelings a trifle. The whole business must have been very unpleasant for him; but he could have saved himself some trouble by writing me at once, after my first letter on the subject, saying that I had completely misunderstood him and should so inform you.

Your conversation with Mr. Sifton is most interesting. As you doubtless know, the Free Press printed, June 12, both my letters, with a villainous reply on the editorial page. The last part of this production suggests that the eminent Dafoe now proposes to clamp down the lid. None the less I have replied again, in the letter of which I enclose a copy. Of course I have only touched on a few of the outrages in this last article; but I really hadn't the patience to go over the whole thing point by point. If he comes back again with more dirt, I may be obliged to do this. Meanwhile this will keep the pot boiling. I can assure you that I have every intention of continuing the discussion until Dafoe cries off. As far as I can discover, you and I are among the very few people in Canada who think it is worth while replying to newspaper attacks at all. Like you, I remain firmly convinced of the wisdom of doing so, and indeed, in a case like this, the necessity of doing so. I am, however, much fortified by your advice.

Judith Robinson is considering dealing with the whole affair in what she calls "a clinical study of Liberalism in decline, with Dr. XXXX Dafoe's as the case history". I very much hope she will. It would be a masterpiece.

Heard from Coldwell not long since a story about Beauchesne which will amuse you. Beauchesne, I understand, has his C.M.G. on his visiting cards. A month or so ago, he went to Toronto to attend a function where H.J. Carmichael was one of the principal figures. He handed his card to the flunkey at the door, who promptly announced "Mr. Arthur Bewchesney, General Motors of Canada". Let

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us hope that King's new creations will have better luck!

Have you seen the Lever Brothers pamphlet on the problem of unemployment and post-war reconstruction? I think it would interest you. It's published by the O.U.P. The recent League of Nations report on the ~~XXXXX~~ transition from war to peace economy is also interesting. I have been reading a number of these things in the course of my duties, more especially as I shall shortly have to prepare a memorandum for presentation to the House of Commons Committee on Reconstruction, and may be appointed to the Ontario Committee on the same subject which I hear is likely to be set up. I fear my observations on such matters are unlikely to meet with your approval! But at least I am trying to prepare carefully for what I have to say.

I get a sardonic enjoyment out of thinking what King would say about this aluminum affair if he were in Opposition. Can't you just hear his declamations about "Tory overlords", "the rights of the people", "profiteering" and all the rest of it. But look at him now!

The Ontario Liberal party has evidently decided to commit hari-kiri, a decision with which I am in hearty accord. Clark's Detroit speech should be as disastrous for the provincial Liberals as Champ Clark's speech was for the Dominion Liberals in 1911. Drew is making the most of it, and I trust will continue to do so.

I have a most interesting piece of news for you, but think it unsafe to commit it to paper; it must wait till I am in Toronto again. When that will be, I don't know, but probably before the end of the summer.

Yours sincerely,

Eugene Forsey

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144453

320 Bay Street, Toronto,
June 19, 1945.

Dr. Eugene Forsey,
5 Lakeview Terrace,
Ottawa, Ontario.

Dear Eugene:

I have read your last reply to the Free Press. Like all the others, it is really excellent. I am awfully glad you agree with me that the thing to do is to keep right on and compel these people to shut you out of their paper. As soon as this is done, I wish you would send me the extract from the Free Press in which they say they will publish no more. I will send it on to Mr. Clifford Sifton with an intimation that I know his paper better than he does himself.

I note what you say as to Mr. Cahan. Will discuss this matter further when you are down.

Yes, I have seen the Lever Brothers' pamphlet, and thought very highly of it.

The public has lost all memory, and those at Ottawa have little conception, of the ranting and rampage that would be carried on by Mr. King if he had the opportunities of the present Opposition. Insincerity is his second name.

Do get in touch with me always as soon as you come to Toronto.

Yours very truly,

AM/E.

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THE ROUND TABLE.

144454

THE ROUND TABLE LIMITED,
RHODES HOUSE,
OXFORD.

June 21st, 1943.

The Right Hon. Arthur Meighen,
320, Bay Street,
Toronto.

Dear Sir,

I am writing on behalf of the Editor to thank you for your letter of April 27th and for the book entitled "Dissolution of Parliament" which you have so kindly sent him. He is away on holiday for a week or so, and I will show him both when he returns. Meantime I thought you would like to know that they had arrived. The letter reached this office on June 14th, but the book did not arrive till the 19th.

Yours faithfully,

E. M. L. Handley

Assistant Secretary.

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144455

520 Bay Street, Toronto,
September 23, 1945.

Oxford University Press
480 University Avenue,
Toronto, Ontario.

Dear Sirs: Attention Mr. J. C. Irwin

Would you kindly send to Mr. Charles Clark, c/o "The High River Times," High River, Alberta, a copy of "Dissolution of Parliament" by Dr. Eugene Forsey, and charge same to Mr. Meighen.

Yours very truly,

E. Private Secretary.

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144456

3 Lakeview Terrace,
Ottawa, June 23, 1943.

Dear Mr. Meighen,

Many thanks for your letter. I have just had a most interesting call from Miss Charlotte Whitton, who has been here most of the morning, sent by Mr. Bracken, doubtless at your suggestion. It was for me a most profitable and helpful interview.

I have also just had word that I am to come to Toronto for the first meeting of the Ontario Reconstruction Committee next Monday, the 28th. I shall look forward to seeing you for a few minutes if you can spare the time. I thought I had better warn you beforehand, for once! Usually I have such short notice myself that that is not possible.

M.E. Nichols was here the other day, and I had an interesting chat with him. He says Senator Farris is sending him a blast against me, to which he invites me to reply. Farris did an earlier blast, but recalled it; after thinking the matter over, he had decided that, before announcing that Nichols' reviewer (and presumably I) was wrong, he had better read the book! He read Nichols' copy, then bought one of his own, and now says that, though he found the reviewer was right after all, he has produced a revised version. I await it with interest, and without the least trepidation; indeed, I welcome the opportunity of replying. I do hope, however, that it is on a level somewhat

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more respectable intellectually than Ewart's or Dafoe's trash.

Saturday's Free Press did not contain my letter, but it is possible it arrived too late. I shall wait till next Saturday's issue before taking further steps. However, as you probably know, Dafoe in his last ~~blast~~ effort said he was "through with Mr. Forsey the supposed constitutional authority" and was "not interested in Mr. Forsey the political pamphleteer", and that he had already devoted an [redacted] altogether unnecessary amount of space to my works.

"Relations", as I may have told you, is printing my article; and Miss Whitton tells me that the I.O.D.E. is getting in touch with Sandwell about a possible revised version of my Saturday Night articles for their Empire Study Groups. Dafoe, if he hears of this, will be more convinced than ever that conspiracies are afoot!

Yours sincerely,

Eugene Forsey.

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144458

320 Bay Street, Toronto,
June 29, 1943.

Dr. Eugene Forsey,
3 Lakeview Terrace,
Ottawa, Ontario.

Dear Eugene:

I did feel so badly yesterday afternoon when I got home and found that you had already called at the house. What I intended to suggest to you in the morning was that you call late in the afternoon when I would be home. I left here early and got home shortly after 5.30, to find that you had already been there, and further, that Mrs. Meighen and Lillian were both at a show. I really should have 'phoned them but did not think to do so because I fully expected to be home myself anyway, and they do not go to a show once in a long time. Both felt badly to have missed you, and Lillian in particular, because she said it was a very long time since she had seen you.

Now about this Free Press. I have been thinking over the subject. I would advise you to prepare a reply, and a crushing reply, to this last emanation of Dafoe, and send it to Winnipeg for publication. Of course, they will not publish it. Then the next step I would like you to take would be to put all the controversy with the Free Press in a pamphlet. It will end with your own thoroughly effective reply and with a statement that this was refused publication. There would be no necessity of printing a great many of them, but I would think anywhere from 500 to 1,000, whatever you feel like ordering, and most certainly and gladly I will pay for the entire cost. This, I think, will give you the overwhelming edge in the controversy, and the Free Press will find it difficult to complain; in fact, they cannot possibly complain because they had already elected to end it in their own safety first way and for once have been frustrated by a man who is far more than their equal.

(over)

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144459

In fact, I wish I had thought of this at the time of my controversy two or three years ago but it never occurred to me.

I might add it will help the sale of the book.

The Free Press article is enclosed herewith as requested.

Yours very truly,

AM/E.

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144460

3 Lakeview Terrace,
Ottawa, June 29, 1943.

Dear Mr. Meighen,

I have checked the Parliamentary History, the 1806 and 1808 collections of Pitt's speeches, and Stanhope's Life of Pitt, and can find no trace whatever of any statement even remotely resembling that which the Free Press attributes to Pitt. It appears to be just another of Dafoe's fabrications. I propose to write him to that effect, even though I know he won't publish the letter. I shall send you a copy.

Incidentally, Jennings says that he can find no case of any statesman in the United Kingdom who has ever asserted that it is the duty of the Crown to grant a duty on demand. The quotation is given in my book.

Bitt's speeches at the time in question are, incidentally, full of the most sweeping statements in support of the prerogative generally, including very positive assertions that it is not incumbent on him to resign even after a series of XXXXXXXX defeats on motions of a very strong character. It would be interesting to know whether Dafoe subscribes to these doctrines. Perhaps if they are drawn to his attention, he will throw Pitt out the window along with the rest! Interestingly enough, too, it appears that so far from Pitt having "invented" the doctrine of the "penal dissolution", the King and others repeatedly pressed him to dissolve long before he did. I can give chapter and verse for this, if need be.

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I intend to let the brave Dafoe see what the Irish Constitution lays down on this point. Article 13, section 2, explicitly says that the President may "in his absolute discretion, refuse a dissolution to a Taoiseach (Prime Minister) who no longer retains a majoirty in Dail Eireann"; and Article 28, section 10 (or 11; I've left the document at the office) explicitly says that a Government must retain office till its successor is chosen. As the Irish Constitution was enacted by vote of the whole people, and as it makes no provision for the Crown at all, in internal affairs, it should be pretty hard even for Dafoe to drag across the trail here all that stuff about "status" and the struggle between King and Parliament, democracy and what not. I think I shall send Sandwell a note on the matter too.

Dafoe is really just an unscrupulous prevaricator, to put it mildly. As the censors may open this, I suppose I had better not use too strong language, for fear they may dish it up to him on his desk and he may sue me. But in some ways I should rather like to see him try. I think by the time the proceedings were over, his public character would be a wretched spectacle.

Was so sorry to miss Mrs. Meighen and Lillian yesterday. Please give them my regrets and best wishes.

Yours sincerely,

Eugene Forsey

The Stratford Beacon-Herald (June 8) was feebli beyond description.

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PUBLIC ARCHIVES
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CANADA

144462

3 Lakeview Terrace,
Ottawa, July 1, 1943.

I know you won't print this,
but I hope you will read it.

The Editor,
Winnipeg Free Press,
Winnipeg, Manitoba.

Sir,

Your final comments on my letter of June 16 are characteristic. In the main, they consist of repeating points already conclusively disproved, but there are a few remarks which deserve some notice even at this late date.

You asserted very specifically (June 12) that in the debate in the Commons on June 14, 1784, Pitt had made a certain statement which I had ignored. When I point out that Pitt said nothing at all in that debate, you shift your ground and accuse me of arguing that Pitt's silence "is a complete answer" to a charge of ignoring some statement which you now allege Pitt made, at a time and place not stated, to the effect that "a prime minister was entitlted to a dissolution on demand." A more disingenuous attempt to wriggle out of an untenable position it has never been my misfortune to see.

If Pitt ever made such a statement, you owe it to history to say where and when. I have searched the Parliamentary History, the 1806 and 1808 collections of Pitt's speeches, and Stanhope's Life of Pitt, and cannot find the slightest trace of any pronouncement of Pitt's on this subject at all. It is a trifle curious, too, that Wellington and Grey, who were Pitt's contemporaries, appear tohave been entirely unaware of any such pronouncement as you cite, and that Peel, Russell, Derby, Disraeli, Gladstone and Salisbury, all of whom possessed some acquaintance with Pitt's career and with the working of the British Constitution, and all of whom recognized the right of the Crown to refuse dissolution, seem to have been equally in the dark. But, as you pointed out on an earlier occasion, all of these were merely politicians, with party interests to further or protect (Pitt in 1784 had of course no party interests to further or protect). Their opinions cannot for a moment stand against the unsupported ipse dixit of the omniscient and impartial Editor of the Winnipeg Free Press.

Dr. Jennings, as noted in my book, p. 72, says that he knows of no British statesman of standing who has "asserted the duty of the monarch to grant a dissolution on request". But as Dr. Jennings has been a Labour Town Councillor, he also, presumably, is thrown out of court as a "politician", even if the mere fact of his disagreeing with you did not automatically disqualify him.

Your further charge that I "made not the slightest reference, beyond this quotation from Burke, to the constitutional developments in the British parliament beginning on December 18, 1783", and so forth, is another misstatement. Page 164 of my book mentions "thenumerous motions carried against Pitt in 1784"; and page 273 has a summary of the circumstances attending Pitt's dissolution of that year. The original text of my book told the story in great detail. But the publishers insisted on that text being cut in half; the

(over)

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circumstances of the 1784 crisis are well known to everyone with even a nodding acquaintance with this subject; and no one now would dream of questioning the absolute propriety of the dissolution of that year, or of any similar dissolution. Accordingly, I omitted the details from the printed version.

You brazenly repeat your charge that I did not, in my book, give Mr. King's defence of his "suggestion" that Lord Byng should "ask the British Government.....what your course should be". My letter of June 16 gives the precise pages on which I quoted and discussed Mr. King's defence; yet with this staring you in the face, you have the nerve to repeat your charge, apparently counting on your readers either to overlook my words or to disbelieve them on your mere say-so. I have never seen a more glaring example of the lengths to which an inherently rotten case and blind partisanship can drive a man of ability, long experience of public affairs, and (hitherto) some reputation for intellectual honesty.

My letter showed no "unusual disposition to accept Dr. Keith's views as authoritative". You had quoted a certain statement of his as if it settled the matter. I pointed out that a later statement of his seemed to repudiate the one which you quoted (and now quote again, at greater length). Which of the two statements in question is the better founded, everyone who will look at the facts can decide for himself.

The real masterpiece of your final comments, however, is your suggestion that I should "ponder" the long quotation from Keith with which you conclude. No one who had not read my book would guess that the essential parts of this quotation are all given there (pp. 154, 160 163, 191-192), and, what is more, very fully discussed.

I hope that some day you may be induced to issue an encyclical on the Constitution of Eire. Article 13, section 2, of that document says that "The President may in his absolute discretion refuse to dissolve Dail Eireann on the advice of a Taoiseach (Prime Minster) who has ceased to retain the support of a majority in the Dail Eireann." Article 28, section 10, says: "The Taoiseach shall resign from office upon his ceasing to retain the support of a majority in Dail Eireann unless on his advice the President dissolves Dail Eireann and on the reassembly of Dail Eireann after the dissolution the Taoiseach secures the support of a majority in Dail Eireann." Article 28, section 11, paragraph 1, says: "If the Taoiseach at any time resigns from office the other members of the Government shall be deemed to have resigned office, but the Taoiseach and the other members of the Government shall continue to carry on their duties until their successors shall have been appointed." If the British North American Act had contained similar provisions, there could have been no question, in 1926, of the right of the Governor-General to refuse the dissolution requested over the week end of June 26-28, and it would have been impossible for Mr. King to embarrass the incoming Government by making his resignation take effect immediately, contrayy to all precedent, leaving the country, in his own words, with " no Prime Minister" and "no Government". Clearly the Irish have lost their liberties; equally clearly the remedy is to send for the Editor of the Winnipeg Free Press to draft them a new Constitution from which the tyrannical provisions of Articles 13 (section 2) and 28 (sections 10, and 11, paragraph 3) will disappear, and in which the Prime Minister will reign supreme, untrammelled by any enactments for preserving the authority of Parliament or the orderly transaction of public business at a time of change of Government.

Yours truly,

Eugne Forsey.

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144464

3 Lakeview Terrace,
Ottawa, July 2, 1943.

Dear Mr. Meighen,

I hope you found the reply to Dafoe adequate. I keep thinking of things I might have said, either in that letter or earlier in the correspondence. However, I have given him a few good stout blows.

Now, in an editorial of June 29, he comes back again at the subject, and in a more "safety first" way than ever, attacking Sandwell, with side-swipes at me. I have answered in the enclosed letter. The rest of his editorial is just further brazen assertions of things long ago proved untrue, and calls for no further comment from me, though Sandwell may have a go at it. I have sent him a copy of my reply of two days ago, and shall send him a copy of this one too.

Your kind letter of June 29 has just come. I was very sorry to miss Mrs. Meighen and Lillian. The meeting at Queen's Park ended sooner than I expected, and so I arrived at your house earlier than I had anticipated (also, I thought it would take me longer to get there than it did). But I am glad you did not telephone home, as my going was rather problematical anyhow, and it would have been a pity for Mrs. Meighen and Lillian to miss the show (though I hope they would not have done so in any event).

Your suggestion about the pamphlet is a very tempting one. But I am already indebted to you for so many kindnesses that I hardly feel I could accept another, especially one so substantial as this! Also, what you had done would be almost bound to become known, and the Free Press would then point to this as proof of its charge of "conspiracy". If you really feel strongly that such a pamphlet should be issued, I shall look into the cost of printing it, and see whether it is within my means. I am afraid it will be far beyond them. But we shall see.

Now I must run, as I have a huge pile of work waiting.

Yours sincerely,

Eugene Forsey

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144465

3 Lakeview Terrace,
Ottawa, July 2, 1918.

The Editor,
Winnipeg Free Press,
Winnipeg, Manitoba.

Sir,

Your editorial of June 29 attributes to me the view that "the Governor-General has the right to disagree with advice tendered him by the Prime Minister if he feels that way".

This statement is a falsehood, excusable only on the assumption that you have lost your wits.

Yours truly,

Eugene Forsey

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CANADA

144466

320 Bay Street, Toronto,
July 5, 1945.

Dr. Eugene Forsey,
3 Lakeview Terrace,
Ottawa, Ontario.

My dear Eugene:

First, I received yours of 29th and delayed reply knowing I would hear again. Am now returning Mr. Farthing's letter which I was glad indeed to read. The tribute he pays you is more than deserved.

Then I received this morning copy of your letter to the Free Press, dated July 1st, and your further letter of July 2nd with another reply to the F. P. of even date. Both are excellent and the swift deadly shafts are well deserved. You can imagine now the time I have had over my lifetime with that paper. In the controversy in which I engaged with them two years ago it lied just as persistently and as brazenly as it has done with you.

I like very much your letter of 1st July. The only thing I would alter, had I been writing it, would have been the last paragraph, and that merely to emphasize that the Irish Constitution requested by the authorities of that country merely found a means of providing the safeguards which in Britain and other British Dominions the Crown provides and which are long established in the unwritten Constitution. It was to avoid recognizing the Crown and any relationship to the unwritten Constitution of Britain that the necessity arose for specific insertion of corresponding safeguards in their own Irish Constitution. Of course, the above is plain anyway and will be perfectly plain to Dafoe, but he will take care not to make it plain to his readers.

(over)

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144467

Now I still stick to it that you should publish this correspondence. It will hit him right between the eyes and it is just what he does not want. I have no fear of the little help I give becoming known and if it does become known, I would not worry the slightest. It is a perfectly honourable and proper thing to do and I will insist on doing it if you will only agree to make the publication.

Will have to take care to get hold of next week's Saturday Night.

Yours sincerely,

AM/E.

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CANADA

144468

3 Lakeview Terrace,
Ottawa, July 11, 1943.

Dear Mr. Meighen,

I was away most of last week, and since I got back have been too busy to write letters. Hence my delay in answering yours of the 3rd., which I need hardly say I was very pleased to get.

I am glad you liked the letters to the Free Press. I cherish a hope that they will sting the old man into publishing them, in spite of his pronunciamento. We shall see. Meanwhile he has had another go, July 6, on the basis of Gore's "personal memoir" of King George V, a book which I read, and which throws no light on the subject at all. By characteristically ingenious selection of his quotations, and slippery use of words and dates, Dafoe contrives to make it appear as if I had been talking through my h_at about the crisis of November 1910. Careful examination of what he quotes shows that this is of course not true. However, in the circumstances I don't think it worth while answering this stuff, as my answer would merely repeat what I have said before, and he wouldn't print it.

Of course there would be nothing improper or dishonourable about your doing what you so kindly suggested about the pamphlet; if there had been, you would not have suggested it. But I still think it would be imprudent, simply because the Free Press would be sure to get hold of it and would then come blaring out that it was all a put-up job between you and me from the beginning. Of course this would be not only untrue but utterly irrational; but both you and I know from experience how easily the "groundlings" as you called them are swayed by irrationalities; so I think the effect would be to cast doubts on the book's standing and impartiality. I am very sorry about this, especially as it may seem an ungracious way to treat your kind suggestion; but I am so firmly convinced that it would be a mistake to accept that I really can't see my way clear to do anything but say no. I shall, however, look into the cost of printing as soon as I get a chance. Nichols, who now has the bulk of the correspondence, has not yet returned it. I shall have to jog his memory. Another difficulty is that I haven't got copies of all the F.P. stuff of last fall, though I suppose I can get them if I try hard enough.

Incidentally, the F.P. published on July 3 a rambling and ill-written screed from a Mr. N.T. Carey, of Winnipeg, full of irrelevancies. Its most shattering argument is that I am an "imperialist". I need hardly say that I feel suitably crushed by this display of logic.

I might have made, about the XXXX Irish Constitution, an even more interesting point than the one you suggest. In the Free State Constitution, they explicitly denied the right of a defeated Cabinet to get a dissolution at all. In the new Constitution, they re-introduce the British custom of allowing dissolution to a defeated Cabinet in certain circumstances, but are careful to attach to it the British safeguard of allowing the head of the XXX State to refuse dissolution if the circumstances warrant such action. If my book ever runs to a second edition, I shall include a passage on the Irish Constitution.

Sandwell's latest is pretty much a straight reproduction of some remarks I made to him the last time I was in Toronto. I grinned when I read it. It will probably infuriate the old man worse than anything yet, as it unmasks so completely his partisan purpose.

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The Ontario election is hotting up, apparently. A year ago, I should have expected to be in it. Now I am on the shelf, politically. Someone asked me the other day if I didn't intend to run for Parliament some day. I said no; for one thing, no one would nominate me, and for another, I should have no chance of election if I were nominated. I added that I felt sure I should be a useful member, but a rotten candidate. I also mentioned the fact that my present employers would have fits if I even thought of being a candidate, and that I had to earn my living! I did not, on this occasion, say what I have often said before, that after the way you had been treated I had had a sickening of the whole business.

This typewriter ribbon is atrocious. Hope you can read this production. Weather as hot as Hades here; I only hope it has not addled my brain.

Yours sincerely,

Eugene Forsey

Am sending under separate cover copy of "Relations", with my article. There is some perfectly poisonous stuff in the rest of the paper, and I'm rather sorry I was inveigled into writing for it at all. However, they gave me $8.00 for the thing, which must be the first time on record that an Ulster Protestant ever got a copper out of the Jesuits!

E. F.

Was very sorry about Harrington's death. A very fine and able man. The Journal had an editorial, appreciative, but suggesting Harrington had retired, here and in Nova Scotia, because of excessive sensitiveness. On this I propose to comment in a letter to them to-morrow. I wish I had taken notes of what he told me of his dealings with King. I hope Mrs. Harrington has kept the papers.

E. F.

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144470

520 Bay Street, Toronto,
July 13, 1943.

Dr. Eugene Forsey,
3 Lakeview Terrace,
Ottawa, Ontario.

My dear Eugene:

I have your letter of 9th and will certainly have to accept your decision.

I read with some curiosity John W. Dafoe's letter to you of 9th. It would seem to me to prove that mud-slinging is about the last weapon of defence which passes from the faltering hands of ~~old~~ age.

Have just this minute seen the comment made by you on the back page of Dafoe's letter. Sandwich's comment is more pungent and even more appropriate than my own.

Yes, there is a real libel law in England, because there is an effective level of fair dealing in that country. There truly is no libel law here.

As requested, I am returning your letter of July 1st. Have had a copy made for my file.

Yours very truly,

AM/E.
Encl.

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CANADA

Many thanks for your letter.

144471

3 Lakeview Terrace,
Ottawa, July 18, 1943.

Dear Mr. Meighen,

This week's Saturday Night has a reprint of the Free Press editorial of July 6, with two further productions of Sandwell's. One of these latter is very good; the other is not. The Free Press' attempt to confuse the issue about what happened in November 1910 seems to have succeeded. I am accordingly sending him a copy of the enclosed, which I think sets the thing in the right perspective, and blows away Dafoe's smoke-screen.

I have a most interesting (mainly my speech) conversation to report to you when next I see you; I wouldn't dare put it on paper, though I have made notes, which I shall use to refresh my memory when next I come to Toronto.

Meanwhile, I leave to-morrow for another bout of work in Glace Bay, after which I hope to join Harriet and the baby in Saint John, for a brief holiday. I shall probably not be settled down anywhere till about the week after this now beginning, so I fancy there will be no use your bothering to send any answer to this, even if it required an answer, which it doesn't.

Trip postponed till Saturday the 24th.

As soon as I get back, if Nichols has returned the Free Press file, I shall look into the cost of printing it. It is very obliging of Sandwell to keep the thing warm.

Yours sincerely
Eugene Forsey

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144472

3 Lakeview Terrace,
Ottawa, July 18, 1943.

The Editor,
Saturday Night,
Toronto, Ontario.

Sir,

The Winnipeg Free Press (whose columns are now closed to me) appears to think that certain passages in Mr. Gore's "King ~~George~~ George V: A Personal Memoir" prove that the King did not refuse Mr. Asquith's first request for dissolution in November 1910. They prove nothing of the sort.

The King was willing to create peers, but only after all other means of passing the Parliament Bill had been exhausted. The necessary steps were:

(a) to see whether the Lords would pass the Bill in the existing Parliament, thus settling the question without recourse to either a general election or a creation of peers;

(b) if this failed, then to dissolve Parliament to see whether the electorate really wanted the Bill;

(c) if the electorate said yes, then to see whether the Lords would give way as they had after the election on the Lloyd George Budget;

(d) if the Lords remained adamant, then to create enough peers to swamp the opposition.

What Asquith attempted was to leave out step (a), and proceed at once to a dissolution. This the King refused, though when step (a) had been taken and failed, he certainly was prepared to insist that there must be a dissolution before he could proceed to step (d).

Mr. Gore's words, quoted by the Free Press, so far from disproving the accounts of the crisis given in my book, really confirm them; for he says distinctly: "The dissolution arose from the rejection on the 23rd. November (1910) by the Lords of Mr. Asquith's Parliament Bill." In other words, dissolution took place only after step (a) had been taken and had failed; and we know, from the King's own words to Lord ~~Lansdowne~~ Lansdowne, as well as from Sir Almeric Fitzroy, that step (a) was taken on the King's insistence.

The Winnipeg Free Press account is simply another attempt to confuse the issue.

Yours truly,

Eugene Forsey

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144473

3 Lakeview Terrace,
Ottawa, August 1, 1943.

Dear Mr. Meighen,

You may be interested in the enclosed, which I should like to have back when you have read them. I don't know whether this is the Dingman I met some years ago at Lake Couchiching, or another of the same family.

I had a fairly lively time in Cape Breton, doing jobs for both the miners and the steel workers. Judging from what information I got there, it looks as if the National War Labour Board, ~~NWLB~~ by its award of a 55 cent base rate to the steel workers in Hamilton, had knocked the whole "settlement" of the January steel strike into a cocked hat. However, I have not yet seen the full text of the judgment; perhaps the Finding and Direction, which I have seen, are as ambiguous as the "Memorandum of ~~Agreement~~ Settlement" was. Really, when you sit down to try to work out what that typically Mackenzie King document really means, it's enough to make your head swim. I fear we are not yet clear of the trouble which its slipperiness created.

I saw Ted in Sydney; he had expected to be away earlier, but bad weather prevented. Hence my good fortune in running into him. We had a pleasant chat. He seems well and happy. He asked me to look him up if I got to Halifax. I hope he will do likewise if he comes to Ottawa, though I very stupidly neglected to say so.

Yours sincerely,

Eugene Forsey

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144474

320 Bay Street, Toronto,
August 4, 1943.

Dr. Eugene Forsey,
5 Lakeview Terrace,
Ottawa, Ontario.

Dear Eugene:

Thanks indeed for sending me Mr. Dingman's letter and enclosure of the Beacon-Herald article. Isn't it strange that an Editor would write an article on the teaching of a book without ever having read the book.

Anyway, I am very happy that the Editor, if not the Beacon-Herald, has altered his view. He certainly will strengthen his altered opinion when he does the reading which he plans.

The Dingman family were originally two men who owned the Stratford Beacon-Herald, and also owned the St. Thomas Times-Journal. They are now quite old, and the leading one of the two lives retired in Toronto. He is a very fine man. At one time he was Chairman of the Licence Board for Ontario. The sons I do not know, and this is probably one of them who writes you. I really know of no other Dingman family, though there is a very tall Dingman in the bond business here, with Milner, Ross & Co. This man might have been at Couchiching, but if not it was one of the newspaper families.

So far as my reading has taken me, the Dingman conversion leaves the Winnipeg Free Press all alone--so poisoned with partisanship that it cannot think.

Very glad you saw Ted. He seems to feel he is doing a worthwhile job now and that makes him happier than he was.

Write me whenever you have time. I am returning enclosures as requested.

Yours sincerely,

AM/E.

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144475

3 Lakeview Terrace,
Ottawa, August 10, 1943.

Dear Mr. Meighen,

How right you were about Selkirk!

The result in Cartier is very disappointing. Lewis is a man of great ability, and would have been an outstanding addition to the House. Rose, whom I have known, slightly, for some years, is an out-and-out Communist, and will be just a nuisance, though he is not without brains.

The big Bloc Populaire vote is very disquieting. I fear we shall have about 50 or 60 Nationalists in the next House. Then, either they will be able to dicate their terms, as the price of supporting some Government (probably Liberal); or they will be left outside altogether, whereupon the bleating about French Canada being neglected, etc., will get worse than ever. It is a nasty prospect whatever way one looks at it; and, I may add, it is another of King's legacies to his country.

Thank goodness the war news looks better; but this aircraft strike in Montreal is a nasty business, and seems to me just an exhibition of incompetence on the part of the leaders concerned. I am glad to say they are not part of our organization. However, it is probable that if the Government had shown enough energy and intelligence at an early stage in this aircraft business, the trouble need never have happened.

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144476

I notice we're not getting any bombastic statements from King on these latest election results. Remember how he whooped about the by-election results in 1920 and 1921? I must remember to see that someone casts that in his teeth in the coming session.

Thought you might like to see the enclosed, though you may have seen it already.

Thanks for your letter. I have since heard that one of the Dingmans still controls the St. Thomas paper.

Yours sincerely,

Eugene Forsey

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144477

320 Bay Street, Toronto,
August 11, 1943.

Dr. Eugene Forsey,
3 Lakeview Terrace,
Ottawa, Ontario.

My dear Eugene:

I am always glad to hear from you and do not like too long a time to intervene between letters.

Had seen the editorial which you sent me but am glad to have another copy. Small comforts get more and more precious as one gets older.

The situation in Quebec is not only disquieting; it is ominous. That this situation was developing I have had no doubts for a long, long time. There are many men who cannot complain, and chief among these is Mr. King. The Bloc Populaire preached nothing at all in Stanstead or in Cartier that Mr. King's candidates had not preached and secured election on for at least five elections, and that Mr. King himself had not only countenanced but encouraged. This mess that we are in--not far removed at all from the chaos which disintegrated France and delivered that country to Germany--is the result of false and villainous politics exploited for the satisfaction of individual ambitions. It is the work of the demagogue, and Mackenzie King is the father of that progeny in Canada.

With all good wishes,

Yours sincerely,

AM/E.

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144478

3 Lakeview Terrace,
Ottawa, August 16, 1943.

Dear Mr. Meighen,

(Please return.)

Am writing principally to enclose a letter I received to-day from H.A. Smith, who used to be Dean of the Faculty of Law at McGill, and has since been on the Faculty of the London School of Economics and Political Science. He was co-author, with Percy Corbett, of a book, "Canada and World Politics", published about 1927, I think. I do not recall it very clearly, but my impression is that it was an able piece of work, as it ought to have been, considering the qualifications of its authors.

Who can have sent Smith the review, and which review it was, I have no idea, except that I gather it was not the Free Press production! The only people I can think of who might have sent the review are you, John Stevenson, and Sandwell; but I have no idea whether any one of you knows Smith. It is all a great mystery.

Incidentally, the Free Press has been after me again, twice, August 12 and 13. In one editorial, it calls my book "that bogus product of supposed constitutional research"; in the other it drags me into a discussion of the Ontario election result, by way of scornful repudiation of the idea that any Prime Minister would ever dream of doing anything but what Nixon has done, after defeat at the polls. Really, the impudence of some people passes all belief. I

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144479

have had further samples of this sort of thing, in relation to a much more important matter, in some investigation I have had to do recently into the record of the Communist Party in the last three or four years. You will scarcely believe it when I tell you that that outfit are now trying to make out that they never opposed the war at all!! But I have four quotations to prove that they are doing excatly that: two from Buck, two from A.E. Smith. The tragedy is that people who lie so unblushingly always find people ready to believe them.

The Free Press, ~~MYXXXMX~~ by the way, calls me "a prominent member of the C.C.F. brain trust." I don't know which will be the more surprised by this: myself, or the C.C.F. I felt much inclined to write Dafoe and tell him so, but decided it would be a waste of time, and would probably send him rocketing back to his former idea that I was a Tory conspirator!

I thoroughly agree with your comments on the Quebec situation. If only retribution could descend on King without descending on so many innocent people at the same time! The next Parliament will, I am afraid, be a happy hunting ground for intriguers. You are well out of it. So, I think, am I.

Meanwhile, King is enjoying strutting about in other people's limelight; and I suppose we are due, shortly, for another of those windy rigmaroles of his on a series of subjects he knows nothing about. I must add that I neither listen to them nor read them, except when ordered to do so for office purposes!

Yours sincerely,

Eugene Forsey

Have no idea when I shall be in Toronto again. Presumably I shall have to come up sometime for a meeting of the Social Security Committee; always assuming that Colonel Drew doesn't abolish it or throw me off it!

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144480

320 Bay Street,
Toronto, Ontario
August 18, 1943

Dr. Eugene Forsey,
3 Lakeview Terrace,
Ottawa, Ontario

My dear Eugene:

I just received yours of the 16th and have read Mr. Smith's letter with much interest.

He says that when better times come he would like the book. My suggestion is that you send him it from where you are, even if you send your own and I will replace it for you.

Dafoe's conduct with you has just relegated him to the scrap heap as far as I am concerned. He has bounced about like a mad bully, proud and even intoxicated with his capacity to banish reason and hard thinking and just curse.

The Communists are truly a terrible lot. I do not know and I have never seen Tim Buck but the other man you mention is one of the worst specimens of humanity.

I was quite amused at Churchill making certain that he was not going to spend too many days in Quebec, confined to undesirable company. The day of reckoning for MacKenzie King is, I think, drawing near. Do you remember Mark Anthony used to

"---mock
The luck of Caesar which the gods give men
To excuse their after-wrath."

Am returning Mr. Smith's letter and thank you very much for letting me read it.

Yours truly,

AM/ER

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144481

380 Bay Street,
Toronto, Ontario
August 23, 1943

Dr. Eugene Forsey,
3 Lakeview Terrace,
Ottawa, Ontario

Dear Dr. Forsey:

I have given thought to the information which you were good enough to communicate to me today to the effect that I had once expressed an opinion with respect to the propriety of Lord Byng's conduct throughout the crisis of 1926 inconsistent in one respect with the views I had on another occasion expressed to you.

I understand that you have been informed that at some time several years ago when the Rt. Hon. Winston Churchill was visiting Canada I had said to him in conversation that in my opinion Lord Byng was in error when, after the event which has been recorded as the defeat of my Government, he granted dissolution to me instead of recalling Mr. King and granting dissolution to him.

As soon as you mentioned this to me I immediately and emphatically denied having expressed any such a view at any time to Mr. Churchill or to anyone else. The fact is I can think of no opinion as regards any phase of the subject that I would be more certain not to express than that which has thus been attributed to me. I say this for the following reasons:

(1) The defeat on the Robb resolution was at best only a technical defeat. The adverse majority was one and one of those who comprised that adverse majority had no right to vote and immediately admitted voting in error.

(2) The debate necessarily took place, as indeed had all the proceedings since Mr. King's resignation, in my enforced absence from the House of Commons. No fair minded person would contend that an alternative Prime Minister taking office after a resignation must be in a position to carry majorities in the House continuously in absentia. That he fails to do so under such circumstances on a single occasion by a single vote cannot sensibly be construed as a reflection on the implied assurance he gives the Governor General on taking office that he has reasonable prospects of commanding the confidence of the House. True, Mr. King went so far as

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August 23, 1943

Dr. Eugene Forsey - (2)

to contend that such alternative Prime Minister must even be able to carry on in the enforced absence of his own Ministers as well. The absurdity of this makes it scarcely worthy of notation.

As your book very clearly appreciates, all that I was attempting to do in absentia was the formal completion of formal and noncontentious business and this because of the expressed desire and assured support of the Progressives to that end.

(3) The Robb resolution was not a resolution affecting policy or administration but was a demand on the House of Commons to express its opinion on a matter of existing law. The opinions of the Department of Justice and of the Department of the Privy Council were recorded in the House unequivocally opposed to the opinion expressed in the resolution.

I take the occasion to emphasize that the one thing which has always disappointed me in the discussions that have since taken place over these events of 1926 has been the failure of many writers, including certain excellent writers, to fairly assess the circumstances and realities of and, therefore, the significance to be attached to the vote on the Robb resolution.

I trust you will see that the above statement reaches any quarters where there may be misapprehension on the subject.

Yours truly,

AM/ER

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144483

THE OTTA

Churchill and Roosevelt Talks Packed Usual Color

By I. NORMAN SMITH.

QUEBEC, Aug. 24.

ALWAYS the fun starts in a bus. This time we were examined even by detectives as we got aboard outside the hotel and away went the five bus loads of newsmen headed by jeeps.

The long-awaited conference with Churchill and Roosevelt took place precisely where we had gathered two Saturdays ago for cocktails on the "upper deck" of the Citadel that is a veranda hanging 400 feet over the St. Lawrence. There were the three flags, the old cannon, the river far below. There were about 170 reporters, photographers and broadcasters; there were ordinary cops and special cops; there were Mounties and White House detectives, and sitting on three chairs with their backs to the stone parapet were Churchill and Mr. Roosevelt with their host, Mr. King, in the middle.

Eden and Bracken and Hopkins perched on the ledge in behind, but the smartest of these was Eden. He looked a different man than when he arrived all haggard from Moscow. Today he was the Bond street Eden, in fawn Summer suit and with the face to go with it.

But the healthiest looking of the whole party was the President. Brown and calm, he was sitting there smoking his cigarette placidly, while Mr. King opened the proceedings with a few friendly remarks. He gives an impression of power, benign power perhaps, but power. His slender, cigarette-holder and blue tie give him, with the dressed look, but somehow you don't look at his clothes, but his face. It was Prime Minister Churchill who led off, however, and he started almost coyly. He said he expected the President would say a few words to us first and then he would make his remarks conform. But now the President had asked him to open and, well, he had to open. Mr. Churchill looked a little worried for a minute, but himself he had a fresh sheaf of telegrams from overseas. But as he talked he warmed to his subject and what began uncertainly wound up a vigorous and effective speech. And it sounded so much like Churchill speech, the colorful phrases, the Puckish humor, the bits of anger that occasionally break through his polish. No one who heard this at ranging could ever suggest anyone wrote Churchill's speeches are Churchill.

Suddenly he took a fierce crack at a fly on his knee and this betrayed the fact that he was feeling. Then he resumed telling of the sympathy with our task of covering a conference about which the news must certainly be kept quiet. After all, he had been a reporter while most of us were in our teens.

But we should bear in mind that Churchill is a fighting man in war was war and bearing that in mind should be to their virtue a little blind and to their faults a little kind. Churchill had another light linen suit on, though this time it was fawn whereas yesterday's was white. But his grey felt hat must have been the same one, looking still a little fatigued after yesterday's golf. The cigar was there, the voice and spirit, and if he looked tired you had an idea he had been fighting a war and had reason to look tired.

The conference, said Mr. Churchill, had reached good conclusions. He hoped it was certainly the conclusions were unanimous. He seemed to enjoy saying that, in a pugilistic sort of way. It was no small thing to get two such great nations united on such vast problems through even during the period between conference the two nations didn't differ in principle but only in emphasis and priority. Yet the value of these meetings, in the saving of bloodshed, in the foresight of the deliberations, was something that couldn't be overestimated.

Out of Casablanca had come Sicily, apparently taking to Allied occupation in a kindly way. And out of Quebec would come something else, though what the old enemy would misled the enemy.

Mr. Churchill spoke of the superb exertion of our Russian ally locked far away in land battle, and he explained Russia's absence from Quebec because Japan was under consideration in Russia was not at war with Japan.

At this point Mr. King's known passion for accuracy came to the fore. Mr. Churchill was speaking about the four long years of war when Mr. King leaned over and whispered to him that it was five years. Churchill nodded and observed that the Prime Minister had just remarked that China had in fact been at war for seven long years and it was indeed something we should not forget.

It was a touch reminiscent of the conducting class where Mr. King's own pupils. When Mr. Churchill concluded the President took up the talk with a slow easy-going confidence that contrasted notably with the almost heated enthusiasm of the speaking class. The Prime Minister spoke like a warrior, still burning with the fight and with a fierce determination to beat the day-lights out of his foe. The second seemed the statesman, whose decisions are great energy by his personal reserves and weapons are immense and who is moved to feeling for freedom, happiness and the full life.

Mr. Roosevelt said he and Mr. Churchill and Mr. King had sat up until early this morning to give a real news announcement to give us. But they failed utterly. The news was too vital to the troops whose lives would be sacrificed.

It was the President, the democrat, who stressed the fact at this point that in any event the world would be run by conferences but by the people. We live in democracies and it is our people who decide the issues, who feed the troops, make the ships, provide the shells.

The effort of the peoples of the democracies had been magnificent but they must be kept up. He thought he could assure us that plans were being developed, had been developed, but he called for the support of the people to make those plans successful. To which Mr. Churchill called "hear, hear".

After some kind remarks about the flavor of Canadian trout and some very serious and complimentary tributes to the work of Canada in this war, Mr. Churchill read his assembly the brief formal statement that is all that may be directly quoted from the entire meeting. He warned us it was not exciting, in fact it probably didn't contain a cough in a carload. But to save us pestered us to hear it, so we selves he would read it to us.

The President was enjoying happy about things. His sunburn was magnificent whereas Mr. Churchill looked rather pale. Yet if we pause a moment we will see that the President came here more or less direct from a long fishing party in Lake Huron, while Mr. Churchill came from war-torn England where it is neither April nor enviable in any other way.

Mr. King followed Mr. Roosevelt to say just briefly that Canada had been honored by the selection of Quebec and to thank the newspapermen for so generously putting Canada on the map.

The Prime Minister looked exceedingly happy about it all, though it was not his nature to dress to the Summer style set by his colleagues. Mr. King was in his customary dark suit with thin white stripe, black shirt with black stripe, black and white tie and black and white socks. His remark can be as a sort of an outline of the previous statements, yet it is difficult to see that they could have been omitted.

Mr. King has at no time forced himself into the limelight, though of course as Prime Minister he is one of the most public appearances. But a remark he made in conclusion is in tone and choice of words indicative of the attitude: "It has been my privilege to know something of what has been done behind the scenes." There is nothing there to political opponents can tear apart, though Conservative die-hards are still suspecting Mr. King called this whole conference just to mend his political fences.

There is no conclusion to this story other than that all credit is due to our warriors to say that what has taken place at Quebec will some day be announced from the mouths of guns in a manner that all will hear and remember for generations to come.

J. M. A. Gauvreau

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144484

3 Lakeview Terrace,
Ottawa, August 27, 1943.

Dear Mr. Meighen,

Thanks very much for your letter, and the copies. I shall of course see that they are passed on at once to the proper quarters. I should have done so already, and written to acknowledge receipt, if I had not been fully occupied getting down to Montreal and fetching my wife and baby back from there.

I enjoyed the lunch the other day very much, though I am afraid that as usual I forgot to say "Thank you". I am only sorry that you had so much nuisance about it. Please, if such circumstances ever arise again, just leave word at your office that you had a previous engagement and forget about me.

I thought you might not have seen the enclosed, and might enjoy it. No need to return. What is the Journal getting at anyway?

Yours sincerely,

Eugene Forsey

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144485

320 Bay Street, Toronto,
August 30, 1943.

Dr. Eugene Forsey,
5 Lakeview Terrace,
Ottawa, Ontario.

My dear Eugene:

Thanks for sending me the extracts from the Ottawa Journal. When I saw who the writer was, I was not the least surprised. Norman Smith is a strong Liberal and is, I think, part owner of the Journal. Of course, F. D. Ross has nearly all, if he has not all. Smith became second in command when the Journal absorbed the Ottawa Free Press away back about 1915. In my judgment, ever since, wherever he can do so, he steers Journal articles pro-King, but I don't think he gets very much chance.

Kindest regards,

Yours very truly,

AM/E.

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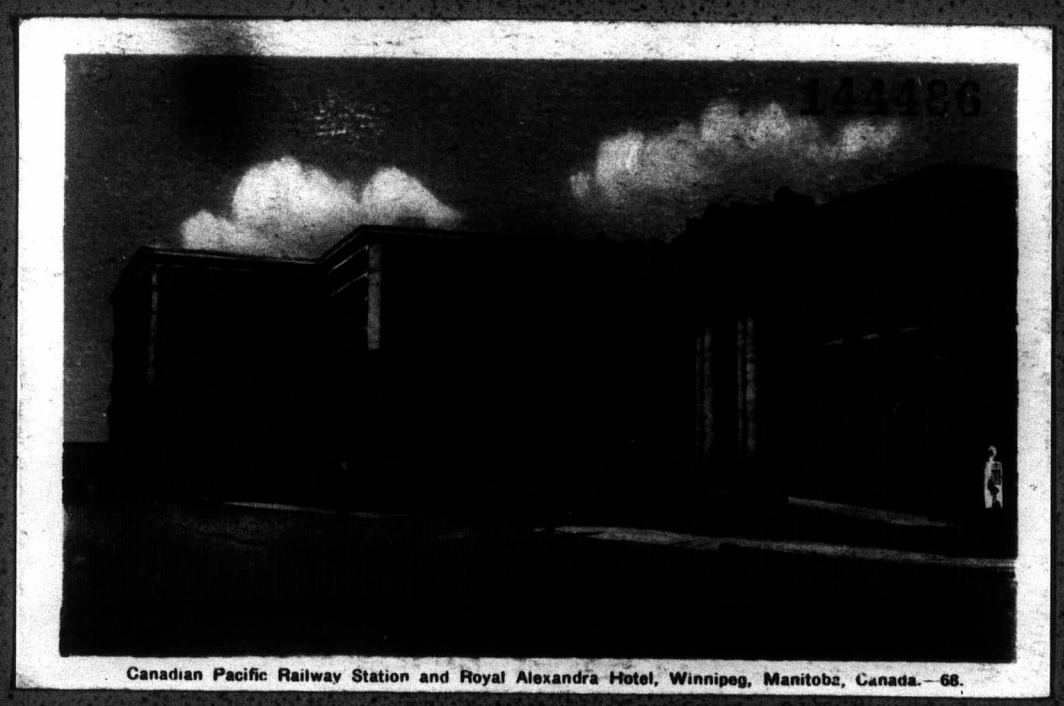

Canadian Pacific Railway Station and Royal Alexandra Hotel, Winnipeg, Manitoba, Canada.—66.

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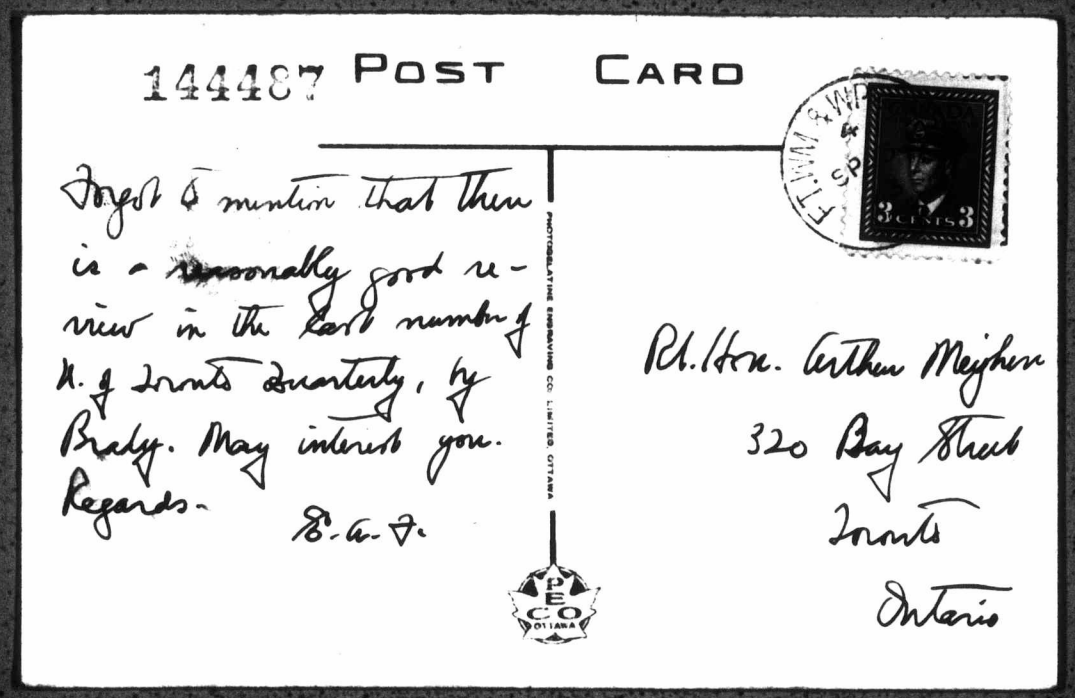

144487 POST CARD

Forgot to mention that there is a reasonably good review in the last number of U. of Toronto Quarterly, by Brady. May interest you. Regards.

E. A. D.

PHOTOGELATYPE ENGRAVING CO. LIMITED OTTAWA

PEC OTTAWA

Rt. Hon. Arthur Meighen
320 Bay Street
Toronto
Ontario

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144488

3 Lakeview Terrace,
Ottawa, September 29, 19[illegible]

Dear Mr. Meighen,

Here's a new version of the Mackenzie King legend for you. I [illegible] have written the Gazette about it.

I suppose you have seen Beauchesne's proposal to abolish appeals against the Speaker's rulings? Pleasing idea, with the kind of Speakers we've been having! I note that the papers say that appeals are always defeated anyway. This is their customary long memory and erudition on such subjects.

You will be interested to know that a friend of mine, a young constitutional lawyer, recently was asked by the editor of a magazine with a large circulation among business men to write an article on the question of possible changes in the Canadian Constitution. In the course of his article (which I saw, and which was both moderate and competent, though I did not agree with all of its conclusions), he referred to my exchanges with the Winnipeg Free Press as showing that the question of the reserve power of the Crown was of considerable importance; words to that effect, anyhow. The article was turned down, one of the chief reasons being that my name was mentioned, and mentioned

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as if I were an authority on such matters; and that, as I was a Socialist or "left winger" (I have forgotten the exact term used), this would not commend the article to ~~MM~~ business men! Comment is superfluous.

I shall be in Toronto a week from to-day, and shall drop in at your office in the morning a note on that conversation I had with my Australian friend, so that you can have a record for your files. Incidentally, I passed on your letter to the proper quarter, and received a very nice acknowledgment.

I shall be tied up pretty well the whole day, October 6, so may not see you; but if I stay over till next day, as is possible, I hope I may have that pleasure.

Yours sincerely,

Eugene Forsey

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144490

320 Bay Street, Toronto,
September 30, 1943.

Dr. Eugene Forsey,
5 Lakeview Terrace,
Ottawa, Ontario.

My dear Eugene:

Thanks for your letter of 29th. I had not seen the legend, but it is getting worse with the years. Yesterday, just to get back into form, I dictated an answer, as I would make it, to King's porous piffle of Tuesday. The man's vanity is becoming insufferable.

I was exceedingly interested in what you said about your friend's article. That seems incredible and I can hardly wait to be told what magazine it was.

Be sure to come in next Wednesday when you are here. I will be on hand and awfully glad to see you.

Yours sincerely,

AM/E

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144491

3 Lakeview Terrace,
Ottawa, September 30, 1943.

Dear Mr. Meighen,

Bracken's statement is a masterpiece. I can't help thinking that someone I know had a hand in it; if not, then Bracken himself has studied someone's style with profit.

My own conviction is that King intends to bring on an election very soon, and that that characteristic production the other night was just an attempt to lull his opponents into a false sense of security. I shall not be surprised to read any morning that he has secured a dissolution. I suppose when he does, he will blandly produce this statement of Bracken's as an excuse: "a glaring example of that very partisan activity of --eh! --which I --eh! -- had occasion to --eh! eh! -- speak in my address to the National Liberal Federation." Well, I hope that I shall get a chance to mount some platform in the election and tell as many people as I can reach the truth about this man. I have the outline of a speech all prepared. I hope I can find the platform.

Yours sincerely,

Eugene Forsey

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From Our Readers

144492

(Letters to the Editor must be accompanied in each instance by the name and address of the sender whether for publication or not the name to be written in ink. Contributors are asked to be brief. All letters are subject to editorial revision or rejection).

Three, Four, Shut the Door

Sir, — In his column of September 27, Mr. F. C. Mears states that Mr. Mackenzie King has headed five governments. Would you or Mr. Mears be kind enough to give details? As far as the records in the Canada Year Book and other official publications go, Mr. King would appear to have headed only three governments. He formed his first in December, 1921. It lasted till June, 1926. He formed his second in September, 1926. It lasted till August, 1930. He formed his third in 1935, and it is still in office. Where do the other two come in, and when?

EUGENE FORSEY,
Ottawa, September 29.

Editors' note: Mr. Mears, confronted with this argument, says he is willing to settle for four Governments, but lower than that he won't go. He says the re-formed Government after the 1940 election should count as a fourth. All King Ministers were re-elected in 1940, and so far as Mr. Mears knows they did not have to be resworn, but they did have a new mandate and a new lease on life. Will Mr. Forsey compromise?

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144493

Notes of a Conversation with Sir Shuldham Redfern
and Rt. Hon. H.V. Evatt, early in the summer of 1943.

Sir Shuldham informed me, before Evatt arrived, that Evatt considered my book a "classic". He (Redfern) had asked me down at Evatt's request.

Evatt had, of course, not received the copy of my book which I had sent him. It was waiting for him in Australia. The copy he had, and had read, had been given him by Sir Alan Lascelles, the King's Secretary. Lascelles was formerly Secretary to the Governor-General, here, in Bessborough's time. Redfern read us a memorandum Lascelles had sent him, the original of which is on file at Buckingham Palace. Lascelles typed the original himself, at Bessborough's dictation (so I understood). It records certain impressions and opinions of Winston Churchill, as given by him to Bessborough, here, during a visit to this country before the war. Churchill said that he himself considered that a dissolution was "normal" only at or near the end of the Parliamentary term. At any other time it was abnormal, and could be justified only if "the utility of the existing Parliament was exhausted". (Evatt struck in to express his emphatic agreement.) Churchill had had conversations about our 1926 crisis with both King and Meighen. King had told him that he considered Lord Byng's refusal of dissolution to him perfectly justified, but that he thought that after Meighen's defeat on the Robb motion Byng should have recalled him (King) and given him the dissolution. Meighen had not only said that he [redacted] thought Byng should have recalled King after the passing of the Robb motion, but that he (Meighen) had so advised, tendering his own resignation accordingly; but that Byng had refused the resignation, saying that he simply would not have King back. I said at once that I did not believe Meighen had ever said anything of the kind; and he has subsequently confirmed my impression, in a very explicit and strong letter. (The original is in my files; carbon copies went to Government House, where at least one is filed. I presume the other has been forwarded to Buckingham Palace.)

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Evatt said he had read my book with the greatest interest, and that he greatly liked my whole approach. On the one point on which we differed (the question of who should have had the dissolution after the passing of the Robb motion) I had not entirely convinced him; but I had given him new facts, such as the passage of the vote of censure on King's Government, of which he had had no idea; and he proposed to give these very careful consideration in the second edition of his book which his publishers were pressing him to prepare. He had done his best to get all the facts of the 1926 crisis, but in Australia this was of course very difficult to do. He still thought there were some points on which I could be answered or criticised, but did not appear to consider these very serious. He had never been much interested in the early Australian cases; had had no idea there were so many of these, or of cases generally. My surmise about his mistake on the Tasmanian case of 1877 was correct; he had copied it from Todd. I gathered that he felt, after reading my account of the early Australian cases, that they were more important than he had formerly thought.

He was most scornful about the theory that the election of 1926 had settled the constitutional point; indeed, he could not have been more scornful; his language was scathing and contemptuous. He reiterated the view expressed in his book that the question of "status" was utterly irrelevant; again his language was strong and unequivocal.

He said that Keith, as an "authority", was "finished" in England at least since the publication of his (Evatt's) book. He had not written the book to show Keith up; but he had derived considerable enjoyment from doing so incidentally. He had been goaded past endurance by Keith's pontifical pronouncements on every crisis in the overseas Empire, pronouncements always delivered within a few hours of the occurrence of the crisis, when it was impossible for Keith to have the full and accurate information necessary for a considered, balanced judgment. The result, of course, had been exactly what might have been expected. I remarked on the fact that Keith, in his review of Evatt's book in the Journal of Comparative Legislation, had been surprisingly mild. Evatt said, yes; he had been

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a great deal more careful since the publication of that book than he had ever been before; the one retort he had indulged in was to catch him (Evatt) out in one small, irrelevant point.

Both Redfern and Evatt agreed that King had treated Byng very badly, and Redfern said it was plain that King had a guilty conscience about it. King was always ready to expatiate on the crisis, and to justify himself, at every possible opportunity. He had given his version to Redfern very soon after Redfern arrived in Canada; was obviously [illegible] anxious to get his word in first, forestall criticism, indoctrinate Redfern before anyone else could get at him. I gathered that this was his normal behaviour in respect to this matter.

Redfern and I showed Evatt the Winnipeg Free Press review and subsequent comments on my book, including, of course, Dafoe's choice abuse of Evatt himself. He was perfectly furious. "Who is this swine? [illegible] What is he? A French-Canadian? 'An ardent, ambitious and aspiring Labour politician'! Labour politician! A nice thing that, from a Liberal! 'A politician even when on the Bench'! Well, [illegible] I was on the Bench [illegible] ten years, and very few of my judgments were ever upset on appeal; fewer than any of my brethren. You may tell Mr. Dafoe from me that I am instructing my solicitors to take action against him!" He made it clear that he thought Dafoe's stuff absolutely inexcusable from start to finish, and utterly worthless as criticism.

Evatt, à propos of the Acts prolonging the life of the Legislature in Ontario and Saskatchewan, was very emphatic that they were completely improper and without excuse. He said the plea of wartime necessity or wartime conditions was irrelevant and ridiculous.

He and Redfern asked me what the C.C.F. had said about my book. I said, "Nothing", forgetting that Coldwell and Lewis had both spoken of it most warmly as very interesting and important, and that other C.C.F. M.P.'s besides Coldwell had spoken highly of it. I said I had tried to impress on them that the

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the rubber stamp theory was a dangerous one for the C.C.F. Bratt said: "Dangerous! I should think it was! Most dangerous!"

Redfern said that Tweedsmuir had written a most scathing indictment of Keith's treatment of the 1926 crisis. He told us, with a chuckle, that when Lord Athlone had read my book, he said: "Redfern, I think I shall send a copy of this to the Prime Minister for a Christmas present!" Redfern also said that, up to the time he reviewed my book, Dafoe had for some time been out of favour with King; he (Redfern) seemed to hint that the review had not been wholly disinterested!

Eugene Forsey

Eugene Forsey, October 4, 1943.

(This memorandum was compiled from notes written down the day after the conversation took place.)

I should perhaps add that, on the question of who should have had the dissolution, Redfern, when Bratt was reiterating his own view, struck in with, "Ah! yes, but there were those intervening events, which Forsey notes? Bratt said, yes, he hadn't been aware of all that.

E.A.F.

E.A.F.

(Copies of this memorandum left with Mr. Meighen and with my mother, for extra security. One copy in my safety deposit box, Toronte General Trusts Corporation, Ottawa.)

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OCTOBER 12, 1943. 144497

THE GLOBE AND MAIL, TORONT

FINANCE AT LARGE

By WELLINGTON JEFFERS, Financial Editor

Some More Talk From Various Angles On Maximum Profits, Full Employment And Optimum Production and the Future

Is Hydro a Herring.

"Your debate with Dr. Eugene Forsey is most interesting, but I sincerely hope that our good Ontario Hydro will not be a herring across the trail of the answer to Dr. Forsey's question, 'What will happen if full employment and optimum output conflict with maximum profit?' I am intrigued by this question, and should like to see the answer 'run down.'

"I should very much like to see you deal further with Dr. Forsey's major question. Far be it from me to quarrel with capitalism—that is the way I eat. But I do not like 'poverty amid plenty,' and I do not want totalitarian Socialism. Can you not point out the middle course?"

G. G. Complin,
Toronto.

An Answer from Edmonton.

"Dr. Forsey asks: 'What will happen if full employment and optimum output conflict with maximum profit?' Once more we find hopeless confusion in the terms used.

"The greater the national production, the greater the profit to the nation; therefore, optimum production will result in maximum profit for the nation. However, with the vastly improved methods of production which will emerge from the war, optimum production may not provide 'full employment.'

"It would be a far more pertinent question to ask: 'What will happen if optimum production conflicts with full employment? Can the advocates—both socialists and supporters of the present system—meet that challenge?'

"We know that Canada's resources can be organized to produce abundance. We know that, if equitably distributed, this will provide security with freedom for all, to the 'profit' of everybody. We know, from past experience, that distribution cannot be carried out under our present wage system. In the first place, every increase in wage rates raises prices correspondingly, so that at any level wages are insufficient to provide 'the highest possible standard of living.' Secondly, because 'employment' must continue to be a diminishing factor in the productive field if progress is to be maintained, therefore as our ability to produce increases, so the relative number of wage-earners will decrease and the means for purchasing production will diminish.

"That seems to be an inescapable issue which has to be faced."

Edmonton, Alta. L. D. Byrne.

Dr. Forsey Replies.

"I need hardly say that I do not expect you to devote further space to my views. But there are a few points in your latest reply on which I should be loath to let you have the last word!

"1. The surpluses of publicly owned industries plowed back into business still seem to me to stand on a different footing from those of private enterprises. In the one case, the results accrue to the public, in the other to the private shareholders. (Ed. Note: That is the theory, but results accrue to the public in both cases. How else explain why Montreal Power now sells power to the public at less than one-fifth of the rates in 1902.)

"2. Your point about the taxation of dividends and the non-taxation of interest payments seems to me well taken. But it applies far more widely than you indicate; for there is, in effect, discrimination in this regard between not only public enterprise and private, but also as between one private enterprise and another. One company has secured all its capital from stocks and surplus earnings, and pays income tax on everything it makes above costs of operation; another has secured much of its capital from bond issues and pays no income tax on its interest payments. Students of public finance have for some time been aware of this situation and have made various proposals for dealing with it. At present, risk capital is undoubtedly bearing more than its fair share of the tax burden." (Ed. Note: I agree.)

"3. I am afraid I did not make clear my point about maximum profit. Of course, I did not mean to imply that companies would deliberately choose to run their plants at less than capacity. What I did mean was that they might find it profitable to keep the capacity down. I take leave to doubt whether, with the number and strength of monopolies and near-monopolies now existing, the force of competition or potential competition would be as effective as you evidently believe. I fully agree that the business man is interested not in the highest unit profit but in the highest total profit; but he may be in a monopoly position which enables him to get the highest total profit by restricting production; and potential rivals may find it simply impossible to invade his territory.

Eugene Forsey,
Director of Research, Canadian Congress of Labor

Tampering With Self-Adjusting Process III

There is no reason why any company—whether it is a monopoly, a near-monopoly or one of a number of competing companies—should expand if its management and directorate are of the opinion that the field for its products is effectively occupied by existing domestic companies and by available imports. If production is profitable and demand is growing beyond its power to supply, such a company will decide not to expand at its peril: others will almost certainly see the opportunity and try to get the capital to avail themselves of it if the Government allows a free field for such enterprise.

There is more expansion in potential output going on all the time in normal periods than the actual increase of plant and acreage would show. In the previous discussions of Dr. Forsey's brief, I had a good deal to say about obsolescence. The companies which make productive or processing machinery or machine tools are continuously trying to improve their products as a condition of remaining in business. Naturally their salesmen push these products with producers and processors. The latter are forced to buy the new machinery in self-defense if it is better than their old, and so within the same walls, with the same number of workers and the same number of machines, there may be great expansion of output. Wage-earners are beneficiaries of such a process. When plant is expanded as well, then expansion of output is very rapid because the new plant has the latest machinery. In other words, what I want to say here is that I believe a situation, such as that portrayed by Dr. Forsey, will be dealt with quite quickly in the ordinary course of things under a "free economy." Even unregulated monopolies are hard to preserve.

The one exception is that the expansion will not occur if further business has to be done at a loss and without hope of eventual profit. It is true that under public ownership expansion would occur in such a case if there were votes in it whether there would be loss or not. The loss would be to the taxpayer and the profit to the Government. And the Government in question would refrain in other cases where a gain in votes would be problematical.

Give Each His Chance and All Profit Most

In capitalism no effective economic unit can rest on its oars without being carried backward. A growing demand in peace days for Government intervention in business to restrict marketing and prices and enterprise would show a tendency to rest on the oars. Unemployment would result. The true way for prosperity and progress and citizen self-respect—this department has often advanced—is to open the way for enterprise wider than it has ever been. Only so can such persistent unemployment as in the 1930's be overcome in the postwar years. The whole European idea of Governments dominating industry can only work out in unemployment. Until we began to borrow such European ideas 10 years ago the net result on this continent of an open road for enterprise has been the provision of individual opportunity on a scale never before seen and therefore the collective progress has been greater.

The old proven road for both employer and labor to profit more and more continues to be now as of yore to produce more and more and better and better. That common goal should unite employers and employees more than all those things that drive them apart. If that is admitted it should be possible—and in a growing number of cases it is being done—to have intelligent and reasonable co-operation between the vital factors in industry to assure better results than ever. The principle of pay proportionate to productivity, if it is accepted as a base by both sides, gives a standard which will permit more employment with better results at all times than in industrial warfare and constant efforts to restrict and regiment.

I am, like Mr. Complin, for the middle course. Parliaments and Governments have an inescapable duty to provide those non-commercial public works which will be of greatest advantage to all citizens and to look vigilantly to see that economic doors are not closed. Their main duties are to smooth the ways for citizens, to keep the peace, to prepare against possible foes and to keep the scales of justice fair at all times.

Mr. Byrne's argument, if accepted, seems to me to lead directly to social credit. But I do not admit that provision of more productive machinery continually leads to greater unemployment. In different industries where the process is very rapid it does lead to a period of delay before labor displaced can be retrained and employed elsewhere. It actually produces more employment in the end because the same inventors are opening up new avenues continually when capital is ready and allowed to aid.

GLOBE AND MAIL - SEPTEMBER 27, 1943. 144498

Finance THE GL

FINANCE AT LARGE

By WELLINGTON JEFFERS, Financial Editor

Can Capitalism Deny the Law of Its Own Being? Can State Deny Rights of Its People to Profits In Enterprise and Not Make Economic Avernus?

"I enclose a copy of Hansard giving the case presented by Dr. Eugene A. Forsey, director of research for the Canadian Congress of Labor, before the Special Committee on Reconstruction and Re-Establishment on July 15. I draw your attention particularly to these words:

"'We are told that postwar capitalism will be radically different from the pre-war type. Postwar capitalism will have a single over-riding social objective: full employment and the highest possible standard of living; and this will be its governing principle. But capitalism already has a governing principle: maximum profit. What will happen if full employment and optimum output conflict with maximum profit? Can capitalist industry deny the law of its own being?'

"Isn't that a leading question? What comments have you to offer?"

Employer, Toronto.

Capitalism Means Freedom for Individual Objectives.

Of course, postwar capitalism will be different from the prewar type. The very law of its being entails constant change to meet new occasions and new duties. Like democracy it is no more static than the sea, it has its periods of storm and calm, its currents and tides, its icebergs, eddies and whirlpools and it is inhabitated by whales, sharks, food fish, submarines, corvettes, enemies, friends, merchant ships, destroyers. It is all-pervading and touches life and the world everywhere. It has its bad spots and its hours of danger, but, by and large, it has changed (or, if you like the words better, it has grown or evolved) so successfully since its era began that the world has seen more productive change in the 19th and 20th centuries than it saw between the 18th century and the stone age 10,000 years earlier. It has enabled mankind to break from the chrysalis of feudalism and develop from a race of crawlers between earth and sky into one of fliers. It has organized steam, electricity and the expansive power of gas to perform what any sane man 100 years ago would have said were impossibilities.

Capitalism never did have and never will have a "single overriding social objective." It is simply the surrounding atmosphere for as many objectives as there are civilized persons. Its governing principle is not, as represented, "to provide full employment and the highest possible standard of living." Large employment and higher standards of living are the effects, not the objectives of capitalism. They are stations on the road to the objective. Because of capitalism the world has hundreds of millions of people more than could have been supported under the system that it supplanted.

Swift Obsolescence Shows Energizing Power of Capitalism.

What then is its governing principle. Its springs are in countless savings by men and women who deny themselves present consumption in the prospect of future enjoyment or profit. In all forms or stages of capitalism the capitalist seeks, marshals and directs savings to the tasks of providing the machinery and equipment and plants to make or grow commodities, to harvest crops, to store goods, and to transport them by rail or canal or truck or plane. Under capitalism they are encouraged to be adventurous, constructive; to take great risks they must have hope of profits, in other words, they must provide that margin of earnings which repays the bondholders, bankers, shareholders and others for services rendered.

It would be just as true to say of a socialistic State as of a capitalistic State that the governing principle of its enterprises must be maximum profit or they will perish. The Soviet Republic found out the disasters inherent in so-called profitless industry so early in the first years of struggle that it was strongly urged by Communist deputies themselves that the standard of success of any socialistic farm or enterprise should be whether or not it was making a profit. "If not, close them down," said some tough-minded ones. The swift movement to the right in Russia in adopting such capitalistic directives as "pay according to the work done" and providing incentives for expert direction or management, are evidence on that point.

It is true that capitalist creations do try to make profits, not alone for shareholders but to provide for replacing depreciating machinery, for expanding the machinery of production, for improving processes. It must also provide for obsolescence: that is one of the key principles which have made capitalistic countries the arenas of progress in invention and control over nature to an extent impossible to others unless they enlist capitalistic aid.

Ontario Hydro Thrives on Fruits of Capitalism

Dr. Forsey, elsewhere in his able presentation, refers to the deeds of Ontario Hydro to show what can be done outside the realm of capitalism. He does not refer to the fact that Ontario Hydro started by taking over some very thriving products of capitalism which would have covered the Province by at least as massive a hydro-electric industry as now exists and perhaps by a larger one. Quite probably Dr. Hogg would have headed such a power system or one of its large units if it had not finally merged, just as he now does Hydro. And Ontario Hydro itself could not have succeeded without the savings of capitalists (savers) who bought its bonds, and without a very sane capitalistic appreciation of the fact by the managers and commission that there must be profits to ensure progress. Hydro men call them reserves, but those reserves and Hydro's comparative freedom from taxation have enabled it to use these funds to finance its growth on a large and arresting scale.

Its existence did prevent a number of corporate power enterprises developing. I am informed that, under capitalism, many Ontario districts would have had power sooner. That is all water under the bridge, but that side of it also should be understood if Hydro is to be used as an argument for Government ownership and intrusion into business generally. Dr. Forsey does not go that far, but these things are the alternative to capitalism, and he does indicate that capitalism has to produce results—or else. There is no fear of its not producing results unless Canadian laws and restrictions prevent profits; in other words, unless the restrictions are so harsh as to prevent savers and investors from getting paid for the money and services they afford. That would stop the stream at its source; it would dry up the enterprise of risk-takers.

What Disasters Come if Profits Dry Up?

I might try to answer to Dr. Forsey's question with another: "What would happen to the Government's plans for full employment and optimum production if declining profits arrest the flow of savings into investment and stop the savings of enterprises, including enough to meet the exigencies and needs for development of the future?" I have full conviction of the truth of what I say that, in such an event, the unemployment, poverty and distress experienced in Canada would be greater than any yet experienced in the depressions of the last 100 years.

There is never trouble about employment or output when profit prospects are generally good. Profits, like savings, are an amalgam representing past abstention and foresight and a very present comprehension that future needs for all the tools of modern life and increasingly selective tastes in civilized countries must be prepared for by reserves and by laying in materials and training workers and executives for new occasions and new duties.

No, I agree that capitalist industry cannot and does not deny the law of its own being. Any State under any ism that denies the same law is in for trouble.

144499

3 Lakeview Terrace,
Ottawa, October 18, 1943.

Dear Mr. Meighen,

I hope you had an engoyable time at the Coast. I am nearly crazy with the accumulation of work here, a fact which will spare you any long letter. But I thought you might like to be confirmed in some opinions we hold in common by having a look at the enclosed. I should like them back when convenient, as I should like to add them to my Free Press collection. If Dafoe is the conscience of his party, what more does one need to know about the party or about Dafoe? If the light which is in you be darkness, how great is that darkness!

Have not had a moment to get in touch with Lady Byng, but hope to do so before long. Lou Golden tells me that a fellow-journalist tells him that Ferguson, of the Free Press, told Clokie of the University of Manitoba, that I had a personal "pique" against King, and that was why I wrote my book. As soon as I get time, I ~~XXXX~~ shall write both Clokie and Ferguson in appropriate terms. One really needs to know nothing further about the lamentable condition to which the Liberal Party has been reduced when this is the best it can do. Ferguson would seem to be indeed one of those "persuaded, in broad principle, to the Dafoe philosophy". It is, of course, possible that the report is incorrect, as I hope it is. But I wonder!

E. A. J.

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144500

520 Bay Street, Toronto,
October 26, 1943.

Dr. Eugene Forsey,
3 Lakeview Terrace,
Ottawa, Ontario.

My dear Eugene:

I have just returned from the West and have your short letter of 18th. Had already read the Gazette eulogy (quoted in Western press) and felt as incensed over it as you would. Dafoe's treatment of your book, and especially of your correspondence, has cured me of respect for his intellectual integrity.

I was past Winnipeg before I knew of the invitation to attend the banquet, but would not have attended anyway. My Secretary, I observe in her R.S.V.P., did not even express regret.

Was very interested in your letter to Mr. Clokie and in the other enclosures you sent. Same are returned herewith.

I do wish you had been at Vancouver. I spoke an hour to a crowd brought out by the Kiwanians. May say one reason for my doing so was that the London & Western Trusts Manager there is very prominent in the Kiwanis Club. Unfortunately, a reporter for the "Province" who rushed his report in within ten minutes of my being through, put in a first paragraph which seemed to me to be intended either for purposes of sensation or to hurt the cause I was advocating. In any event it used language not one word of which I used and the meaning of which was directly contrary to everything I had advocated. It incensed me very much, but the paper was in no way to blame. The publisher, Mr. Nichols, was there and knew, of course, that I said nothing of the kind, and frankly admitted it. One pays an awful penalty sometimes for speaking without manuscript. However, I certainly could not have made anything like the speech I did had I been fettered by mss. or notes.

(over)

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There is only one issue on which you and I have different opinions, and yours are as honest as mine. I only hope I live long enough to witness the persuasion of events which I know will some day change your view. May these events not be too distressing.

With very kindest regards,

Yours sincerely,

AM/E.
Encl.

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144502

320 Bay Street, Toronto,
October 28, 1945.

Dr. Eugene Forsey,
3 Lakeview Terrace,
Ottawa, Ontario.

Dear Eugene:

You may have seen two editorial attacks in the Toronto Star of yesterday of a speech I made in Vancouver last Thursday. I am sending you herewith copy of my reply—mainly because I know you would be astonished at the words the "Star" attributed to me.

Am also sending you copy of an article on the speech written by Mr. E. S. Woodward, whom I do not know or, at least, remember, and copy of my reply.

Kindest regards,

Yours very truly,

AM/E.
Encl.

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144503

3 Lakeview Terrace,
Ottawa, November 3, 1943.

Dear Mr. Meighen,

You must be thinking me singularly ungracious not to have replied before this to your kind letters. The fact is that I have been even busier than usual, not only at the office but at home. I have had submitted to me for an opinion a ms. on Canadian Government, and reading it and setting down my comments absorb most of my time away from my regular work. The ms. is, incidentally, very bad, though written by a man who, to my certain knowledge, can do good work. Apparently he thinks that a detailed knowledge of one part of the field makes him competent to write about the whole thing without even bothering to look up the facts on any other part. Anyhow, there is an average of about two howlers per page, some of them very serious. I suspect the author is a Brit; I know that some of his observations would make you froth at the mouth, as they did me. You will hardly be surprised to learn that he has been employed by the present Government and sent across the country at public expense. The precise nature of his duties I do not know; I can only hope he confined himself to matters of which he has real knowledge, and did not venture into fields where he is not at home. I may add that all this is extremely confidential, especially as I understand that this man's having written this ms. is pretty widely known, and any

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repetition of my comments might get back to him and make me just one more enemy; also, the publisher who sent me the thing might object. However, I could not resist mentioning the matter, for your eye alone.

I appreciate very much your sending me the correspondence about your Vancouver speech. Not being a very assiduous reader of the Toronto Star (a paper I despise), I had not seen its editorials. Indeed, I had not seen anything about the whole affair till your letters came, though I have since seen the Province report and the Star editorials. You do get the most abominable treatment by the press. I am very glad you are going to dictate your own version of what you said; I shall need it when I come to do that collection of your speeches! Incidentally, I gather that the fact of our being even on speaking terms is considered in some quarters in Ottawa as one of the seven wonders of the world!

Mr. Woodward sounds like a single taxer or a monetary crank. I have very little use for either, though they are usually amiable characters. It will be interesting to see how he receives the correct version of your remarks.

In haste,

Yours sincerely,

Eugene Forsey

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144505

3 Lakeview Terrace,
Ottawa, December 1, 1943.

Dear Mr. Meighen,

Many thanks for the copy of your Vancouver speech, which arrived yesterday. I shall of course read it with the utmost care, and shall, as you kindly suggested, let you have my comments in due course. I have such a heavy programme of work for the next few weeks that I fear it will be some time before I am able to give it the attention it deserves. Even such reading as I do now is done mainly on the street car on my way to and from work; and that sort of thing is just not good enough for serious study. Also, I suspect I shall have to do some digging before I can make any comments worth your reading. But any delay in writing you will not be due to lack of appreciation of your kindness, or to lack of will to study the speech.

I have now nearly finished my report on the ms. on Canadian government which was submitted to me some time ago. It was so full of mistakes, and I was so anxious to have my own corrections fool-proof that it has taken a great deal of time and energy. I hope it will be effective in preventing another piece of "authoritative" misinformation from being slung at the Canadian public.

Yours sincerely,

Eugene Forsey

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144506

CANADIAN GOVERNMENT AND POLITICS: H. McD. Clokie; Longmans, $3.50.

Notes on errors of fact and interpretation.

Pp. 4 and 67: Is the British Parliament's function in amending the Canadian Constitution now merely "formal"? Is it "unthinkable" that it would refuse "changes sought by Canada? It did ~~refuse~~, in 1920 and 1924 (defer action pending further discussion extra-territoriality of Canadian legislation), and the amendment sought was not obtained till 1931 (Statute of Westminster). Is it certain that the British Parliament would pass an amendment asked for by the Dominion Parliament but opposed by. e.g., Ontario and Quebec?

P. 9: "If nationalism founded on cultural, racial or religious sentiment is the cult of the day, the French of Canada have a far better claim to political independence --- and also a better prospect of it --- than the Irish in the British Isles." The Irish in Eire already have political independence. The minority in Northeast Ulster have not, but their claim to it is at least doubtful. The Irish in Liverpool and Glasgow can surely have no claim to any kind of political independence. As for the prospect of political independence for French-Canadians: what on earth does this mean?

P. 28: Under the Union, 1840-1867, "Political necessity imposed a hyphenated premiership, double legislative majorities (one for each half of the colony)." Was the principle of the double majority ever accepted in the Province of Canada? It was a pet idea of Sandfield Macdonald's; but when he took office, he found it completely unworkable and had to drop it almost at once. See, e.g., Reginald Trotter, Canadian Federation, pp. 51-3. Between 1856 and 1864, there were seven Governments, four Conservative and three Liberal. Did a single one of them have a majority in both Canada East and Canada West? I am morally certain that every Conservative Government had a large majority in Canada East and a minority in Canada West, and that every Liberal Government had the opposite. In fact it was precisely the fact that there was not only no double majority but no stable majority at all which caused the breakdown of the Union.

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P. 30: Did the London Resolutions embody only "slight modifications" of the Quebec Resolutions? The O'Connor Report notes of the differences (Annex 4, pp. 47-8) cast some doubt on the appropriateness of the adjective.

P. 48: The conventions of the Constitution "are to be found in the memory of politicians and in the precedents formed by the significant events of recent years." Is it only "recent" (undefined) precedents which count? And are these and the "memory of politicians" the only sources from which the conventions may be derived? What about the speeches of eminent statesmen, the writings of people like Anson, Dicey, Bagehot, Low, Lowell?

P. 48: "In practice, the Canadian conventions are interpreted and applied by Canadian politicians with ultimate resort for confirmation to the Canadian parliamentary electors." This appears to imply that the electors are the final authority in interpreting the Constitution, at least the conventional part of it. Any such view is highly objectionable, and unfounded.

P. 51: "To a large extent, of course, it will be evident that these peculiarities [of the Canadian Constitution] spring from retaining the forms of constitutional monarchy while the spirit and practice of government is (sic) fundamentally democratic, if not pseudo-republican." The author appears to think that there is necessarily a contrast between "constitutional monarchy" and "democracy". This is not so. Great Britain and the Dominions are constitutional monarchies and democracies (except that in South Africa the negroes are excluded). There can be constitutional monarchy without democracy, and democracy without constitutional monarchy. Whether a particular constitutional monarchy is or is not a democracy depends on whether its Constitution is or is not democratic.

To call our Constitution "pseudo-republican" is most misleading, especially when the term is not defined. The Crown has a real and important function. It is hard to say which would be the more confused by the phrase "pseudo-republican": American readers or Canadian students.

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P. 52: "When the end of the legal term of Parliament is approaching, or even earlier if his authority is seriously challenged in the House of Commons by an adverse vote, it is the Prime Minister who determines the nature and occasion of an appeal to the electorate." This seems to suggest that dissolution can take place only when the end of Parliament's maximum term is approaching or when the Government is defeated in the House of Commons. Actually, the Government may properly advise dissolution well before the end of the maximum term of Parliament, even if there has been no "adverse vote", provided there is a great question of public policy at issue, or if the Government's majority is so small and its general position so weak that legislation is virtually at a standstill, or in certain other circumstances set forth in detail in Evatt, The King and His Dominion Governors, and Forsey, The Royal Power of Dissolution of Parliament in the British Commonwealth. Professor Clokie appears to have overlooked such dissolutions as Mackenzie's in 1874, Laurier's in 1911, and Taschereau's in Quebec in 1936. The passage is also objectionable in that it asserts in unqualified terms the Government's right to a dissolution on demand. No such unqualified right exists, as Mr. Churchill's statement of March 29, 1944, is alone enough to prove.

Pp. 52-3: "The House of Commons has thus a double function: it registers the popular vote . . . and it continues to endorse the Prime Minister's legislative and administrative policy until the maximum terms of five years expires or until a new issue arises and the trend of opposition to the Prime Minister has gained such momentum that he has to make another appeal to the electorate." This is thoroughly inaccurate, and embodies the vicious notion of plebiscitary as against parliamentary government. It clearly implies that a change of Government can really take place only by means of a general election; that if a Government is defeated in the House of Commons, either it appeals to the electorate forthwith, or else its successor does. This is not necessarily so at all, as British nineteenth century experience, and Australian experience

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of both the nineteenth and twentieth centuries make perfectly clear. The theory Professor Clokie here sets forth deprives Parliament of real power, and reduces the responsibidity of the Cabinet to Parliament to a shadow. The whole matter is of particular importance now because of the likelihood that the next Parliament, and perhaps several succeeding Parliaments, will have several parties, none with a clear majority. Acceptance of Professor Clokie's plebiscitary theory of the Constitution would mean that the country would be constantly put to the tumult and turmoil of a series of general elections without adequate reason. It is possible that Professor Clokie meant to guard against this by saying "until a new issue arises and the trend of opposition", etc.; but if so, the phrasing is dangerously loose, and is open to the same objections as those noted in regard to the passage just previously quoted, from p. 52.

P. 64: In 1926, the question of refusal of dissolution "was debated entirely on the basis of the best practice in the British type of parliamentary government and, when the parliamentarians themselves could not agree, the practical issue of who should be prime minister and thus have the right to advise the Governor-General was actually taken to the electorate." This is in a paragraph dealing with the interpretation of the [illegible] Constitution. To be sure, Professor Clokie does not actually assert that the final authority on [illegible] interpretation of the conventions of the Constitution is the electorate; but [illegible] again the phrasing is loose. It must also be pointed out that no motion challenging the challenging the constitutionality of Lord Byng's action in refusing dissolution was ever presented to the House of Commons, so that the House never even had a chance to pronounce on that question. Mr. King himself was very careful to admit that, in certain circumstances, the Crown could refuse. The full facts are given in Forsey, op. cit.

P. 112: On the change of Government in 1926: "When [Mr. Meighen] likewise failed to secure adequate or continuous support in parliament, the Governor-General granted him a dissolution." The average reader would never guess from this that

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Mr. Meighen's Government, despite the Prime Minister's absence, was sustained on no less than four critical divisions, one of them a direct vote of censure on Mr. King's Government for misconduct in the administration of a great Department of State, and one a direct motion of want of confidence in the new Government's fiscal policy, by majorities of 12, 10, 10 and 7 (which, for that Parliament, were majorities of respectable size), and that it was finally defeated by one vote, on a motion which involved neither policy nor administration, by only one vote, and that because the Prime Minister's seat was vacant and one of the Opposition broke his pair.

P. 112: "No monarch has actually refused to dissolve parliament against ministerial advice for over a hundred years; but whether he can do so constitutionally is not clear." Both statements are untrue. The first overlooks the case of November 1910; the second overlooks a whole series of authoritative pronouncements, of which Mr. Churchill's is only the most recent. For the earlier ones, see Forsey, op. cit. It may be added that the phrase "refused to dissolve parliament against ministerial advice" is as curious and contradictory as Mr. King's famous "a misrepresentation of the facts in their true light". What makes the whole thing worse is that Professor Clokie repeats substantially the same statements on p. 161, where, discussing royal discretionary powers in general, he says: "Does the King have any discretion in Britain? Opinion is divided. There is no precedent in the past hundred years for a monarch's rejection of his minister's advice with regard, say, to the dissolution of parliament. This does not mean, however, that it (sic) could not be exercised; it is simply a statement that there has been no such use for a century or more." Here again Professor Clokie appears to have modelled his style on Mr. King's, and his statements are most inaccurate. No reader unacquainted with the literature of the subject (and readers of an elementary text are almost certain to be mainly in that category) would guess that the weight of authoritative opinion is overwhelmingly in favour of the view that the

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discretion does exist. Technically, it may be true to say, "Opinion is divided"; but among persons with any claim to knowledge of the subject, the division is about 95-5.

P. 161: "The standard view of royal discretion is that the question hinges on the Crown's successful chance of finding ministers with parliamentary support who will take responsibility for the government. Thus, in Canada in 1926, when Lord Byng rejected Mr. King's request for a dissolution, his bad judgment in inviting the leader of the Opposition to form a ministry was shown by the latter's defeat in the House. . . . In 1939 in South Africa, when the issue of war or neutrality divided the Cabinet, the Governor-General . . . would appear to have been justified in refusing a dissolution to General Hertzog and in calling on the leader of the majority in the Cabinet who clearly possessed parliamentary support, as the vote against neutrality showed." Also, pp. 163-4 "In Canada in 1926, although Mr. Meighen, as Mr. King's successor, seemed to rely largely on the Governor-General's personal discretion as justification, he did actually have to assume responsibility for the situation and had to accept the consequences for the Governor-General's misjudgment and his own miscalculation in taking office. In the last resort, in any case, there is a final appeal to the electorate. This is the ultimate test. It is the right and duty of the King or his representative to possess a Prime Minister who can carry on the government with the confidence of the House of Commons. If he misjudges the parliamentary situation (as Lord Byng did in 1926), his chosen Prime Minister must appeal to the electorate to return a parliamentary majority. . . . A refusal of dissolution, even if the request appears to be intended to evade a possible vote of censure as in 1926, can only be justified when there are certain prior conditions or other political circumstances. Decision in this case is a matter of judgment rather than of constitutional rules. If a Prime Minister resigns on such a refusal, the success of a new Minister

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in gaining parliamentary confidence or his later electoral victory would automatically confirm the wisdom of the Governor-General's course of action.

"Although it may be argued that the present doubt as to the constitutionality of the reserve power of the Crown, especially so far as dissolution is concerned, flows from a transitional stage in cabinet government --- a stage between responsibility to parliament and responsibility to the electorate --- the fact is that the Prime Minister is not directly elected by the people; his position still comes from having or winning a majority in parliament. And although the direct election of a ministry may be more in harmony with the current democratic tendencies, it possesses the dangers as well as the merits of the logical democratic process."

Mr. Meighen's defeat on the Robb motion in 1926 did not show that the Governor-General showed "bad judgment" or "misjudgment" in asking him to form a Government. The statement completely overlooks: (a) the fact that Mr. Meighen's Government, between its assumption of office and its defeat on the Robb motion, had been sustained on four critical divisions, by what were for that Parliament substantial majorities; (b) that it was defeated on the Robb motion only because the Prime Minister's seat was vacant and a Progressive broke his pair (the latter, point, surely, not even the best "judgment" of the Governor-General could have foreseen!); and (c) that the majority of the Progressives reversed their stand after they had formally expressed their intention of supporting the new Government in finishing the session's business and their conviction that there should be no dissolution till a judicial investigation of the Customs scandal had been concluded and Parliament had been summoned to deal with the report. (This last, incidentally, shows that the majority of the Progressives formally approved the Governor-General's refusal of dissolution.) How on earth any human being could have foreseen that the Progressives would eat their own words within a few days neither Professor Clokie nor any of the other purveyors of this kind of nonsense have ever explained. The Governor-General surely cannot be expected to be a clairvoyant!

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The whole thing is the more peculiar and the more inexcusable in that the facts are fully set forth in Forsey, op. cit., pp. 137-9, 155-60; and that no one has challenged them; and that Professor Ckekie reviewed that work in the Canadian Historical Review, and must therefore have read it.

The view that the refusal of dissolution in South Africa in 1939 was justified, while that in Canada in 1926 was not, is, to say the least, highly questionable; see Forsey, op. cit., chapter VII. Certainly, if the "vote against neutrality" in South Africa showed that General Smuts "possessed parliamentary support", the four votes in Canada showed that Mr. Meighen possessed parliamentary support.

[redacted]

What is meant by the statement that Mr. Meighen "seemed to rely largely on the Governor-General's personal discretion as justification" for taking office I do not know, especially as this statement is coupled with the remark that "he did actually have to assume responsibility for the situation". Certainly Mr. Meighen relied on the Governor-General's discretion in the sense that he believed that the Governor possessed a discretionary power, in certain circumstances, to refuse dissolution. But in the context, if the words mean anything at all, they mean that Mr. Meighen simply took the stand that the Governor could refuse and let it go at that, and that he tried to escape responsibility for the refusal of dissolution and his own appointment. This, of course, is wholly false. Mr. Meighen gave two powerful reasons why the Governor was justified in exercising his discretion in this particular case (and, accordingly, why he himself was justified in taking office); and he never made the slightest attempt to evade responsibility for the situation. Everyone who [redacted] has even the sketchiest notion of the rudiments of parliamentary government knows that any such attempt would have been utterly futile; and not even Mr. Meighen's worst enemies would venture to assert that he was so abysmally ignorant of the British Constitution as that. Professor Clokie's statement seems to be an echo of Dr. Neuendorff's

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assertion that "It is important to note that Meighen did not try to defend the attitude of the Governor-General as constitutional." Dr. Neuendorff's book, as anyone can see by looking up Professor MacGregor Dawson's review of it in the Canadian Historical Review for March 1943, is as completely worthless as my any book could well be; her remark on this subject, palpably false, is a very fair sample of the whole work. Why Professor Clokie includes it in his bibliography (p. 191), without any indication at all of its value, is a mystery.

In plain terms: of course Mr. Meighen accepted responsibility. He could do nothing else, and he never tried to anything else; he would merely have made a fool of himself if he had.

On his "miscalculation" in taking office, see comments above on Lord Byng's alleged "bad judgment", etc.

What does Professor Clokie mean by saying the refusal of dissolution can "only be justified when there are certain prior conditions or other political circumstances"? The phrase might mean anything. What prior conditions? What circumstances? It would have been just as enlightening to insert at this point the multiplication table.

Is the contrast between "constitutional rules" and "matters of judgment" valid? The exercise of discretion in refusing dissolution will always be in some degree a "matter of [redacted] judgment" as to whether given conditions, which would make the refusal constitutional, do or do not exist; but the matter remains one of "constitutional rules" none the less. To suggest the opposite is to take refuge in complete constitutional agnosticism; to throw up our hands and say that there are no objective standards at all. That course is both unnecessary and dangerous. It is unnecessary because the precedents, the authorities, and the essential principles of British parliamentary government, give us ample basis for a considerable number of rules. It is dangerous because the absence of objective standards leaves the Crown an absolute and unfettered discretion which might be fatal to democracy, and leaves the public an easy prey to any rhetorical

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claptrap a cunning charlatan may fling at its head. The whole thing is just a piece of intellectual laziness.

The final paragraph quoted above is vague and confusing, to say the least. There is no real "doubt" about the reserve power of the Crown to refuse dissolution, and very little, if any, doubt about the circumstances in which refusal is proper. There is not, as far as I am aware, any proposal to make either the Prime Minister or the Cabinet "directly elected by the people", so that there seems no point in introducing this rambling dissertation at all. Why direct election would be more - "democratic" or "logically democratic", Professor Clokie does not explain; nor does he give any idea of the "merits" and "dangers" of direct election. Finally, he offers no reason for thinking that Cabinet Government is in a process of transition from the traditional British system of responsibility to Parliament to this other system of direct election and direct responsibility to the electorate. What enlightenment the reader is expected to get from his paragraph passes my comprehension.

P. 162: Professor Clokie says that one school of thought on the subject of the reserve power of the Crown holds that it is the function of the Crown to "protect the country against unconstitutional, malicious or vindictive conduct (whether personal or partisan) on the part of a prime minister". Against unconstitutional conduct, yes; but who, nowadays, would add "malicious or vindictive (whether personal or partisan)"?

P. 58: "Federalism creates a hiatus in ministerial responsibility. With a federal division of powers there is necessarily a large area of government for which no body of 'responsible' ministers are responsible. A political party may be elected to power in either Dominion Parliament or provincial legislature with a mandate to accomplish a certain purpose. but the leader of the party, as head of the ministry, may then find that the authority of the government he controls is strictly limited. The political responsibility of ministers is thus regularly defeated by the existence of federal restraints."

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This is pure nonsense. Federalism does not "create a hiatus in ministerial responsibility". There is no "area of government", large or small, in which responsible ministers cannot be responsible. If, as is here suggested, a political party is elected to power in the Dominion or a province with a mandate to do things outside the powers of the legislature concerned, then the only appropriate comment is that the party concerned is either ignorant or dishonest. To suggest that the "political responsibility of ministers is thus regularly defeated by the existence of federal restraints" shows a failure to understand the nature of ministerial responsibility. If any party is so ignorant or or dishonest as to campaign along the lines suggested, the electors can, and ultimately will, hold it responsible for its ignorance or fraud. The use of the word "regularly" suggests that Canadian parties are habitually ignorant or dishonest in this respect. Similar comments apply to p. 70, lines 13-19, where the same statements are made in shorter form.

P. 60: Discussing the Statute of Westminster, Professor Clokie says: "The provincial governments were to benefit equally [with the Dominion] by British renunciation in the provincial sphere." The word "governments" should of course be "legislatures"; and even then the statement would not be correct. Under section 3 of the Statute of Westminster, the Dominion Parliament's legislation has extra-territorial validity. Provincial legislation has not. (See Professor Clokie's own Appendix, pp. 316-7.) Similar comments apply to the statement near the bottom of p. 210 that "the provinces too were specifically released from the old bonds of colonial status."

P. 64: "When a new subject of legislation, civil aviation, which was not contemplated in 1867, came into dispute between Dominion and provinces ten years ago, it was agreed that the Court would best determine the location of the power of regulation." There was no question of any "agreement", no necessity of any "agreement", no possibility of any "agreement". Under our law, the courts alone can decide such a question, unless, of course, the British Parliament passes an amending Act.

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P. 65: The contrast between the American Constitution and the British North America Act in the matter of judicial review of ~~XIX~~ legislation is wholly unjustified. Neither document explicitly establishes judicial review. In the United States, the principle was read into the Constitution by Chief Justice Marshall.

P. 70: "Thus far at least, few alterations have occurred in the formal or legal concepts of the federal system, and development has taken place through judicial interpretation rather than by statutory amendment." It is not very clear what the first part of the sentence is intended to mean, or what its connection is with the second part. But the first part is open to objection as likely to convey the notion that the strict law of the Canadian Constitution, notably as to the division of legislative powers, has been very little changed. This, of course, is not so; see the O'Connor Report to the Senate, and the writings of Hon. C.H. Cahan, Professor F.R. Scott, Professor H.A. Smith, and others.

P. 89: "Practically all the international unions are pledged to non-partisanship in politics." This is rather misleading. As of October 1944, 26 international unions had one or more locals affiliated to the C.C.F. The United Steelworkers, the largest international union in Canada, has six locals affiliated (well over 14,000 members in these); the International Association of Machinists, the second largest international union has two locals affiliated (about 1,500 members); the ~~third~~ fourth largest international union, the United Mine Workers, has 34 locals affiliated (about 13,000 members), most of these having been affiliated for the last six years.

P. 76: "The names 'Conservative' and 'Liberal' . . . it is clear . . . did not spring from a distinctive Canadian cleavage between conservatives and liberals." This is surely highly questionable, to say the least. Macdonald and Brown, Cartier and the Dorions, were surely divided by genuine differences of principle which can be appropriately described as the differences between conservative and liberal ideas? That some Liberals ultimately became Conservatives does not in the least invalidate this statement. That has happened also in England, where, Professor Clokie seems to admit, the names "Liberal" and "Conservative" did correspond to a

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real difference in principle. Nor is is relevant that subsequent developments in both Canadian parties may have tended to blur the original distinctions.

P. 201: The date of the Alberta provincial election of 1935 is wrongly given as 1936.

P. 86: In 1940, in the Dominion election, only 10 Social Crediters, not 17, were elected. (A few lines farther down there is a misprint, the year 1941 being given twice instead of only once.)

P. 92: In 1920, "the Conservatives, who were also faced with the selection of a new leader left the choice to the retiring prime minister (Sir Robert Borden), who designated Mr. Arthur Meighen." This is not in accordance with the very circumstantial description of the proceedings given by Sir George Foster, and printed in Wallace's Life of Foster. On p. 165, Professor Clokie says that in 1920 "the parliamentary caucus or small party council immediately selected a new leader." This is a manifest contradiction of the first statement, and is also not in accordance with Foster's account.

P. 200: Provincial Legislatures "are elected for maximum terms of four or five years." The maximum term has been five years for all provincial Legislatures since 1932. The dates on which the provinces changed from four to five year terms are: Quebec 1881, Nova Scotia 1897, New Brunswick 1902, Manitoba 1908, Saskatchewan 1908, Alberta 1909, British Columbia 1916, Ontario 1930, Prince Edward Island 1932.

P. 103: The date for the election of 1917 is wrong. Professor Clokie gives the date as July 17; actually, as the Canada Year Book shows, Parliament was not prorogued till September 20, and the election took place on December 17.

P. 104: No one holding office under the Crown may stand for election, "save Cabinet Ministers under circumstances and conditions to be mentioned in the next chapter." There are no longer any qualifying "circumstances and conditions", and have not been since 1931. What about parliamentary assistants?

P. 129: "Until 1931 members of the House who took ministerial posts had to seek re-election." No. Only Ministers with portfolio. The statement as it stands will render the incautious or unlearned reader totally unable to understand the position of the

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temporary Government of Ministers without portfolio in 1926. See pp. 159-60.

P. 107: The provision in the British North America Act for what Professor Clokie calls "executive veto" (in which he apparently includes the provisions for reservation and disallowance) do not "indicate a formal acceptance of the unparliamentary concept of 'checks and balances'." They have nothing whatever to do with any such concept. The provision for withholding the royal assent is carried over from the British Constitution, and operates in exactly the same way. The provisions for reservation and [redacted] disallowance are carried over from the British colonial system, which certainly did not borrow them from any system of "separation of powers" or "checks and balances", or use them for any such purpose. This further example of Professor Clokie's repeated attempts to assimilate our Constitution to the American is intensely irritating and thoroughly wrong-headed and misleading. Except in its federalism, and to a limited degree in respect to parties, our system is not in the least like the American, and to try to make out that it is is simply to darken counsel. The attempt is presumably intended to make the thing more intelligble to American readers; it is likely to have the reverse effect, and to make them utterly unable to understand what is going on up here. It is, of course, obvious, that the powers of reservation and disallowance impose checks on the legislative bodies concerned; but the checks are of an altogether different nature, and for altogether different purposes, from the checks in the American system. It is also highly doubtful whether the term "executive veto" should be used at all in connection with our system, especially as it is likely to mislead American readers without enlightening anyone else; and it is even more doubtful whether the powers of reservation and disallowance should be included under the term "executive veto" if it is used.

Pp. 107-8: The remarks about the non-participation of the monarch in person, as a rule, in the processes of Canadian legislation are beside the point. The monarch in Britain often opens and prorogues Parliament and gives the royal assent by commission, and not in person. Queen Victoria, for years, rarely appeared in

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London at all. The presence of absence of the monarch in person does not really affect the essence of the matter in the least.

"The Act of 1867 . . . distinguished two kinds of royal powers --- those requiring the personal action of the ~~MONARCH~~ sovereign and those capable of being performed by a representative 'in the name of the Queen'." Is this really the basis of the distinction? Was it not rather a distinction between powers in which it was felt that the Crown might normally be advised by Dominion Ministers (though even here there were qualifications) and those where it must be advised by British Ministers; that is, between powers involving purely internal questions and powers involving Imperial questions? Even this principle is subject to exceptions, such as the power to appoint extra Senators, under Section 26, a power which involved no Imperial question, but where the action of both the Governor-General (who "recommends") and the Queen (who "directs") is required to make the appointments.

P. 108: The description of the powers of reservation and disallowance as "veto on appeal" seems to be a needless coining of a phrase.

P. 108: The appointment of the first Senators was not a "legislative function".

P. 109: "Between fifteen and twenty [Dominion] bills were reserved". Dominion-Provincial Legislation gives 15. What warrant is there for suggesting there were another one to five? And what an extraordinary way of putting it!

"Since 1927, the royal representative has ceased to send back to the King (as he used to through the Colonial Secretary) the copies of Canadian Acts required by Section 55." Is this so? If so, it is clearly a violation of the Statute. Professor Clokie adds that "Canadian legislation is now transmitted through the Prime Minister's office to the Dominions Office at Westminster as a matter of courtesy and record." Is this a distinction without a difference, or what?

P. 110: "Since 1878 . . . the Governor-General . . . has been charged with almost unlimited 'representative powers' in the field of legislation." This is likely to be highly misleading to American readers, though a careful reading of the context might show

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them that all that Professor Clokie means is that in the exercise of his powers of giving, withholding or reserving the royal assent, the Governor-General no longer relies on the advice of British Ministers, or their instructions. The phrasing elsewhere on the page rather suggests that this was so till 1926, when the Balfour Report "brought [it] to an end".

P. 111: "In 1873, the Governor-General, supported by the British advisers of the Queen, refused to make the additional senatorial appointments that a new Prime Minister considered desirable to improve his political position in the Senate." This is not correct. Sessional Paper No. 68, of 1877, shows, on the contrary, that the Governor-General actually recommended the appointments, the recommendation being forwarded to the Queen on January 26, 1874. It was the British Government which refused to advise the Queen to give the necessary "direction". The S.P. gives Lord Kimberley's reply, February 18, 1874, explaining why. On p. 119, Professor Clokie states the facts correctly.

P. 112: The statements about the prorogation of 1873 do not accord with the accounts in the Sessional Papers, Pope's Life of Sir John Macdonald, or Dufferin's own account.

P. 115: The British North America Act of 1871 was only in part "permissive". It also explicitly removed any doubts of the validity of the Manitoba Act.

P. 116: The property qualifications of Senators are not correctly stated: "owners of property to the value of $4,000."

P. 120: Professor Clokie might have noted that the Senate also rejected an Address for a constitutional amendment in 1936.

P. 127: "Eight Parliaments have approached within a very few months of their possible life". Two Parliaments (those elected in 1891 and 1930) have "approached within a day of their possible life".

P. 138: "Three Conservative ministries have been brought to a close by the Prime Minister's death (Sir John Macdonald, 1891; Sir John Thompson, 1894) or retirement (Sir Robert Borden, 1920)." Sir Robert Borden's Government of 1917-1920 was a Union, not a Conservative, Government; and the Conservative Governments of Sir John Abbott and

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Sir Mackenzie Bowell were ended by the Prime Minister's retirement. At p. 165, Professor Clokie mentions the retirement of Sir John Abbott, and says (incorrectly) that Sir Mackenzie Bowell "resigned when his ministry broke up as a result of internal discords." Bowell reconstituted his Government after the "discords", and carried on till the end of the session.

P. 141: The sitting of the House of Commons after the dinner recess is for three hours, not "two or three".

P. 147: A Member may speak for forty minutes "unless the closure is to be applied or unless a twenty-minute limit is enforced". What the first phrase means I do not know; as far as I am aware, a twenty-minute limit can be enforced only when closure has been applied.

"There is no daily 'question hour' as at Westminster." ??

P. 158: "The honour [of a Canadian Privy Councillorship] has also been conferred . . . on the Chief Justice of Canada." The present Chief Justice is not a Canadian Privy Councillor; neither was his predecessor, Sir Lyman Duff; neither was his predecessor, Judge Anglin. Sir Charles Fitzpatrick and Sir Louis Davies were, but they were ex-Ministers.

"The Governor-General does not attend meetings of this quorum [of Council] (as the King may those of his Privy Council at Westminster." Isn't there some confusion here? Does the quorum of the Canadian Council ever meet for the formal passing of Orders-in-Council, as a handful of members of the British Privy Council does, with the King present?

P. 159: "Since 1891 it has been the practice for the Prime Minister to serve as President of the Council." No. Mr. Rowell was President, 1917-1920, and Mr. Calder, 1920-1921.

Pp. 159-60: On the temporary Government of 1926: "It will be recalled that (before 1931) acceptance of a ministerial post necessitated the recipient's re-election to parliament. As the session was drawing to a close and Mr. Meighen was not sure of securing the confidence of the House, it was decided that he alone should actually take a departmental office post and thereby lose his parliamentary seat. His colleagues in the Cabinet --- all but one being already Privy Councillors --- were not

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sworn in as ministers, but were designated as 'acting' ministers, so that they might retain their seats. The House refused to accept the administration of such an 'acting ministry', of which the chief minister was no longer in parliament and the rest not specifically in charge of departments, and on July 2nd. passed a vote of want of confidence in the Government. The dissolution of parliament was thus forced, and in the ensuing election the Cabinet of 'acting ministers' was defeated. This episode has often been interpreted as implying that privy councillors have no status for ministerial purposes unless specially designated and sworn as ministers of departments. It also reveals that a ministry will probably not be acceptable to the House of Commons unless an adequate number of them are members of the House and of the Committee of the Council."

This is where the chickens of p. 129 come home to roost. The whole passage is thoroughly inaccurate and misleading. Indeed, that is putting it mildly. In the first place, neither before 1931 nor at any other time did "acceptance of a ministerial post" necessitate the recipient's re-election to the House. Only acceptance of a portfolio involved this consequence. Ministers without portfolio were never obliged to vacate their seats, even if they were also acting Ministers of departments. There are dozens of precedents, a good many of them set forth in detail, with full references, in Forsey, op. cit. In the second place, there was not then, and there is no evidence that there is now, any means of swearing in a Minister except as Minister of a department (except, of course, that all Ministers, with or without portfolio, must take the Privy Councillor's oath, which all of Mr. Meighen's Ministers did). In the third place, the Ministry was not an "acting ministry", though most of its members were acting Ministers of departments. It was a perfectly valid, constitutional Ministry, of a type for which there were at least 16 precedents in various parts of the Empire. Professor Clokie, like so many others, has completely failed to draw the elementary and crucial distinction between a Minister, and a Minister of a department. In the fourth place, all the Ministers were specifically in charge of departments, Mr. Meighen

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as Minister of his department, the others as acting Ministers of the other departments. From Professor Clokie's account, one would almost suppose that no such thing as an acting Minister of a department had ever been heard of before; whereas in fact they are a perfectly normal feature of Canadian constitutional practice. In the fifth place, the so-called "Cabinet of 'acting ministers'" was not defeated in the election. It had given way to a Cabinet of the ordinary kind on July 13, and the election did not take place till September 14. In the sixth place, anyone who has interpreted the episode as Professor Clokie says some people have is either a fool or a deliberate liar. The interpretation could only be true if there had never been a Minister without portfolio in Canadian or British constitutional history; and there have been dozens, probably hundreds, of them. Mr. King's Cabinet at the end of 1925 contained no less than five Ministers without portfolio. In the sixth place, every one of the members of the temporary Government except Mr. Meighen was a member of the House of Commons (and Mr. Meighen had just forfeited his seat through a technicality), and every one of them was a member of the Committee of the Council (which, of course, consists simply of those Privy Councillors whom the Prime Minister invites to Cabinet meetings). The sentence beginning "It also reveals" is, therefore, pure nonsense, in the literal sense of the term: absolutely meaningless. Anyone with any real knowledge of constitutional usage and of the facts of this affair knows all this anyway; anyone who doesn't will find it all set out in the greatest detail, with full references, in Forsey, op. cit. As already pointed out, Professor Clokie reviewed this book, and therefore presumably read it; indeed, in the review in question, he actually says: "In respect to Mr. Meighen's cabinet, Dr. Forsey provides an admirable defence of the 'acting ministers' by a clear exposition of the status of privy councillors and ministers." His whole discussion of the question is therefore utterly inexcusable; in fact, much stronger adjectives might properly be applied to it. Most of Professor Clokie's observations on the

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subject are just a re-hash of the 1926 propaganda of the Liberal party and the maunderings of Dr. Neuendorff, without even the poor excuses which avowed Liberal partisans and Dr. Neuendorff could proffer.

Incidentally, Professor Clokie crowns his exposition of the subject by adding that "It is possible . . . for a privy councillor to be a minister or even Prime Minister even while not a member of parliament for the time being --- as was the case with Mr. Mackenzie King in 1925 after defeat in his own constituency at the general election of that year." So, in respect of the temporary Government, it is not open to him to plead that Mr. Meighen's temporary absence from the House of Commons prevented the number of Ministers in the House from being "adequate". See also pp. 172-3.

P. 160: What is the evidence for the statement that there was a "lengthy controversy" with the British Government about the Governor-General's exercise of his power in "Senate appointments" and "dissolution of Parliament"? The only times I have ever heard of when Senate appointments came up at all in discussion with the British Government were in 1873 and 1896. In 1873, the Governor-General acted on the advice of his Ministers and made the desired recommendation for appointment of extra Senators, and the Sessional Paper already referred to above contains no trace at all of any controversy, lengthy or otherwise, with the British Government. The British Government simply said no and gave its reasons, and that was the end of it. The Governor-General's exercise of his powers never came into question at all; and if Professor Clokie had taken the trouble to go into the matter properly and get his facts straight he would have known this. In 1896 there was certainly no "lengthy controversy" with the British Government; on the contrary, the Canadian and British Governments agreed that Lord Aberdeen's action was proper. As for the power of dissolution, there is no evidence at all, that I have ever heard of, of any controversy with the British Government over the Governor-General's exercise of his powers. The only time when anything of the sort could conceivably have occurred was in 1926, when Lord Byng flatly declined Mr. King's "suggestion" that he should consult the British Government, and when Mr. Amery, the responsible British Minister, equally

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flatly declared that it would be constitutionally improper for the British Government to express any opinion.

P. 165: On dismissal of Ministers: "Though Lord Dufferin is said to have considered this action in 1873, it is unconfirmed by any official evidence." That Dufferin really did contemplate dismissing Macdonald seems clear from his letter in Pope's Correspondence of Sir John Macdonald, pp. 228-9.

P. 166: "Ever since the first Macdonald ministry the province of Quebec has been regarded as entitled to three French ministers and one English." For some time now, the French-Canadians of Quebec have regared themselves as entitled to, and have usually got, four Ministers. The English-speaking Protestants in Quebec always expected at least one Minister, and sometimes had two (Mr. King's Government, end of 1925, Mr. Robb and Mr. Marler; Mr. Bennett's Government, Mr. Cahan and Sir George Perley). Since 1935 or thereabouts, until the appointment of Mr. Claxton, the English-speaking Protestants of Quebec have had no Minister, unless one counts Mr. Ralston, who comes from Nova Scotia and sits for a P.E.I. seat. In addition to the French-Canadian Ministers and the English Protestant, Quebec has, on occasion, had an Irish Catholic: Mr. Doherty, 1911-1923, and Mr. Power, 1935-1944.

"To balance this Ontario is accordingly given at least four ministers." Ontario may or may not have more Ministers than Quebec, depending on the relative strength of the ministerial party in the two provinces.

"There is usually a non-French Catholic (preferably Irish and from Ontario)." There is always an Irish Catholic, who may come from any province; there is no "preferably from Ontario" about it. Macdonald wanted to appoint McGee, from Quebec, and ultimately appointed Kenny, from Nova Scotia; in the Borden and Meighen Governments, 1911-1921, the Irish Catholic representative was Mr. Doherty, from Quebec; in the present Government, untill a few weeks ago, the Irish Catholic representative was Mr. Power, from Quebec.

"The Post Office and Public Works are now often under French ministers." One or the other; not both.

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"The ministry of Fisheries is allotted to an appointee from the maritime provinces." Unless the word "usually", in the earlier part of this sentence, is meant to apply here also, this would not be strictly accurate. The present Minister is from Quebec.

Pp.173-3: "Members of the Cabinet are paid regular salaries, in addition to their parliamentary indemnities, as Ministers of the Crown regardless of whether they are in active charge of a department or are without portfolio." Here again is an inexcusable error, which makes the whole business of the temporary Government in 1926 absolutely incomprehensible. As clearly set forth in Forsey, op. cit., Ministers without portfolio do not receive salaries; that was why it was possible to form a temporary Government of Ministers without portfolio without the Ministers vacating their seats. Forsey's book does not, I think, mention the two exceptions: Hon. Gideon Robertson and Hon. A.K. MacLean, in 1918 and for a year or so after. These two Ministers without portfolio did receive salaries, but under a special Act passed for that purpose and lapsing a year after the war. (See Hansard, 1918, pp. 76-7.) This exception so far from strengthening Professor Clokie's case, knocks the bottom out of it; for if Ministers without portfolio recived salaries anyhow, no special Act would have been necessary.

P. 183: "A Solicitor-General, who is . . . often a parliamentarian." The Solicitor-General, when there was one, was always a Member of Parliament. Where on earth did Professor Clokie get this quaint notion about "often"?

P. 187: "Compulsory military service was introduced in 1940." Surely Professor Clokie should have added, "for home service"? What would Americans, reading of the recent crisis, make of it in the light of the statement as it stands?

P. 194: "British Columbia . . . came into Confederation with [its] pre-existing institutions practically unaltered by the union. . . . Representative institutions were not fully developed and were later regulated by provincial statute." British Columbia's pre-Confederation Constitution, which did not include responsible government, was completely scrapped at Confederation, and a new Con-

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stitution adopted. See Ralph Flenley, Essays in Canadian History in Honour of George M. Wrong, the essay by Professor Sage, especially pp. 176-86.

P. 195: "The veto . . . is actually never employed by the [lieutenant]-governor." Forsey, in Canadian Journal of Economics and Political Science, February 1938, gives 25 cases in which it has been employed, the most recent in 1924.

P. 197: Professor Clokie should mention that the Lieutenant-Governor receives formal Instructions from the Dominion Government on his appointment (they are printed in the printed memorandum of the Department of Justice, 1937, on the Office of Lieutenant-Governor), and may receive special instructions on particular occasions (for examples, see Forsey's article, just referred to). To say, as Professor Clokie does at p. 217, that "the conventions of responsible government make it as unconstitutional for the Dominion government to instruct him in his duties as it is for the British government to instruct the Governor-General" is flagrantly contrary to the facts. Note the special instructions of ~~XXXX~~ 1873 and 1882 (given in the Department of Justice Memorandum), and 1924 (Forsey's article); the case of the Lieutenant-Governor of Nova Scotia in 1926, when the Dominion Government "advised" him to refuse to appoint extra Legislative Councillors (Canadian Annual Review, 1925-26, p. 408); and the numerous instructions in the McInnes case in British Columbia (SP. Canada, 1900, No. 174; S.P. British Columbia, 1899); also Sir John Macdonald's Correspondence, pp. 52-4, 126-7, 183-4, 225, 288-9, 316, 379, 398-9, 420-6, 428-9, 439-40, 464-5, 468.

P. 198: Since 1882, reservation of provincial bills has been "rare". There have been 65 reservations in all. 23 of them have occurred since 1882, though only 12 since 1895, only 10 since 1900, and only three since 1920. Why ~~XXXX~~ Professor Clokie picks 1882 as the dividing line is not clear. (At p. 209, he seems to favour 1900.) Incidentally, in view of his earlier remarks on the unconstitutionality of Dominion instructions to Lieutenant-Governors, it is rather curious to find him, on p. 209, saying that "Since 1882 it has been agreed that it is contrary to the princples of ministerial responsibility within the province for a lieutenant-governor to reserve bills unless instructed to do so by the Dominion

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ministers." It would be interesting to have Professor Clokie's comments on the Alberta reservations of 1937, when the Dominion Government denied giving any instructions (see Forsey's article, already referred to). On this same page, 209, Professor Clokie says, à propos of reservation: "There is ground for thinking that it is as incompatible with provincial responsible government for a lieutenant-governor to be instructed to act contrary to the advice of his provincial ministers , as it was for the Governor-General to be instructed by British ministries to disregard his Canadian advisers." Is there? It depends on what theory of Canadian federalism one holds. Here, and elsewhere, Professor Clokie appears to confer a sort of Dominion status on the provinces. Dominion instructions in such matters are clearly a limitation on the powers of the province; so is the Dominion power of disallowance; whether either is "incompatible with provincial responsible government" is another matter altogether.

P. 224: Removal of County Court judges does not require an Address from both Houses.

P. 225: The reference to "the customary old French civil law" in Quebec is a trifle misleading, as the law in question is embodied in a written code.

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320 Bay Street, Toronto,
January 15, 1944.

Dr. Eugene Forsey,
3 Lakeview Terrace,
Ottawa, Ontario.

My dear Eugene:

I have not heard from you for quite a while and have one or two reflections. First, I am really concerned lest you may be devoting too much of your time to clerical and secretarial work and the like of that. You have abilities for work of a much higher order. This is no new thought at all, but it won't do any harm to venture passing it on.

Next, I do not know whether you have seen a letter (or rather a copy of it) written by Dr. Eid of Macklin, Sask., to the Member for his Riding, Mr. Gregory, M. P., on the subject of Health Insurance. If you have not a copy I can send one. The letter was sent to me and I must admit I was tremendously impressed by it. Of course, my mind does not run in ultra-modern channels on this and kindred subjects. Eid's letter is written out of experience in Germany and is well authenticated. Of course, all Parties are committed to Health Insurance and Lord knows what. Everything that is new nowadays is "progressive."

On no account must you get out of the habit of calling and having lunch with me when you come to Toronto, and the oftener the better.

Yours very truly,

AM/E.

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144531

3 Lakeview Terrace,
Ottawa, January 17, 1944.

Dear Mr. Meighen,

I am sending under separate cover a copy of the Canadian Historical Review containing a review of my book by Professor Clokie of Manitoba University. It is, I think you will agree, a curious mixture; in parts it seems to me to reveal total incomprehension of what I wrote. I shall be interested to see any comments you may care to make. I should be inclined to think that a copy of any such comments might well go to Professor Clokie himself. Any reply I might make to him would be regarded as partipris; but comments from you he would be obliged to consider more seriously.

I think the truth is that these academic people have been so steeped in Grittism that they just cannot understand plain English except where it happens to fit in with their own views. But I cannot understand why Clokie should have understood parts of what I said and not other parts. In some instances it seems clear that he just did not read what I said at all.

With best wishes,

Yours sincerely,

Eugene Forsey

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144532

P.S. Your kind letter of the 15th. reached me just after I had finished the above. I should be very glad to have the copy of Dr. Eid's letter, especially as I shall shortly have to advise the Congress on this question of health legislation. The Government's Bill is, as you once said of another of their productions, "a roaring farce and a resounding fake".

Very many thanks for your exhortations about wasting my time on clerical work, etc. You will be glad to know that I have at last an office of my own, and am promised a stenographer for the very near future. Meanwhile, such typing of my own letters and so forth as I have to do at least keeps me out of mischief! It also means a piling up of other work which will probably effectively prevent me from being a C.C.F. candidate, or taking any very active part in any election; for which I am sure you will be thankful! Seriously, however, I am really expecting to get my office properly organized, with an assistant and a secretary, very soon; and then I shall be able to do more effective thinking than for some time past.

Have just returned from Nova Scotia, where I was working with J.L. Cohen, K.C., on a Steelworkers' job, before a Royal Commission. Cohen is a warm admirer of yours (though he holds very different views), and wishes you were in the House. He had some very interesting comments to make on various public matters, which I shall tell you about when next I see you. That may be towards the end of the month, or may not be till March or April. My ~~FREE~~ visits to Toronto are rare these days. It is more than kind of you to renew your invitation to lunch.

E.C.D.

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144533

320 Bay Street, Toronto,
January 20, 1944.

Dr. Eugene Forsey,
8 Lakeview Terrace,
Ottawa, Ontario.

My dear Eugene:

I received yesterday yours of 17th and this morning the "Canadian Historical Review." The latter is herewith returned as you will doubtless need it.

I have written a letter to you on the subject of Clokie's article and same is enclosed. It seems to me quite certain you can improve on this. From the standpoint of precedent particularly you know more of the subject than any living person. I am quite sure that any suggestion you make will have my approval.

My idea is that you would send a copy to Professor Clokie, or make such other use of it you like.

As requested, I am sending you a copy of Dr. Eid's letter.

Yours sincerely,

AM/E.
Encl.—5.

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144534

520 Bay Street, Toronto,
January 20, 1944.

Dr. Eugene Forsey,
5 Lakeview Terrace,
Ottawa, Ontario.

Dear Dr. Forsey:

I have read with such patience as I could command the article on your book by Professor Clokie, in "Canadian Historical Review." One finds it difficult to know where to begin in an attempt to disentangle this disjointed and logically incoherent composition.

In the first part of the article the writer seems to have some notion that the Royal power of refusing or granting dissolution in Britain or the British Dominions may well vary because of what he describes as "different circumstances" and he illustrates these different circumstances as perhaps depending upon the numerical rigidity of Upper Chambers. Inasmuch as the right and duty of the Crown in respect of dissolution rests solely upon the need which may from time to time arise to make certain that a Government (and particularly a Prime Minister) maintains its answerability to Parliament and the answerability of Parliament to the people, one is at a loss to know what "circumstances" Professor Clokie has in mind. The principle underlying the right and duty is everywhere the same. Just what the "numerical rigidity" of Upper Chambers would have to do with the subject will have to be left to more imaginative persons than myself.

In the latter part, Professor Clokie definitely states that Lord Byng in 1926 was entitled to refuse dissolution to Mr. King. He questions, however, Lord Byng's wisdom in doing what he was entitled to do, on the ground that he was wrong in thinking that I had a right to assume that I would be an alternative Prime Minister acceptable to Parliament. This is so thoroughly dealt with in your book that one wonders whether Professor Clokie has really read the book or not. The Progressive Party had itself done sufficient in the way of representations to the Governor-General to justify him in his belief that I had a reasonable chance of carrying on in the Parliament as then constituted. The repeated

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votes in that Parliament, supporting the Government of which I was the head, after debates and divisions conducted entirely in my absence, would also seem to be of some importance if Professor Clokie had read the record. The one vote which he regards as having negatived all grounds for belief that I could carry on was in reality not an adverse decision at all. It was carried on a single vote falsely given, and it, too, was, of course, carried without my being able to exercise my right as Leader to argue the subject in the House, or to cast my vote. Further, the decision of Parliament on the point in issue was manifestly and grossly wrong, as admitted by Prof. Clokie himself. It seems to me to be asking too much of Lord Byng that he should have contemplated an obviously preposterous action even by a false vote on the part of Parliament from which the Prime Minister was temporarily excluded.

I suppose, however, I should not forget that Professor Clokie has been living under the shadow of the late Chancellor of Manitoba University. So far as I have been able to ascertain, Dr. Dafoe is the only man in any country who has undertaken to attack the case which you have so very ably made and supported by such a wealth of historical data. So far as I have learned, even Mr.Keith has never essayed the task.

Yours very truly,

AM/E. Arthur Meighen.

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144536

3 Lakeview Terrace,
Ottawa, January 25, 1944.

Dear Mr. Meighen,

Thanks very much for your letters. I am not certain whether or not to send a copy of the formal one to Clokie, as the wretched man has, I happen to know, received rather a blow lately, and this might crush him pretty thoroughly. But I shall certainly at least make use of what you have said in the letter I propose to send him myself (sending also a copy to the Editor of the C.H.R.). Re-reading the review, I got angrier and angrier. I think the part that infuriates me most is the suggestion that you did not take responsibility for the refusal of dissolution, and that Byng's action becoming a campaign issue was your fault! I propose to comment strongly on that. I shall send, or bring, you a copy of the letter. I shall be too busy to write it till late this week at best.

Meanwhile you will be amused by the enclosed characteristic letter which accompanied the bundle of Dafoe correspondence, which has just been returned to me. I shall pick it up when I am in Toronto next Monday. I shall probably be on the hop during the single day I am there, but mean to look in on you for a few minutes in the morning anyhow.

Yours sincerely,

Eugene Forsey

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144537

320 Bay Street, Toronto,
January 26, 1944.

Dr. Eugene Forsey,
5 Lakeview Terrace,
Ottawa, Ontario.

Dear Eugene:

I am very glad that you are going to take in hand the Clokie article yourself. What I thought was that you wanted me to write something that could be passed on casually to him. You can certainly make a better job than I can in the way of a complete answer, and I sincerely hope you will be able to get at it soon.

Thanks for sending me the enclosed, re Dafoe. Whenever a prominent newspaperman passes the others can be depended upon to lift him among the immortals.

Be sure and call when here, and do have lunch with me.

Yours very truly,

AM/E.

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3 Lakeview Terrace,
Ottawa, February 25, 1944.

Dear Mr. Meighen,

Am sending under separate cover copy of the latest Canadian Journal of Economics and Political Science, with MacGregor Dawson's review of my book, and mine of Miss Neuendorff's. Dawson's is a good deal more coherent than Clokie's; but it is pretty feeble stuff. Its chief interest lies in its admissions. I don't think I shall bother making any sort of reply, unless you think I should. I haven't yet finished my reply to Clokie; it was a more elaborate affair than I had expected, and as my wife is on a short holiday, my domestic responsibilities have been rather heavier than usual. However, I hope to get the thing done next week, and shall send you a copy. I may also be bothering you for an opinion on certain parts of a ms. the Oxford Press has asked me to look over, another effort on the government of Canada. It is very bad, in some ways even worse than the previous one they submitted to me. The temerity of these authors simply appals me. This particular ms. devotes a good deal of space to the organization of the Courts, and as that is a subject of which I know next to nothing, I should like to submit to you a sample passage or two (about two or three pages in all) and see whether the author is as inaccurate on this part of the subject as he is on others. If this is trespassing too much on your kindness, of course you must say so, frankly.

I think the most lamentable part of Dawson's review is the passage in which he intimates that King just can't have been so completely wrong; this will doubtless be the verdict of "history" (the muse having been well corrupted

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by King beforehand, through the stuffing of Canadian universities with his adherents). Perhaps this is too pessimistice a view; but it will certainly not be easy for suwceeding generations to believe that such a complete nincompoop could have been repeatedly elected Prime Minister of Canada.

I have a perfectly superb new story about him, which I look forward to telling you when next I am in Toronto. It is absolutely authentic, and I think beats all the others we have heard. I am relishing the thought of taking it to you, Judith, Lou and Stevenson, also Frank Beare. It occurred to me that it was perhaps better not to commit it to paper, as both your correspondence and mine may well find their way to the P.M.'s desk. If they do, what a nice time he must have had these last few years, reading what we've said about him!

Have no idea when I shall be in Toronto again, but shall let you know beforehand if I can.

Yours sincerely,

Eugene Forsey

My secretary has taken office; very nice girl, and most efficient; also very decorative!

E.F.

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February 28, 1944.

Dr. Eugene Forsey,
5 Lakeview Terrace,
Ottawa, Ontario.

My dear Eugene:

I received your letter of 25th Saturday, but too late to reply. Have read the article by MacGregor Dawson and also your own. Needless to say, your own pleased me greatly.

Now, as to whether you should reply to Mr. Dawson, I certainly would like you to do so. You can imagine the pleasure your reply will give me. You can wipe him off the slate so thoroughly that it is very unlikely he will come back. His article is, indeed, very weak, and when one considers that it has taken him many months to get up the courage to write it, one realizes the effect your book had upon him.

His continuous talk about the wisdom of the Governor just advising is, of course, fatuous nonsense. No doubt in the world Lord Byng advised King to the utmost of his power, but once King decides, nobody knows anything about the advice. Unless the Governor is prepared to follow intelligently sound Constitutional doctrines, he fails in the discharge of a very important and necessary function. Advising becomes a function only if the advice is accepted.

Be sure and recommend to Dawson that he read your book again.

Will be very glad indeed to look over your Mss. for the Oxford Press. The B. N. A. Act, of course, provides for the establishment of our Courts, and from memory I do not think it was at all changed in this respect by the Statute of Westminster.

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Will be delighted to see you when you come up and will take no excuse this time for not coming with me to lunch.

Best regards,

Yours very truly,

AM/E .

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3 Lakeview Terrace,
Ottawa, March 5, 1944.

144542

Dear Miss Edmondson,

If Mr. Meighen has finished with the Canadian Journal of Economics and Political Science containing Dawson's review of my book, I'd be glad to have it back. It is my only copy, and they seem to be scarce. I should have mentioned this when sending it.

I enclose a slightly truncated offprint for your files. (Sorry: find I haven't got it offer all. Only a Globe!)

Yours sincerely,
Eugene Forsey

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good. With the material presented, the reviewer has no quarrel. One would have wished that the statistical analysis could have been pressed further at many points but that task has been left to others. The raw materials are there. For the historian these volumes fill an important gap. For the teacher of American or Canadian history and for research workers in either field, they should prove useful as works of reference.

W. BURTON HURD
McMaster University.

The Royal Power of Dissolution of Parliament in the British Commonwealth. By EUGENE A. FORSEY. With a foreword by Sir JOHN MARRIOTT. Toronto: Oxford University Press. 1943. Pp. xx, 316. ($5.00)

IT rarely falls to the lot of an academic author for his volume of research to give rise to widespread journalistic controversy and it is still more rare for a book based on a doctoral dissertation to receive even the most supercilious mention in the press. Dr. Forsey's work, however, has attained this double distinction. It is unnecessary to inquire what personal or partisan factors are involved in this situation; it will suffice to say that the thesis of this book is of a highly controversial nature relating to a constitutional point of considerable importance. To put it briefly, it is Dr. Forsey's contention that there is a very real element of discretion vested in the King (or his representative) with respect to the dissolution of parliament. Similar views have previously been expressed by many constitutional commentators, but never before has the topic been investigated so carefully nor have the authorities been canvassed so thoroughly as here. This conclusion, although running counter to prevalent Canadian opinion, might not have received so much attention had it not been for the extensive analysis made of the "crisis of 1926," to which two of the longest chapters, nearly one half of the text, are devoted.

It is well understood that the Crown's power of dissolving a legislature before the expiration of its maximum legal term is a central and distinguishing feature of the British type of parliamentary government. There is no question, therefore, about the constitutionality of dissolution. The issue at stake is as to the responsibility for its exercise. The first question to which Dr. Forsey addresses himself is this, Does the King (or his Governor) have any discretion by way of refusing a dissolution or is the decision entirely determined by the Crown's responsible ministers?

In attempting to answer this question one immediately runs into the peculiar nature of British constitutionalism. It is evident that the issue is not a legal one that can be solved by appeal to judicial determination as would be done with a similar problem in the American system. Even in Canada, which is often regarded as possessing a written constitution, the legal terminology settles nothing in this respect. Accordingly, our author first seeks the answer in constitutional usage as displayed by precedent. Chapter II, the second longest chapter (60 pages), is devoted to "Precedents of Grant and Refusal of Dissolution," and Appendix A (another 13 pages) lists special dissolutions and refusals not dealt with in the text. The conclusion is that there are some 51 cases of refusal of dissolution and ten cases in which a prior promise of dissolution was refused by the King or his representative (pp. 55-6). For this meticulous investigation constitutional historians are greatly indebted to Dr. Forsey.

There are, however, some difficulties. With one exception, these cited precedents of refus[illegible]issolution are from overseas. The sole precedent from

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Great Britain is the dubious one of 1910, which cannot be regarded as definitive of British usage until acknowledged by British authorities. But quite apart from the doubtful British case, there are some fifty overseas precedents of a governor's refusal of dissolution. Most of these precedents are drawn from the minor legislatures, though seven of them come from the central parliamentary systems of the Dominions. All of them, save the cases in dispute in Canada (1926) and South Africa (1939), are several years before the recognition of Dominion status. Dr. Forsey meets the argument from "colonialism"—(Had not the Judicial Committee in a Canadian prerogative case said "Earlier practice in bad times is of no weight"?) —by urging that ever since the introduction of responsible government the overseas systems have followed British rules. But one may well ask, in order to test the validity of overseas precedents as exemplifying British principles, whether these overseas precedents would be cited in Great Britain as decisive of British usage. The truth seems to be that they are not so cited: they are local guesses or approximations that may determine Dominion or overseas practice but do not in themselves settle the nature of British usage.

Here we come to a serious doubt to which our author has not apparently given adequate attention. It is assumed that the constitutional role of the Crown is uniform throughout the British Commonwealth and that a precedent from one place is authoritative elsewhere. One may question this. Certainly the law relating to the Crown, except as to succession, varies according to the will of the several legislatures. It may be suggested that similar diversity is to be found in constitutional usage. If this is so, it is possible that the King (and consequently his governor) should behave differently in each of the several Dominions. Dr. Forsey has almost admitted this when, in accounting for the numerous overseas dissolutions, he says "The apparent differences in practice are explicable almost entirely in terms of different circumstances" (p. 69). Later, too, he specifically uses this "differentiation" argument in order to repudiate the current nonsense that refusal of dissolution is a reversion to colonial status (p. 245). But he does not seem to realize that this very sound argument also tends to undermine the use of any but Canadian precedents. The possibility that varying types of party system and numerically rigid upper chambers may alter the function of the King and his representatives should make one hesitant in attributing Commonwealth-wide authority to overseas (or even British) precedents.

If there is any merit in precedents, Dr. Forsey has amply demonstrated that overseas governors have exercised a discretionary power of refusing dissolution. Precedents, however, must be tested by their agreement with the principles of the constitution, and it is when these are weighed (in chapters III and IV) that the real point at issue emerges. Our author is not so much concerned with establishing for the King an absolute right of refusing dissolution as with investigating the circumstances under which a prime minister should not ask for dissolution. From the standpoint of parliamentary government this is undoubtedly the most important part of the book, for the primacy of modern premiers threatens to transform the nature of cabinet government, and makes it eminently desirable that the principles of ministerial responsibility be re-examined. The rules which are here suggested deserve the most serious consideration, though one may hesitate to accord all of them the status of constitutional principles. It is unfortunate, however, that the author should have found it necessary to set up the monarch as the guardian of the constitution, for this he does by implying that if the prime

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minister asks (unconstitutionally) for a dissolution it is the duty of the King to refuse it. The chief parliamentary function of the head of the state (whether king or president) is to pick a "winner" as prime minister, and if the latter has any difficulty with parliament the former again has to decide whether to grant a dissolution or refuse and try some one else. The considerations governing the decision do not seem to be entirely capable of reduction to rule; they are matters of wisdom and discrimination—but they do not include acting as constitutional censor, that is for parliament or the electorate. It is not necessary to establish the unconstitutionality of the prime minister's advice in order to justify exercise of royal discretion.

A considerable portion of the book is devoted to analysis of the circumstances leading up to the Canadian dissolution of 1926. Dr. Forsey is on sound ground in displaying the "constitutional crisis" as a hoax. There is every reason—both from overseas precedents and British principles—to regard Lord Byng as entitled at that time to refuse a dissolution when Mr. King reported his parliamentary difficulty. The Governor-General thought he could find in Mr. Meighen an alternative prime minister acceptable to parliament. But the constitutionality of the refusal should not blind one to its unwisdom. Lord Byng committed a very serious error of judgment; as events showed, Mr. Meighen was acceptable to neither parliament nor the electorate. Our author will not accept this; the Governor-General was apparently bound to refuse Mr. King's unconstitutional request for dissolution. One would suppose that if a dissolution had been granted this book would have been, like Laski's *The Crisis and the Constitution*, a diatribe against gubernatorial connivance at unconstitutionality. There is no doubt that the request for a dissolution while a motion of censure was pending was in the nature of sharp practice; but even if actually unconstitutional, this was for parliament and the electorate to remedy, not for the Governor-General. It may be regretted that Dr. Forsey's criticism of Mr. King leads him to gloss over Mr. Meighen's responsibility. By accepting office the latter not only encouraged Lord Byng in what proved an inexpedient course, but he assumed—or should have assumed—responsibility for the circumstances of his appointment. The existence of royal discretion does not mean that there is interruption in ministerial responsibility. It seems largely Mr. Meighen's fault that the Governor-General's action became a campaign issue and lowered the prestige of the King's representative. With respect to Mr. Meighen's cabinet, Dr. Forsey provides an admirable defence of the "acting ministers" by a clear exposition of the status of privy councillors and ministers.

Despite its polemical form this volume is an admirable contribution to discussion of parliamentary principles in Canada. Although one may not accept all the author's conclusions, it must be said that he has clarified a number of important points and has raised a vital issue. Every student of constitutional government should ponder the principles he deduces as governing the exercise of dissolution and which are summarized in chapter VIII.

H. McD. CLOKIE
The University of Manitoba.

À travers les Anciens Canadiens de Philippe-Aubert de Gaspé et *À travers les Mémoires de Philippe-Aubert de Gaspé*. Par PIERRE-GEORGES ROY. Montréal: G. Ducharme. 1943. Pp. 279; 296.

AFTER having searched every nook and cranny of Canadian history for nearly half a century, Pierre-Georges Roy certainly deserved to enjoy the fruits of retire-

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ment and take a well-earned rest. For several months, in fact, he has been resting in his own peculiar way—by continuing to work. On the subject of the well-known novel and memoirs of Philippe-Aubert de Gaspé, he has just published two volumes which contain savoury comments on the personages and events of the period. It is local history, without which history would often lack continuity and lose part of its substance.

When, in the evening of life, Philippe-Aubert de Gaspé presented to the public the recollections of his youth, did he often succumb to the seductive temptation of distorting or painting the truth? Was the octogenarian writer inclined to exaggerate or to lie? To this important question Pierre-Georges Roy replies with documentary proof: P.-A. de Gaspé was not a liar and never betrayed the truth, even if he did sometimes permit himself—probably unknowingly—to exaggerate certain details and distort certain facts. The memory of an old man is not always the best guarantee of authenticity of narratives or events. Connoisseurs would like to know these exaggerations and inaccuracies. If they peruse the 575 pages of these two volumes they will not be disappointed. They will learn, for example, that it was not Richard Montgomery who attacked the Beaupré coast with fire and sword in 1759, as P.-A. de Gaspé stated, but Alexander Montgomery, brother of Richard, the leader of the unsuccessful raid on Quebec in 1775. The octogenarian was also mistaken when he said that Richard Montgomery's body was delivered up to his family in 1825.

Philippe-Aubert de Gaspé also said that one day General Prescott met a habitant of Beauport on the St. Charles River ice bridge, drawing a load of wood to Quebec. The worthy habitant, taking him for a poor wayfarer, invited him to ride on top of the load. Thus, according to the octogenarian writer, Prescott entered the town. Pierre-Georges Roy sums up that statement in the following words: "This story is difficult to swallow. General Prescott had too keen a sense of discipline and dignity to enter the town sitting on a load of wood. In accepting this story P.-A. de Gaspé was doubtless the victim of a wag." Mr. Roy also spurns the unjust opinion of P.A. de Gaspé with respect to General Murray.

On page 189 of the volume entitled, *À travers les Mémoires de P.-A. de Gaspé*, the topic "bénifice du clergé" is dealt with. This expression is faulty. It should read "bénifice de clergie," which refers to the well known privilege of freedom from the jurisdiction of secular courts enjoyed by the clergy of the middle ages.

These valuable works would have been enriched if the author had placed at the end of each volume an onomastic index of the numerous personages who pass before our eyes and recall another world and a picturesque era which is gone forever.

SÉRAPHIN MARION

The Public Archives of Canada.

Histoire de Montréal. II. *1760-1942.* Par CAMILLE BERTRAND. Montréal: Imprimerie des Frères des Écoles Chrétiennes, 949 rue Côté. 1942. Pp. 307. ($1.25)

STUDENTS of local history have awaited with great interest the appearance of the second volume of Camille Bertrand's *Histoire de Montréal.* In his first volume (noted C.H.R., XVI, June, 1935, 235), M. Bertrand established claim to a very high place among Montreal's historians. The volume under review completely supports that claim. Here is recounted the history of Montreal from 1760 to 1942. With considerable ingenuity, the author has blended the topical and the chrono-

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3 Lakeview Terrace,
Ottawa, March 13, 1944.

Dear Mr. Meighen,

I am ashamed to have been so long answering your kind letter of February 28, but have been exceptionally busy out of office hours, chiefly on this ms. that was sent me. I have decided to improve my knowledge of our judicial system by hunting up the facts myself, instead of plaguing my learned friends; so I shall ask you only a very few questions on this and other points. Here they are:

1. The author says: "Each Minister appoints a personal secretary who handles the details of the office; this post is one of importance because normally the Minister has more work than he can complete himself and much of the administration of his Department falls upon the secretary." He then goes on to mention the Deputy Minister, with a reasonably decent description of his functions. I feel pretty certain that the passage quoted is balderdash, but I am not very familiar with the work of private secretaries, so should like your comment.

2. The author asserts that in the House of Commons, the Senate and the provincial Legislatures, the "previous question" immediately cuts off not only amendments but debate. This I am certain is wrong as far as the House is concerned (I well remember the use made of this device in January 1926!); I suspect it is equally wrong as far as the Senate and the provincial Legislatures are concerned. But as I have found myself wrong on some points where this Johnny is right, I should like to know from you what the facts are.

3. He uses the terms "malicious prosecution" ("The County Courts have jurisdiction over cases involving malicious prosecution, libel, slander") and "non-feasance or misfeasance". I know "misfeasance", of course, but am not sure about the correctness of the others.

4. Is he correct in saying that in the Senate a division takes place on the demand of 2 Senators?

5. Is he correct in referring to the High Court dividion of the Supreme Court of Ontario as "the highest court in the province"?

Very elementary questions, which will doubtless astonish you; but I hope I have some idea of my limitations. This author apparently has none.

I am going to do a reply to Dawson and send it to Bladen, the Editor of the Canadian Journal of Economics and Political Science, telling him he can pass it on to Dawson if he sees fit. (I am certain he will.) Shall send you a copy of this, with the one to Clokie, still, alas, uncompleted. Once I get this ms. off my hands, I shall finish up Clokie and do Dawson. Unluckily, this is a peculiarly busy time of year for me.

In justice to Dawson, I rather think it is less lack of courage than lack of time which has kept him from doing his review of my book sooner. After all, my review of Neuendorff has been even longer delayed! And I can say with an absolutely clear conscience that it was not lack of courage which caused <u>that</u> delay!

I wonder if you saw, in the same number of the C.J.E.P.S., the obituary of Dafoe. It would have been effusive if applied to the Almighty. I particularly liked the passage about his "passion for getting all the evidence". I suppose it

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was that which led him to invent a speech of Pitt's and then accuse me of suppressing it! There are other fine passages, too, about his "regard for facts," his "sense of history", his "insistence on moral principle". I really have half a mind to write MacKay, who wrote the obiturary, asking him if he ever read the exchanges between me and Dafoe, and offering him the concluding letters if he'd like to see them.

I suppose you have seen King's deliverance on the Health Insurance Bill, in answer to Dr. Bruce. If not, get Bruce to show it to you, or look up Hansard for March 3, second page, first column. It's a characteristic production; no one else on the face of the globe could get an equal number of escape clauses into an equal number of words; and the whole thing just goes to show how right you were in saying that parliamentary government in this country is now nothing but a memory. I wish to goodness you were in the House to go for him; failing that, I wish I were there myself. I sometimes feel as if you and I were almost the only two people left who really care anything about parliamantary government and the British constitutional system; but I suppose that is a jaundiced view; there must be yet many thousand knees which have not bowed the knee to Baal!

That reminds me of another Kingly performance: his speech on the campaign funds affair, the other day. That speech really displays almost every turn in his repertoire: the gargantuan sentences, the superfluous phrases, the defiance of the rules of grammar and syntax, the shrill screams of outraged virtue, the evasion of the point at issue, the attempt to make out that any criticism of him or his Government strikes at the very foundations of democracy and parliamentary institutions, the suggestion that his opponents ought to (and in due course will) blush with shame for having even thought of doubting his infallibility and inerrancy, the attempt to turn a reflection on his own conduct into a reflection on the critic's conduct. For once I sympathized with Blackmore. Where he got his story I don't know; but Coldwell got much the same from a very prominent Conservative shortly after the last election, and another almost equally prominent Conservative confirmed the statements to me, in substance. I was asked to look into the evidence which might be found in published statistics of the price and quantities of sugar over the period in question; must admit I could find nothing conclusive, nothing even really suggestive. But that does not affect the manner of King's statement, though it may justify the matter.

Must run now to the Parliamentary Library to track down some of the other statements in this ms. about which I am doubtful.

My best to you and Mrs. Meighen, in which my wife joins.

Yours sincerely,

Eugene Forsey

As you will see, I have typed this myself; I don't feel justified in using my excellent new secretary for the purpose. She is a treasure; I only hope she will stay. I am becoming quite a model of Chesterfieldian politeness in my efforts to keep her satisfied!

E.A.F.

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March 14, 1944.

Dr. Eugene Forsey,
3 Lakeview Terrace,
Ottawa, Ontario.

My dear Eugene:

I have your letter of 13th and will try to answer at once, as far as I can, the various questions you have put.

1. Of course, a Minister can use his private secretary practically for any purpose he wants to, but I have never known of a secretary having charge in any way of the administration of the Minister's Department. That certainly is not his proper function, nor do I think it is actually attempted by secretaries. The secretary's duty, as far as the Department is concerned, is to follow his Minister's instructions in the provision of material and information to enable the Minister to make his decisions. Yes, you are right, the passage quoted must be, as a matter of actual practice, balderdash.

2. I have not the Rules of the House of Commons here, nor the Rules of the Senate. Am sorry for this as I could answer more concretely if I had. The Commons' rules have, of course, been revised since I worked under them, but I feel certain the following answer is correct:--The "previous question" is a motion which merely says "that the question be now put." The man who so moves moves the previous question. This does not, however, end the debate, because the motion for the previous question is itself debatable. Everyone has the right to speak, subject only to the closure rule which I think appears as an amendment to Section 17, or appears about that place, and which provides for termination of the debate. Once the previous question is carried, then the main subject must be decided. That is to say, the "question" which must now be put according to the decision of the House, on the motion for the previous question, must actually be put without debate. I cannot say definitely what is the rule in the Senate, because the matter never came up, but I am quite certain that the very same rule would apply.x As to the practice

x - except that there is no closure in the Senate.

(over)

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or rules of the Provincial Legislatures, I have no information either, but it would seem to me likely the previous question can be moved there and with like consequences.

3. I never knew County Courts that had jurisdiction in malicious prosecution, libel and slander--certainly not in libel and slander. An action for damages for libel and slander is compulsorily a Jury action and must be tried in the High Court. "Non-feasance" and "misfeasance" may be of many kinds. I could quite conceive of certain non-feasance or misfeasance actions being within the jurisdictions of County Courts.

4. Really I cannot say as to whether two Senators can demand a division or not. On this you could be quite dependably informed by telephoning Mr. Moyer, Clerk of the Senate. Parenthetically I may add here that Dr. Beauchesne is, of course, a first-class authority on the rules of the House (when he feels he can use his mind and not just his discretion), and I am sure if you would see him he would be glad to inform you on any points not covered in this reply. It would seem to me not unlikely that two Senators would be sufficient to demand a division.

5. It is not correct to say that the High Court Division of the Supreme Court of Ontario is the highest Court of the Province. I think the terms used are wrong. The High Court of Ontario is called the High Court of Justice, and not the High Court Division of the Supreme Court. I am not absolutely sure as to the use of the words "of Justice", but the chief trial Court of Ontario is called the High Court and not the Supreme Court. However, the highest Court in the Province is the Court of Appeal of Ontario, and not the High Court. I have never practised Law in Ontario, but am sure the above is right. For further certainty you might telephone Rupert Broadfoot, and you can use my name as andexcuse for telephoning.

I am patiently but happily waiting for your answers to Dawson and Clokie.

No, I had not seen the C.J.E.P.S. eulogy of Dafoe. I like your description of it. Do write MacKay just as you suggest and ask him to square the information you give him with his sycophantic humbug. Dafoe was a powerful writer in the newspaper sense. The weapon which he almost universally used was to mis-state deliberately but cleverly his opponent's position. After that he was a very real master of crushing, vitriolic attack.

Yes, I read the account of King on Health Insurance. This man never changes his method; he has only one. I will not be in the House again, but I am very confident you

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will be there. I look forward yearningly for the day when you take your place in that Assembly. I wish we could be more together because there are certain things in which a long life has convinced me you are definitely wrong, but your ardour for work and your power of analysis, controlled by your integrity of intellect, will undoubtedly lead you to sound positions and will make you extremely valuable to this country.

Do not fail to come around every time you are in town.

Yours very truly,

AM/E.

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144552

3 Lakeview Terrace,
Ottawa, March 23, 1944.

This author proclaims his indebtedness to J.S. Ewart (the ex.!), & "knowledge" criticism. Mr ma. Looks like it! E.A.D.

Dear Mr. Meighen,

Many thanks for your letter. The answers were most useful. Incidentally, I forgot to mention that the same author stated that it was the provincial parties which raised the campaign funds for Dominion campaigns. This is news to me, but I confess I never looked into the matter, and am therefore not in a position to say whether he is right or wrong; judging by the rest of his remarks, he is probably wrong (I counted 12 errors of fact on a single page the other night!).

Thanks also for the copy of Mr. Hale's article. I had seen it; a copy of the paper was sent me at the office, whether by you or Mr. Hale I do not know. I think the article is very good. But is his final quotation from Tennyson correct? I though it should be: "Pray God our greatness may not fail
Through craven fear of being great."
Or is it "fears"?

I wish I had half your confidence in my abilities and character. I fear I have an increasingly poor opinion of both. I certainly have much better friends than I deserve.

Yours sincerely,

Eugene Forsey

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144553

March 25, 1944.

Dr. Eugene Forsey,
5 Lakeview Terrace,
Ottawa, Ontario.

~~My~~ dear Eugene:

It may be worthwhile to refer to the first paragraph of yours of 23rd, even though it does inflict you with a letter that is hardly worthwhile.

What the man you have in mind says about campaign funds' collection is so far out that it is a wild joke. The situation is never that way and very often quite the reverse.

Yours very truly,

AM/E.

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Norfolk Hotel

GEORGE E. WELCH, MANAGER

New Glasgow, N.S.

April 13. 944.

Dear Mr. Meighen.

I'm afraid I didn't thank you for your last letter, which was very useful indeed. I have now sent off 5-6 pages of typescript on that ms., as a result of which I am fairly certain the world will be spared a very bad book.

I've been up to my ears in work for the Trenton Steel Works inquiry, which has now brought me down here. I shall be here, I fancy, at least ten days, perhaps much longer. I expect to use some of my spare time to finish off my comments on Blokie's review and do my comments on Dawson's. Charlotte Whitton is pressing me to do a short popular pamphlet on the Union as

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guardian of the Constitution. She thinks it will be highly topical after the election (which may well be true). She says she is constantly hearing of stand-up fights, stirred up by my book, between the worshippers of Defoe and Ewart and the ungodly. Incidentally, J. S. Ewart, Jr. lives across the street from me!

When I get the comments on Klokie and Dawson done, I shall send them to you before having them typed, and shall be grateful for your criticisms.

Yours sincerely,
Eugene Forsey.

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Dutiful. Harriet has had a relapse; not serious, but enough to keep me home from the office [illegible] and up & the care in household duties.

144556

3 Lakeview Terrace,
Ottawa, May 11, 1944.

Dear Mr. Meighen,

This is just to report progress, and to some extent lack of progress. I got my very extensive replies to Clokie and Dawson done in draft (pencil, legible only to me) in New Glasgow three weeks ago, but that is as far as I have got. I did not feel justified in asking my secretary to type them in office time, and I have had no time to type them myself. First I was recuperating from a bout of flu which hit me in New Glasgow and left me temporarily deaf in one ear; then the baby got sick, with a threat infection, and gave us a pretty anxious time; then my wife got the infection. For some days I was fully occupied just looking after them, and the whole business has left me rather debilitated, and with a good deal of work to catch up with. However, with any kind of luck I ought to be able to get at the typing next week. I have decided to risk my own unaided efforts, as my former plan of asking you to look over the thing first would really only cause further delay (not because you would be slow, but because I should then have to re-type part or all of the thing); also, it would be an imposition upon you; and in any event it is perhaps better that I should take full responsibility for the matter myself.

I ran into MacKay the other day, and took up with him the matter of his fulsome eulogy of Dafoe. He professes never to have seen my correspondence with that worthy. I am going to mount it on heavy paper (it is getting rather tattered from much use) and send it to him for his enlightenment, of course asking to have it back. How it is

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that he has not seen Dafoe's review in the Department of External Affairs, I do not know. King's propaganda machine must have slipped a cog for once.

I noted with amusement the characteristic pronouncement by King at the opening of the Imperial Conference. As usual, it defied grammatical analysis. I shall force myself to read the speech he made to-day to both Houses of the British Parliament. He was in full cry while I was waiting for the street car this morning; I could hear his dulcet tones coming through the open door of a shop nearby; but I had to get on the car before I could hear much. Churchill's introduction, of which I heard the tail end, sounded to me as if it put King in a pretty tight corner. I suppose the British Government is trying to flatter him into some kind of reasonableness. He understands nothing but flattery or a kick in the seat of the trousers, and the latter method of approach is in this case barred. I dare say the electors of Saskatchewan may apply it; I hope so. Perhaps New Brunswick will follow suit. The only thing about Quebec is that any successor to Godbout is likely to be even worse than Godbout himself, so that, gratifying as it would be to see King's crew receive their deserts there, the country as a whole would have to pay the price, and a heavy one. I have recently had a further manifestation of the ugliest form of Franch-Canadian nationalism, to which I have replied at some length and with some vigour. The upshot may be that I shall be called on to take part in some public discussion of the matter, for which I am more than ready. If the discussion materializes, I shall probably call on you beforehand to refresh my memory on certain points. I think the time has come for some pretty plain speaking, and if the opportunity presents itself I shall not dodge it.

Yours sincerely,

Eugene Forsey

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144558

May 16, 1944.

Dr. Eugene Forsey,
3 Lakeview Terrace,
Ottawa, Ontario.

My dear Eugene:

I am always glad to hear from you. I regret very much that you and your family have been suffering from "flu." It took a few swats at me also, but I am in fine shape again.

You are quite right about your Clokie and Dawson articles. You do not need any help from me, for no one in any country understands this subject better than you do, and besides, you think clearly and you, therefore, get on ground that is impregnable.

Churchill was, of course, feeding out candy in his introduction, and in very large doses. He certainly over-stepped the mark, for no British public man has any right to express preference for Canadian leaders, and Churchill went the length of smearing other leaders in Canada when he said that no one else could have brought the country united into the war. The truth is--which he does not seem to know--that our unity now is at the lowest ebb in our history. It is nothing but a barbarian war between nationalism and patriotic service at a time of the greatest crisis that the world has known. There is no country in the world today where material prospects are better, and no country where political conditions are worse.

King's speech, of course, was merely a setting-up of straw men in order to knock them down. This talk about inclusive and exclusive policies is just academic humbug. The peace of the world will depend upon the strength of the great Powers who really want peace, and certainly the leader of those Powers for many generations past has been Britain. Not only has

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Britain been the leader but she has been the mainstay and the sole guardian of peace for the greater part of that time. If we have not sense enough to stand together on these vital issues of peace and war, and stand together not only to rescue ourselves but to prevent the need for rescuing, we will deserve all we get. I can think of nothing more utterly vain than that the British Empire should speak perhaps in three or four languages on matters that go to the very right of the human race to live.

Yes, I agree with you as to the merits of the leaders of Quebec.

Very sincerely yours,

AM/E.

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144560

3 Lakeview Terrace,
Ottawa, May 27, 1944.

Dear Mr. Meighen,

Yesterday afternoon Mr. Hardy, the Parliamentary Librarian, told me that the Times Literary Supplement of April 8 had a full page review of my book. I hunted it up last night. It is worth looking at, though it has the usual confusions. Whoever wrote it says that the Life of Asquith does not bear me out on the 1910 affair, and that I have completely misinterpreted Sir Almeric Fitzroy, Lord Newton and Lord Esher (which is ridiculous, as their words leave no room for "interpretation" of any kind); that I have put Byng's defence on the right grounds (the pending vote of censure and the possibility of an alternative Government); that I have demonstrated the correctness of refusing a dissolution to King and granting one to you, in the wholly changed circumstances which had then arisen; that I have proved the legality of the temporary Government but not its constitutionality. I think I shall send the T.L.S. a short reply, though I suppose it will be about a century before it reaches them. I wish I could get hold of a copy of the issue, but suppose that in present circumstances this is virtually impossible.

I really expect to get my replies to Clokie and Dawson typed out this coming week. We are at last getting out of the woods, the baby being completely well again and Harriet only bothered by a nasty cough which is apt to waken us both at night. Also, I have got the grass (or rather hay) cut, and have dealt with various other urgent domestic problems; so I should have a little time to myself. I have a formidable programme of meetings, speeches and what not for the summer, even if no election takes place; if there is an election, I may be pressed into service, and shall certainly take any opportunity to tell the electorate a few home truths about King. But frankly I am not at all anxious to get drawn into active politics, for a variety of reasons, among them the almost intolerable amount of claptrap and woolly rhetoric one has to put up with.

I shall be coming through Toronto, I think, about the middle of August, and shall hope to see you; there appears to be no prospect of my being there any earlier.

Yours sincerely,

Eugene Forsey

The T.L.S. says Churchill upheld the Crown's right to refuse dissolution "as recently as March 29" of this year. I must look this up. His references to King were nauseating and outrageous. E.F.

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PUBLIC ARCHIVES
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CANADA

144561

June 5.

To my intense annoyance and disgust, I discovered this only this morning in my pocket. I had no envelope of my own at the office, and had taken the thing home to put in one of my own envelopes.

I have about half of my reply to Clokie typed out, and may get the rest done before I leave for Washington to-morrow afternoon. I shall be away the rest of the week.

Churchill's remarks about King fully deserved all you said of them. Incidentally, I observe that King got in his statement about the fall of Rome before Roosevelt could make his speech on the same subject. When it comes to getting into the limelight, this man is a champion sprinter.

I suppose you noticed that the Communists have now paid their tribute to the Liberal party's herculean exertions in behalf of national unity? That, I should think, may be taken as proof positive of the contrary. I trust Communist support will do King as much ~~XXXX~~ good as it has done everyone else who has ever enjoyed it. I fancy he counts on it to hold some seats which would otherwise go to the C.C.F.; I should think it quite possible that the Communists have got Liberal funds for this precise purpose.

It will be interesting to see what happens in Saskatchewan. If the Liberal machine there is broken, then King's chances elsewhere are certainly about as bad as they can be. But I suppose he can always fish up some constitutional issue that will catch the fancy of a lot of mugs, though who the villain of the piece will be this time I can't quite see.

Yours,

E.A.H.

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PUBLIC ARCHIVES
ARCHIVES PUBLIQUES
CANADA

144562

June 6, 1944.

Dr. Eugene Forsey,
5 Lakeview Terrace,
Ottawa, Ontario.

My dear Eugene:

I just received yours of 27th May and a most interesting letter it is.

First, as to the Times Literary Supplement, I have called Mac. Wallace. He takes the Supplement and as soon as he gets home will 'phone me if he has a copy, and, of course, let me have it if he finds it. I will then send it on. Presumably he will want it back when you are through with it.

I have a suspicion who wrote the article in the Supplement. My guess is Lascelles--now Sir Alan Lascelles. If you ever find out, let me know.

The thing that I cannot understand about their article is that they should dispute the proof of Constitutionality of the temporary Government, made in the book. If ever anything was complete and unanswerable, it was just that proof. I am uneasy to get their article myself. Really, unless my mind is failing, I can think of nothing more absurd than to challenge the Constitutionality of that Government. However, on the whole the review is very favourable to you. As regards the interpretations of the 1910 incident, Churchill's statement of March 29th will be a tremendous help. The real point at issue is: Does the right subsist? and Churchill's pronouncement would be at the present time the most authoritative that could be issued.

John Stevenson says that Churchill made such a pronouncement, and he is going to send me the evidence when he can locate it. Some way or the other I missed it.

(over)

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144563

You have done a lot of work in the way of replies to Clokie and Dawson, but I think it is worthwhile. Have not the least doubt your replies will put them out of court and do so in such a way that even the less learned will understand.

Personally I hope you will not take part in the campaign, and if my advice is worth anything, would definitely say "No."

As to Saskatchewan, I have not been out. King has had his usual luck. Rains have fallen in torrents just when needed, and prospects in Saskatchewan are the best for a long time. This always helps a Government. Indeed, similar good fortune pursued him in 1926. I would prefer the C. C. F. to win rather than the Liberals. Naturally, I would much prefer the Progressive-Conservatives to be successful, but I do not suppose they can be even though they are said to have a very excellent leader in Ramsay. My impression is the anti-Government split will help King. My reason for preferring the C. C. F. to win in Saskatchewan, rather than the Liberals, is that such a result will far more certainly contribute to the overwhelming defeat of this arch-fakir when his turn comes.

I did not see or hear of King's pronouncement on the fall of Rome. It would be portentous.

I am looking forward to seeing you when you are here in August and wish it were sooner.

Always with best regards,

Yours sincerely,

AM/E.

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PUBLIC ARCHIVES
ARCHIVES PUBLIQUES
CANADA

144564

June 7, 1944.

Dr. Eugene Forsey,
5 Lakeview Terrace,
Ottawa, Ontario.

My dear Eugene:

I have just received and am sending you herewith the page from The Times Literary Supplement of April 8, containing the review of your book. Have just finished reading it myself.

Will venture to say a word about their contention or inference with regard to the possible unconstitutionality of the temporary Government of 1926.

This article describes the swearing in of Ministers without portfolio, and, therefore, without salary, as an evasion of the then law. Such a statement shows clearly that the writer either did not know what the then law was or certainly did not appreciate its purpose. The then law did not say that a Member of Parliament could not be sworn in as a Minister of the Crown with salary without vacating his seat. What the law said was that no Member of Parliament could accept a salary under the Crown or pay for any work whatever from the Crown, or, indeed, pay for a bill of groceries sold to the Crown, without vacating his seat. Manifestly, the purpose of the law was to prevent Members of Parliament using their position as Members to advantage themselves financially. To repeat, clearly, definitely and unmistakably the Statute did not have in mind the prevention of a Member of Parliament serving the State in any capacity without pay and without being entitled to pay. Therefore, there was no evasion or attempted evasion, and the use of the word is utterly without warrant or the shadow of justification.

I haven't the slightest doubt you agree with the contention absolutely. There isn't the slightest room for difference of opinion, and I am sure you will make this mighty plain in your answer.

(over)

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144565

It might be worthwhile to add that a thing doesn't become unconstitutional even if it is an evasion: it becomes illegal. The writer of the "Times" article ought to go back to school.

Yours very truly,

AM/E.
Encl.

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CANADA

144566

A. R. MOSHER, President
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THE CANADIAN CONGRESS OF LABOUR

LE CONGRES CANADIEN DU TRAVAIL

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NORMAN S. DOWD, Executive Secretary

June 12, 1944.

Mr. Arthur Meighen, P.C., K.C.,
320 Bay Street,
Toronto, Ontario.

Dear Mr. Meighen:

Thanks very much for your letters of the 6th and 7th, and the copy of the Times Literary Supplement review. Does Dr. Wallace want this last returned? It was very good of him to let me have it.

I feel exactly as you do about the comments on the temporary Government, but I really don't think it is worthwhile sending the Times any reply because it would probably be a month or so before it would reach them (by which time people would have forgotten all about it), and also because with the present shortage of paper, they are very unlikely to print anything. Anyone who reads the book can see for himself just how much there is in the reviewer's contentions on the subject of the temporary Government.

What I should be much more inclined to challenge in normal circumstances is the implication that I have misrepresented the account of the 1910 affair given in the Life of Asquith, and the perfectly crazy assertion that I have misinterpreted the statements of Fitzroy, Newton and Esher. However, for the reasons stated, I don't think I shall bother, though I intend to note these points when I draw this review to the attention of a certain personage here, whomit is probably better not to name in this letter. I think it is important that the personage concerned should be aware of the facts. I have tried to keep him supplied with a full dossier, including my replies to each review as it appeared.

Many happy returns of the 16th.

Yours sincerely,

Eugene Forsey

EAF:RM

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CANADA

144567

June 14, 1944.

Dr. Eugene Forsey,
The Canadian Congress of Labour,
230 Laurier Avenue West,
Ottawa, Ontario.

My dear Eugene:

Thanks for yours of 12th. I think I know who the personage is to whom you refer in the last paragraph.

Perhaps the following way of putting the situation on the subject of the alleged "evasion" of Dominion law would help you in the formulation of your arguments:

"The criticism rests on the assumption that the object of the Canadian law was to prohibit Members of Parliament from making use of their Membership to advance themselves politically. A moment's thinking would have convinced the writer that the object was to prevent Members of Parliament from advancing themselves financially. The first conception is so grotesque that one wonders how it entered into a rational mind."

Yours very truly,

AM/E.

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144568

3 Lakeview Terrace,
Ottawa, June 28, 1944.

Dear Mr. Meighen,

Am on my holidays, and hence have at long last got this much done. I now really expect to finish up the job on Dawson in a few days, and shall send it along. The more I read of both reviews the more disgusted I get.

Saskatchewan certainly handed King a lovely jolt. I don't feel much doubt now that when the Dominion election comes the Liberals will get the worst trouncing since 1911.

Bouchard has set the cat among the **piggons.** I notice that the replies to him consist of abuse and bleatings. Am inclindd to think that in the long run his speech will do good, though at present, from what I hear, it is solidifying the French-Canadians behind the Nationalists. Le monde est dans un triste état; but while the rest of it appears to be getting better, Canada appears to be getting worse, in a good many ways.

Yours sincerely,

Eugene Forsey

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PUBLIC ARCHIVES
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144569

July 3, 1944.

Dr. Eugene Forsey,
5 Lakeview Terrace,
Ottawa, Ontario.

My dear Eugene:

I have now read carefully the memos contained in your letter of June 28th. It seems almost unnecessary to say that I think very highly of them and especially of the answer to Clokie. This is a particularly able production, and both are such that I am very anxious that they should be published and put in printed and permanent form. You have dealt with a subject of very great importance and you have dealt with it more thoroughly than any man ever has done before. Your answers to these criticisms are complete and should be available to students, and, if possible, placed in public institutions to which your book has gone.

My only general observation is that before being printed they should be made more complete in themselves. One who has read the book and knows it as I know it gets the full impact of your replies. One who has read it more cursorily would have difficulty in comprehending the replies. I do not think you would have much trouble or would need to add very greatly to them to make them in a larger measure stand on their own feet. At different points I have indicated in pencil where additions would be necessary. On page 1, for example, there might be inserted before the word "Either" in the middle of the page something like this: "If Mr. Dawson's contention is capable of simplification, it would read like this:--"

I think you could improve on the clearness by re-expressing the sentence at the end of paragraph 4. (The Dawson reply).

I suggest in the middle of the second part of paragraph 7 the words "is based on the evidence and only on the evidence." The last sentence I would change to "It is readily admitted Lord Tweedsmuir was a great writer and a great gentleman", and leave it at that.

In the middle of paragraph 9 say "the plainest English I could command." This, of course, is trivial.

(over)

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144570

The end of paragraph 15 is far from clear, and needs an addition explaining what the proviso was, etc.

Re paragraph 15—it might be well to put in the query "Suppose Mr. King refused to accept the request to face Parliament on the Motion of censure, what then?"— The fact that he was requested to face Parliament by the Governor-General could never be made known. Mr. King, therefore, would simply have resigned just as he did anyway and all the tub-thumping about the Governor-General would have had exactly the same base, or lack of base, as it did have.

I suggest adding the words "There is nothing necessary" at the end of paragraph 25.

Your reply to Clokie is a masterpiece. My suggestions must be read in the light of this first comment.

I know what you mean in the first sentence, but I do not think it is clear enough. It should be re-expressed.

The last sentence of paragraph 4 is, of course, quite correct, but my remarks as to making the replies more self-contained apply here.

In paragraph 5 near the end, I would be more explicit. For example, use the words "pronounce a free judgment" and maybe add at the end "A judgment delivered under a threat which has much of terror to the individual Member is really not a judgment at all."

You have always refused to accept any assistance from me whatever, of a financial nature, and, of course, I know the reason for this, but I would like to assure you that you do not need to worry about the financial end in getting these replies printed and into the institutions where they will be referred to by scholars, or, for that matter, in having them reach directly all whom you want them to reach.

Yours very truly,

AM/E.

Certainly the Governor-General would not disclose, and Mr. King would not have to. There was silence regarding the Asquith and King George IV. affair.

A. M.

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144571

3 Lakeview Terrace,
Ottawa, July 10, 1944.

Dear Mr. Meighen,

Thanks very much for your letter, with its kind words and its valuable suggestions for improvements in the text of my replies. I am particularly impressed by your point about what would have happened if Byng had explicitly rested his case on the motion of censure. It is a pity, incidentally, that the convention has never been established here, as it seems to have been (on the whole, anyway) in Australia, that when dissolution has been refused the documents should be brought down in the House. I must look up the record and see just how far this practice was followed out there; my impression is that in most cases the documents were brought down at once, or almost at once.

I have sent the replies to the two writers, the two editors, and to the quarter here which I referred to before. I doubt whether a great deal would be gained by wider distribution, especially as I am very sceptical about how much any pamphlet would be read. King may face after the next election a situation much like that of 1926, and may try the same game. Then would come the time for a short, clear, strong pamphlet, setting forth the facts in the plainest terms. For this I now have all the material readily available, and I could get it ready in a few hours. This would, in the circumstances, be read, and would, I think, finance itself.

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144572

Meanwhile, much as I appreciate your kind suggestion about publication, I still feel that it would be a mistake for me to take advantage of it, simply because people like the W.F.P. would get hold of it and make the kind of insinuations with which both you and I are only too familiar; and that would go far to destroy the effect of my book itself. Charlotte Whitton has been at me repeatedly to do a pamphlet, in popular style, on this issue, in which, of course, I could incorporate some of the replies to various critics. But, though she assures me it would not burden me financially as she feels certain she could get it underwritten (by whom I don't know), I doubt whether the thing would get read at present, I don't see where I could find time to it, and I feel that any assistance she could produce would be open to the same objections as in your case. Perhaps this is just laziness, or hypersensitiveness, or foolishness, on my part. It certainly must seem very unappreciative of proffered kindnesses. I can only assure you again that whatever else it is it is not that.

Perhaps we can talk about it when I am in Toronto in August. I have to go to that Couchiching affair (much to my regret), and worse still, speak at it; and present prospects are that I shall spend August 26 (Sunday) in Toronto, on my way back. I should also be in Toronto Saturday evening. Both are bad times, I know, but perhaps we could arrange to meet.

My best wishes to you and Mrs. Meighen. Hope you have good word of the boys.

Yours sincerely,

Eugene Forsey

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PUBLIC ARCHIVES
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CANADA

144573

July 13, 1944

Mr. Eugene Forsey,
3 Lakeview Terrace,
Ottawa, Ontario

My dear Eugene:

Just to say, in answer to yours of the 10th, that I expect to be here all or nearly all of August. I do go though, every August, out to Kincardine for a week-end and it might just be that that is the week-end I would have to go. Anyway, you phone my house and certainly if I am in Toronto I will see you, and hope it can be at the house.

Very kindest regards, as always,

Yours truly,

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144574

COPY

Ottawa, August 14, 1944.

Mr. Emil Ludwig,
c/o The Macmillan Company of Canada Ltd.,
St. Martin's House,
70 Bond Street,
Toronto, Canada.

Dear Mr. Ludwig:

I have just been looking at your little book on Mr. Mackenzie King, and notice at pp. 57 and 58, your account of the constitutional crisis of 1926. Someone (I have no difficulty in guessing who) has gravely misinformed you on this subject. It is perfectly true that Mr. Meighen's Government, which succeeded Mr. King's, was very soon defeated in the House of Commons. But: (a) Before that defeat, it had been sustained on no less than four critical divisions, by majorities of 12, 10, 10 and 7. One of the majorities of 10 was on a motion censuring Mr. King and his Government for misconduct of a great department of state. The majority of 7 was on a direct motion of want of confidence. These facts you can verify for yourself by looking up the Journals and Debates of the House of Commons. They are important facts, for they show that the Governor-General had good reason to think that an alternative Government to Mr. King's might be able to carry on with the existing Parliament. (b) Mr. Meighen's Government was finally defeated by a majority of 1, that majority being provided by a member who broke his pair. This also you can verify by reference to the Journals and Debates. I might add that the motion on which the defeat came did not deal with any matter of policy or administration but only with a false and misleading proposition of law which will not withstand a moment's critical examination.

It is not true at all that Mr. King's Government, at the date when he asked for dissolution, "had never been defeated". It had been defeated twice: once, on a sub-amendment to the Stevens amendment of censure, a sub-amendment which would have struck out the censure; and once on a motion to adjourn the debate. The first defeat was by a majority of 2, the second by a majority of 1. But even if these defeats had never taken place, it would be utterly misleading to describe Mr. King's Government as entitled to dissolution of Parliament on the ground that it had never been defeated. Mr. King asked for dissolution while debate on a motion of censure was in progress and before the House could pronounce its verdict. If a Government in that position is entitled to dissolution, then no Government will ever be defeated except by its own consent; any Government which saw the least danger of defeat could always hurry off to Government House and get dissolution and then parade itself before the electorate as "never defeated". Mr. King's request was absolutely without precedent in the whole history of the British Empire and Commonwealth; if it had been granted, it would have meant the absolute supremacy of the Cabinet over Parliament, the abolition of the responsibility of the Cabinet to Parliament. That, indeed, was the fundamental issue. The whole affair had nothing whatever to do with Canada's right to self-government; what it had to do with was the basic question of the supremacy of Parliament and its right to pronounce judgment on the Cabinet.

You speak of the Governor-General's having granted Mr. Meighen "the dissolution which had been refused to King". This again is thoroughly misleading. Mr. King had had the previous dissolution, only ten months before. Mr. Meighen had not. Mr. King asked for dissolution when there was good reason

(over)

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144575

to believe that an alternative Government might be able to carry on with the existing House. Mr. Meighen asked for dissolution only when it had been proved that neither Government could carry on with the existing House. Mr. King asked for dissolution while a motion of censure against him was under debate; he thus sought to prevent the House from pronouncing judgment on his Government. Mr. Meighen asked for dissolution only after the House had pronounced judgment on both Mr. King's Government and his. There is thus all the difference in the world between the request of Mr. King on June 26-28, and the request of Mr. Meighen on July 2. The whole set of circumstances had completely changed in the interval. Your phrasing gives no inkling of this; indeed, it appears to convey the opposite impression.

If you should ever contemplate a second edition of your work, I hope that you will not reprint this passage without having a look at my discussion of the subject in my "Royal Power of Dissolution of Parliament in the British Commonwealth" (Oxford University Press, 1943), where you will find the facts, and the constitutional authorities on the subject, very fully set forth, with chapter and verse. After reading what I have to say, you may still choose to reprint what you say in this edition. But at least you will do it with your eyes open, not relying, as I think you must have done on this occasion, on a purely ex parte account of what took place and of what the constitutional doctrine on the subject is.

Yours truly,

(Signed) Eugene Forsey.

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CANADA

144576

COPY

505 Grenola Street,
Pacific Palisades
California

September 5, 1944.

Mr. E. A. Forsey,
5 Lakeview Terrace,
Ottawa, Ontario.

Dear Mr. Forsey:

I have received and read with care your letter of August 14th.

The matter to which you mainly refer is one of past political controversy, into which I do not find either time or inclination at the moment to enter. If I were to engage in controversy, or to cite authorities in support of my views and in opposition to your own, I would feel it necessary to draw upon the views expressed by the late Dr. J. W. Dafoe and by Mr. Berriedale Keith.

I suppose that the general public itself will be in a position to judge of rights and wrongs of the particular situation which arose in 1926. I may say there is no doubt in my mind that the view which has been expressed in brief compass in my book is the view which has been accepted generally by the people of Canada. When I can find an opportunity I will have pleasure in reading the account of the constitutional incidents set out in your book on The Royal Power of Dissolution of Parliament.

Yours truly,

(Signed) Emil Ludwig.

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PUBLIC ARCHIVES
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CANADA

144577

3 Lakeview Terrace,
Ottawa, Ontario.

Sept. 21, 1944.

Mr. Emil Ludwig,
303 Grendia Street,
Pacific Palisades,
California.

Dear Mr. Ludwig:

Pressure of work has prevented me from replying sooner to your letter of September 5th.

It is a trifle late to say that you "do not find either time or inclination to enter" into "past political controversy" on the 1926 crisis. By your statements in your book, statements which, as I pointed out, are thoroughly misleading, and in one instance, wholly at variance with the officially recorded facts, you have already entered into the controversy and rendered powerful support to one side in it.

Of "the views expressed by the late Dr. J. W. Dafoe", on this subject I have only this to say: I know of no reason whatever why he should be regarded as an authority. I do know that he was a bitter partisan, and that on this very subject he displayed an unscrupulous mendacity and a capacity for scurrilous abuse which had to be seen to be believed. He wrote a very long review of my book, following it up with a series of editorials, editorial notes and special articles. The whole performance consisted of about equal parts of skillful distortion, outright lying and venomous attacks on me for having done what I had not done, but what he was doing in these various productions. The high-water mark of his efforts was to invent a speech by William Pitt the Younger, which Pitt never made, and then to denounce me in the most virulent terms for not having quoted from it. If ever you do find it necessary to draw upon Dr. Dafoe's views on this subject, I hope you will look up the whole of what he said in the Free Press on my book, and what I said in the same columns in reply. I shall also be happy to furnish you with the two final letters which I wrote in answer to misstatements which Dr. Dafoe made, after he had announced he would print nothing more from me, and with his final, and extremely abusive, personal letter to me. I seriously considered suing him for libel. The only thing that deterred me was legal advice to the effect that the libel law of this country is so defective as to be of very little practical use.

As to Prof. Berriedale Keith, I think you will find his claims to be regarded as an authority on such matters pretty effectively disposed of by the Rt. Hon. H. V. Evatt, formerly Judge of the High Court of Australia, and now Attorney-General and Minister of External Affairs for that country, in his book "The King and his Dominion Governors", Oxford, 1936. My own dissection of Prof. Keith's statements constitutes hardly more than an elaborate footnote to Dr. Evatt's work.

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PUBLIC ARCHIVES
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CANADA

3 Lakeview Terrace,
Ottawa, Ontario.

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303 Grendla Street,
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It is a trifle late to say that you "do not find either time or inclination to enter" into "past political controversy" on the 1926 crisis. By your statements in your book, statements which, as I pointed out, are thoroughly misleading, and in one instance, wholly at variance with the officially recorded facts, you have already entered into the controversy and rendered powerful support to one side in it.

Of "the views expressed by the late Dr. J. W. Dafoe", on this subject I have only this to say: I know of no reason whatever why he should be regarded as an authority. I do know that he was a bitter partisan, and that on this very subject he displayed an unscrupulous mendacity and a capacity for scurrilous abuse which had to be seen to be believed. He wrote a very long review of my book, following it up with a series of editorials, editorial notes and special articles. The whole performance consisted of about equal parts of skillful distortion, outright lying and venomous attacks on me for having done what I had not done, but what he was doing in these various productions. The high-water mark of his efforts was to invent a speech by William Pitt the Younger, which Pitt never made, and then to denounce me in the most violent terms for not having quoted from it. If ever you do find it necessary to draw upon Dr. Dafoe's views on this subject, I hope you will look up the whole of what he said in the Free Press on my book, and what I said in the same columns in reply. I shall also be happy to furnish you with the two final letters which I wrote in answer to misstatements which Dr. Dafoe made, after he had announced he would print nothing more from me, and with his final, and extremely abusive, personal letter to me. I seriously considered suing him for libel. The only thing that deterred me was legal advice to the effect that the libel law of this country is so defective as to be of very little practical use.

As to Prof. Berriedale Keith, I think you will find his claims to be regarded as an authority on such matters pretty effectively disposed of by the Rt. Hon. H. V. Evatt, formerly Judge of the High Court of Australia, and now Attorney-General and Minister of External Affairs for that country, in his book "The King and his Dominion Governors", Oxford, 1936. My own dissection of Prof. Keith's statements constitutes hardly more than an elaborate footnote to Dr. Evatt's work.

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I think "the general public itself will be in a position to judge of rights and wrongs of the particular situation which arose in 1926" when it is correctly informed on the matter, as I think it is now becoming. Any verdict which it may be considered to have pronounced in 1926 is clearly invalidated by concealment of one most important fact which became known only after the election, and by the systematic lying and distortion which marked a large part of the campaign.

Whether the view which you expressed has or has not "been accepted generally by the people of Canada" is a question which I do not propose to argue here, for the simple and sufficient reason that it is entirely irrelevant to the correctness or incorrectness of your statements. The number of people who accept an erroneous view of any subject does not in the slightest degree affect the fact that it is erroneous. If, for example, every single person in Canada believed that on June 28, 1926, Mr. King's government "had never been defeated", the fact still remains that the Journals and Debates of the House of Commons show that the statement was untrue. General acceptance may be a valid test of aesthetic truth; it is not a valid test of historical truth.

You may be interested in the enclosed excerpt from Hansard, 5th Series, which contains Mr. Churchill's view on the question of refusal of dissolution.

Yours truly,

Eugene Forsey.

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144579

Churchill on dissolution: Hansard, Fifth Series, vol. 398, March 29, 1944, P. 1516:

Mr. Price (Forest of Dean): He is claiming for the Executive now to dissolve Parliament and go to the country . . .

The Prime Minister: I never said anything of the sort. I must make it absolutely clear that it does not rest with any Prime Minister to dissolve Parliament. The utmost he can do is to tender advice to the Crown.

Mr. Price: That, of course, is the law, but in actual fact the advice comes from the Prime Minister.

The Prime Minister: 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.

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144580

3 Lakeview Terrace,
Ottawa, August 15, 1944.

Dear Mr. Meighen,

I have now read Ludwig's masterpiece. It is only less nauseating than the enclosed interview. Undoubtedly King himself wrote the passage on 1926. It has all his serpentine slipperiness and all his peculiar regard for the truth. You may be amused by the enclosed copy of the letter I sent Ludwig on the subject. I hope it may cause him a blush or two, if nothing more.

I forgot to tell you the other day that this man who is so averse to publicity, so completely the coy and modest violet, is having the Film Board go through all its photographs of him and pick out those in which he appears in distinguished company, provided he appears in the centre; those in which Churchill or Roosevelt appears in the centre are cast into outer darkness. Apparently he has taken to heart the words at the middle of Ludwig's page 41.

Ludwig's Montreal host was of course Emile Vaillancourt; he told me so himself. Vaillancourt is much addicted to trotting out "Industry and Humanity" for the edification of all and sundry; he even circulated printed quotations from it, broadcast, some months ago. I must have got fifty of them. Vaillancourt is an empty-pated busybody. One of his recent exploits was to circulate copies of a peculiarly virulent article by a Montreal French Jesuit, which I wrote the author could only be described as crazy, venomous, untruthful, and full of hatred, malice and all uncharitableness. I had some further correspondence with Vaillancourt on the subject, which I may show to you some time. You may have seen the

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article I was dealing with; if so, I am sure you would agree that nothing worse has ever come out of Quebec.

I should be obliged if you would pass on the Norman Smith interview, and the letter to Ludwig, to Lou Golden and Judith Robinson when convenient. Judith, by the way, has seen my correspondence with old Vaillancourt, and professed to find it entertaining. You might ask her about it.

Golden's review was a masterpiece, especially the heading, but he really let Ludwig off easily.

Yours sincerely,

Eugene Forsey

EF/mrg

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144582

August 17, 1944.

Dr. Eugene Forsey,
5 Lakeview Terrace,
Ottawa, Ontario.

My dear Eugene:

I just received your letter of 15th and immediately read with intense interest and delight your letter to Ludwig. It seems to me a catastrophe that this letter cannot be made public in some way. If you would be ready to have it published in the Ottawa Journal, I would see what I could do to get it admitted. It is a masterpiece—clear, cogent and unanswerable. Without any question of doubt whatever, you are right as to the real author of the portion of Ludwig's book dealing with this Constitutional matter, and probably of other parts of the book as well.

Please forgive me if I do not read Norman Smith's sycophantic slobbering. My experience with King was so long and so disgusting that it really takes too much out of me to read this stuff. It brings to my mind "the gilded puddle that beasts would cough at," for drinking out of which Marc Anthony was deemed a hero.

Yours sincerely,

X - or a Toronto paper

AM/E.

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76 ROOMS
EUROPEAN PLAN

144583

Isle Royale Hotel

SYDNEY'S ONLY MODERN FIREPROOF HOTEL

Sydney, N.S.

August 28, 1944.

Dear Mr. Meighen,

I need hardly say that I was greatly pleased to get your letter of the 17th. Unfortunately I have been so busy almost ever since (in the train most of the time) that this is really my first chance of replying.

The letter to Ludwig was, as you doubtless noticed, very hastily and carelessly written; e.g., I spoke of "misconduct of a great department of state", when I meant "misconduct in the administration of a great department of state". However, that is a minor matter.

I haven't the least objection to the publication of my letter to Ludwig; but I wonder whether it would really be wise? (Incidentally, when I left Ottawa I had not yet got my one copy back from Judith Robinson.) The last paragraph, commending to him my own book, is almost certain to be taken by the public as indicating a vanity equal to Mr. King's own; and I question whether such an impression would do anyone except Mr. King any good! At any rate, I think I should at least give Ludwig a chance to reply before I hand the thing to any paper. I rather think the Toronto papers are more likely to take anything than the Ottawa Journal, which has never even reviewed my book, as far as I can find out.

All the reviews I have seen of Ludwig's book are most uncomplimentary. I think he, or rather King's

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has overreached himself, and the thing is so patently and abysmally silly that it defeats its own ends. I came down in the train from Couchiching with Jim Macdonnell (who had been campaigning in Muskoka-Ontario) and R.P. Sparks; and either one of them was saying that he had a friend who thought that senile decay had already set in in a certain quarter. Really, this book, the recent speeches in the House, the Smith interview, and the oration on Pat (see the last numbe but one of Time) strongly suggest it.

I had hoped to call you up on my way back through Toronto, last Thursday evening; but it proved impossible, as I was captured by friends as soon as I got off the train. Jim Macdonnell tells me, by the way, that he hopes still to get me back into my old party, and that you had given your blessing to the attempt! He said he had hoped to get up to Couchiching when McTague was there, find me, and, with McTague's help, kidnap me!

I shall probably be back in Ottawa Friday, though I may have to sit up all the way, as there are no berths of any kind in any train till September 11! If, by that time, you still think it would be useful to publish my letter to Ludwig, I shall see what can be done.

I thoroughly sympathize with your feeling about the "gilded puddle that beasts would cough at." It is only rarely that I can bring myself to read anything of King's. People often ask me if I think this or that remark of his was right. I nearly always have to reply that I neither heard nor read it. I suppose if I should happen to have a part in the election campaign, I should have to read a good deal of his stuff. That only increases my distaste for the prospect of any such activities; and the prospect seems remote.

Yours sincerely,

Eugene Forsey

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144585

September 1, 1944.

Dr. Eugene Forsey,
Isle Royale Hotel,
Sydney , N. S.

My dear Eugene:

I have your letter of 28th.

You are certainly right not to have anything in the way of publication of your letter take place until Ludwig at least has had a chance to reply. I do not think you will find very much in his reply. He will, of course, have to wait until he finds just what wording Mr. King desires him to use.

I have not seen the celebrated oration on Pat, but have had several people 'phone me and ask me to be sure and get it.

There are a great many more than Jim Macdonnell who entertain the beliefs and hopes which he expressed to you.

Very kindest regards,

Yours sincerely,

AM/E.

This letter sent to Ottawa.

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144586

3 Lakeview Terrace,
Ottawa, September 2, 1944.

Dear Mr. Macdonnell,

You may be interested in the enclosed, which I should like to have back when you have finished with it. You may show it to anyone you like. Perhaps Mr. Meighen might like to see it.

I have drafted a reply to Soucisse, and am just waiting for certain additional information from official sources before putting it into final shape and sending it off. Whether Sandwell will print it I don't know; but I shall send a copy to Soucisse himself, and shall also take the liberty of sending you one. I am all against provoking the French-Canadians; but I believe in self-defence!

Yours sincerely,

Eugene Forsey

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144587

September 18, 1944.

Dr. Eugene Forsey,
c/o Canadian Congress of Labour,
250 Laurier Ave. West,
Ottawa, Ontario.

Dear Eugene:

Jim Macdonnell has handed me your letter to him of 2nd September and the accompanying correspondence. This I have read with "emotion" and as well with considerable amusement. It is likely I mentioned that Dugré article to you. When I read it some months ago it amazed me almost beyond recovery. It was the most utterly scandalous exhibition of hissing hatred I think I had ever read.

I need hardly say that I agree with your criticism in your letter of May 2nd. Jim Macdonnell says it reminds him of the Philippics. The only qualification I would make, though, to my full endorsement is that I cannot quite agree with you on your concessions, or on all of them anyway. Certainly the French-Canadians have had equality of economic opportunity, and this for at least one hundred years. I have no doubt what you mean, though, in your letter is that no one has equality of economic opportunity now, and with this, of course, also I cannot agree. I have never argued out the matter of Socialism with you and it would probably take a long time, but if you had ever sought to work with these people in Government and had thus got a conception of what an economic system run by such a Government would mean, you would be cured of about the only serious ailment that I think you ever had. Further, my experience convinces me that the operation of anything--Governmental, industrial or anything else--by a Government under a Parliamentary system is so blasingly inefficient (a much stronger word would be justified, but unnecessary) no matter whether the composition of the nation be French and English or all English, that no good citizen with any similar experience would ever want to extend its operation beyond the minimum sphere.

I have been trying most of my life to find out what "French-Canadian grievances" are, and trying in vain.

(over)

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Certainly a policy of meeting even fanciful grievances has not been a success. We are in the worst plight now of all our history, and the future is dark indeed. They keep saying that they would be satisfied if we would learn French. I cannot say that I learned French, but I certainly worked hard at it and made more progress than any other public man from English Canada. Did you observe that it helped? After retiring entirely from public life, without thought of returning, I sent my eldest son to make him a real French-speaking Canadian, and if there is a thorough-going French-speaking Canadian alive it is he. Have you observed that that helped? Never was their press more bitter or more seething with hatred than when I accepted leadership again in 1941, and this even though, as they have been compelled to admit themselves when challenged, I had never in my life said anything disrespectful of them.

At Mr. Macdonnell's request, the correspondence is returned.

Yours very truly,

AM/E.
Encl.

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144589

3 Lakeview Terrace,
Ottawa, September 20, 1944.

Dear Mr. Meighen,

You will be interested in the enclosed. Ludwig's letter I should of course like to have back. I should hardly have bothered stretching the butterfly on the wheel in this fashion if I had not thought it practically certain that he would send the letter on to King. I think it evident that you were correct in saying that Ludwig would wait to see what form of words King would want him to use. I hope the pair of them will enjoy the reply.

You will enjoy J.L. Cohen's comments on the Ludwig masterpiece. He wrote me that he bought a copy just as he was leaving Ottawa for Toronto, and remained "speechless with rage" until he got to Smith's Falls. "A fraud, by a fraud, on a fraud" is his summing up.

I wonder if you saw an exchange of letters between a Mr. Soucisse and Sandwell in Saturday Night of August 12? I have been collecting, laboriously, material for a thorough reply to Soucisse, and am now ready with it; indeed, I have had the material complete for some days, but unusual pressure of work has prevented me from dictating the letter. I fancy it will be too late and too long for Sandwell to publish; but I am going to send copies to Soucisse himself and a few other people, and propose to inflict one on you and one on Jim Macdonnell, with whom I have had some sympathetic correspondence on this French-Canadian Nationalist business. I am glad to find that he agrees with me that the time has come for a bit of self-defence.

Yours sincerely,
Eugene Forsey

(over)

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144590

Have just received your letter of the 18th., which pleases me very much. I agree with most of what you say, bar the one point on which we never have seen eye to eye. Quite apart from that, however, I am still inclined to stick to the statement that French-Canadians do not have equality of economic opportunity; but I must add that I think it is largely their own fault, because of their educational system. If it were not for that, they would have as much equality of opportunity as English-Canadians, at all events, whatever such equality may be.

Certainly your experience has been discouraging and disheartening almost beyond belief, though by many English-Canadians also you have been pursued with a meanness, vindictiveness and mendacity unparalleled in Canadian history. So I, for one, do not blame the French-Canadians unduly, inexcusable as their conduct towards you has been.

Soucisse's letter to Saturday Night was of very much the same kind as Dugré's production. I am anxious to do all I can to meet French-Canadians half-way; but really, I think the only hope of getting anywhere is to start off by telling these Nationalists plainly that a large part of what they say is unmitigated falsehood. No enduring national unity can be built on the foundation of acceptance or toleration of rank lying. Luckily the number of French-Canadians who hate and despise these Nationalist ravings is growing.

It is lucky for me, though, that I cherish no political ambitions, for I doubt if any party would tolerate the sort of plain speech on this subject which I feel to be necessary. Perhaps this is too cynical a view.

R.A.J.

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144591

September 5, 1944.

Oxford University Press,
University Avenue,
Toronto, Ontario.

Dear Sirs:

Would you kindly send copy of Dr. Eugene Forsey's book, "Royal Power of Dissolution of Parliament in the British Commonwealth", to

Hon. Mr. Justice J. Keiller MacKay,
59 Kingsway Crescent,
Toronto 9, Ont.

with attached card enclosed, and charge same to the account of Rt. Hon. Arthur Meighen, 320 Bay St.

Yours very truly,

E.
Encl.

Private Secretary.

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144592

September 22, 1944.

Personal

Mr. Arthur G. Penny,
The Chronicle-Telegraph,
Quebec, P. Q.

Dear Mr. Penny:

You probably have still well in mind the book of E. A. Forsey on Rights of the Crown in respect of Dissolution. You will also recall the attack made on this book by the late John W. Dafoe, and the letters Mr. Forsey wrote in answer to this attack, the last two of which were refused publication.

Dafoe's attack was, so far as I know, the only adverse criticism of the book which appeared in Canada or elsewhere. This was true at least until very lately when McGregor Dawson produced a laboured and very ineffective defence of his own earlier statements in the way of a critical comment on Forsey's book. It also has been answered most decisively.

Dafoe rested his attack on the hypothesis that the right of any discretion on the part of the King had entirely disappeared in England. Forsey showed by historical references that this was not true. Now I find that the Rt. Hon. Winston Churchill, in the British House of Commons on March 29th of this year, very definitely and firmly confirmed this Prerogative on the part of the Crown. I am enclosing to you extract from the British Hansard. Nothing could be more conclusive.

I am sure you will agree that this extract should be carefully noted and filed. It very clearly takes away the last possible excuse for Mr. Dafoe's final tour de force.

Yours very truly,

AM/E.
Encl.

Arthur Meighen.

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144593

September 22, 1944.

Dr. Eugene Forsey,
5 Lakeview Terrace,
Ottawa, Ontario.

My dear Eugene:

I do not know when I got such pleasure as in the reading of your reply to Ludwig. He is to be congratulated on his wisdom in declining to enter the controversy. You have smashed him beyond hope of recovery, and the only regret I have is that I cannot think of the proper way to see that this correspondence is thoroughly published. It certainly must be, some way or the other.

Quite manifestly, Ludwig's letter to you was dictated by King. I don't suppose he had ever heard before of Berriedale Keith himself or of John Dafoe's screeds.

This is the first time I had seen the wording of Churchill's statement in the House. As was to be expected, it is excellent. It knocks the whole foundation out of Dafoe's structure. You had, from the historical standpoint, completely upset his wretched edifice already, but now Churchill comes along and sweeps away the hypothesis which, notwithstanding history, seemed to have root in Dafoe's mind, viz., the hypothesis that the right of the Crown to the exercise of any independent discretion had completely disappeared in England.

I am doing this right now--I am sending out copies of this extract from Hansard to the Editors of several papers. I am also writing Mr. Clark of the Oxford Press, enclosing him a copy. In each of my letters I am emphasizing the vital significance of Churchill's words.

Cohen made a very faithful and pungent summary of Ludwig's filthy flattery.

(over)

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144594

I shall be very interested indeed in reading what appears in Saturday Night and do hope they publish what you have written.

The following is hardly worth adding in a letter like this, but I cannot recognize such a thing as "an inequality of opportunity" that rests on the fault of the complaining party.

I have made a copy of Ludwig's letter and am returning the original herewith as requested.

Yours very truly,

AM/E.
Encl.

P.S.--Copy of three or four of my letters is enclosed.

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Perhaps you'd show this to Mr. Macdonnell. I'm short of copies. No need to return. Havoc.
His nephew, Serge Brent, might also like to see it.
E. A. D.

144595

3 Lakeview Terrace,
Ottawa, Ontario.

Sept. 26, 1944.

The Editor,
Saturday Night,
Toronto, Ontario.

Sir:

Your reply to Mr. V. Soucisse's letter on the grievances of French-Canadians, in your issue of August 12, says a great deal that needs to be said, but by no means all. Unfortunately, this is not the first piece of such propaganda which has come out of Quebec; and what makes it worse is that some of it has come from, or been circulated by, people who, like Mr. Soucisse, have hitherto been considered moderate in their views and anxious to reach an understanding with their English-speaking fellow citizens. The time has come, I think, for English-speaking Canadians to defend themselves against the scandalous and totally unfounded accusations which these irate Nationalists hurl at us.

I am sorry my comments have been so long delayed, but it has taken some time to assemble and verify the facts required to disprove some of Mr. Soucisse's reckless assertions.

Mr. Soucisse says:

1. "The pressure against our own minorities is increasing rather than diminishing". Where and how?

2. English-Canadians are pressing a "gun...tightly against our French-Canadian ribs". Where and how?

Perhaps Mr. Soucisse intends his remarks about the postponement of redistribution to serve as evidence for both (1) and (2). Pretty flimsy evidence! The Address, asking for that postponement, was introduced by a French-Canadian Minister, Mr. St. Laurent, and supported by the overwhelming majority of French-Canadian Members of both Houses. I think the majority, French and English, were wrong (I said so publicly at the time in the United Church Observer). They have given French-Canadians their one real political grievance, and a substantial one. The arguments for the measure were trivial; those against it, presented in the statesmanlike speeches of Mr. Cardin and Mr. Pouliot, overwhelming. But the fact remains that French-Canadian introduced it, and most of the French-Canadian Members and Senators voted for it; yet Mr. Soucisse blames it all on the wicked English!

3. Confederation, Mr. Soucisse implies, was a "shot gun marriage" with the "pressure on Quebec", not on English Canada. English Canada "wanted [its] debts paid"; it was English Canada which "insisted on the marriage, (not the bride". What does all this mean? Before Confederation, what is now Quebec was united in a legislative union with what is now Ontario. There was already a "marriage", and a much closer one than there

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is now. It had existed for 27 years. It had ended in absolute deadlock. What "pressure" was put on French-Canadians to get them into Confederation, what "debts" English-Canadians thought they would get "paid" by substituting a federal union for a legislative one, or how they would be paid, I am at a loss to understand. I have read the Confederation Debates several times and the lives of most of the Fathers of Confederation at least once, and in the whole lot, I have never seen one syllable of anything like this. If Mr. Soucisse has any evidence of it, let him produce it.

4. Mr. Soucisse says that his uncle, the late Senator L.O. David, "and his group", if they had had their way "would never have allowed Confederation". What would they have done? Preserved the deadlock? Restored the separate colony of Lower Canada? Mr. Soucisse leaves the answer to our imagination, but he is explicit about the reasons for the attitude of his uncle and his friends. They "would never have allowed it" because "judging by past experience they did not believe that the English-speaking partner would respect his obligations". What was this "past experience"? What were the "obligations"? When, where and how, before 1867, did the "English-speaking partner" fail to respect them?

5. Mr. Soucisse adds that his uncle's fears have been justified; since Confederation also English-speaking Canadians have not respected their obligations. "The roads are littered with the remains of broken promises." What promises? Here, for once, Mr. Soucisse condescends to offer specific instances.

(a) "The blanched skeletons of the Manitoba, Keewatin and New Brunswick school questions dot the plains." What the Keewatin school question was I have not the faintest idea. I have yet to meet an English-Canadian who has ever heard of it. With the Manitoba and New Brunswick school questions, however, I have some acquaintance, and on these I have some evidence to offer for the defence.

What "promises" were given to the French-Canadians in regard to French schools in Manitoba I do not know. The British North America Act and the Manitoba Act say nothing whatever about French schools or English schools, but only about Roman Catholic schools, Protestant schools, and denominational schools. However, assume that promises were made to the French-Canadians of Manitoba, and promises of a very sweeping character. What happened? The Manitoba Legislature, exercising the provincial autonomy of which so many French-Canadians have been such staunch defenders, abolished separate schools. Who passed a Remedial Order, ordering the Manitoba Government to restore them? A Dominion Government headed by Sir Mackenzie Bowell, an Englishman, and a Past Grand Master of the Orange Order. Who constituted the majority of that Cabinet? English-speaking Protestants. When the Manitoba Government defied the Remedial Order, who introduced a Remedial Bill into Parliament to restore the separate schools? The Government of Sir Mackenzie Bowell. Who led the opposition to the bill, and fought it to a standstill? A French-Canadian Roman Catholic, Wilfrid Laurier. Who found an election to restore the Manitoba separate schools? The Government of Sir Charles Tupper, headed by an English-Canadian and made up predominantly of English-Canadians. Who fought them, and won? Wilfrid Laurier, a French-Canadian Roman Catholic. Who gave him his majority in the election of 1896? Quebec. The rest of the country broke about even; it was the French-Canadian vote which defeated the Government. If there are to-day no separate schools in Manitoba, Mr. Soucisse has his own people to thank for it, not us.

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What "promises" were given about French-Canadian schools in New Brunswick again I do not know, though I again point out that the British North American Act says nothing whatever on the subject. But here also I know something of the history. The New Brunswick School Act which started all the complaints was passed in 1871. The Roman Catholics of the province petitioned for its disallowance. The House of Commons passed a resolution asking that the Act be referred to the Judicial Committee of the Privy Council for an opinion as to its constitutionality. The Dominion Government made the reference accordingly, October 30, 1872. On November 29, 1872, the Law Officers of the Crown in London gave it as their considered opinion that the Roman Catholics of New Brunswick had had no such "rights, privileges or schools" as were protected by section 93 of the British North American Act, and had no recourse under that section. On December 13, 1872, the Lord President of the Council informed the Colonial Secretary (who duly informed the Dominion Government) that he considered there was no ground for referring the New Brunswick Act to the Judicial Committee. On April 7, 1873, the Law Officers, after considering additional material sent in by the Roman Catholics of New Brunswick, reaffirmed their previous position. On May 14, 1873, the Dominion House of Commons, by a vote of 98 to 63, carried, against the Government, a motion asking for disallowance of the Act of 1871 and amending Acts. 39 members did not vote. Of those who voted for the motion, 54 appear to have been English-speaking, at least 40 of them English-speaking Protestants. The single French-Canadian Protestant, Mr. Jely, also voted for it. Against the motion there were four French-Canadian Roman Catholics, including, of course, the two French-Canadian Ministers, Sir Hector Langevin and Mr. Robitaille. In other words, the English-speaking members who voted divided just about equally, and the Protestants not far from equally, even though the motion proposed a course of action, which some eminent French-Canadian Roman Catholics, and Sir John Macdonald (surely no persecutor of the French-Canadians!) thought unwise and impolitic. The Dominion Government, in spite of the vote, declined to disallow, but again referred the matter to the British Government, May 27, 1873, announcing at the same time its willingness to help finance an appeal by the New Brunswick Roman Catholics to the Judicial Committee. The British Government, June 30, pointed out that its Law Officers had declared the Acts a valid exercise of the powers of the Legislature, and declined to take any action. Meanwhile, the Supreme Court of New Brunswick had unanimously upheld the Acts. In the case of Maher v. the Town of Portland, the matter was carried to the Judicial Committee, which sustained the Supreme Court of New Brunswick. These facts Mr. Scusiese can verify for himself by consulting Dominion-Provincial Legislation, vol. I, pp. 664-708; the Journals of the House of Commons, May 14, 1873, pp. 347-348; and Wheeler's Confederation Law of Canada (1896), pp. 339 et seq.

The present position in New Brunswick is as follows: In Saint John, Moncton and Fredericton, there are de facto Roman Catholic separate schools. In Saint John, for example, six of the twelve grade schools and two of the high schools fall in this category. The Roman Catholic population built and owns these schools. The city pays rent for them and provides for cleaning and painting the interior, fuel, and general wear and tear, while the Roman Catholic population as such provides for external painting and repairs and the heating system. All the pupils and all the teachers of all eight schools are Roman Catholics; at least three of the grade schools and the girls' high school have nuns as Principals, and the majority of the women teachers

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Roman Catholics, and until recently the secretary of the Board was a Roman Catholic, who had held that office for about twenty years. Religious doctrine cannot be taught within school hours, but can be and is taught before or after school. In Moncton and Fredericton there are no Roman Catholic high schools; otherwise, the position is similar. In the predominantly French-speaking areas of the province (and about a third of the population is French-speaking), the Boards of Trustees are of course mainly French-speaking and Roman Catholic, and the rural and elementary schools are under Roman Catholic influence. As to the language question: the aim of public policy in the province is to have all the pupils in the French-speaking districts become completely bilingual. Recently the Department of Education has allowed the study in the first three grades to be in the mother tongue; but oral English must be given in all grades. Special efforts are being made to improve educational conditions in the French-speaking districts, by requiring all French-speaking teachers to take a year in Normal School, by increasing the number of Inspectors and providing each with a bilingual Assistant, and by sending special educational officials into the French-speaking districts to make the people more education-conscious and to impart an idea of modern educational methods and procedures necessary to meet the needs of the French schools, especially in the Primary subjects. All these facts may be verified from official sources.

This situation may not be ideal, from the point of view of either the majority or minority; but it is certainly very much more favourable to the latter than Mr. Soucisse's letter would lead the unwary reader to suppose.

(b) "The Ottawa Catholic schools", says Mr. Soucisse, "have to close for lack of funds." Inquiry at the Ottawa Separate School Board a week or so ago elicited the interesting response that the schools in question were not closed and had not been closed, except for the summer holidays. It is quite true that the Ottawa Separate Schools have been in some financial difficulty. The reasons have been set forth fully in an official, public statement by the Provincial Secretary, who happens also to be M.L.A. for Ottawa West: (1) The Separate School Board had allowed its financial position to deteriorate year by year without taking any steps to meet its financial obligations. For example, the auditors' report shows that the sinking fund, which should contain $300,555.94, actually contains only $400.00, "so that any levies made and collected for the sinking fund other than the $400.00 have been used for other purposes." (2) As a result of its inability to meet the claims of its creditors, ("most of whom are themselves Separate School supporters"), and to obtain protection against legal proceedings, the Board by its own decision placed its affairs under the supervision of the provincial Department of Municipal Affairs. The Department was successful in making a settlement with the creditors, on condition that the Separate School tax rate should be increased by .98 mills on the dollar. The Separate School Board objected to this very moderate increase. (This appears to be the sole basis for Mr. Soucisse's statement that the schools "have to close for lack of funds".) (3) There are two very important contributing factors to the present financial position of the Board. One is that, although Ottawa has very efficient public high schools, the Separate School Board has chosen to teach the ninth and tenth grades in the separate schools. The cost is $50,000 a year. The creditors, most of them, it must be repeated, Roman Catholics, have insisted that these classes be discontinued and the pupils sent to the public secondary schools, which have plenty of accomodation available. This would reduce the Separate School tax rate by about 2 mills on the dollar, or about twice the amount of the present and much complained of increase. The other important factor contributing to the present difficulties of the Board

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is that a great many separate school supporters are transferring their support to the public schools. In the last two years alone, 620 such transfers, involving an assessment of $1,333,495, have occurred. These facts speak for themselves.

(c) "French-Canadian lads are scattered among English-speaking regiments in British Columbia and under local Himmlers an attempt is made to denationalize them and 'unify' them into Englishmen" The Department of National Defence states that the position in the army is: (1) French-speaking soldiers receive their training in their own language. Only the words of command are given in English for the sake of uniformity, but all explanations are given in French. (2) There are French-speaking officers and instructors on the staffs of all Training Centres where French-speaking soldiers are sent for training. Some Training Centres are exclusively French-speaking. (3) A Bureau of French Translation has been in existence for more than three years, and practically every training manual, pamphlet, textbook, King's Regulations (Can), Financial Rules and Instructions, Routine Order, General Order, or Army Order is available in French. (4) As a rule, French-speaking personnel, on completion of training, are posted to French-speaking Units or Sub-Units. (5) There are French-speaking Units or Sub-Units in all Arms or Services.

6. "Even Communist Russia allows twenty languages and thirty different nationalities to live and unite with their own particular flags, songs and folk dances." French-Canadians habitually fly the French tricolor, the papal flag, and the special flag, which, a few months ago, was hoisted on the new buildings of the University of Montreal in an impressive ceremony. Where and when have English-Canadians ever interfered with this sort of thing? Where and when have they interfered with French-Canadian songs and folk dances? All the English-Canadians I know take the liveliest pleasure in those songs and dances.

7. Mr. Boucisse accuses "our Fascist Tories" of "hatred and persecution of Catholics as such". Who are these "Fascist Tories"? How numerous are they? Where, in the whole of this country, is there "persecution of Catholics as such"? Some "hatred" of Catholics there may be; but I challenge Mr. Boucisse to produce evidence that it is at all widespread, or indeed any more widespread than hatred of Protestants among French-Canadians.

8. "The enemies of Quebec ... always accuse it without having any precise and definite figures at hand". From the context, this appears to refer to figures of recruits. Down to the time it was written, there were no precise figures, though many English-Canadians had repeatedly asked for them. They were refused. By whom? By a Government which contains five French-Canadian Cabinet Ministers (and another who is half French-Canadian) and three French-Canadian Parliamentary Assistants; a Government headed by a man who has throughout his career since 1919 has had the overwhelming support of French-Canadian Members of Parliament and still has it. (This is worth noting also in connection with point 5 (c) above.) Since Mr. Boucisse's letter appeared, however, the Government has furnished the following figures, which would appear to be precise:

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Estimated Intake Into the Armed Forces

Officers and Other Ranks and Ratings
(Women Excluded)

To March 31, 1944

Province	Enrolments, National Resources Mobilization Act	Total Three Services	Percentage Total Intake to Male Population Ages 18 to 45
Prince Edward Is.	875	7,299	38.4%
Nova Scotia	5,826	36,128	45.6
New Brunswick	6,354	40,968	43.6
Quebec	46,443	154,505	22.1
Ontario	41,502	389,006	43.3
Manitoba	8,665	69,168	43.5
Saskatchewan	11,407	74,296	38.9
Alberta	9,330	71,335	40.1
British Columbia	10,176	80,391	44.4
	140,778	913,092	36.9%

(Source: Canada At War, No. 39, August,1944)

In short, the total number of volunteers from Quebec was not "over 150,000", but about 108,060; and if we take the ratio of volunteers to the male population of ages 18 to 45, the Quebec figure is 15.4%, while the lowest for any other province is Saskatchewan, 32.9%. Nova Scotia shows 40.9%, British Columbia 38.8, Ontario 38.3, Manitoba 38.1, New Brunswick 36.6, Alberta 34.8, and Prince Edward Island 33.8.

9. Mr. Soucisse says that Quebec had "nothing but hatred and sarcasm as an incentive" to send men overseas. So French-Canadians have no rights to defend? No representation in the House of Commons, or the Senate, or the Dominion Cabinet, or the Legislatures and Cabinets of Nova Scotia, New Brunswick, Prince Edward Island, Ontario, Manitoba and Alberta? No Quebec Legislature? No right to speak their own language in the Dominion Parliament and Courts and the Legislature and Courts of Quebec? No French-speaking judges? No representation in the direction of the Canadian Broadcasting Corporation, the Canadian National Railways, or on the Board of Transport Commissioners, the Air Transport Board, or the Unemployment Insurance Commission? No French radio programmes? No schools? No free speech? No freedom of worship? And never a word of appreciation from any English-Canadians: not from Mr. John Grierson, Col. Wilfred Bovey, Professor F.R. Scott, Mr. Leslie Roberts, Professor John Humphrey, Professor Gordon Rothney, Miss Helen Howes, Mr. Lee M. Cox, the late Sir Andrew Macphail, Mr. T.S. Ewart? "Nothing but hatred and sarcasm"?

10. Mr. Soucisse accuses English-Canadians of wanting to "besmirch the French of France and of Canada". What English-Canadians, where and when, have shown any evidence of wanting to "besmirch the French of France"? I have never met or heard one. What English-Canadians apart from a handful of cranks

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have shown any sign of wanting to "besmirch the French of Canada"? Where and when? Are they more numerous than the French-Canadians who would besmirch the English of England and of Canada? Can Mr. Soucisse offer us any English-Canadian counterpart to Father Dugré's "A Letter to Mr. Leacock et Al"?

11. Mr. Soucisse says we should "honour" French-Canadians in the active army, navy and air force. We do. I have yet to meet or hear of an English-Canadian who does not. When Mr. Soucisse adds that these French-Canadian volunteers have done "something [English-Canadians] would not have done in the circumstances", he is indulging in pure assumption. He knows nothing whatever, and in the nature of things can know nothing, of what we would have done in similar circumstances.

12. "Show me a French-Canadian general. Name me a French-Canadian on the General Staff. The Canadian Navy is just as exclusively exclusive." The Canadian Army has no full Generals, English-Canadian, French-Canadian, or otherwise. But there are eight French Canadian Major-Generals: T.L. Tremblay, P.E. LeClerc, E.J. Renaud, G.P. Vanier, L.R. LaFleche, Sir Eugene Fiset, E. de B. Panet, and H.A. Panet. In addition, Major-General Maurice Pope, who has just been appointed to one of the highest military posts in the country, is half French-Canadian and completely bilingual. Doubtless General Pope, whose mother was a Taschereau and whose father was a convert to Roman Catholicism, is imbued with a particularly virulent "hatred of everything French and Catholic". In the Air Force, which Mr. Soucisse does not mention, the following French-Canadians hold the rank of Air Commodore or higher: T/Air Vice Marshal J.L.E.A. de Niverville, A/Air Vice Marshal A. Raymond, H/Air Commodore J.E.A. Charest. How much nearer the mark the insinuations about the General Staff and the Navy may be, I am not in a position to say; but I suspect the margin of error is about the same.

13. "From now on the French-Canadians are going to take the running of their affairs in their own hands." They have, ever since 1867. Mr. Soucisse prophesied that Mr. Duplessis would select a French-Canadian as Provincial Treasurer. He has now done so. No one stopped him. No one could. Who wanted to? Not one English-Canadian in a thousand even knows, let alone cares, whether the Provincial Treasurer of Quebec is French-Canadian, English-Canadian or half-and-half.

14. "Always remember that you forced this on us. You wanted a separation; well you are getting it." What shadow of evidence can Mr. Soucisse produce for either of these statements?

15. "You are going to be awful lonesome without us." Mr. Soucisse would be surprised how many English-Canadians would feel not "lonesome" but more than thankful if Quebec were to get out of Confederation. I do not agree with them; but I think their number is growing, and will grow further every time someone like Mr. Soucisse bursts into print or makes a speech. A single production like his letter to you does more to promote anti-French-Canadian feeling than a dozen diatribes by the most rabid anti-French-Canadian agitator in existence. Fortunately there is a large and growing body of French-Canadians who repudiate and despise this crazy Nationalism. It is a pity they cannot put green baize bags over people like Mr. Soucisse.

Yours truly,

Eugene Forsey

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144602

September 22, 1944.

Personal

Mr. Balmer Watt,
The Edmonton Journal,
Edmonton, Alberta.

Dear Mr. Watt:

You probably have still well in mind the book of E. A. Forsey on Rights of the Crown in respect of Dissolution. You will also recall the attack made on this book by the late John W. Dafoe, and the letters Mr. Forsey wrote in answer to this attack, the last two of which were refused publication.

Dafoe's attack was, so far as I know, the only adverse criticism of the book which appeared in Canada or elsewhere. This was true at least until very lately when McGregor Dawson produced a laboured and very ineffective defence of his own earlier statements in the way of a critical comment on Forsey's book. It also has been answered most decisively.

Dafoe rested his attack on the hypothesis that the right of any discretion on the part of the King had entirely disappeared in England. Forsey showed by historical references that this was not true. Now I find that the Rt. Hon. Winston Churchill, in the British House of Commons on March 29th of this year, very definitely and firmly confirmed this Prerogative on the part of the Crown. I am enclosing to you extract from the British Hansard. Nothing could be more conclusive.

I am sure you will agree that this extract should be carefully noted and filed. It very clearly takes away the last possible excuse for Mr. Dafoe's final tour de force.

Yours very truly,

AM/E.
Encl.

Arthur Meighen.

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September 22, 1944.

Mr. Arthur R. Ford,
Winnipeg Free Press,

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144603

September 22, 1944.

Personal

Professor H. W. Wallace,
91 Walmer Road,
Toronto 5, Ontario.

Dear Mac:

You probably have still well in mind the book of E. A. Forsey on Rights of the Crown in respect of Dissolution. You will also recall the attack made on this book by the late John W. Dafoe, and the letters Mr. Forsey wrote in answer to this attack, the last two of which were refused publication.

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CANADA

144604

September 22, 1944.

Mr. Grattan O'Leary,
The Ottawa Journal,
Ottawa, Ontario.

Dear Grattan:

You probably have still well in mind the book of E. A. Forsey on Rights of the Crown in respect of Dissolution. You will also recall the attack made on this book by the late John W. Dafoe, and the letters Mr. Forsey wrote in answer to this attack, the last two of which were refused publication.

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AM/E.
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(over)

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P.S.—In a letter to the author, Forsey took exception to Emil Ludwig's cavalier treatment of this subject in his recent contribution to Liberal campaign literature. I am not at liberty to send you the correspondence which ensued, but hope to be able to some day. Ludwig knows now something of the penalty that is paid for entering a controversy that one knows nothing about.

A. M.

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PUBLIC ARCHIVES
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CANADA

144606

September 22, 1944.

Personal

Mr. Arthur G. Penny,
The Chronicle-Telegraph,
Quebec, P. Q.

Dear Mr. Pennyt

You probably have still well in mind the book of E. A. Forsey on Rights of the Crown in respect of Dissolution. You will also recall the attack made on this book by the late John M. Dafoe, and the letters Mr. Forsey wrote in answer to this attack, the last two of which were refused publication.

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Arthur Meighen.

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PUBLIC ARCHIVES
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CANADA

144607

September 22, 1944.

Personal

Mr. John Bird,
Winnipeg Tribune,
Winnipeg, Manitoba.

Dear Mr. Bird:

You probably have still well in mind the book of E. A. Forsey on Rights of the Crown in respect of Dissolution. You will also recall the attack made on this book by the late John W. Dafoe, and the letters Mr. Forsey wrote in answer to this attack, the last two of which were refused publication.

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CANADA

144608

September 22, 1944.

Personal

Hon. W. H. Dennis,
Halifax Herald,
Halifax, N. S.

My dear Senator Dennis:

You probably have still well in mind the book of E. A. Forsey on Rights of the Crown in respect of Dissolution. You will also recall the attack made on this book by the late John W. Dafoe, and the letters Mr. Forsey wrote in answer to this attack, the last two of which were refused publication.

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Encl.

Arthur Meighen.

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PUBLIC ARCHIVES
ARCHIVES PUBLIQUES
CANADA

144609

September 22, 1944.

Personal

Mr. Arthur R. Ford,
London Free Press,
London, Ontario.

Dear Arthur:

You probably have still well in mind the book of E. A. Forsey on Rights of the Crown in respect of Dissolution. You will also recall the attack made on this book by the late John W. Dafoe, and the letters Mr. Forsey wrote in answer to this attack, the last two of which were refused publication.

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Encl.

Arthur Meighen.

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CANADA

144610

September 23, 1944.

Mr. W. H. Clarke,
Oxford University Press,
University Avenue,
Toronto, Ontario.

Dear Mr. Clarke:

You probably have still well in mind the book which you were good enough to publish, written by E. A. Forsey, on the Rights of the Crown in respect of Dissolution. You will also recall the attack made on this book by the late John W. Dafoe, and the letters Mr. Forsey wrote in answer to this attack, the last two of which were refused publication.

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Encl.

Arthur Meighen.

(over)

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PUBLIC ARCHIVES
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144611

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A. M.

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PUBLIC ARCHIVES
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CANADA

144612

September 25, 1944.

Mr. R. McEvoy,
The Evening Telegram,
Toronto 1, Ontario.

Dear Mr. McEvoy:

You probably have still well in mind the book of E. A. Forsey on Rights of the Crown in respect of Dissolution. You will also recall the attack made on this book by the late John W. Dafoe, and the letters Mr. Forsey wrote in answer to this attack, the last two of which were refused publication.

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144613

P.S.—In a letter to the author, Forsey took exception to Emil Ludwig's cavalier treatment of this subject in his recent contribution to Liberal campaign literature. I am not at liberty to send you the correspondence which ensued, but hope to be able to some day. Ludwig knows now something of the penalty that is paid for entering a controversy that one knows nothing about.

A. M.

MEIGHEN PAPERS, Series 6 (M.G. 26, I, Volume 222)

PUBLIC ARCHIVES
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CANADA

144614

September 25, 1944.

Personal

Mr. John Stevenson,
The Globe and Mail,
Toronto 1, Ontario.

Dear John:

You probably have still well in mind the book of E. A. Forsey on Rights of the Crown in respect of Dissolution. You will also recall the attack made on this book by the late John W. Dafoe, and the letters Mr. Forsey wrote in answer to this attack, the last two of which were refused publication.

Dafoe's attack was, so far as I know, the only adverse criticism of the book which appeared in Canada or elsewhere. This was true at least until very lately when McGregor Dawson produced a laboured and very ineffective defence of his own earlier statements in the way of a critical comment on Forsey's book. It also has been answered most decisively.

Dafoe rested his attack on the hypothesis that the right of any discretion on the part of the King had entirely disappeared in England. Forsey showed by historical references that this was not true. Now I find that the Rt. Hon. Winston Churchill, in the British House of Commons on March 29th of this year, very definitely and firmly confirmed this Prerogative on the part of the Crown. I am enclosing to you extract from the British Hansard. Nothing could be more conclusive.

I am sure you will agree that this extract should be carefully noted and filed. It very clearly takes away the last possible excuse for Mr. Dafoe's final tour de force.

Yours very truly,

AM/E.
Encl.

(over)

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144616

THE EVENING TELEGRAM

Published at 227-245 Bay Street Toronto 1

(Founded in 1876 by J. Ross Robertson)

Daily Average Circulation
For August
162,496
Member Audit Bureau of Circulation

SUBSCRIPTION RATES
DELIVERED BY CARRIER
75c per month — $9.00 per year

BY MAIL (Outside Toronto postal zone)	Canada and Great Britain	United States
12 Months	$7.00	$9.00
6 Months	3.75	5.00
3 Months	2.00	3.00
1 Month	.75	1.00

Payable in Advance. Postage Included.

C. O. KNOWLES, *Managing Editor*
A. T. CHADWICK, *Business Manager*
Proprietors and Publishers—Alfred T. Chadwick, J. E. Cameron, Douglas S. Robertson, C. O. Knowles and C. H. J. Snider. Trustees of the Estate of the Late John Ross Robertson.

TORONTO, TUESDAY, SEPTEMBER 26, 1944

MORE LIGHT ON FAMOUS CONSTITUTIONAL ISSUE.

Our Canadian Hansard hardly ranks as a best seller, but however few are its addicts, the number of Canadians who read the British Hansard is undoubtedly less. For this reason a passage between M. Phillips Price, Labor member for Forest of Dean, and Prime Minister Churchill may not have attracted the attention which its bearing on a Canadian constitutional incident warrants. The exchange dealt with the Crown's prerogative to dissolve Parliament.

The subject is of interest here since W. L. M. King once made it an issue on which he managed to wangle a return to power. After sitting through his first Parliament as Premier, Mr. King went to the country in 1925 and was defeated. The Liberals were returned with 101 seats to the 116 which had been carried by the Conservatives. But though defeated Mr. King clung to power for six months, when, to escape an adverse vote on the Customs scandal, he asked Baron Byng, Governor General, to dissolve Parliament and permit another election. The request was refused, and Mr. Meighen, the Conservative leader, was called upon to form a Government. The new Government was short-lived, and an election was called. Mr. King took the position that he was an injured innocent, the victim of an unconstitutional act by the Governor General in refusing him the dissolution for which he had asked. His supporters asked Canadians to decide whether they were to rule themselves or to be ruled from London. It was pure humbug, but it succeeded.

Recently E. A. Forsey wrote a book, The Rights of the Crown in Respect of Dissolution, in which he marshalled authorities which clearly exposed the humbug of Mr. King's claim. The book was criticized by the Winnipeg Free Press, Mr. King's prairie organ, which refused to publish at least two of Mr. Forsey's letters in reply. Now Mr. Churchill has pointed out that the Crown is not compelled to accept the advice of the Prime Minister in regard to dissolution, but may call on others for advice. His exposition of the right of the Crown in regard to dissolution came at a moment when he had sent a majority decision back to Parliament for reconsideration. Recorded in the British Hansard it is as follows:

> Mr. Price (Forest of Dean): He is claiming for the Executive now to dissolve Parliament and go to the country—
>
> The Prime Minister: I never said anything of the sort. I must make it absolutely clear that it does not rest with any Prime Minister to dissolve Parliament. The utmost he can do is to tender advice to the Crown.
>
> Mr. Price: That, of course, is the law, but in actual fact the advice comes from the Prime Minister.
>
> The Prime Minister: 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.

This impropriety did not bother Mr. King in 1926. He did use language which suggested that he had power to make the decision, and invited the electors to believe that the Governor General had no right to call on other advisers who had a stronger following in the House. The electors were humbugged into believing Mr. King. It would be interesting to know what Mr. Churchill thought of Mr. King at that time.

SOCIAL SECURITY HERE AND IN BRITAIN.

There may be a tendency in some quarters to regard the British social security plan as treading in the footsteps of Mr. King's baby bonus scheme. The publication of the British White Paper may be heralded as one more evidence of how Canada, under Mr. King's guidance, leads the world. It may be cited as support for the measure which was put through at Ottawa.

But there are several differences between the plan announced in Britain, which has been acclaimed by the Times as a great advance in self-help, and what is proposed for Canada in the name of social security. The British plan is a complete and integrated one, and not merely an aggregation of unrelated parts. It covers the worker from the cradle to the grave, and from those prospective beneficiaries who are able to contribute it collects part of the cost. When the Baby Bonus Act was introduced at Ottawa, the Government refused to send it to a committee to be considered as part of a more comprehensive plan.

There is a difference, too, in the legislative approach to the subject. Canada's baby bonuses were projected into practical politics in the Speech from the Throne, but were really exposed to discussion in the closing days of Parliament, the bill being brought down only a week or so before adjournment. In Britain the Beveridge report has been the subject of discussion for 22 months, and as a result of that discussion the Government has formulated its plan, which it has presented in the form of a White Paper for consideration by Parliament before debate upon it in the House occurs.

Incidentally, while Canada pushed the baby bonus plan through with little time for thought, the London Herald points out that even now the Government's plans for Britain are only in the White Paper stage.

I, Volume 222)

RCHIVES

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MEIGHEN PAPERS, Series 6 (M.G. 26, I, Volume 222)

The Quebec Chronicle-Telegraph
27 BUADE STREET
QUEBEC, QUE.

144027

With the Editor's Compliments

SATURDAY, SEPTEMBER 30, 1944

CHURCHILL UPHOLDS ROYAL PREROGATIVE

Some time ago there was reviewed in these columns in some detail a book by Dr. E. A. Forsey on the Prerogative of the Crown with respect to the Dissolution of Parliament. This work, it may be recalled, was in the nature of a postscript to the famous political controversy provoked by Rt. Hon. W. L. Mackenzie King when he reproached the late Lord Byng, at that time Governor General of Canada, with having exceeded his consitutional powers by refusing to dissolve Parliament on the advice of himself, Mr. King—then, as now, Prime Minister—; calling on Rt. Hon. Arthur Meighen to form a Government, instead. The issue was an important one because upon it Mr. King regained office in the elections that followed not long after, notwithstanding a grave administrative scandal that had prompted Mr. King to seek Dissolution in preference to facing a vote of want of confidence in the House of commons. As a consequence of his defeat, Mr. Meighen resigned the leadership of the Conservative Party and withdrew for a time to private life.

Dr. Forsey is a distinguished Canadian historian and economist, with a particular talent for research, and his book —supported by a wealth of authoritative evidence—clearly proved, in spite of Mr. King's reproaches and the verdict given in his favor by the Canadian electorate, that it is, in fact, the Prerogative of the Crown to dissolve Parliament, or to refuse to do so, and that Lord Byng, as the representative of the Crown, had not exceeded his powers. To stampede popular opinion in this Dominion against any British action, on the ground that it has interfered with Canadian sovereignty, is always easy. But the value and, indeed, the necessity of the particular Prerogative in question has always been obvious to disinterested observers, since there are bound to be rare occasions on which the personal or the partisan interest of the Prime Minister is so strong that he is no longer able to advise the Crown solely as the Chief of State and the Crown, for this reason, is obliged to seek advice elsewhere and to act on its own best judgment, in the national interest.

* * *

So able and so convincing was Dr. Forsey's book that it received an excellent reception from the Press of Canada, at the time it was published; the only attack on it being made by the late John W. Dafoe, Editor of the Winnipeg Free Press, whose rock-ribbed Liberalism is well known and who could not have been expected to let so damaging a blot on Mr. King's record go by without challenge. If Mr. Dafoe's attack missed fire badly that is due, first of all, to the fact that he had a poor case to defend, while the position of Dr. Forsey was so secure to be practically unassailable. Indeed the Dafoe sortie was based on two false premises: mis-statements of what was in Dr. Forsey's book and an obstinately maintained but quite unfounded assertion that the Royal Prerogative in dispute had disappeared in England itself. As incidentally amusing, it may be mentioned that Mr. Dafoe abused Dr. Forsey roundly for alleged failure to quote a supposed speech by the Younger Pitt which—so Mr. Dafoe said—supported his own contention. In rebuttal, Dr. Forsey showed that the Younger Pitt had never made such a speech at any time and Mr. Dafoe failed to meet his defiance to produce the text of it, in whole or in part. At the same time, Dr. Forsey exposed the mis-statements for which Mr. Dafoe was responsible and proved on the highest authority that the Royal Prerogative had not disappeared in England, as pretended.

As Dr. Forsey was left victoriously in possession of the field, there was no need for others to intervene in this jousting at the time. It is interesting to recall it now, however, since a statement made not long ago in the British House of Commons by no less an authority than Prime Minister Winston Churchill completely knocks the props from under Mr. Dafoe's position, once and for all. This statement is reproduced in the British Hansard, Fifth Series, Volume 398, March 29, 1944, Page 1516. Mr. Price (M.P. for the Forest of Dean) had declared: "He (Mr. Churchill) is claiming for the executive now to dissolve Parliament and go to the country." To this the Prime Minister rejoined:

> **"I never said anything of the sort. I must make it absolutely clear that it does not rest with any Prime Minister to dissolve Parliament. The utmost he can do is to tender advice to the Crown."**

* * *

This is sufficiently clear and definite in itself but we are indebted to Mr. Price for leading Mr. Churchill to explain the Prerogative still more precisely. The member persisted: "That of course, is the law, but, in actual fact, the advice comes from the Prime Minister." Mr. Churchill thereupon closed the exchange by affirming:

> **"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."**

Even after the precedent set by Mr. King, therefore, Mr. Churchill still maintains that the dissolution of Parliament is the Prerogative of the Crown and that power to do so does not rest with the Government of the day. Nothing very practical is to be gained by establishing the point now but we feel that it is worth doing, nevertheless, if only as a belated act of justice towards the wrecked career of Hon. Arthur Meighen and the wounded memory of a great hero of World War I—Canada's former Governor-General, Lord Byng.

Mr. Churchill Settles a Controversy.

It is often very profitable to take a look at the British Hansard. Thus the other day, perusing its pages, we came upon a statement by Mr. CHURCHILL with a complete bearing upon a controversy which has raged long in this country. The controversy over the rights of the Crown to dissolve Parliament.

When, two years ago, Mr. EUGENE FORSEY wrote a very able book holding that dissolution of Parliament was a matter for the Crown, that it held discretionary rights with respect to it, certain constitutional pundits—some of them with a memory of the Lord BYNG incident of 1926—fell upon him unmercifully. He was just a Tory reactionary; under the dead hand of the past. Even Mr. EMIL LUDWIG, in his recent panegyric on Mr. MACKENZIE KING, got well on the side of the "Tory" thesis.

Ottawa Journal

Well, here is what we came upon in the British Hansard, vol. 398, March 29, 1944, page 1516:

"Mr. Price (Forest of Dean): He is claiming for the Executive now to dissolve Parliament and go to the country. . . .

"The Prime Minister: 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.** The utmost he can do is to tender advice to the Crown.

"Mr. Price: That, of course, is the law, but in actual fact the advice comes from the Prime Minister.

"The Prime Minister: **This is one of the exceptional occasions when the Prerogative of the Crown comes into play and where in doubtful**

144618 Extra copy

circumstances the Crown would refer to other advisers. 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 power to make such a decision."

Professor MCGREGOR DAWSON, the Winnipeg *Free Press*, the Toronto *Star* and Toronto *Saturday Night* will please note.

MR. FORSEY LEAVES SOME UNANSWERED QUESTIONS.

144619

With all the self-assurance that marks the doctrinaire, Eugene Forsey, who is employed by the Canadian Congress of Labor to do "research" work, appeared before the Canadian Institute of Public Affairs with a series of postulates on conditions ahead. Business confidence, he said, is the shyest of nymphs. With present-day talk of economic change he expects it to become more bashful, private investment will droop and the government will have to spend a lot of money to maintain employment. The larger the expenditure the more frightened business will become and government participation in industry will increase. This will continue until, willy-nilly, we will all end up socialists, in Mr. Forsey's opinion.

Having thus built a case that is right up the alley of the C.C. of L., which is the Labor wing of the C.C.F., it was only to be expected that Mr. Forsey would frame a couple of questions with a socialistic tinge, inviting a socialist answer. Why go through a series of painful and costly attempts to escape the inevitable? Why not set about a deliberate and planned change from capitalism to socialism, forthwith? In these arguments and questions Mr. Forsey has so palpably revealed himself as a full-blown socialist, they should be regarded as those of a special pleader for socialism and not of one in search of pure economic truth.

Mr. Forsey's statements to the Institute were assumptions of what he thinks will occur in the future. He took his audience to the point where it got a socialistic system and he left it there. The newspaper accounts of his speech make no mention of his views on public finance under socialism. Probably he did not mention them. It is the custom of all socialists to preach the advantages of their theory without being explicit on how it is to be worked.

Under the capitalistic system governments get very substantial portions of their tax revenues from corporation earnings and profits. But under the socialism that Mr. Forsey wishes to introduce there would be very little industry left in private hands. If all industry is to be owned by the state there would be no profits to tax. Who, then, would pay the expenses of ten governments, baby bonuses, pensions, unemployment insurance and all the other social security measures which are being projected?

Obviously the whole weight of paying for these would fall upon the individual taxpayer. In a socialistic era there would be no large incomes to tax, so everyone down to the office girl would be required by the government to contribute to the two billion dollar budgets which loom ahead. Without tax revenues from corporations the individual's taxes would not go down. They would go up.

Someone may say, "Oh, but wages will be higher under socialism."

If wages were higher, prices would be higher, and the cost of living would be higher. Under socialism, as at the present time, the labor that went into the production of an article would largely determine its price, that is unless the socialists propose financial hari-kari by selling goods below the cost of production. But even in a socialist Utopia the people could not lift themselves by their boot straps.

Mr. Forsey's speech to the Institute of Public Affairs was an ingenious bit of socialistic pleading. It would be interesting to have a socialist's views on public finance in a completely socialized country.

UPS AND DOWNS

MEIGHEN PAPERS, Series 6 (M.G. 26, I, Volume 222)

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CANADA

144620

3 Lakeview Terrace,
Ottawa, September 25, 1944.

Dear Mr. Meighen,

Very many thanks for your kind letter of the 22nd. I am delighted that you have sent the Churchill extract to various editors. I hope it will do good. I greatly enjoyed your description of Ludwig's masterpiece in your P.S. to Mr. Nichols. I need hardly say that I was very much pleased that you liked my reply to Ludwig. I got a lot of pleasure out of writing it!

Had I looked far enough ahead, I should never have written to him personally at all, but to some paper, making sure that he got a copy. Then he would have had to reply publicly, if at all (and King would no doubt have insisted on his replying), and I could have trounced him publicly. As it is, I see no way of publishing the letters except by his permission, which he will take good care not to give.

I was very foolish to ask you to let Judith Robinson have that copy of my first letter to Ludwig, as she has failed to return it, in spite of my writing to remind her. If you made a copy of it, perhaps you would be kind enough to have Miss Edmondson make another copy for me. I am afraid Judith must have lost the thing, and I should like to have my file complete. If I had your memory, no doubt I should be able to dictate the whole letter now, verbatim. But alas, I haven't.

Of course you are right about my loose use of "equality of opportunity".

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144621

I should have sent you the Churchill statement before, but waited till I happened to be writing anyway.

Two friends in England have written me about a review in the Sunday Times of August 20, which I have not yet seen. One says it is "by an authority on the subject"; both imply that it is favourable. I shall go up to the Reading Room again shortly, and make a second attempt to find this. Perhaps you will be able to find it at the Albany Club or elsewhere in Toronto; if not, let me know, and I'll send you word of what it is like, and, if necessary, a copy.

Yours sincerely,

Eugene Forsey

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CANADA

144622

September 26, 1944.

Dr. Eugene Forsey,
3 Lakeview Terrace,
Ottawa, Ontario.

My dear Eugene:

As asked in yours of 25th, I am enclosing the copy you sent me of your first letter to Ludwig. At the time it was received I had some copies made.

I would certainly advise Ludwig that you think the public are entitled to the discussion which took place between you and him on that phase of his volume covered by your book, and asking his permission to publish same. I think I would intimate as well that you feel you have the right to publish your own letters in any event—which, of course, you have. Your letters simply must get to the public.

I am sending you today an editorial which appears in the Telegram. I would like them to have pointed out that Churchill's statement simply knocks the pins from under everything Dafoe has written on the subject.

Will certainly be glad to receive the Sunday Times article when you get it. Meantime will try to locate it here.

Yours very truly,

AM/E.
Encl.

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Churchill on dissolution: Hansard, Fifth Series, vol. 398, March 29, 1944, P. 1516:

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144624

THE QUEBEC CHRONICLE-TELEGRAPH
Quebec, Que.
Saturday, September 30, 1944.

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CHURCHILL UPHOLDS ROYAL PREROGATIVE

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Dr. Forsey is a distinguished Canadian historian and economist, with a particular talent for research, and his book--supported by a wealth of authoritative evidence--clearly proved, in spite of Mr. King's reproaches and the verdict given in his favor by the Canadian electorate, that it is, in fact, the Prerogative of the Crown to dissolve Parliament, or to refuse to do so, and that Lord Byng, as the representative of the Crown, had not exceeded his powers. To stampede popular opinion in this Dominion against any British action, on the ground that it has interfered with Canadian sovereignty, is always easy. But the value and, indeed, the necessity of the particular Prerogative in question has always been obvious to disinterested observers, since there are bound to be rare occasions on which the personal or the partisan interest of the Prime Minister is so strong that he is no longer able to advise the Crown solely as the Chief of State and the Crown, for this reason, is obliged to seek advice elsewhere and to act on its own best judgment, in the national interest.

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As Dr. Forsey was left victoriously in possession of the field, there was no need for others to intervene in this jousting at the time. It is interesting to recall it now, however, since a statement made not long ago in the British House of Commons by no less an authority than Prime Minister Winston Churchill completely knocks the props from under Mr. Dafoe's position, once and for all. This statement is reproduced in the British Hansard, Fifth Series, Volume 398, March 29, 1944, Page 1516. Mr. Price (M. P. for the Forest of Dean) had declared: "He (Mr. Churchill) is claiming for the executive now to dissolve Parliament and go to the country." To this the Prime Minister rejoined:

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Even after the precedent set by Mr. King, therefore, Mr. Churchill still maintains that the dissolution of Parliament is the Prerogative of the Crown and that power to do so does not rest with the Government of the day. Nothing very practical is to be gained by establishing the point now but we feel that it is worth doing, nevertheless, if only as a belated act of justice towards the wrecked career of Hon. Arthur Meighen and the wounded memory of a great hero of World War I--Canada's former Governor-General, Lord Byng.

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144626

3 Lakeview Terrace,
Ottawa, October 3, 1944.

Dear Mr. Meighen,

Thanks very much for your letter of the 26th., and for the copy of my first letter to Ludwig.

I don't think it is even worth while asking Ludwig for permission to publish the correspondence. And, frankly, I think all the objections I originally urged against publication of the first letter still hold, and are reinforced by other objections to the other letters. In the light of pure reason, these objections may have little or no force; but you and I both know that one cannot count on people being purely reasonable, or, indeed, often reasonable at all. I feel quite certain that if the letters were published (assuming any paper would take them), the Free Press and other enemies of both yours and mine would seize gleefully on them as proof of extreme egotism and vanity on my part and vindictiveness against old Dafoe, who is now no longer in a position to defend himself ici-bas. This is, of course, ridiculous; but it would probably appear plausible to most people. Their attitude, I think, would be, "Oh, well, the old man is dead; why pursue him even into the grave?" The answer, of course, is that Ludwig, not I dragged him into this business, and that I have said nothing in these letters, about Dafoe, that I did not say while he was alive, and, indeed, in letters to his own paper. But I do not think people could be trusted to understand the force of that. In any event, I think ~~Ludwig's~~ Ludwig's book has backfired very badly, and done King far more harm than good. Also, thanks to Churchill's statement, and your circulation of it, the essential

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point about the whole business is getting tremendous publicity of the best kind, far better, and far more damaging to King, than anything I could do by publishing these letters. Ludwig would probably also complain bitterly against publication of my letters alone, with their quotations from his; would say it was evading his prohibition of the publication of his letters, and so was unfair. This, in the light of pure reason again, is nonsense; but how many ~~MANAX~~ people will look at things in the light of pure reason? You have great confidence in their capacity for doing so, a confidence which seems to me a triumph of faith over experience; I have far less.

It is possible that King will hot up Ludwig to ask for publication of the letters himself, counting on the possibility that my remarks about Dafoe and Keith will damage me and the views I have been upholding. If Ludwig does ask for permission to publish, I shall of course say yes; one can't refuse a direct challenge; and I should have a first class defence, then, against the charge that I was trying to stir the embers of an old controversy. But I fancy that Ludwig, at least, if not King, will be more prudent.

The Telegram editorial is very good. I suppose you saw the similar one in the Ottawa Journal? If not, let me know, and I'll send a copy. King must be furious. He is also, doubtless, anything but pleased with the Sunday Times review, of which I enclose a copy. I think all this can scarcely fail to have considerable effect; and no one can drag a red herring across the trail by screeches about my intellectual, political or temperamental shortcomings.

By the way, a propos of your remarks to Nichols about Dawson, I think it only right to remind you that Dawson did confess to having considerably changed his opinions; and his review gave evidence of important changes.

No word from Saturday Night. Soucisse writes to say he can answer my "charges".

Yours, S. A. D.

MEIGHEN PAPERS, Series 6 (M.G. 26, I, Volume 222)

PUBLIC ARCHIVES
ARCHIVES PUBLIQUES
CANADA

144628

October 5, 1944.

Dr. Eugene Forsey,
5 Lakeview Terrace,
Ottawa, Ontario.

Dear Eugene:

You have probably noticed some editorials. I sent you one from the Telegram and am now enclosing another from the Stratford Beacon-Herald. This latter paper is the one that had a sentence or so adverse to your book. Afterwards, however, the editor admitted he had not read it. He has made amends and written a very excellent article now.

There has been another in the Ottawa Journal, but I have not yet received it. If you have it I would like a chance to read it. I have also a most commendatory letter on the subject from Senator Dennis, but no editorial.

Below is portion of a letter from Principal Wallace, received today:

> "Your contention regarding the Prerogative of the Crown in the matter of Dissolution would seem to be finally upheld by Churchill's pronouncement. Not that your position was in any special need of reinforcement. My impression was that Forsey's book was generally accepted as an objective study of the highly complex question, and that his conclusions had won general acceptance. Nevertheless it is easy to understand that you feel elated to have Winston come down so unequivocally on your side. My congratulations!"

In case you have not seen Maclean's issue of October 1st, I am sending you an article contributed by Senator Bouchard, which kindly return.

Yours sincerely,

AM/E.

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144629

October 5, 1944.

Dr. E. A. Forsey,
5 Lakeview Terrace,
Ottawa, Ontario.

Dear Eugene:

I just received your letter of 3rd. You may be right about the matter of publication. I shall never set myself up as a judge of the public reaction to anything. I certainly would like if King would call for the publication, but there is no chance of his doing so.

I wrote you the other day for a copy of the Ottawa Journal editorial. Have not seen it yet. The best one to date is that of the Chronicle Telegraph. In case you have not seen it, copy is enclosed.

I was delighted to read the article by Sir Cecil Carr in the Sunday Times. I am sending a copy to Mr. Clarke of Oxford Press, to whom also I sent copy of the Churchill statement. He was very pleased that Churchill made a statement.

The only thing in the article I have a reservation about is the third last sentence on the first page:

> " Some critics dislike the convention because it does not allow a bare majority in the House of Commons to be all-powerful at all times."

I am not sure that this statement is absolutely correct, and, in any event, it rather implies that the discretionary prerogative vested in the Crown or Governor-General may be used for the purpose of correcting Parliament. Its great purpose really is to see that Parliament is maintained supreme.

Yours very truly,

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PUBLIC ARCHIVES
ARCHIVES PUBLIQUES
CANADA

144630

3 Lakeview Terrace,
Ottawa, Ontario.

October 5th, 1944.

Mr. Arthur Meighen, P.C., K.C.,
320 Bay Street,
Toronto, Ontario.

Dear Mr. Meighen:

Thanks very much for your letter of the 3rd, and its enclosures. I am very glad to be able to add the Beacon-Herald editorial to my collection. I expect to send you a copy of the Journal one tomorrow.

I suppose you have seen the one in the Globe and Mail of October 4th? This last refers to one in the Quebec Chronicle-Telegraph. I have just written Mr. Penny for a copy. I think it may have appeared Sept. 30th, which issue is missing from the file in the Reading Room.

I am very glad also to have the excerpt from Principal Wallace's letter, which must have given you very great pleasure.

The Bouchard article is very good. I shall return it as soon as my wife has read it.

Yours sincerely,

Eugene Forsey

EF:RM

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PUBLIC ARCHIVES
ARCHIVES PUBLIQUES
CANADA

144631

3 Lakeview Terrace,
Ottawa, Ontario.

October 10, 1944.

The Rt. Hon. Arthur Meighen, P.C., K.C.,
320 Bay Street,
Toronto, Ontario.

Dear Mr. Meighen:

Thank you for your letter of the 5th and the enclosure. It is certainly the best of the lot, though perhaps I should not say so, as it gives me such a tremendous boost. There are places in it where I trace your hand. I wonder if it will rouse the Free Press to a fresh outburst of venom. I hope King will see it anyway, and have little doubt that his corps of secretaries will bring it to his attention.

I trust the Churchill editorial and the Bouchard speech reached you safely.

I also was disturbed by the sentence you quote from Sir Cecil Carr. Thinking it over, I decided that either (a) he was thinking of cases such as have occurred in Australia where the government was sustained by a majority of one or two, asked for dissolution, was refused, and gave place to another government which was able to carry on; or (b) he was referring to the whole body of conventions in regard to dissolution and the opportunity which they afford in appropriate circumstances for an appeal from an adverse vote in the House of Commons to the electorate. I wish, however, he had made the point a little clearer, but at any rate he has not provided anything for King to hang his hat on.

By the way, the original clipping from the Chronicle-Telegraph reached me this morning.

Yours sincerely,

Eugene Forsey

EAF:RM

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CANADA

144632

October 10, 1944.

Dr. Eugene Forsey,
3 Lakeview Terrace,
Ottawa, Ont.

Dear Dr. Forsey:

I am enclosing copy of an editorial just received from the Publisher of the Vancouver Province. I am also enclosing copy of letter which I have written him acknowledging same.

Yours sincerely,

AM/E.
Encl.

MEIGHEN PAPERS, Series 6 (M.G. 26, I, Volume 222)

PUBLIC ARCHIVES
ARCHIVES PUBLIQUES
CANADA

Nichols 144633

COPY

Toronto, October 10, 1944.

Dear Mr.

I am grateful to you indeed for the very excellent editorial you wrote on Mr. Winston Churchill's pronouncement. Forgive me if I add a few words here--this subject, as you can understand, means more to me than it does perhaps to anyone else in the country.

I just want to emphasize one feature which seems to be completely lacking in appreciation in all comments on the occurrences of 1926. The Governor-General was justified in refusing dissolution and calling upon me only if he had reasonable grounds for believing that I could carry on in the then Parliament. Nearly every comment on this feature contains some assertion to the effect that I was immediately, or almost immediately, defeated, and from such comment the impression follows that perhaps Lord Byng had not such reasonable grounds for believing that I could carry on.

The fact is that the Government did carry on for approximately a week (and that under the circumstances specially referred to hereafter) and carried several divisions against the former Government. Included in the votes decided against the former Government was one censuring such Government for its administration of the Customs Department. This carried, I think, by a majority of ten, or at least of eight. My Government was defeated, or said to have been defeated, by the vote on a resolution declaring that as a matter of law the Government was not properly constituted, its Ministers being Acting Ministers rather than Ministers of Departments drawing salaries. This, of course, was a matter of law, and both the Justice Department and the Privy Council Department had ruled most definitely that the constitution of the Government was quite proper and in order.

What I do want to emphasize, and what certainly ought to be emphasized is:

1. In reality my Government could not have been said to have been defeated at all. The one vote that defeated it was admittedly cast in error in defiance of a pair made. I was not under obligation to accept that as a defeat.

2. The necessary assumption of the Governor-General that I had a reasonable chance of carrying on was surely not based on the belief that I must be able to carry on as Prime Minister in my own enforced absence from the House. This enforced absence was a matter of legal compulsion, which was illogical and was very shortly afterwards done away with by Statute. No Government could long carry on in any Parliament in the absence of its leader.

(over)

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3. Much less could Lord Byng's assumption that I had a reasonable chance of carrying on be said to involve the requirement that I must be able to carry on in the absence from Parliament of my Ministers. If the Resolution on which the unfortunate vote was given was a right and sound Resolution, then it necessarily followed that I must be able to carry on without Ministers because the Resolution said these men were not Ministers and they could not become Ministers until re-elected. Could anything be more grotesquely absurd than that in assuming I had a reasonable chance to carry on, I must be able to do so in the absence of both myself and of all Ministers? In this connection it is most important also to observe that Mr. King declared emphatically in Parliament, at the time, that I had no right to an adjournment, which, of course, meant an adjournment to enable Ministers to be elected.

The great truth that emerges from all these considerations is that the British Constitution, of which ours in every principle is a copy, will only work when carried on by gentlemen. As the attempt to carry on, immediately following the change of Government, was only for the purpose, and frankly declared to be only for the purpose of dealing with a very small amount of unfinished and uncontentious business, to avoid the great expense and inconvenience of bringing Members back from all over Canada for that purpose two or three months after, there obviously should have been no attempt to defeat the Government while engaged in that temporary duty and in that alone. This is especially and emphatically true in view of the representations of the Progressives made to the Governor-General at the time, requesting that the business of the Session be finished, and at least indicating, if not directly promising, their support to that end.

I have always been most anxious that my friends at least understand the considerations set out in this letter.

Yours very truly,

(Signed) Arthur Meighen.

AM/E.

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CANADA

144635

October 10, 1944.

Mr. M. E. Nichols,
Vice-President and Publisher,
The Vancouver Daily Province,
Vancouver, B. C.

Dear Mr. Nichols:

I am grateful to you indeed for the very excellent editorial you wrote on Mr. Winston Churchill's pronouncement. Forgive me if I add a few words here—this subject, as you can understand, means more to me than it does perhaps to anyone else in the country.

I just want to emphasize one feature which seems to be completely lacking in appreciation in all comments on the occurrences of 1926. The Governor-General was justified in refusing dissolution and calling upon me only if he had reasonable grounds for believing that I could carry on in the then Parliament. Nearly every comment on this feature contains some assertion to the effect that I was immediately, or almost immediately, defeated, and from such comment the impression follows that perhaps Lord Byng had not such reasonable grounds for believing that I could carry on.

The fact is that the Government did carry on for approximately a week (and that under the circumstances specially referred to hereafter) and carried several divisions against the former Government. Included in the votes decided against the former Government was one censuring such Government for its administration of the Customs Department. This carried, I think, by a majority of ten, or at least of eight. My Government was defeated, or said to have been defeated, by the vote on a resolution declaring that as a matter of law the Government was not properly constituted, its Ministers being Acting Ministers rather than Ministers of Departments drawing salaries. This, of course, was a matter of law, and both the Justice Department and the Privy Council Department had ruled most definitely that the constitution of the Government was quite proper and in order.

(over)

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144636

What I do want to emphasize, and what certainly ought to be emphasized ist

1. In reality my Government could not have been said to have been defeated at all. The one vote that defeated it was admittedly cast in error in defiance of a pair made. I was not under obligation to accept that as a defeat.

2. The necessary assumption of the Governor-General that I had a reasonable chance of carrying on was surely not based on the belief that I must be able to carry on as Prime Minister in my own enforced absence from the House. This enforced absence was a matter of legal compulsion, which was illogical and was very shortly afterwards done away with by Statute. No Government could long carry on in any Parliament in the absence of its leader.

3. Much less could Lord Byng's assumption that I had a reasonable chance of carrying on be said to involve the requirement that I must be able to carry on in the absence from Parliament of my Ministers. If the Resolution on which the unfortunate vote was given was a right and sound Resolution, then it necessarily followed that I must be able to carry on without Ministers, because the Resolution said these men were not Ministers and they could not become Ministers until re-elected. Could anything be more grotesquely absurd than that in assuming I had a reasonable chance to carry on, I must be able to do so in the absence of both myself and of all Ministers. In this connection it is most important also to obse5ve that Mr. King declared emphatically in Parliament, at the time, that I had no right to an adjournment, which, of course, meant an adjournment to enable Ministers to be elected.

The great truth that emerges from all these considerations is that the British Constitution, of which ours in every principle is a copy, will only work when carried on by gentlemen. As the attempt to carry on, immediately following the change of Government, was only for the purpose, and frankly declared to be only for the purpose of dealing with a very small amount of unfinished and uncontentious business, to avoid the great expense and inconvenience of bringing Members back from all over Canada for that purpose two or three months after, there obviously should have been no attempt to defeat the Government while engaged in that temporary duty and in that alone.

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 Toronto, October 10, 1944.

Mr. M. E. Nichols,
Vancouver, B. C.

This is especially and emphatically true in view of the representations of the Progressives made to the Governor-General at the time, requesting that the business of the Session be finished, and at least indicating, if not directly promising, their support to that end.

I have always been most anxious that my friends at least understand the considerations set out in this letter.

Yours very truly,

AM/E. Arthur Meighen.

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CANADA

144638

3 Lakeview Terrace,
Ottawa, Ontario.

October 17, 1944.

Rt. Hon. Arthur Meighen, P.C., K.C.,
320 Bay Street,
Toronto, Ontario.

Dear Mr. Meighen:

Thanks very much for the copy of your letter to Mr. Nichols, of which I hope he has taken careful note.

I am amused to see that even the Communists in Ontario are now explicitly admitting the right of the Lieutenant-Governor to refuse a dissolution, if an alternative Government can be found!

I am enclosing copy of a letter I have just addressed to Grattan O'Leary.

Incidentally, did you ever get a copy of my letter to Saturday Night in reply to Soucisse? I sent one to you at the same time that I sent it to Sandwell. I have not heard a syllable from him about it and it occurs to me that the copies I have sent to Toronto may have gone astray. Other copies sent to St. John and Montreal at the same time (Sept. 23rd) reached their destination. If yours did not arrive, please let me know and then I shall see whether Sandwell's reached him.

Yours sincerely,

Eugene Forsey

EF:RM

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CANADA

COPY

144639

- 1 -

3 Lakeview Terrace,
Ottawa, Ontario.

October 17, 1944.

Mr. M. Grattan O'Leary,
Editor,
The Ottawa Journal,
Ottawa, Ontario.

Dear Mr. O'Leary:

Glancing at some old copies of the Journal the other day, I noticed two editorials in the issue of August 8th which raise certain points to which I venture to draw your attention.

(1) The editorial "In a Political Way" states that the Dominion Government's price and wage ceiling policies "were brought to Parliament, adopted by Parliament". This is surely an error? The policies in question, as far as I am aware, were and are embodied in Orders-in-Council and have never been submitted to and adopted by Parliament. I checked on this point some little time ago with Mr. Hanson when he was Leader of the Opposition and he confirmed my impression in every respect, except that he called my attention to a slip in the date of one Order-in-Council. If these policies have subsequently been embodied in Acts of Parliament, I should be very much obliged if you could let me have a note on the subject.

(2) In the editorial "The Governor-General", there appears the following passage:

> "He cannot choose the Prime Minister or other ministers. He cannot dismiss them. He cannot dissolve Parliament. He cannot refuse his assent to a bill. He cannot attend meetings of the Cabinet. He cannot take advice from persons outside the Cabinet."

I venture to suggest that almost all of these statements are put in too unqualified a form. Undoubtedly, you have stated correctly the normal position, but as recently as 1931, the King, in the special circumstances of that year, chose Mr. Ramsay MacDonald to head the National Government, and in 1923 he chose Mr. Baldwin rather than Lord Curzon. Earlier examples are fairly numerous. I see no reason why the powers of the Governor-General in this respect would be less than those of the King. Certainly the Governor-General exercised some discretion in the choice of Sir John Abbott and Sir Mackenzie Bowell, and I am not aware of any authoritative announcement to the effect that such powers have lapsed in Canada. They have certainly not lapsed in England. It would be easy to quote numerous authorities on the position in England. In the normal working of the two-party system, if a government is defeated, the Crown is bound to call on the Leader of the Opposition, but when there are several parties, or when a government is not defeated, the Crown may, in certain circumstances, retain some discretionary power to choose the Prime Minister. The history of Australia is particularly instructive on this point.

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144640

Mr. M. Grattan O'Leary,
Ottawa, Ont.

Oct. 17, 1944.

On the Crown's power to dismiss Ministers, force a dissolution of Parliament against the wishes of its advisers, or refuse assent to Bills, I suggest that you have a look at Evatt's "The King and His Dominion Governors".

On taking advice from persons outside the Cabinet, I think there is ample evidence that Queen Victoria in moments of crisis frequently did this, and I know of no authoritative statement that suggests this power has lapsed. I have been informed on what I think unimpeachable authority that at the time of Mr. King's resignation in 1926, Lord Byng consulted both Sir Robert Borden and Mr. Eugene Lafleur on the constitutional question of refusal of dissolution. Clearly this power has to be exercised with great care and good judgment; equally clearly it does not in any way infringe the principle of ministerial responsibility because if the Crown wishes to act on the advice of these outside persons, and against the advice of the Cabinet, it must either persuade the Cabinet to change its mind and accept responsibility for the other course of action, or find a new Cabinet which is prepared to tender and accept responsibility for the advice in question; and any such new Cabinet would, of course, have to secure the support either of the existing House of Commons or of a new House.

I think it well to mention these things to you because it seems to me that with the growth of a multiple party system in Canada, the reserve powers of the Crown may be brought into use here much oftener than in the past, just as they have been in Australia and for the same reason. It would therefore be unfortunate if the public were led to suppose that these very necessary and valuable powers had ceased to exist.

I need hardly say that I was very pleased with your recent editorial on Mr. Churchill's statement on refusal of dissolution, and with your kind reference to my book.

With best wishes,

Yours sincerely,

Eugene Forsey:RM

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144641

October 18, 1944.

Dr. Eugene Forsey,
3 Lakeview Terrace,
Ottawa, Ontario.

My dear Eugene:

I am very glad to have your letter of 17th and the chance to read your comments written to Grattan O'Leary.

Grattan is sometimes hasty, and, while very bright and very likeable, is not just the most conscientious worker. I have not the least doubt he will accept your corrections, because what you say is right beyond all question.

Yes, I certainly received the copy of your letter to Saturday Night, dated September 22nd. Could not believe I had not acknowledged receiving it until Miss Edmondson so advised me. The failure to acknowledge came from my sending it over temporarily to Jim Macdonnell, who showed it to George Grant. On its return I forgot that I had not already written you.

It is a most exhaustive and conclusive presentation, and, while Mr. Soucisse will likely attempt reply, as that is after the manner of the grievance-seeker, there will in reality be no effective answer.

I sometimes wonder how you get the time to do all the work you accomplish.

While writing, let me send you a half-dozen copies of the Quebec Chronicle Telegraph editorial which you may like to have. I got a small stack of them.

Yours sincerely,

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144642

3 Lakeview Terrace,
Ottawa, October 20, 1944.

Dear Mr. Meighen,

Hardy, the Parliamentary Librarian, sent me a note the other day, that he had just seen some interesting comments on my book in an article by Marriott on "The Machinery of Government", in the October number of the Quarterly Review. I looked it up to-day in the Parliamentary Library. The whole article is very interesting and good. The paragraphs on my book, which come near the beginning, are most kindly. Marriott quotes my statement that Byng's action was "not only entirely constitutional, from start to finish, but essential to the preservation of constitutional liberty", and adds: "In this judgment I cordially concur."

I thought you would be glad to hear of this. I am communicating it also to another quarter, where I think it may do good.

Yours sincerely,

Eugene Forsey

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144643

October 21, 1944.

Dr. Eugene Forsey,
5 Lakeview Terrace,
Ottawa, Ontario.

My dear Eugene:

I am so glad that Harriott has written as stated in yours of 20th. Have written down to try to get the Quarterly Review and will eagerly read the entire article.

Yours sincerely,

AM/E.

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144644

3 Lakeview Terrace,
Ottawa, October 21, 1944.

Dear Mr. Meighen,

Thanks very much for your letter and the extra copies of the Chronicle-Telegraph editorial, which I am very glad to have. It was certainly far the best of the lot.

In writing yesterday, I forgot to say that Marriott, in his article, quotes the Churchill statement. He also includes the information, which you no doubt knew, but which I did not, that Sir Cecil Carr is Mr. Speaker's Counsel and an authority on delegated legislation and administrative law. Two books of his on those subjects, I find, are in the Parliamentary Library. I have not read them; perhaps in due course I may be able to get round to it. It cheers me very much that you think I get through a good deal of work. I feel I get very little done outside of office routine, and domestic jobs.

Glad you liked what I wrote in reply to Soucisse, and am sorry to have bothered you about it. I had a very nice letter about it from Col. Currie, late Deputy Minister of National Defence, to whom I had sent a copy. Jean-Charles Harvey is doing an excellent job on these Nationalist gentry in Le Jour; I hope it is producing some effect.

Yours sincerely,
Eugene Forsey (own)

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144645

It now appears I shall be occupied the whole day and evening when I am in Toronto Nov. 4, so probably shan't see you.

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144646

3 Lakeview Terrace,
Ottawa, October 26, 1944.

Dear Mr. Meighen,

Have just got from the Parliamentary Library Clokie's "Canadian Government and Politics". This, very much between ourselves, is the book whose original ms., you may recall, was submitted to me for criticism by a publisher (not the one who now issues it). I noted 165 errors of fact or misinterpretations. The book contains about 69 of the ones I noted, the rest having been corrected. (Incidentally, Clokie catches me out on one point.) The discussion of 1926 is bad, inexcusably so in view of all the explanations Clokie has had from me on the points involved. There is a fairish amount of other stuff which is pretty objectionable.

The reason I am bothering you with all this is that I suspect this book may get adopted as a school and university text book, and I am wondering whether that should be allowed to happen without some challenge. It occurred to me that you might be willing to look at a memorandum from me on the errors, and consider whether they were serious enough to warrant any action. On the other hand, you might prefer merely to look up the book itself and especially certain pages which I might indicate to you as (in my judgment) particularly open to objection. It is, of course, quite possible that if you read the book itself you will spot various mistakes which escaped me, or which I just don't know enough to catch. At any rate, I think it is worth at least asking you about the matter, as I should prefer not to have a new generation of Canadian students inoculated with nonsense on this whole subject, and especially nonsense which would contribute to

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restore King's reputation.

If you think the thing requires action, you might be able to make suitable suggestions in some quarters, and I in others.

You will enjoy the concluding phrase in Emil Ludwig's letter to Time, October 16, à propos of their attack on him, September 25: "The historical truth is much more important than any political issue." Isn't that really superb? It is worthy to rank with King's expressions of pious horror (in his interview with Norman Smith) about the people in public life who pervert and distort and misrepresent the facts and engage in detraction. "It pains me", says this worthy; and, says Smith, "You could see it really did pain him."

Yours sincerely,

Eugene Forsey

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144648

October 27, 1944.

Dr. Eugene Forsey,
5 Lakeview Terrace,
Ottawa, Ontario.

Dear Eugene:

I have yours of 26th. I am just as interested as anyone can be in trying to see that King does not by indirection (as no doubt he is trying) get the stain removed from his conduct in 1926. I suggest you send me the memorandum on the errors with a note as to such of them as have been corrected in his present book. I am particularly busy just now and would like to avoid reading the book if I could.

Anything I can do will probably be in the direction of seeing that it is not accepted as a subject in the school system. Am not so sure that my influence will be very great in University circles. Those circles—at least the active part of them—are more friendly to your ideas than mine in matters economic, and would probably listen to a representation from you better than one from me.

However, I have not the least objection to putting in a spoke where I can, as long as I can make the reason for it thoroughly well grounded.

From memory, I do not think you have published your memorandum, and publication might have a very excellent effect—or perhaps better, a re-written memorandum referring only to present errors.

Yes, one cannot help bowing in reference before the exalted ethics of Mr. Ludwig. I do not know Norman Smith very well, but from what I do know of him, would consider he would be about the easiest of all the newspaper men outside the Winnipeg Free Press sycophants to be taken in by the moralist of the East Block.

(over)

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Have read the Quarterly Review article and have made copies of all that refers to you. It is grand.

Yours sincerely,

AM/E.

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CANADA

144650

THE QUARTERLY REVIEW

October 1944

Extract from
"THE MACHINERY OF GOVERNMENT"
By Sir J.A.R. Marriott

.....

Another prerogative personally belonging to the Sovereign is that of assenting to or refusing a Dissolution of Parliament. So lately as March 29 of this year Mr. Churchill strongly repudiated the idea that the Prime Minister has the right to dissolve Parliament. 'This,' he said, 'is one of the exceptional cases where the power of the Crown comes into play, when in doubtful circumstances the Crown would refer to other advisers as has been done on several occasions.' Mr. Asquith emphasised the same point when, in December 1923, Mr. Baldwin's appeal to the electorate on Protection had met with an ambiguous response. No one of the three parties could command an absolute majority in the House of Commons, and the question of a second appeal to the Electorate was discussed. Had Mr. Baldwin, before resigning office or Mr. MacDonald after accepting it, been so ill advised as to ask the King for a dissolution of Parliament the King might properly have refused his request. Mr. Asquith, whose decision had given the Labour Party a sufficient though precarious majority, stated the Constitutional doctrine with characteristic clarity:

> 'The dissolution of Parliament,' he said, 'is in this country one of the prerogatives of the Crown. It is not a mere feudal survival, but it is part, and I think a useful part of our Constitutional system for which there is no counterpart in any other country..... The notion that a Minister who cannot command a mauority in the House of Commons.....is invested with the right to demand a dissolution is as subversive of Constitutional usage as it would, in my opinion, be pernicious to the general and permanent interests of the nation at large.'

... question of the right of the Crown in this matter has late... examined with exemplary industry and erudition by a Canadian scholar. Mr. Forsey's admirable monograph is naturally concerned primarily with the exercise of this Royal Prerogative in a Dominion. His conclusion is very definitely in favour of jealously guarding the right of the Crown as essential to the effective functioning of the parliamentary type of democracy. To establish that contention Mr. Forsey has examined the parliamentary history of Great Britain since 1784, of the Six Australian Colonies, as well as of the Commonwealth, of New Zealand, of Cape Colony and the Union of South Africa, and of the Canadian Parliaments, Provincial and Dominion. To the proceedings during the South African crisis of 1939 he has given special attention, and even more to the action of Lord Byng as Governor-General of Canada in 1926. In that year Lord Byng, it will be recalled, refused a Dissolution to Mr. Mackenzie King, and shortly afterwards granted one to Mr. Meighen, the conservative successor to Mr. King.

(over)

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Many commentators have reproached Lord Byng with unconstitutional conduct. Mr. Forsey, on the contrary, holds Lord Byng's action to have been 'from start to finish not only entirely constitutional but essential to the preservation of Constitutional liberty.' In that judgment I cordially concur.

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THE CROWN AND PARLIAMENT

The Royal Power of Dissolution of Parliament in the British Commonwealth. By Eugene A. Forsey. (Oxford, 21s.)

BY SIR CECIL CARR

When the Long Parliament of 1935 ends at last, and peace brings back party politics, new issues, new groupings and new electors may some day give us (not for the first time in our history) a House of Commons which does not represent the country, or a Ministry which does not represent the House of Commons. The remedy for such deadlocks is what Dicey numbered among the conventions of our constitution—the discretionary power of the Crown to dissolve Parliament.

When does the Crown grant or refuse a dissolution? When can a Prime Minister's advice be disregarded? Since, in Balfour's phrase, no constitution can stand a diet of dissolution, when is a defeated Government entitled to a second dissolution? If the existence of a great political issue be material, how is the size measured?

To the study of these problems Mr. E. A Forsey contributes a masterly survey of the exercise of the Royal prerogative throughout the British Commonwealth. Starting with the crisis of 1784 and the age of Burke, he has analysed over a hundred grants of dissolution in special circumstances and over fifty refusals to dissolve, summarising the views of commentators (Professor Berriedale Keith's various opinions can seldom have received so close attention) and adding comments of his own. As Sir John Marriott remarks in a just and generous foreword, this power of the Crown has never before been so thoroughly examined, nor can it ever be necessary again to go over the ground covered down to 1939.

This function of the Sovereign (or his representative) is notoriously delicate. He must not seem to be the ally of a party. He must decide and he must make no mistake. In 1784 George III proved right in calling Pitt and his colleagues to office against the wishes of the House of Commons. In 1834 William IV proved wrong when he similarly called in Peel and Wellington.

x x x x x

Mr. Forsey, a former Rhodes scholar from Canada, makes a detailed and convincing defence of a more modern decision—Lord Byng's in 1926, when Mr. Mackenzie King was refused the dissolution to which he protested he was entitled under British practice and Mr. Meighen was sent for. Attacks on Lord Byng by the losing side (as also on Sir Patrick Duncan for refusing General Hertzog a dissolution in 1939) show how hard it is to protect the exercise of the prerogative from the dust of the political arena. The rules of the game, of course, are not universally agreed. Asquith's exposition in 1923 did not go unchallenged. Some critics dislike the convention because it does not allow a bare majority in the House of Commons to be all-powerful at

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at all times. Others would substitute a Parliament sitting for fixed periods like Congress at Washington, where our type of dissolution cannot occur. Private members grumble that the threat of dissolution with its emphasis on votes of confidence, intensifies party discipline and stifles independence.

Despite these discontents, the system will survive if we can preserve the best traditions of its working—good honest cricket with an innings for each side in turn and such impartiality of umpiring as Mr. Forsey's pages happily exemplify.

(From the London Sunday Times, August 20, 1944.)

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144654

October 28, 1944.

Mr. John Bird,
The Winnipeg Tribune,
Winnipeg, Manitoba.

Dear Mr. Bird:

Since writing you last, there have been certain further developments which I know you will be desirous of having.

Enclosed is copy of an article written by Sir Cecil Carr in the "Sunday Times" of August 20th, in which Forsey's book receives unqualified endorsation. I find that Sir Cecil Carr has been for many years Counsel to the Speaker of the British House. It is hard, therefore, to think of any verdict that could be more authoritative.

There is as well and article in the "Quarterly Review" of October 1944, by Sir J.A.R. Marriott. Marriott wrote the introduction to Forsey's book and a fine introduction it was. He has been recognized as the leading authority among writers on this subject for a long time. Attached is an extract from this article. The whole thing is very carefully done and well worth reading.

Yours very truly,

AM/E.
Encl.

Arthur Meighen.

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144655

October 28, 1944.

Mr. Arthur G. Penny,
Quebec Chronicle-Telegraph,
27 Buade Street,
Quebec, P. Q.

Dear Mr. Penny:

Since writing you last, there have been certain further developments which I know you will be desirous of having.

Enclosed is copy of an article written by Sir Cecil Carr in the "Sunday Times" of August 20th, in which Forsey's book receives unqualified endorsation. I find that Sir Cecil Carr has been for many years Counsel to the Speaker of the British House. It is hard, therefore, to think of any verdict that could be more authoritative.

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Yours sincerely,

AM/E.
Encl.

Arthur Meighen.

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144656

October 28, 1944.

Mr. Arthur R. Ford,
London Free Press,
London, Ontario.

Dear Arthur:

Since writing you last, there have been certain further developments which I know you will be desirous of having.

Enclosed is copy of an article written by Sir Cecil Carr in the "Sunday Times" of August 20th, in which Forsey's book receives unqualified endorsation. I find that Sir Cecil Carr has been for many years Counsel to the Speaker of the British House. It is hard, therefore, to think of any verdict that could be more authoritative.

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Yours very truly,

AM/E.
Encl.

Arthur Meighen.

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144657

3 Lakeview Terrace,
Ottawa, October 30, 1944.

Dear Mr. Meighen,

Shall get at the memorandum as soon as possible; may be able to bring it up to Toronto at the week end. I think a fresh note on the errors which remain in the printed version would be best. Officially, of course, I am not supposed to have seen anything else; the report on the ms. was highly confidential.

If you have an extra copy of the paragraphs from the Quarterly Review article, I should be very glad to have it. I suppose Nichols sent you the recent note in the Current Affairs column of the Province?

In haste,

Yours sincerely,

Eugene Forsey

Copy sent Oct 31/44
EMF

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144658

3 Lakeview Terrace,
Ottawa, October 30, 1944.

Mr. M.E. Nichols,
Editor,
Vancouver Province,
Vancouver,
British Columbia.

Dear Mr. Nichols,

Thank you very much for the clipping from the Province of October 23.

The suggestion about King's possible course if he cannot have his own third best is interesting. There is, of course, no limit to the man's brasenness, and I dare say he might proffer the advice to send for Coldwell, even proffer it unsolicited. I think, however, that it should be stated emphatically that:

(a) if he resigns, he has no right even to proffer advice as to his successor, let alone to have it accepted. The Governor-General might or might not choose to ask for his advice on the subject; that is entirely within His Excellency's discretion.

(b) even if the Governor-General chooses to ask for Mr. King's advice, he is not obliged to follow it.

There is not the slightest doubt about either of these propositions. Both can be supported by dozens of quotations from authorities on the British Constitution, writers of all shades and all periods from 1800 on.

I think it is fairly well established also that if a Government is defeated, it is the duty of the Governor-General to call upon the Leader of the Opposition, whoever he may be. Certainly Dr. Jennings, in his "Cabinet Government", lays this down as the modern convention in Britain. It seems to me obviously proper and common sense. I cannot believe that the C.C.F. would challenge it; they would be putting their necks in a noose if they did. Of course if the Leader of the Opposition sees fit to decline, then, in some circumstances, the leader of a third party might properly be called upon. But unless the Leader of the Opposition has been called on, recourse to a third party, whether on the advice of the retiring Prime Minister or otherwise, would be improper; it would lead to all sorts of abuses and accusations of bias and partisanship against the Governor.

All the above applies to Great Britain, but I know of no reason for suggesting that it does not apply equally here. Certainly Sir John A. Macdonald considered that (a) and (b) applied here. Only the very strongest evidence to the contrary could upset the presumption that the British rule does apply in Canada, particularly where, as in this case, there is very solid reason in public policy why it should. Just fancy what a rumpus it would have created in Britain in January 1924 if Baldwin had arrogated to himself the right to advise the King to pass over

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over Ramsay MacDonald and call on Asquith? Similarly, fancy the rumpus there would be here from the C.C.F. if it got the largest or second largest number of seats and a retiring Liberal or Progressive Conservative Prime Minister advised the selection of the leader of a third and smaller party?

If necessary, I can supply some cogent quotations.

Kindest regards.

Yours sincerely,

Enclosure from original ms. of my book.

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Mr. King, in his letter of July 3, 1926, told Lord Byng that he (Mr. King) "could not assume the responsibility of advising Your Excellency to send for [Mr. Meighen]." (Dawson, Constitutional Issues, p. 75) There was no need for him to assume any such responsibility. If there is one point in British constitutional practice which is firmly established, it is that the Crown is not obliged to accept, or even to ask, the advice of an outgoing Prime Minister as to who his successor should be, even if the same party remains in power. (The authorities for this statement are legion; see, for example, Jennings, Cabinet Government, pp. 28-37, 40.) When Mr. Gladstone finally retired, in 1894, Queen Victoria did not even ask for his advice as to his successor, and not even the G.O.M. had the temerity to offer the advice unasked. (Morley, Gladstone, vol. III, pp. 512-514.) See also Parkes, Fifty Years in the Making of Australian History, pp. 232-240, for an admirable statement.

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144661

3 Lakeview Terrace,
Ottawa, December 18, 1944.

Dear Mr. Meighen,

I have now nearly finished with the memorandum on Clokie, and hope to send it to you by way of Christmas card.

Meanwhile, there are several points I have run across recently in regard to other matters on which I should like to have your comments.

The first is a statement by Duplessis that "It is customary for the Federal Government to consult with the Provincial Government about the nomination of the representative of His Majesty" in the province. (This is à propos of the appointment of a successor to Fiset.) This is news to me. I was under the impression that when Douglas, of Saskatchewan, a few months ago, made a similar claim, King replied tartly that there was no foundation for anything of the kind. What are the facts?

The second point is a statement in an article which I understand is being circulated to the C.C.F. papers across Canada as follows: "When a man like R.B. Bennett, who was born in Canada, and received everything from his country, honors and fortune, said, at a farewell banquet given him prior to his departure for England, 'I am going home', and another former prime-minister of this country, Arthur Meighen, answered 'I envy you'; it was generally interpreted in Quebec as a complete lack of patriotism on the part of men who are supposed, by their standing to represent English-Canadians in this country."

The third is from the same article: "The discriminative way in which conscription was applied in 1917, which has been proven from many sources, namely in the 'Memoirs' of Sir Robert Borden has left a bad taste in their [French-Canadians'] mouth."

I should be very much surprised to learn that there was any truth in the former tale; from my recollection of Borden's Memoirs, I am perfectly certain that they contain nothing to substantiate the latter, and I should be much interested to know what the other "many sources" are. I propose to find out, if I can, by challenging the writer. But I should be very much interested to have your comments on both tales.

On recent political events I shall not comment. I think you can surmise my feelings. You will, perhaps, be interested to know that in the closed session of the C.C.F. Convention on the subject of conscription, in the course of a very frank discussion, with about 40 French-Canadian delegates present and many of them taking an active part, there were just two Nationalist speeches; the rest, whether they agreed with the majority or not, based their arguments [illegible] on general, not French-Canadian Nationalist, grounds. This I found very heartening. Of course this is not for publication, but I think there is no harm in my mentioning it privately.

Am rather swamped with work at the moment, so shall cut this short.

Yours sincerely,

Eugene Forsey

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144662

December 21, 1944.

Dr. Eugene Forsey,
5 Lakeview Terrace,
Ottawa, Ontario.

My dear Eugene:

I am always glad to have a letter from you on any subject at all, and am glad of the opportunity of answering the questions posed in yours of December 18th.

I know of no authority for Duplessis' statement. The only appointment of Lieutenant-Governor that I had to make while Prime Minister was in Ontario. I appointed Colonel Cockshutt and did so without consulting the Government of Ontario. My reason for being quite confident there is not such practice is as follows:—True, the Dominion Prime Minister, always, of course, after consultation with his colleagues, virtually chooses the Governor-General of Canada. This has been the case as long as I can remember, and probably has been so since Confederation. The usual practice was to submit some names of those eligible and have us make a choice. We were, of course, quite free to make suggestions as well. This was practicable because, as respects Goverments in Canada, His Majesty on the advice of the British Government has no politics. The very contrary, of course, is the case in Canada. Were such a rule to apply, the Dominion Government would have to consult those opposed to them in many cases, and you can imagine how likely they would be to take their recommendation. Certainly it is absolutely wrong to say that the Dominion has been in the habit of acting at all on the advice of Provincial Governments in the exercise of this prerogative.

I had not seen the canard referred to as having appeared in the C. C. F. papers across Canada, about Bennett saying at a farewell banquet that he was going home and my answering "I envy you." This is just malicious fiction. I was present at the banquet and heard his speech. He made no such statement. What I said I had later put together and printed, and a copy is enclosed. We have certainly a shocking level of politics in this country.

(over)

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Answering your question as to the discriminative way in which conscription was applied in 1917, I cannot do better than enclose copy of a letter I wrote on this subject to Gustave Monette, on May 2, 1942. Please read this copy just at this point and then contemplate the following further comments:

I was in the House constantly throughout the Session of 1918. The only criticism I ever heard of the enforcement of conscription—at least all I can remember hearing and I am sure my memory is right—was one made by Sir Wilfrid Laurier in that year. A miniature riot had taken place in Quebec. One of the requirements in the enforcement of conscription was that every man not in uniform between certain ages (that is between the age limits then immediately under call) was required, after a certain time, to procure and carry on his person always an exemption certificate. The officers engaged in the enforcement in the Quebec area located two men in a pool room who had not their certificates. They claimed to have them at home, but were placed in confinement until these could be procured. The riot was an effort to get them out of confinement. Immediately they procured the exemption certificates they were released. Sir Wilfrid Laurier claimed in the House that if we had had the right stamp of man enforcing, he would have given them a chance to go home and get their certificates. Sir Robert Borden's answer was immediate and conclusive. If time should be given for men to go home and get certificates, then the law requiring them to carry such certificates on their persons was a dead letter. The necessities of enforcement required such a law, and, therefore, required its enforcement. The same law applied at the time in, I think, all the Provinces, as respects a man carrying his driving licence. The same law applies now as respects a man carrying his registration certificate and is enforced the same way. Sir Wilfrid attempted no reply and I am confident from memory no one else did. The same procedure was, of course, adopted throughout Canada.

In the above connection I might add that some years ago in Montreal on a stormy day, Ted's car slid into the back of a street car. His machine was damaged a little, but the street car certainly was not. He did not have his driving licence and was carried to jail with a bunch of others accused of theft, etc., and kept there all forenoon until he was able to get his licence. He made no complaint.

I certainly read, and read carefully, Sir Robert Borden's Memoirs. There was nothing whatever in them to justify the statement contained in your paragraph on this subject. The so-called "many sources" exist only in the imagination of the writers.

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144664

Dr. Eugene Forsey,
Ottawa, Ontario.

I would have been very interested indeed to have heard your comments on recent political events. I make only this one:—The Resolution of so-called "confidence" originally proposed by King was a tricky and dishonest Resolution. The only way it carried even an implication of confidence was the use of the words "its policy of." When these words were struck out, there was nothing left that could be characterized as a declaration of confidence in Government policy of any kind. Further, Mr. Coldwell, who moved the striking out of the words, intimated before, and I believe at the same time as well, that he could not support the Government war policy as it stood. Indeed, if such is not the case he had no reason for moving that the words be struck out. King, therefore, accepted the votes of men—and a lot of them—who were definitely opposed to his policy and said so, as being votes of confidence in that policy. A course more utterly lacking in self-respect could not be conceived, nor could more dishonest conduct be conceived. I am astonished that Coldwell should now be applauding the course King took in accepting the Resolution.

Yours very truly,

AM/E.
Encl.

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144665

3 Lakeview Terrace,
Ottawa, December 27, 1944.

Dear Mr. Meighen,

Herewith the notes on Clokie's "Canadian Government and Politics". When you have read them you may or may not feel that the errors of fact and interpretation are important enough to warrant any intervention by either of us. If you do, please let me know, as I can then get in touch with the Saskatchewan Minister of Education, with whom I may perhaps have some influence. Some of the errors are, to my mind, very serious; but then they are sprinkled through a book which is otherwise, I think, reasonable enough.

The memorandum is for your information only, though if you think fit you may show/confidentially to anyone you think ought to see it and can be trusted to keep its authorship to himself. The reason I make this stipulation is that the Oxford Press asked me to go over the ms. originally, and I sent in a detailed report on it; and Mr. Clarke has given me to understand that this whole transaction must be kept very quiet. He has also strongly approved my refusal to review the book, in view of my previous connection with it. I think I am therefore under an obligation to him and to the Oxford Press not to let my comments become public. In any event, my name is very unlikely to carry any weight in the circles where you will be using the information contained in the memorandum (if you do decide to use it). My comments must stand or fall on their own merits.

I read with interest Dr. Bruce's speech in the House a few weeks ago. I thought I detected a style other than his own in certain crisp passages. Perhaps you may have detected still another style in other passages, not so crisp, but not, I hope, without some usefulness.

Our best New Year's wishes to you and Mrs. Meighen and your family.

Yours sincerely,

Eugene Forsey

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144666

3 Lakeview Terrace,
Ottawa, December 29, 1944.

Dear Mr. Meighen,

Many thanks for your very full and informative letter of the 21st., with its enclosures, which arrived yesterday. I am very glad to have the material, and can make good use of it.

The article from which I quoted has not yet appeared (as far as I know).x I saw an advance copy, and at once wrote you and also the author of the article. I had a reply from him also yesterday. He is a decent person, and I think genuinely misinformed. He is going to check his sources and let me know the results. Meanwhile, I am going to send him a summary of the information you have sent me. Whether the article can be stopped or revised at this stage I do not know. If it is not, I shall write the C.C.F. papers as soon as it appears, in suitable terms.

I think the newspapers, and the campaign of deliberate misrepresentation in Quebec for the last 27 years, are responsible for the production of such articles as the one in question, written by people of whose good faith I have not the slightest doubt. I had heard this "I am going home" story before, but hitherto only in versions which did not actually give your name. This was the first chance I had had to nail it down, and I took it promptly.

Yours sincerely,

Eugene Forsey

P.S. The date of my next visit to Toronto has been changed to January 17.

x Have just heard it has appeared in the Manitoba Commonwealth, but I have not been able to find it.

E. F.

I have pointed out to the author of the article not only what you have said but also: (a) that Fiset was Deputy Minister of M. & D. in 1917-18; (b) that the Militia Act of 1868 was introduced by Cartier and administered by L.-C. Ministers from 1868 to 1873 and 1878 to at least 1891.

E. F.

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thanks for them. thought you might like to have them back. (Brebner correspondence)

my Note on Mackenzie is to appear in the forthcoming Canadian Historical Review; and my article on the extra Senators (with a slight change in the first paragraph) in the May Canadian Journal of Economics.

E.A.D.

144667

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144668

January 2, 1945.

Dr. Eugene Forsey,
3 Lakeview Terrace,
Ottawa, Ontario.

My dear Eugene:

I had to delay until the week-end reading carefully your comments on Professor Clokie's book. Perhaps, first, I had better answer your question. I certainly do think the errors of fact and interpretation are important enough to warrant intervention. In fact, it is hard to conceive how any man who dares to hold himself out to the world as an author could make a more lurid display of errors in both fields. You say that on the whole the book is reasonable enough, but it passes my comprehension how any man guilty of the twaddle which you have here unmasked could work his way to a reasonable literary product of any kind.

I shall make a few comments on some individual paragraphs.

Without any question you are right in the first paragraph. Admittedly there is nothing more now that Canada can ask that is in the nature of a concession from the British Parliament. In 1920 and '24 there was--on the subject of extra-territoriality. I am personally disposed to think that the British Parliament will follow any address from the Parliament of Canada as to amending the B. N. A. Act and that even though there might be objection, unanimous or almost unanimous, from Ontario or Quebec. There could not, of course, be unanimous opposition from both, for in that event the Address could not pass. The theory of the contractual nature of our so-called "Constitution Pact" cannot be supported and I do not think could appeal to the British Parliament now. What Clokie says is, therefore, just wrong.

His references on the general subject of political independence, as treated in your second paragraph, are just school-girlish in their immaturity.

What he says on his page 48 about the conventions of the Constitution really dumbfound one. Imagine anyone far past infancy talking about the "memory of politicians" as a source of conventions of a Constitution!

What he says on his page 51 is, of course, just balderdash. When he was admitting the exclusion of negroes from

(over)

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the franchise in South Africa, he forgot the exclusion of naturalised Japs in Canada. What he means by "pseudo-republican" he does not try to define—wisely.

Coming to his page 52, I find it hard to believe that he ever read your book. If he did, he has marvellous powers of intellectual expurgation. In his mind, apparently, the Prime Minister is Constitutionally an autocrat. The Prime Minister on all matters speaks the mind of his Cabinet. If he does not and the subject is of real importance, a resignation or resignations must follow. Anyway, to say that he decides exclusively the nature and occasion of an appeal to the electorate shows that he has hardly started thinking on the subject.

There could really be nothing more awful in his book than what you quote from pages 52-3. One marvels as he passes from page to page how this man got anybody to publish his twaddle. He has not even a sane conception of what Parliament means in a British country.

Again while wrestling with his stuff at page 56, one wonders if he has read any authorities at all. Imagine a man saying that an electoral vote is the appropriate and final Court of Appeal on the meaning and working of a Constitution.

You have answered him admirably in every phase of his treatment of the crisis of 1926.

His English on page 112 descends to the same level as his logic. In Heaven's name what is this man Professor of? I many a time think that parents are foolish in these times to allow a University to obstruct and befuddle a child's education.

I did not think anybody was so mentally helpless as to imagine that in 1926 I "seemed to rely largely on the Governor-General's personal discretion as justification" for my conduct. This is no worse, however, than his notion that "the King or his representative possesses a Prime Minister."

Struggling through the tangled nonsense quoted from Clokie at the bottom of your page 6, I come to the same estimate of his intellectual capacity as Macaulay came to on the moral stature of Bertrand Barere.

I suppose I could not expect Clokie to take the trouble to follow my course carefully in 1926, but I would expect him to understand the plain and powerfully-supported argument of your recent book. I never imagined that the guileless Dr. Neuendorff would succeed in including in her victims a University Professor.

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144670

 Toronto, January 2, 1945.

Dr. Eugene Forsey,
Ottawa, Ontario.

Of all the fantastical humbug this man wrote, nothing is worse than that on his page 58. It really is so terrible that it baffles correction.

There are certain things clear as day in the conventions of the British Constitution. In fact, it is all fairly clear and there is very little, if anything, on which there is really substantial difference of view. Wherever Clokie puts his pen into the subject, he pollutes it. One shares the consternation of a very great Englishman at the ways of nature, where toads are permitted to

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Really one stands appalled that such a work as this could be solemnly printed by any publishing house. I do not know what you have in mind in the way of exposing it. It hardly seems right that, because you advised the Oxford Press on the Mss., you should now be debarred from doing the necessary public duty of exploding and exterminating the poisonous rubbish this man has produced.
W

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Whatever you think I can do to aid you, all you have to do is ask or give me a hint. A printed book by a Professor, impr sively bound and imposingly advertised, can look quite important and is only too likely to beguile the innocent.

You do not ask for the Mss. to be sent back, so I will not return it now, in the hope that you do not need it.

The very best to you in 1945, and do not fail to ask me for any help you need.

Yours sincerely,

AM/E.

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144672

January 2, 1945.

Dr. Eugene Forsey,
3 Lakeview Terrace,
Ottawa, Ontario.

My dear Eugene:

I had to delay until the week-end reading carefully your comments on Professor Clokie's book. Perhaps, first, I had better answer your question. I certainly do think the errors of fact and interpretation are important enough to warrant intervention. In fact, it is hard to conceive how any man who dares to hold himself out to the world as an author could make a more lurid display of errors in both fields. You say that on the whole the book is reasonable enough, but it passes my comprehension how any man guilty of the twaddle which you have here unmasked could work his way to a reasonable literary product of any kind.

I shall make a few comments on some individual paragraphs.

Without any question you are right in the first paragraph. Admittedly there is nothing more now that Canada can ask that is in the nature of a concession from the British Parliament. In 1920 and '24 there was--on the subject of extra-territoriality. I am personally disposed to think that the British Parliament will follow any Address from the Parliament of Canada as to amending the B. N. A. Act and that even though there might be objection, unanimous or almost unanimous, from Ontario or Quebec. There could not, of course, be unanimous opposition from both, for in that event the Address could not pass. The theory of the contractual nature of our so-called "Constitution Pact" cannot be supported and I do not think could appeal to the British Parliament now. What Clokie says is, therefore, just wrong.

His references on the general subject of political independence, as treated in your second paragraph, are just school-girlish in their immaturity.

What he says on his page 48 about the conventions of the Constitution really dumbfound one. Imagine anyone far past infancy talking about the "memory of politicians" as a source of conventions of a Constitution!

What he says on his page 51 is, of course, just balderdash. When he was admitting the exclusion of negroes from

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the franchise in South Africa, he forgot the exclusion of naturalised Japs in Canada. What he means by "pseudo-republican" he does not try to define--wisely.

Coming to his page 52, I find it hard to believe that he ever read your book. If he did, he has marvellous powers of intellectual expurgation. In his mind, apparently, the Prime Minister is Constitutionally an autocrat. The Prime Minister on all matters speaks the mind of his Cabinet. If he does not and the subject is of real importance, a resignation or resignations must follow. Anyway, to say that he decides exclusively the nature and occasion of an appeal to the electorate shows that he has hardly started thinking on the subject.

There could really be nothing more awful in his book than what you quote from pages 52-5. One marvels as he passes from page to page how this man got anybody to publish his twaddle. He has not even a sane conception of what Parliament means in a British country.

Again while wrestling with his stuff at page 56, one wonders if he has read any authorities at all. Imagine a man saying that an electoral vote is the appropriate and final Court of Appeal on the meaning and working of a Constitution.

You have answered him admirably in every phase of his treatment of the crisis of 1926.

His English on page 112 descends to the same level as his logic. In Heaven's name what is this man Professor of? I many a time think that parents are foolish in these times to allow a University to obstruct and befuddle a child's education.

I did not think anybody was so mentally helpless as to imagine that in 1926 I "seemed to rely largely on the Governor-General's personal discretion as justification" for my conduct. This is no worse, however, than his notion that "the King or his representative <u>possesses</u> a Prime Minister."

Struggling through the tangled nonsense quoted from Clokie at the bottom of your page 6, I come to the same estimate of his intellectual capacity as Macaulay came to on the moral stature of Bertrand Barere.

I suppose I could not expect Clokie to take the trouble to follow my course carefully in 1926, but I would expect him to understand the plain and powerfully-supported argument of your recent book. I never imagined that the guileless Dr. Neuendorff would succeed in including in her victims a University Professor.

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144674

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144675

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You do not ask for the Mss. to be sent back, so I will not return it now, in the hope that you do not need it.

The very best to you in 1945, and do not fail to ask me for any help you need.

Yours sincerely,

AH/E.

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144676

3 Lakeview Terrace,
Ottawa, January 8, 1945.

Dear Mr. Meighen,

Many thanks for your letter of the 2nd. It was a scorcher. I shall take steps to bring this book to the attention of the Minister of Education for Saskatchewan. I presume you can do likewise with the Minister in Ontario.

There are two points at which you appear to have misunderstood what I said:

1. The first paragraph of my comments, on the amendment of the B.N.A. Act. Clokie said that the British Parliament's part in the process is now purely formal; that it would certainly pass any amendment Canada asked for. You are therefore in agreement with him. I had some doubts about whether, if, for example, the provincial Governments of Ontario and Quebec protested against a particular [redacted] amendment, the British Parliament would be willing to act simply on a joint Address of the Senate and the House of Commons. I am glad to find that you feed any such doubt is unwarranted; and beyond question you ought to know.

2. The remark about the negroes in South Africa (p. 2 of my comments) was mine. Clokie did not mention South Africa or negroes in this context at all. I merely used the illustration to try to make clearer what I had in mind.

I should perhaps add that Clokie caught me out in two mistakes, both stupid ones, and quite inexcusable, and that, in the course of looking up something else the other day, I have found a minor mistake in my book (fortunately the real facts, established by a 1941 Act of the Ontario Legislature, strengthen my case). So I feel somewhat humbled, and inclined to be a trifle less censorious than I otherwise might.

On the other hand, Clokie had before him, I understand, practically all the points set forth in the memorandum I sent you (just one or two details left out). Certainly he must have seen most of my comments on his original ms., for he has corrected about 100 of the mistakes to which I drew attention. Some of his corrections or would-be corrections, are very extraordinary. For example, he corrects the date of the election of 1921, and leaves the date of the election of 1917 wrong, though it occurs in the previous line of his table, and though I drew attention to both mistakes! Also, in the original ms., he stated that in 1940 the Social Crediters got 21 seats in the Dominion House; I pointed out that they actually got 10; he now says they got 17 (p. 86; in a table on p. 82, he says 10)! I suppose this is the good old British principle of compromise, avoiding extremes! I have only just noticed the discrepancy between pp. 82 and 86.

You will probably not be surprised to learn that this man was sent all across the country the summer before last, by the Government (or some Department or agency of the Government) to lecture to the troops. I do not know what subject he was supposed to speak on. You will be surprised when I tell you that on certain subjects Clokie has done excellent work, notably on the amendment of the British North America Act. The last Canadian Historical Review has a review by him of a French-Canadian Nationalist diatribe in which he again does excellent work. How anyone capable of doing good work in one part of this field can do such rubbish in other parts I cannot understand.

Clokie is, I believe, Professor of Political Science in the University of Manitoba.

(over)

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About the quorum of Council: the statement that four members are required to pass an Order was made in the Debates in 1926, I think by Guthrie, and not challenged. (See pp. 5225 and 5228.) I refer to it in my book, p. 214. I wrote you, late in November 1940, asking whether the quorum had been the same in 1896. You replied, November 25, saying you would have to look it up. On November 29, 1940, you wrote: "I find, just as I expected, that a quorum of Council is, and always has been, four." So I had it on the highest authority!

Of course when the first appointments are made by a new Prime Minister, they must be made by him alone. In 1911, Borden was not even a Privy Councillor, and his first act had to be to advise his own appointment to the Privy Council. Then he had to advise the appointment to the Privy Council of such of his prospective colleagues as were not already members. [redacted] Both of these acts are described and listed as Orders-in-Council (P.C.'s 2419-2420 of October 10, 1911). In September 1926, King advised the appointments to the Privy Council (P.C. 1449 of September 25, 1926), and this act was listed as an Order. In 1930 and 1935, Bennett and King respectively advised the appointments to the Privy Council and to the Departments, and all these acts are listed as Orders-in-Council, though the covering paper lists as present: The Right Honourable Richard Bedford Bennett in the one case and the Right Honourable William Lyon Mackenzie King in the other. (See my book, p. 214.)

I do not know where or how the quorum is laid down, or what legal validity (if any) it has. A priori, I should have supposed that the document embodying the Prime Minister's advice to appoint himself to the Privy Council, and the document embodying his advice to appoint other persons to that body, would not be called Orders-in-Council at all, as they manifestly are not, literally, anything of the kind. Until 1930, as far as I can discover, appointments to Departments (that is, appointments of Ministers to their Departments) were made by a document beginning: "The Committee of the Privy Council advise that a commission do issue", etc.; the Committee consisting of the Prime Minister and the Privy Councillors whom he had invited to Cabinet Council (including those just appointed on his sole advice). This, clearly, is in a different category altogether. It is something passed by Council as such, not simply a record of the Prime Minister's sole advice and the Governor-General's approval. As such, it is what Sir John A. Macdonald appears to have intended should be called a Minute of Council (and I gather this practice was followed to some extent in the early years), embodying advice tendered and approved, in contradistinction to an Order-in-Council, which would be a formal Order by the Governor-General on the advice of Council and (nominally) made by the Governor-General in the presence of at least some members of Council. See p. 207 of Pope's Correspondence of Sir John Macdonald. I think it would have conduced to clarity if Macdonald's original idea had been carried out; but apparently it has not been, and now anything presented to the Governor-General either by the Prime Minister alone or by the Cabinet for his approval is called an Order-in-Council, though the two forms suggested by Macdonald have been kept. (For instance, I think all the Orders passed now under the War Measures Act begin: "Therefore His Excellency . . . is pleased to order ...", and are headed: "At the Government House, Ottawa. Present: His Excellency the Governor-General in Council." Other Orders are in the form originally intended for Minutes: "The Committee of the Privy Council have had before them . . . The Committee concur in the above recommendation, and submit the same for Your Excellency's approval."

Forgive my being tedious and pedantic about this. I wrote you about it once before, I think; I put it down again now in case any further comments occur to you in the light of what you have written in your last letter.

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It was stated in 1926, and not challenged, that no Order-in-Council is necessary to appoint a man to the Privy Council, or to appoint a Privy Councillor Minister of a Department. I presume this is correct. My impression would be that Orders in the strict sense would be legally required only under a particular Statute or some well-defined part of the Common Law. How far many of the Minutes are legally required, I do not know; also, I do not know whether there is any greater legal weight attaching to Orders (in the original and strict sense) than to Minutes. I should suppose not, at any rate after the long practice which has used the term Order indiscriminately. But I set down these random reflections chiefly to get the advantage of any comments you think fit to make.

In England, I believe, they have Orders-in-Council, and Orders of Council; I recall reading something about the two in either Anson or Fitzroy, both of whom would certainly have known what they were talking about; but unfortunately I do not recall the distinction between the two types of Orders. The whole thing would be a fascinating bit of legal and constitutional research, if one had nothing better to do. Doubtless you know all about the English practice; but I wonder if anyone has ever traced the development of our own practice since 1867: what happened to Macdonald's recommendations on the subject; whether they fell gradually into disuse or were formally scrapped; or what. I may find something in his papers at the Archives, or in the despatches of the Governors. I have been running through these, and much else, recently, in odd moments, as perhaps I told you.

Incidentally, in Sir John Thompson's papers (which are completely uncatalogued; just thrown into folders, with even the smallest scraps of paper he used in debates included), there is the printed draft of the first Instructions to Lieutenant-Governors, composed by him. Apparently, according to what this document says, he was the first to notice that the Instructions called for by the B.N.A. Act had never been issued; and he proceeded to remedy the omission.

I got, some years ago, three copies of the Department of Justice's two printed Memoranda, one on Disallowance of Provincial Acts, and the other on the Office of Lieutenant-Governor (both issued in 1937)./ One I gave to Mr. Cahan, one to Professor Frank Scott, and one I kept myself. At the time when the Saskatchewan Liberal Government was prolonging the life of its Legislature, Coldwell issued a statement that the Act should be disallowed. At his request (as nearly as I remember), I did for him a long memorandum on extensions of the life of Paliaments and Legislatures all over the Empire, and on disallowance of provincial Acts in its possible relation to this Saskatchewan Act. With the Memorandum (my own, I mean), I sent to somebody or other connected with the C.C.F. copies of the Department of Justice Memoranda and of two articles of my own. I am pretty sure everything was sent back, but I have never been able to find either the Department's Memoranda or my own two articles, each of which had marginal notes of corrections and additions which should have been made to them. Fortunately I have got another copy of one article, and can get a further copy of the other; but the two official Memoranda I have not ~~xxxxxxx~~ liked to ask for again as, after I received them, I wrote Varcoe pointing out a series of mistakes in one of them, and he never replied. I was very polite in my letter; but evidently it was ill received.

Perhaps you could write the Department for copies; and if you could get an extra copy of each one for me, I should be greatly obliged. I shall be glad to send you a copy of the list of mistakes in both, to add to the Memoranda if you get them.

Please excuse this long letter. I am hoping to see you on January 17 when I am in Toronto. Keep the notes I sent; I have a carbon.

Yours sincerely,

Eugene Forsey

(over)

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144679

× Presumably, in 911, Borden, having advised his own appointment to Council could then have summoned three other Conservative Privy Councillors (e.g. Foster, Borden, and Haggart) to make the appointments of new Privy Councillors; but no such device would be open to, e.g., the G.G.; & was open to Mackenzie in 1873.

E.A.D

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144680

January 11, 1945.

Dr. Eugene Forsey,
5 Lakeview Terrace,
Ottawa, Ontario.

My dear Eugene:

I have just returned from New York and have before me yours of 8th. It really looks to me as if you have established once for all th t I have made a mistake. It is on that point of a quorum of the Privy Council. Certainly when I wrote you in the language you quote, I must have done so after getting very definite authority--possibly after writing the Clerk of the Privy Council. The situation still puzzles me greatly. I cannot recall ever having any other impression than that there was no fixed numerical quorum of the Privy Council.

I am most interested in your history of initial appointments of various new Governments and of the early practice of calling the first recommendations "Minutes" of Council. Even so, it is "Council" that acts and if it can produce an effective "Minute" without four present, or with only one present, it could also produce an effective "Order" under similar conditions.

I wish you would feel free to consult the Clerk of the Privy Council on this point. Who this Clerk is I do not know now, but he always has been, in my time, a well-versed man on subjects of this kind. I am sure he would be glad to be consulted for he has not much to do, and you might get something of value from him.

What I said on the likely practice of the British Parliament on an Address from the Parliament of Canada is, I feel confident, correct, but nevertheless, it is only an opinion. Nothing can vindicate that opinion except experience. My reasoning is that the British Parliament would feel that it must be governed by a principle, and that the principle which would embody the strongest fortification for its conduct would be that such conduct was based on an Address from the Parliament of Canada. If it made an exception in the case even of separate

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Addresses from the Legislatures of Ontario and Quebec, it would be indeed difficult to justify ignoring similar Addresses from other Provinces.

I am setting about to procure copies of:

(1) Instructions to Lieutenant-Governors (Sir John Thompson);

(2) Memorandum on "Disallowance of Provincial Acts" (1937);

(3) Memorandum on "The Office of Lieutenant-Governor" (1937).

I am trying to do so without writing the Minister direct, for, as I think you know, I had a very sharp disagreement with him not long ago. However, if I do not succeed any other way, I shall write the Department.

There may, as you say, be some sphere in which Clokie has a right to represent himself as an author, but it is not in the sphere of Constitutional practice.

Yours very truly,

AM/E.

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144682

3 Lakeview Terrace,
Ottawa, Ontario.

January 12, 1945.

The Editor,
The Telegram,
Toronto, Ontario.

Sir,

A news item in your issue of January 2 states: "Liberals claim that Mr. Hepburn intends taking a fighting stand against the Drew Government. This might lead to the Liberals lining up with the C.C.F. to force dissolution. In this event, Liberals were considering that Mr. Hepburn might be the one called to form a government with the C.C.F. as his supporters."

The authors of these surmises would appear to be very imperfectly acquainted with constitutional usage.

The only possible way in which the Liberals and the C.C.F. could "force dissolution" would be by defeating the Drew Government in the House. Even then Col. Drew would not be obliged to advise dissolution. He could simply resign, leaving his opponents to form a Government if they could. But if he did advise dissolution, and the Lieutenant-Governor accepted the advice, there would be no question of Mr. Hepburn or anyone else being called on to form a Government until after the election, and only then if the Drew Government had been defeated. If, on the other hand, the Lieutenant-Governor refused a dissolution to Col. Drew, and an alternative Government took office, there would be no dissolution. In short, if there were a dissolution, there would be no new Government; and if there were a new Government, there would be no dissolution.

The suggestion that, if the Drew Government were defeated in the House and made way for an alternative Government without a dissolution, the Lieutenant-Governor would call on Mr. Hepburn is altogether without foundation in British constitutional practice. The true constitutional position has been admirably stated by Hon. H.A. Bruce in the House of Commons on December 5 last. Dr. Bruce, as a former Lieutenant-Governor, speaks with authority; and in his speech he cites distinguished British authority as well. He said: "If a Government is defeated in the House or at the polls, the modern rule would appear to be that the Crown must, on the retirement of the Government, send first for the Leader of the Opposition. Only if the Leader of the Opposition refuses to take office is the Crown at liberty to consult others." (Hansard, p. 6993.)

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In other words, if the Drew Government is defeated in the House, and resigns (either voluntarily or because it is refused a dissolution), the Lieutenant-Governor's correct constitutional course is to send for Mr. Jolliffe. The only possible circumstances in which he could send for Mr. Hepburn would be if Mr. Jolliffe declined office (and he has publicly stated that he would accept). That the Lieutenant-Governor would in fact send for Mr. Hepburn even then is extremely improbable; for if Mr. Jolliffe, with a party of 32, felt himself unable to carry on the government, Mr. Hepburn, with a party of 16, and the probable support of four others, could hardly expect to do so. He would have scarcely more than enough members to fill the various Cabinet offices.

It should perhaps be added that there is no foundation at all for the notion, current in certain quarters, that a retiring Prime Minister is entitled to advise the Crown as to his successor. In Dr. Bruce's words: "There is not the slightest doubt that a retiring Prime Minister has no right even to offer advice as to his successor, let alone have it accepted. It is entirely within the discretion of the Crown to ask or not to ask for such advice. There is also not the slightest doubt that even if the Crown chooses to ask for such advice it is not bound to follow it. There is certainly ample authority for this position as far as the United Kingdom is concerned; and in the absence of very strong and positive proof to the contrary, the presumption is that the same rules hold in Canada." (Hansard, December 5, 1944, p. 6993.) Dr. Bruce cited Mr. Gladstone, Sir John A. Macdonald, Sir Richard Cartwright, Sir John Marriott, Dr. W. Ivor Jennings, and the late President Lowell of Harvard, in support of these statements.

Yours truly,

Eugene Forsey

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Wadds pkr Report.

144684

3 Lakeview Terrace,
Ottawa, January 22, 1945.

Dear Mr. Meighen,

Thank you very much for your kindness in sending me a copy of your letter to Colonel Drew.

The only comment I feel inclined to make is that you might perhaps have given Colonel Drew the title of the book. From your words, he might suppose that it dealt with government in the British Commonwealth generally, instead of Canadian government and politics with only incidental reference to other British countries. I am afraid that my notes failed to make this clear, though I think I gave the actual title of the book. I venture to suggest that you might perhaps write Colonel Drew a second letter saying that you inadvertently omitted the title of the book. However, there may be reasons against doing this.

I am very glad you wrote. I shall do likewise for Saskatchewan, as soon as Tommy Douglas is back at work.

I have completed about 8 pages of notes on the draft pamphlet about Parliament about which I consulted you, and have handed them to the committee in charge. The pamphlet, when it appears, is to be used in connection with a discussion of Canadian Government over the CBC, March 6-20 (Tuesday evenings at 8.30), in the Citizens' Forum series. I need hardly say that I have not been invited to take part; I wonder if Clokie has. I shall listen with interest, especially to the first two broadcasts, the Structure of Canadian Government, and the Principle of the Party System. I hope you will listen too, as I surmise that there will be various inaccuracies which we shall both feel ought to be dealt with.

Have not yet had a chance to do anything further in connection with the Clerk of the Privy Council, but hope to do so within a week or two. My time for this sort of thing is pretty well confined to Saturday mornings, and this Saturday I shall be in Montreal.

I am forwarding to you Dr. Bruce's copy of International Affairs. After careful consideration, I have reached the conclusion that the review does not call for a reply from me. About three-quarters of it seems to me perfectly irrelevant, unless it is intended as an oblique reproof to Keith. The final quotation from Aberdeen is a triumph of absolute irrelevance; besides, as Jennings says, it does not embody the "old" notion, or the standard view of the subject; and this is made clear in my book. The only other thing I should want to comment on, if I did reply, would be the amazing remark at the end of Morison's first paragraph. What "fuller explanation" I could have been expected to provide, short of an exposition of Conservative policy to show why you wanted to get King out of office, I do not know; and any such exposition would obviously have been totally out of place. These few observations, however, do not seem to me worth making, except privately to you and Dr. Bruce, and perhaps in a letter to another quarter.

Yours sincerely,

Eugene Forsey

(ovr)

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P.S. Discovered the other day a minor error in my book. Ontario abolished ministerial by-elections altogether by the Act 5 Geo. VI, c. 26 (1941). This involves striking out a few words on pp. 226-7, and adding the Ontario Act to the list on p. 297.

R.T.

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144686

January 25, 1945.

Dr. Eugene Forsey,
3 Lakeview Terrace,
Ottawa, Ontario.

My dear Eugene:

I received your letter of 22nd and am glad you called my attention to the fact that I had not given the title of the book. I wrote Col. Drew yesterday doing so.

The copy of International Affairs has arrived and will be handed to Dr. Bruce.

Yours sincerely,

AM/E.

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144687

January 31, 1945.

Dr. Eugene Forsey,
3 Lakeview Terrace,
Ottawa, Ontario.

My dear Eugene:

Mr. Justice Plaxton has loaned me his copy of "Memorandum on Office of Lieutenant-Governor of a Province", the date of issue of which by the Dept. of Justice is November 1937. He asked that it be returned to him. I am, however, sending it on to you, under separate cover, so please send it back to me as soon as youcan.

Meantime I am writing the Justice Department asking them to send copy to me. Am merely writing the Secretary. When same is received I shall send it to you for your files.

Mr. Justice Plaxton also left with me another larger black-covered book. I looked through it but all it contains are the forms of appointments of Governors-General and Lieutenant-Governors--that is copies of the very patents of appointments. It includes the word "instructions" in the titles but I could not see anything in the way of instructions that were important, and certainly nothing nearly as useful as what are in the book being sent today. I shall send it down, however, if you want it. What I am sending today I am sure you will find very useful.

A third book is coming from Judge Plaxton.

Yours very truly,

AM/E.

P.S.--When returning the Memorandum please send it direct to Hon. Mr. Justice C. P. Plaxton, Osgoode Hall, Toronto.

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144688

Copy for Mr Meighen

PERSONAL

3 Lakeview Terrace,
Ottawa, Ontario.

February 1, 1945.

The Hon. T. C. Douglas, M.L.A.,
Premier of Saskatchewan,
Regina, Sask.

Dear Tommy:

I hope you are now quite restored and are taking good care of yourself.

I am writing about two points:

(1) Professor Clokie of the University of Manitoba has recently published a book, "Canadian Government and Politics". As there has been very little done on this subject in a compendious form, I fancy there will be a tendency to adopt it as a textbook in the various provinces. If there should be any question of doing so in Saskatchewan, I think the Minister of Education should know that this book contains a large number of errors (I have counted fifty), some of them rather serious. I venture to think, therefore, that it should not be adopted as a textbook without a careful scrutiny. I can, if necessary, supply a list of the errors, with notes on each.

(2) I noticed in the papers some months ago brief summaries of a correspondence between you and King on the Lieutenant-Governorship. If, as and when anything is published on the subject, I should be very glad to have a copy. I noticed King and Duplessis were having a spat on the same subject. Each, incidentally, could have made a much better case than he did if he had had the necessary historical and constitutional knowledge.

Our old friend King is still at his old tricks. No election in which he has any part would be complete without some trumped-up constitutional issue. And sure enough, it made its appearance in Grey North yesterday. According to the Ottawa Journal, McNaughton said the opposition parties had broken a long-standing convention, both British and Canadian, that a Minister seeking a seat should not be opposed! After a very hasty check this morning, I feel safe in saying that in Canada alone since Confederation, and without taking account of provincial governments and legislatures, at least thirty Ministers seeking seats in the House have been opposed, among them, King himself,

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The Hon. T.C. Douglas, M.L.A.,
Regina, Sask.

Feb. 1/45.

Jimmy Gardiner, St. Laurent, Humphrey Mitchell, La Flèche, Sir Wilfrid Laurier, Sir Allen Aylesworth and Sir George Foster. Undoubtedly, McNaughton did not think up this production himself. It has all the earmarks of a typical King lie. Long experience has convinced that worthy that, thanks partly to his own efforts, the people of Canada are so grossly ignorant of their own constitution, that he can successfully palm off on them any invention or fabrication on the subject that suits his purpose. In this instance, I propose to recheck carefully all the cases and send the list and a letter to the Ottawa Journal without comment.

Best wishes to you and your wife and daughter, and to any friends of mine you encounter.

Yours sincerely,

Eugene

Eugene Forsey

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144690

3 Lakeview Terrace,
Ottawa, February 2, 1945.

The Editor,
The Journal,
Ottawa.

Sir,

Your issue of January 31 reports General McNaughton as saying that "opposition parties had broken conventions that had been followed in Britain and in Canada for some years, in entering candidates in a byelection being held for the sole purpose of getting a Cabinet Minister into the Commons."

Since Confederation there have been thirty-four cases in which "candidates were entered against Ministers in by-elections held for the sole purpose of getting a Cabinet Minister into the Commons." I enclose a list showing the name of the Minister in each case, the constituency, the exact date of the by-election, and the majority. The first case was on April 20, 1869, the last (before the present by-election) was on November 30, 1942. The list can be checked by reference to the Parliamentary Guides, the Canada Year Book and Hansard. It will be noted that it contains the names of Mr. King himself, General LaFleche, Mr. St. Laurent, Mr. Mitchell and Mr. Gardiner, all members of the present Cabinet; Sir Wilfrid Laurier (twice), Sir Charles Tupper (twice), Sir George Foster, Sir Francis Hincks and Joseph Howe. Sir Wilfrid Laurier, when he first entered the Cabinet, was not only opposed in the ensuing by-election but defeated, and had to fight a second, which he won by a small majority.

The case of Sir Charles Tupper, in 1896, provides an extraordinarily close parallel to that of General McNaughton. Sir Charles had been out of the House and out of the country for some years. He was sworn in January 15, 1896, as Secretary of State, for the purpose of leading the Government in the House of Commons, the Prime Minister, Sir Mackenzie Bowell, being in the Senate. There had just been a first class Cabinet crisis in which seven Ministers had resigned, and Sir Charles' return was vital to the Government. The by-election was held February 4, 1896, and Parliament was due to expire on April 25. The present by-election is being held on February 5 and Parliament is due to expire on April 17. Sir Charles Tupper was opposed, just as General McNaughton is being opposed.

I have not had time to look up the English cases, but there are plenty of them, a notable example being that of Rt. Hon. C.F.G. Masterman, Chancellor of the Duchy of Lancaster in Mr. Asquith's Cabinet shortly before the last war. This case, if I remember correctly, was recently discussed at some length in your columns.

Incidentally, the London Free Press is in error in stating that if Mr. Chevrier is appointed to the Cabinet he will be the first French-Canadian from Ontario to receive this distinction. Mr. Meighen, in 1926, appointed Hon. Raymond Duchamp Morand, of Windsor, Minister without portfolio and acting Minister of Health and of Soldiers' Civil Re-establishment.

Yours truly,

Eugene Forsey

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Ministerial By-elections, 1867-1944

Minister	Constituency	Date	Majority
Hon. Joseph Howe	Hants	April 20, 1869	385
Hon. Sir Francis Hincks	Renfrew North	Nov. 10-11, 1869	120
Hon. W.E. Vail	Digby	October 27, 1874	276
Hon. David Mills	Bothwell	November 15, 1876	508
Hon. Rodolphe Lafleme	Jacques Cartier	November 28, 1876	29
Rt. Hon. Sir Wilfrid Laurier	Drummond-Arthabaska	October 27, 1877	Defeated by 22
Rt. Hon. Sir Wilfrid Laurier	Quebec East	November 28, 1877	315
Hon. A.G. Jones	Halifax	January 29, 1878	220
Hon. A.W. McLelan	Colchester	June 18, 1881	428
Hon. Thomas White	Cardwell	August 27, 1885	641
Rt. Hon. Sir George Foster	King's, N.B.	December 31, 1885	368
Rt. Hon. Sir Charles Tupper	Cumberland	November 9, 1887	1,442
Hon. C.C. Colby	Stanstead	November 18, 1889	1,042
Hon. J.C. Patterson	Huron West	February 23, 1892	25
Hon. W.H. Montague	Middlesex	April 17, 1895	594
Hon. R.G. Prior	Victoria, B.C.	January 6, 1896	107
Rt. Hon. Sir Charles Tupper	Cape Breton	February 4, 1896	780
Hon. A.G. Blair	Sunbury-Queen's	August 25, 1896	624
Hon. Raymond Préfontaine	Maisonneuve	December 9, 1902	1,860
Hon. C.S. Hyman	London	January 13, 1905	330
Hon. Sir Allen Aylesworth	York North	November 22, 1905	449
Hon. William Templeman	Victoria, B.C.	March 6, 1906	696
Hon. Louis Coderre	Rochelaga	November 19, 1912	2,273
Hon. Albert Sévigny	Dorchester	February 10, 1917	466
Hon. S.F. Tolmie	Victoria, B.C.	October 27, 1919	2,134
Hon. F.B. McCurdy	Colchester	September 20, 1920	1,444
Hon. R.W. Wigmore	Saint John City and the Counties of Saint John and Albert	September 20, 1920	4,155
Hon. E.J. McMurray	Winnipeg North	October 24, 1923	2,793
Rt. Hon. W.L. Mackenzie King	Prince Albert	February 15, 1926	5,621
Hon. [illegible]	Middlesex West	March 29, 1926	2,660
Hon. James Gardiner	Assiniboia	January 6, 1936	3,565
Hon. Humphrey Mitchell	Welland	February 9, 1942	3,790
Hon. Louis St. Laurent	Quebec East	February 9, 1942	3,949
Hon. L.R. LaFleche	Outremont	November 30, 1942	5,450

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144692

February 5, 1945.

Dr. Eugene Forsey,
5 Lakeview Terrace,
Ottawa, Ontario.

My dear Eugene:

Just received today copy of your letter to the Journal. It is simply splendid and I am sure will be welcomed by the Ottawa Journal.

I have sometimes thought Dr. P. D. Ross should add a very distinguished Canadian to his staff.

This morning I received from the Justice Department the "Memorandum on Office of Lieutenant-Governor" and am sending you same today.

Yours very truly,

AM/E.

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144693

3 Lakeview Terrace,
Ottawa, February 6, 1945.

Dear Mr. Meighen,

Your comments, as usual, are much too kind.

I am glad you liked my letter to the Journal. Curiously enough, I find that in my list I overlooked one case, and that one a by-election in Grey North itself! Hon. William Paterson had to fight a by-election there August 18, 1896, and was elected by 424.

I have checked the ministerial by-elections in which Ministers were not opposed, and find 125 of them; but of these, 83 were held almost immediately after general elections, when seats would naturally almost never be contested. Disregarding these cases, therefore, almost as many ministerial by-elections have been contested as have been left uncontested. So much for McNaughton's (or rather King's) "conventions"!

Apparently the story went out across the country, for I have found, unfortunately too late, that the Gazette also carried it (McNaughton's speech) as a C.P. dispatch.

I have returned the Department of Justice Memorandum to Judge Plaxton. Thanks very much for letting me see it. I fancy the other copy, which you have been kind enough to get for me, is awaiting me at home now. Did I ever give you a list of the errors in this document? If not, and you would like to have such a list, I can easily send you a copy.

I don't think the other book would be of any use. Thanks.

King must be feeling sick this morning. To me it seems abundantly clear that he will get a fearful thrashing when the general election comes. Some seem to think that he will escape if he can hold it off till after Germany is defeated. I doubt it. Unless I am vastly mistaken, retribution, halting as its foot has been, is catching up with him at last.

Yours sincerely,

Eugene Forsey

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144694

February 7, 1945.

Dr. Eugene Forsey,
5 Lakeview Terrace,
Ottawa, Ontario.

Dear Eugene:

Thanks for yours of 6th. Yes, I would like a copy of your comments on the Justice Department Memorandum. I think I told you that it was prepared by Judge Plaxton when he was C. P. Plaxton of the Justice Department.

I think King gets some satisfaction out of talking about Constitutional matters—that is ever since 1926. He feels he is learned on that subject.

You will observe he gets the word "reaction" into a monotonous number of his sentences in these times. Whenever any word or phrase gets so shop-worn, threadbare and shiny that it is on everyone's lips, he proceeds to adopt it as his own.

Yours very truly,

AH/E.

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144695

3 Lakeview Terrace,
Ottawa, February 12, 1945.

Dear Mr. Meighen,

Thanks for your letter of the 7th. I enclose copy of my notes on errors in Judge Plaxton's Memorandum. I do not need to have it back. I need hardly say again that I am very much indebted to you for the copy of the Memorandum. I shall take good care not to let this one out of my hands for a moment.

I am very sick of the word "reaction". Nine times out of ten it is used without any real thought of what it means; at least so I suspect. I see McNaughton says he has pledged his devotion to the "great cause for which the Liberal party stands". Do you know what this is? I don't. Does anyone? Perhaps the real answer is that it stands for King's indefinite continuance in office. But McNaughton can hardly say that! Do you remember the Ottawa Journal's quip once, that there is a world of difference between what Liberalism stands for and what Liberalism sits for?

The CBC has invited me to broadcast, with a Mr. Terrace and Mr. Wilson of the Financial Post on international trade in the post-war world. The thing will take place a week from to-morrow night (February 20). I don't think any one of us will have anything very earth-shaking to say; for myself, I am rather inclined to base my remarks on recent articles in the London Economist. I think I shall at least cast some doubt on the Winnipeg Free Press' case that Canadian Governments are mere flies on the wheel of international commerce; and in that endeavour I am sure you would wish me well! I should much prefer to be talking about the structure of government or the party system.

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Tommy Douglas has written saying he will bring my letter on Clokie to the attention of his Minister of Education. I think I sent you a copy of the letter in question.

Have not yet read King's replies to the McLean's quiz, but have read Blair Fraser's accompanying blurb, from which I gather that one of King's chief claims to fame is that he often prevents his Ministers from getting their lunch. Amiable character! Did I ever tell you that Fraser (who wrote the Gazette review of my book) informed me, spontaneously, that before writing the review he discussed the book with Pickersgill, one of King's secretaries? I gathered that Pickersgill convinced him pretty completely that King was right and I was wrong. Nice way to do a review!

Did you see Pouliot's remark that the date of the election would be decided by "the old witch in Hull, with her broken broomsticks" and a couple of other soothsayers whom he described? He has evidently got hold of King's predilection for such creatures, and is making the most of it. He gave King a fearful dressing down in the House, very suitably worded.

Yours sincerely,

Eugene Forsey

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144697

Schedule on Errors and Omissions in the Department of Justice "Memorandum on the Office of Lieutenant-Governor", 1937.

P. 8, paragraph V of the Instructions: Mr. Patenaude in Quebec in 1937 evidently disregarded this in the case of the Padlock Act (I George VI, c. 11); for, though he assented to the bill on March 31, it reached Ottawa only July 8.

P. 17. Withholding of assents: There have been eight cases of this in Ontario and one in Quebec; five in Nova Scotia; nine in New Brunswick (I have been unable to find any trace of a refusal in 1877, but there was one in 1876); two in Prince Edward Island. Examination of the Journals and Debates of the various Legislatures will give the details. The cases are summarized in Forsey's article in the Canadian Journal of Economics and Political Science, February 1938.

On the question of reservation, the Memorandum is full of errors:

(1) The tables show 56 bills, not 55.

(2) Three of these ought not to have been included at all:

(a) The Ontario Factories Act, 1884 (47 Victoria, c. 39). This was assented to, forwarded with a note by the Lieutenant-Governor setting forth his doubts of its validity, and left to its operation. It was neither reserved nor disallowed.

(b) The Manitoba Act of 1877, amending the Métis Half-Breed Land Grant Protection Act. This was not reserved, but assented to, and left to its operation, as the Table itself clearly shows.

(c) The Prince Edward Island bill of 1873 vesting a certain portion of Government House farm in the city of Charlottetown was indeed reserved by the Lieutenant-Governor; but it was reserved before Prince Edward Island entered Confederation, and forwarded to London for the signification of the Queen's pleasure; and assent was refused by the Queen, on the advice of the British Government, after consultation with the Dominion Government. All this is perfectly clearly set forth in Dominion-Provincial Legislation, Vol. I, p. 1153.

The Memorandum omits entirely nine cases of reservations:

(a) Two reserved bills reported on in Provincial Legislation, Vol. II, but not noted in the Tables: a British Columbia bill of 1897 and a Quebec bill of 1904.

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on both of which the Dominion took no action.

(b) Seven bills of which Provincial Legislation contains no record, but whose reservation is recorded in the provincial Journals or Debates:

(i) a British Columbia bill of 1872 dealing with illegitimate childrem;

(ii) a New Brunswick bill of 1872 amending the Spirituous Liquors Act;

(iii) a Quebec bill of ~~1877~~ 1878, the famous Quebec, Montreal, Ottawa and Occidental Railway Bill, which figured so largely in the dismissal of the de Boucherville Government;

(iv) a New Brunswick bill of 1889, dealing with the advertising of foreign lotteries;

(v) a New Brunswick bill of 1899, dealing with the licensing of non-residents for employment in Saint John;

(vi) a British Columbia bill of 1904, amending the Municipal Elections Act;

(vii) a Prince Edward Island bill of 1904, dealing with the North River Road and Victoria Park.

None of these seven received the Governor-General's assent. This is clear from the provincial Statutes.

The numbers of reserved bills for each province given in the Memorandum are inaccurate even on the basis of the Tables. The Tables show five (not four) Quebec bills, eight (not eleven) New Brunswick bills, three (not no) Nova Scotia bills. In actual fact, the ~~XXXXXXX~~ numbers of reserved bills by provinces are:

Manitoba, 19 (assent given four, assent refused ~~XXX~~ ten, no action five)

British Columbia, 12 (assent given one, assent refused seven, no action two, no report available but no action taken two)

New Brunswick, 11 (assent given four, assent refused two, no action two, no report and no action three)

Prince Edward Island, 8 (assent given three, assent refused two, no action two, no report and no action one)

Quebec, 7 (assent given one, no action five, no action and no report one)

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Nova Scotia, 3 (assent given one, assent refused one, no action one)

Alberta, 3 (assent not given)

Ontario, 2 (no action)

This makes a total of 65 reserved bills, of which 14 were assented to. Assent was refused in 22 cases; no action was taken on 19; and either assent was refused or no action was taken on 10 (on these last, including the 3 Alberta bills, we have no published reports).

It is singular that the Memorandum makes no comment on the 1924 reiteration of the Minute of Council of November 29, 1882, in a despatch to the Lieutenant-Governor of Prince Edward Island; on the Nova Scotia Legislative Council case of 1926; on the various dismissals of provincial Governments (1878, 1891, 1898, 1900 and 1903); nor on the refusal of dissolution in Quebec in 1897, nor in New Brunswick in 1883, and in British Columbia in 1903; or on the action of the Lieutenant-Governor in Manitoba in 1915 and 1920.

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144700

February 14, 1945.

Dr. Eugene Forsey,
5 Lakeview Terrace,
Ottawa, Ontario.

My dear Eugene:

I just received yours of 12th. Have read the catalogue of errors in the Justice Department memorandum. Am afraid the author has some of the disabilities of Mr. Clokie. One wonders how you get the time to analyse these productions so thoroughly, for it does require a most exhaustive examination of records dating back for many decades.

I am afraid Mr. McNaughton has put on about as poor a performance over recent years as could well be conceived--at least, over recent months.

Will try to remember February 20th and listen in to the broadcast--something I practically never do. I am far from being an admirer of the Financial Post and the group of papers with which it is associated. Would like to have a record of their income derivable from the Dominion Government.

From what I have seen of Blair Fraser's writings, I think he makes it a habit of getting his instruction from King's secretaries.

Had not seen before Pouliot's reference to "the old witch in Hull", etc. Too bad that a man with such a command of invective should have so little balance and sanity of thought on matters of real importance.

Yours sincerely,

AM/E.

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144701

February 16, 1945.

Dr. Eugene Forsey,
3 Lakeview Terrace,
Ottawa, Ontario.

Dear Dr. Forsey:

In the absence of Mr. Meighen, who is ill today with a slight attack of 'flu, I am writing to ask ifyou would be good enough to send your copy of the Justice Department's "Memorandum on the Office of Lieutenant-Governor" to Mr. J. F. H. Teed, K. C., Saint John, N. B. This Memorandum bears directly on important discussions which have taker place between Mr. Meighen and Mr. Teed. The latter endeavoured to get a copy from the Department but was advised that the supply is exhausted.

Mr. Meighen suggests that you send the Memorandum confidentially and for as long as you can spare it. I am advising Mr. Teed today that you have been requested to do so.

Yours very truly,

L.

Private Secretary.

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144702

3 Lakeview Terrace,
Ottawa, Ontario.

Feb. 20th, 1945.

Rt. Hon. Arthur Meighen, P.C., K.C.,
320 Bay Street,
Toronto, Ont.

Dear Mr. Meighen:

Thanks very much for your letter of the 14th.

I think the trouble with Plaxton was chiefly that he relied simply on the tables in Dominion-Provincial Legislation and on Todd (overlooking the fact that the last edition of Todd was published in 1894). I did my checking on this whole business in 1938 and 1939. Have had no time to do anything of the sort recently.

I am sending the Memorandum to Mr. Teed today.

I am sorry you have had the 'flu; I have been fighting a touch of the same thing.

I rather hope you will not be listening to the broadcast tonight, as it is a pretty feeble affair all around. My own view is that a subject of this magnitude simply cannot be dealt with in this fashion, and that the attempt to do it is bound to produce something both superficial and dull.

I think you will be amused by a remark I made to my wife the other day that I had suddenly realized why King never got married: he would have had to give a straight answer to a straight question!

Yours sincerely,

Eugene Forsey

EF:RM

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144703

3 Lakeview Terrace,
Ottawa, February 22, 1945.

The Editor,
The Journal,
Ottawa.

Sir,

Your discussion of Governor-General's warrants, in your editorial of February 21, raises some very interesting questions.

Substantially, your argument is that of Sir George Foster, September 3, 1896 (Hansard, pp. 624-34), that the special warrants can be used only for urgent expenditures not foreseen AND not provided for by Parliament. But, as Sir Richard Cartwright pointed out in the same debate (pp. 640-1), the Act says, "not foreseen OR provided for by Parliament". Cartwright's interpretation is the one sanctioned by usage. At least four times, Governor-General's warrants have been used to provide all the money required for the public service for a period of several months when Parliament had not made the necessary provision, and both Liberal and Conservative Governments have taken responsibility for such use.

On April 24, 1896, Parliament was dissolved, one day before the expiry of its maximum term, with Supply voted only to June 30. The new Parliament did not meet till August 19. Meanwhile, the Liberal Government met all necessary expenditures by Governor-General's warrants.

On July 29, 1911, Sir Wilfrid Laurier's Government abruptly dissolved Parliament during the Reciprocity debate, without having Supply voted (an action strongly condemned by Sir Robert Borden). The new Parliament did not meet till November 15. Meanwhile, both the old Liberal and the new Conservative Governments met all necessary expenditures by Governor-General's warrants. Sir Robert Borden discusses the matter in his Memoirs, pp. 339, 341-2.

On July 2, 1926, Mr. Meighen's Government dissolved Parliament with most the Supply still not voted. The new Parliament did not meet till December 9. Meanwhile, both the Conservative and Liberal Governments met all necessary expenditures by Governor-General's warrants.

On January 25, 1940, Mr. King's Government dissolved Parliament, with Supply voted only till March 31. The new Parliament met May 16. Meanwhile, the Government met all necessary expenditures by Governor-General's warrants.

You are undoubtedly correct in your contention that the proper procedure is to at least try to get Parliament to vote Supply in the normal way, as Sir Mackenzie Bowell did in 1896 and Mr. Meighen in 1926. But if Mr. King decides not to call the present Parliament again, and to meet necessary expenditures by Governor-General's warrants till the new Parliament assembles after the elections, he can point to the precedents of 1911 and 1940.

It is not only in the Dominion that warrants have been used in this way. All the provinces have similar provisions in their law, and in Quebec they have been extensively used at least twice. The seventh Legislature was prorogued December 30, 1890. The Mercier Government was dismissed December 16, 1891, dissolution following December 22. The new Legislature met only on April 26, 1892. Clearly, without Lieutenant-Governor's

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warrants, the whole public service of the province would have been at a standstill for many months. In this case, the new Government made no attempt to get the old Legislature to vote Supply, doubtless because its opponents had a majority which would have rendered the attempt futile. In 1926, when the Taschereau Government found it impossible to proceed with public business in the Legislature, and was obliged to dissolve, June 11, without Supply voted, the special warrants again alone made it possible to carry on the public service till the new Legislature met, October 7.

Yours truly,

Eugene Forsey

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144705

February 26, 1945.

Dr. Eugene Forsey,
3 Lakeview Terrace,
Ottawa, Ontario.

Dear Eugene:

I am very grateful for your letter of 22nd. I was anxious about the facts in this case because I knew the attitude of any Government I was ever in towards Governor-General's Warrants.

When, of course, a Government comes in power at a time when money has not been provided by Parliament, that is an emergency which can quite justly be taken care of by Warrants, until such reasonable preparation as is always necessary can be made for the meeting of the House. Decisions must be made as to policy, etc. to be pursued.

It is the proper course, as you so clearly say, that the outgoing Government should make every effort to get Supply before Dissolution, as was done in '96 and again in '26. I am very glad to see that your studies disclose no case in which a Conservative Government failed to make every reasonable effort to get Supply, or used Governor-General's Warrants save under such conditions of emergency as entirely justified their use.

Mr. King, in truth, cannot point to any precedent except his own in 1940, if he fails to call Parliament this year before its expiration on 17th April. In a measure it is true that he can point also to the 1911 case, but in 1911 Sir Wilfrid Laurier at least could plead that he was blocked in his legislative programme. It is true, though, as Sir Robert Borden pointed out, that he was not blocked at all in any effort to get Supply. In fact, I am quite certain from memory that Sir Robert Borden offered him Supply.

Yours very truly,

AM/E.

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144706

3 Lakeview Terrace,
Ottawa, Ontario.

March 2nd, 1945.
(Delayed by absence of my secretary.)

Rt. Hon. Arthur Meighen, P.C., K.C.,
320 Bay Street,
Toronto, Ontario.

Dear Mr. Meighen:

Thanks very much for your letter of the 26th.

I felt much inclined to state my agreement with the Journal's main contention very much more strongly, but it seemed best not to do so. I think I can do more useful work if I do not get a reputation as one who hits Mr. King over the head with a sledge-hammer on every possible occasion. However, in answer to a further editorial on the subject, I have again stated explicitly my agreement with their main point.

The trouble was that instead of sticking to the straight argument of constitutional propriety, they tried to bolster it by asserting: (a) that the statutory provision for Governor-General's warrants was a relic of the days before responsible government, and had originated in the necessity of giving the Governor power to spend money when the legislature refused supply; (b) that if Mr. King did not call a final session of the present parliament, and resorted to Governor-General's warrants, he would be doing something "unheard of not only in Canada, but in any democratic country in the world"; (c) that the language of the Act meant that the expenditures must be not foreseen and not provided for by parliament, and therefore Mr. King's supposed action would contravene at least the spirit of the law.

(a) seems to me very dubious, but I have not had time to look into the matter. (b) is obviously preposterous, especially in view of what happened only five years ago. (c) is at least very shaky. Fortunately, it now looks as if King had decided to refrain from this particular outrage, so I hope I have not done any harm.

Yours sincerely,

Eugene Forsey

Eugene Forsey,

MEIGHEN PAPERS, Series 6 (M.G. 26, I, Volume 222)

PUBLIC ARCHIVES
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CANADA

144707

March 12, 1945.

P.S. Had a morning at the Privy Council Office Saturday, with some interesting results:

(1) They still do not swear in acting Ministers of Departments as such.

(2) They did swear in Dr. King , in the form enclosed (which I should like to have back), and Heeney thinks MacKinnon also was so sworn. One of his officials is checking on this, and also on earlier cases since 1926. I said I was perfectly certain no Minister without portfolio in R.B.'s Cabinet was sworn as such. The oath they administered to Dr. King is obviously perfectly preposterous, and mere empty verbiage. I nearly laughed my head off when I saw it, and I fancy you also will get some amusement ~~XXX~~ out of it.

(3) I got a look at the Order of July 11, 1896, appointing Laurier President of the Privy Council. Just as I expected, the covering page recorded the fact that the "Committee" referred to in the Order consisted of Sir Wilfrid himself and no one else! The notation is: "Present: the Honourable Wilfrid Laurier in the Chair." All the Orders immediately preceding and following have: "Present: So and So in the Chair" and then a list of names. This is something to put into a second edition if ever I run to one.

(4) On the question of the quorum of Council, I got the enclosed (which, also, I should like to have back).

(5) The Order P.C. 3374 (enclosed; please return when convenient) appears to be either a copy, or something pretty close to it, of one which, according to MacGregor Dawson's collection of constitutional documents, you were the first to have passed. The Order is no longer attached to Commissions. Heeney suspects that the thing goes back to an earlier date, and is having inquiries made. See note on the Order.

(6) Heeney says that Clokie wrote to him, before his book came out, asking for information about the Privy Council and the Cabinet. This Heeney duly furnished, in what I gather was a rather elaborate and careful memorandum. When he got the book, he looked up the relevant part of it, and found it "full of inaccuracies". He appeared justifiably incensed. I am sending him my list of errors, as soon as I get it back from D.C. Harvey, Nova Scotia Provincial Archivist. (He had a brief review in the Dalhousie Review, noting four or five obviously wrong dates. All were before 1850, and had to do with Clokie's historical introduction, which I skimmed very lightly.)

E.A.D.

Shall be in Toronto April 9, and possibly over the preceding week end.

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PUBLIC ARCHIVES
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CANADA

144708

Privy Council

Canada

Ottawa, February 26th, 1945.

Note

Re: Quorum of the Privy Council

The original authority for placing a quorum of the Privy Council at four members is contained in the instructions passed under the Royal Sign Manual and Signet to Viscount Monck the first Governor General of Canada, dated June 1st, 1867. Clause 4 of these instructions states:

> "And We do hereby declare, and it is Our Pleasure, that Our said Privy Council shall not proceed to the despatch of business unless duly summoned by your authority, nor unless four Members of the said Council be present and assisting at the meetings at which any such business shall be despatched."

I understand this direction was not repeated in subsequent instructions for following Governor Generals but accepted as of that time as the prevailing custom. A reference to the quorum as being of four members appears in the Orders in Council defining the functions of the Prime Minister and his "prerogatives". The last of these was P. C. 3374 of October 25th, 1935.

Mr. Lothrop points out that there is no statutory requirement for the quorum and that there is no reason why the Prime Minister, on behalf of the Government, could not advise the Governor General that it was desired to alter the quorum to any number of members thought desirable.

(Signed) W. E. D. Halliday.

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PUBLIC ARCHIVES
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CANADA

144709

Copy of Oath of Office for Minister without Portfolio

Member of the Administration

and

Minister without Portfolio

Oath of Office

I, James H. King, do solemnly and sincerely promise and swear that I will duly and faithfully and to the best of my skill and knowledge execute the powers and trusts reposed in me as Member of the Administration and Minister without Portfolio

So help me God

(Sgd) J. H. King

The foregoing Oath was taken and subscribed by the Honourable James H. King as Member of the Administration and Minister without Portfolio before me, at the city of Ottawa, this 26th day of May, 1942.

(Sgd) A.D.P. HEENEY
Clerk of the Privy Council.

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PUBLIC ARCHIVES
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144710

March 13, 1945.

Dr. Eugene Forsey,
5 Lakeview Terrace,
Ottawa, Ontario.

My dear Eugene:

I am very glad indeed you sent me the material in yours of 2nd March.

So Clokie thinks I was the first to appropriate to myself such wide powers of recommendation!

I wish I had known about that affidavit of Dr. King's for the very short period I was in the Senate while he was Leader. I would have had a fine reason for raking up the past and probing Dr. King's conscience for having undertaken with such solemnity to do his duty if he ever had any to do.

I am returning the enclosures as asked for. Have made a copy of the one by Halliday on Quorum of the Privy Council.

Mr. Hinds, Clerk of Committees of the Senate, wrote me in November, 1940, to say that four is and always had been the quorum of Council. After reading Halliday's memorandum I feel disposed to say that there is no quorum of Council. The pleasure of His Majesty, as expressed to Viscount Monck, cannot be said to bind subsequent Governors-General. The Order-in-Council in form PC5374 would ensure that the Governor General during the term of office of the then Administration, would not, subsequent to the approving of the Order, approve any further Order passed at a meeting at which less than four were present. Such an Order would not be binding on a subsequent Administration.

Yours very truly,

AM/E.

MEIGHEN PAPERS, Series 6 (M.G. 26, I, Volume 222)

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144711

3 Lakeview Terrace,
Ottawa, March 15, 1945.

Dear Mr. Meighen,

Thanks for your letter of the 13th., and the documents which you returned in it.

It is Dawson, not Clokie, who, if I remember correctly, attributes the Order on a Prime Minister's prerogatives to you.

I think you are quite right about the "quorum". With the full facts before me, I shall be able to make changes in any subsequent edition of my book which will make King's conduct look even worse than it does now, especially as I can chuck in the facts about Laurier's appointment in 1896. Quite clearly, there was no set quorum when King kicked up all that dust; though if there had been, all your appointments were made by a meeting of Council where a quorum was present.

I am carefully noting all, even the smallest, corrections, in case a new edition does become necessary. Every one of them will make King's case look worse!

I am afraid you could not have given Dr. King that grilling after all; for, unless I am much mistaken, you resigned from the Senate in December 1941, or January 1942; and Dr. King took this fancy oath only in May 1942. I am waiting eagerly to see whether any previous Ministers without portfolio took any such oath.

Yours sincerely,

Eugene Forsey

MEIGHEN PAPERS, Series 6 (M.G. 26, I, Volume 222)

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144712

March 16, 1945.

Dr. Eugene Forsey,
5 Lakeview Terrace,
Ottawa, Ontario.

My dear Eugene:

I have your letter of 15th.

Yes, I made a mistake in referring to Clokie instead of Dawson.

Also you are quite right about Dr. King. I remembered seeing him sitting across and imagined he had been there for a brief time as Leader before I left, but that is incorrect.

Yours very truly,

AM/E.

MEIGHEN PAPERS, Series 6 (M.G. 26, I, Volume 222)

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144713

3 Lakeview Terrace,
Ottawa, March 19, 1945.

Dear Mr. Meighen,

My researches in the Privy Council Office have produced a most curious result. Mr. Halliday has just telephoned me about his search of the oath book. It shows that the following took exactly thesame oath as Dr. King, as Ministers without portfolio and Members of the Administration, on the dates specified:

Hon. J.A. Macdonald, September 12, 1930.
Rt. Hon. Sir George H. Perley, same date.

Rt. Hon. Arthur Meighen, February 3, 1932.

Hon. Earl Rowe, August 30, 1935.
Hon. Onesime Gagnon, same date.

Rt. Hon. Raoul Dandurand, October 23, 1935.

Hon. J.A. MacKinnon, June 23, 1939.

There appears to be no record of Hon. W.F. Kay taking any such oath, June 17, 1930; nor of Dandurand's taking it in September 1926.

How you come to be on the list, I don't know. As Halliday and Heeney have both been very helpful to me in this and other matters, I should be greatly obliged if you would not write to them about the matter, as you may perhaps feel inclined to do, without letting me know beforehand.

I need hardly say that I shall await with the greatest interest your comments on the above list!

You may be interested to know that I have finished hunting up cases in which Parliaments and Legislatures throughout the Empire prolonged their own existence. King, if he tried to get a prolongation now without substantially unanimous consent, would have really only two precedents: Ontario and Saskatchewan in 1943, both deserving of Evatt's term, "acts of tyranny and usurpation". If King does try this, I can do a short, popular article on the subject in a few hours, and shall certainly do so.

Yours sincerely,

Eugene Forsey

MEIGHEN PAPERS, Series 6 (M.G. 26, I, Volume 222)

PUBLIC ARCHIVES
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CANADA

144714

March 20, 1945.

Dr. Eugene Forsey,
3 Lakeview Terrace,
Ottawa, Ontario.

My dear Eugene:

I certainly got a surprise in your letter of 19th. One thing, however, is clear - there were no such meaningless affidavits prior to 1926. What no doubt occurred was that King gave instructions to the Privy Council Department to have such affidavits prepared and administered to Ministers without Portfolio from that time on, and the practice thus grew up without anyone giving particular attention to it. What I regret very much is that I signed such an affidavit myself. I have not the least recollection of it and certainly should have been on my guard, for if I had been I would certainly have refused to sign it. It probably was put before me with several other things, but there is no excuse whatever for my not observing it and tearing it up.

Will certainly observe your request as to the men who have done the investigating in this matter.

Yours very truly,

AM/E.

MEIGHEN PAPERS, Series 6 (M.G. 26, I, Volume 222)

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Sub-headings and letterpress under picture not mine. E.A.H.

144715

MEET MACKENZIE KING

"O Promise Me - - - Promise Me Truly"

(National Liberal Theme Song)

BY EUGENE FORSEY

Mr. Mackenzie King took office in 1921 on a platform of social and economic reform. He had drafted much of it himself. He has had eighteen years of office to put it into effect. *How much has he done?*

LABOR

Mr. King is an expert in labor relations. Even in 1921, he had had a long and varied experience of the subject both in Canada and the United States. He was the virtual creator of the Dominion department of labor. As its first deputy minister, and later its first separate minister, he was responsible for its organization, and for its first decade was its guiding and controlling spirit. From 1914 to 1917 he was director of industrial research for the Rockefeller Foundation. He wrote a book, **Industry and Humanity**, embodying the fruits of his experience. He professed then, as he professes now, to be the champion of "the humble poor," devoting his life to "seeking to improve the conditions of the people of this country."

1919 Promises

What did he promise labor? Eight things: (a) approval of the general principles of the I.L.O.; (b) introduction into industry of a principle by which "labor and the community, as well as capital, might be represented" in the control of industry; (c) "so far as practicable", Dominion-provincial co-operation for "an adequate system of insurance against unemployment, sickness, dependence in old age, and other disability, which would include old age pensions, widows' pensions and maternity benefits"; (d) representation of labor on Dominion commissions "pertaining to labor matters", and on the C.N.R. Board; (e) retraining for disabled workers; (f) more effective restriction on Chinese immigration, federal incorporation of co-operatives, proportional representation; (g) immediate and drastic action against the high cost of living and profiteering; (h) "discontinuance of government by Order-in-Council and a just franchise and its exercise under free conditions." **(Canadian Annual Review**, 1919, pp. 605 and following.)

What has he done for labor under each of these heads?

(a) Approval of the general principles of the I.L.O. committed him to absolutely nothing, and he has done virtually nothing. Canada's record of ratification of I.L.O. conventions is one of the worst in the world. Mr. King will, of course, plead that the Constitution prevented him from implementing most of such conventions. True. But what had he done to get the Constitution amended in this respect? Nothing.

(b) Representation of labor and the community on boards of directors was one of the main proposals in **Industry and Humanity**. Presumably it lay very close to Mr. King's heart. At any rate, he had talked about it often enough. But in eighteen years of office what has he done about it? Nothing.

(c) Some social security legislation Mr. King has passed. In 1926-27, galvanized into sudden activity by the fact that J. S. Woodsworth and a couple of other labor members held the balance of power in the House, and could keep him in or turn him out, Mr. King introduced and carried an Old Age Pensions Bill. By no stretch of the imagination could this measure, with its high age limit, its severe means test and its meagre benefits, be described as "adequate insurance against dependence in old age." But this gigantic effort exhausted Mr. King's reforming zeal for the next dozen years.

Not until 1940 did he move forward another step, with the Unemployment Insurance Act. This also is a half measure, inadequate both in coverage and benefits, excluding many workers altogether and paying niggardly amounts to workers with dependents. Sickness insurance, disability insurance, widows' pensions and maternity benefits Mr. King has not even tried to introduce; **and the last three he does not even mention in his present election program.** He is too busy congratulating himself on the Family Allowance Act. He does, however, promise, once again, some kind of health insurance and some kind of contributory old age pensions scheme, both conveniently vague, and both entirely dependent on agreement with the provinces. The whole performance might be described as three steps forward, three steps back and a couple of hesitation waltzes.

Once again, Mr. King will be ready with excuses: that his original promises had an escape clause ("so far as practicable"), that the Constitution prevented him from doing anything more than he did, that in his first five years he lacked a clear majority, and that for the last five years the war has precluded further action. The first excuse is correct. There was an escape clause; **and there is another one (agreement with the provinces) attached to the current promise of health insurance and contributory old age pensions.** The other excuses are perfectly worthless. Mr. King found it possible to amend the Constitution on unemployment insurance; what he did for that he could have done for the rest. But he did not even try. It is true that in his first five years he had no clear majority; but who held the balance of power? **The Progressive and Labor members, who on most matters were pledged to go even farther than the Liberal program.** It is also true that for the last five years we have been at war; but the war did not prevent Mr. King from passing unemployment insurance and family allowances. Why did it prevent him from at least making a start on the other things?

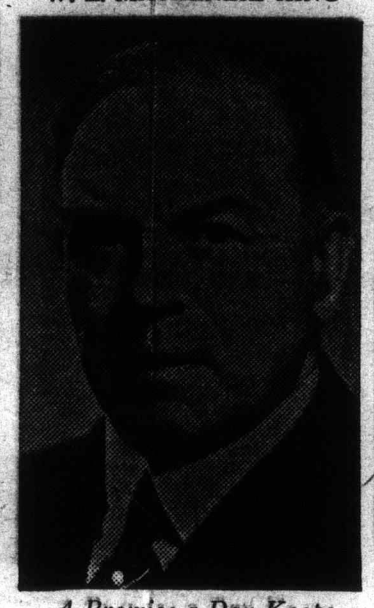
(d) Mr. King has given labor representation on the C.N.R. Board, on a few commissions, and on a considerable number of advisory bodies, mostly of small importance and with limited powers. On most of the really important boards and commissions connected with the war effort, for example, there has been no labor representation at all, in spite of repeated demands by the two Labor Congresses that Mr. King should carry out his long-standing promise in this regard. But of course this promise also had an escape clause: "pertaining to labor matters." Most of Mr. King's promises are thus equipped. Even on his loftiest flight of oratory he always carries a verbal parachute so that he can bail out if things get too hot for him

(c) Retraining for disabled workers is one of the numerous Cheshire cats of the 1919 promises: nothing remains but the smile. Mr. King has never made the slightest attempt to do anything about it, and has now ceased even to mention it.

(f) More effective restriction on Chinese immigration is a promise which Mr. King has performed in reverse. Federal incorporation of co-operatives is in the same position as retraining of disabled workers. So is proportional representation. On all these, Mr. King's record is just nothing, nothing, nothing.

(g) Mr. King did not take office till the wartime inflation had given place to a catastrophic deflation and depression, so he was not called upon to fulfil his promise of "immediate and drastic action against the high cost of living and profiteering."

(h) The "government by Order-in-Council" against which Mr. King reclaimed in 1919, 1920 and 1921, was largely a phenomenon of the war and reconversion period; with the end of that period, not only the Orders-in-Council but also the War Measures Act on which they were based, lapsed, automatically. The promise to abolish them was just sound and fury, signifying nothing. When a new war broke out, Mr. King himself was in office; and he proceeded to indulge in "government by Order-in-Council" on a scale never before approached, let alone equalled. Borden and Meighen had slain their thousands, but King slew his tens of thousands; he become the all-time champion passer of Orders-in-Council. His contribution to a "just franchise" is to debar most Canadians of Japanese descent from voting at all, and to leave untouched the provisions of the Elections Act which deny the franchise to Canadians of Chinese and Hindu origin, and Doukhobors, in British Columbia.



W. L. MACKENZIE KING

A Promise a Day Keeps Freedom Away

No Collective Bargaining Promise

It will be noted that one measure, of vital interest to labor, then and now, is conspicuous by its absence from the 1919 Liberal program. Mr. King never promised to do anything about collective bargaining, and he never did, until the mounting demands of organized labor, its increasing tendency to support the CCF, and the sweeping CCF victory in practically every industrial constituency in Ontario in 1943, frightened him into passing another of his half measures, P.C. 1003. There was good reason why Mr. King omitted collective bargaining from his 1919 program, resisted it as long as he could, is still resisting it as far as he can in Crown companies (which are strictly forbidden to sign contracts with union security clauses —the **Labor Gazette**, March 1945, p. 257, prints the prohibition), and for the first two years of the war actually peddled and pushed company unionism as hard as he could, through his labor office-boy, Humphrey Mitchell, the present minister of labor. For Mr. King, hero of the hour for the "Labor-Progressive" **party, is the father of company unionism on this continent.**

Every one of the numerous "employee representation" (more correctly, misrepresentation) plans against which organized labor in Canada and the United States has had to struggle for a generation is just a variant of the plan Mr. King worked out for the Rockefellers and applied first in the Rockefeller-owned Colorado Fuel and Iron Company. That company had just emerged from a bitter struggle with the United Mine Workers of America, in which union recognition was the "most vital" issue. The company had inflexibly refused to deal with the union. It accepted Mr. King's plan at once. No wonder; for Mr. King had been careful to point out to Mr. Rockefeller that under his plan it would be "essential" that all the employee representatives "should be persons actually employed in the industry or connected with it in some way, not persons chosen from the outside." The company's president, like Mr. King, later disclaimed any intention of using the plan to "combat unionism." But he added, with delightful candor: "We desire harmonious relations within our own company, undisturbed by agitation from the outside"; the classic formula of every anti-union employer since unions began. (The whole story may be found in Selekman and Van Kleeck, **Employees' Representation in Coal Mines**, a standard text.)

Mr. King hoped that his plan "might serve as a model" for other concerns. It did. According to his biographer, the late Hon. Norman Rogers, and indeed according to Mr. King himself (who read the whole thing into Hansard), "Of such value were his services that they were continuously requisitioned by an increasingly large number of the most important industrial concerns employed in the manufacture of munitions and other essential war supplies." Among Mr. King's patrons were Bethlehem Steel, Bethlehem Shipbuilding, Youngstown Sheet and Tube, International Harvester, and General Electric, all then, and long afterwards, notorious for their hostility to unionism. It is not recorded that Mr. King was consulted by any unions.

Mr. Tom Moore, President of the Trades and Labor Congress, in 1919, summed up Mr. King's plan in these words: "There are many ways of destroying trade unions, and they have nearly all been tried except the one of agreeing to them while seeing that they do not operate and function" (a reference to the "no discrimination" clause in the plan); "and this is the design of the plans which are based on the Rockefeller plan."

AGRICULTURE

In the House of Commons, last July, in one of his increasingly frequent tributes to himself, Mr. King said: "I have given my life, the greater part of it, to seeking to improve the conditions of the people of this country. . . . I have fought for measures of social security and national well-being wherever the opportunity presented itself." We have seen just how much truth there is in that boast as far as labor is concerned. What about the other great body of ordinary people in this country, the farmers?

Mr. King in 1919 had plenty of glowing promises for them, too: encouragement of co-operatives, utilization of the national credit to assist co-operative agricultural credit associations; extension of the Canadian government elevator system; provision of "interior and terminal cold storage warehouses equipped for the assembling, assorting, preparing, storing and grading of food products supplied to the farmer at cost of operation"; Government arrangements for the "distribution of fertilizers at lowest possible cost."

How much of all that has he carried into effect? Let any farmer answer. The chances are that not one farmer in fifty even knows that Mr King ever thought of such things.

PUBLIC RELATIONS

So much for the 1919 program promise and performance. But Mr King has other, and equally compelling, claims on the gratitude and confidence of the Canadian people his record as a defender and reformer of Parliament and the Constitution; his record in foreign policy and his achievements in promting national unity.

Mr. King is very proud of what he has done in all three fields. Unfortunately lack of space makes it impossible to do more than give a very few choice examples.

Parliament and the Constitution

No public man in Canadian history has been so vociferous about "the rights of Parliament" and "the supremacy of Parliament" as Mr. King No man has declared oftener or more insistently that "Parliament must" or "will decide." If ever there was a question on which Parliament ought to have been called upon to decide, wartime labor policy was that question. But in the whole of the government's extensive wartime labor legislation, there is exactly one measure on which it has invited "Parliament to decide": a bill to debar certain persons from being members of boards of conciliation.

This weighty matter required submission to Parliament; such trifles as collective bargaining, conciliation machinery, wage control, the right to strike, could all be settled by mere executive decree, without consulting the representatives of the people. So could that other trifle, price control. And this is done by the very man who, twenty years before, made the welkin ring with his denunciations of "Order-in-Council" government."

"A merciful Providence fashioned us holler,
"A' purpose that we might our principles swaller."

Contempt for Democracy

But this trampling on the rights of Parliament was nothing new. Mr. King had done it before. In 1926, when a motion of censure against his government was under debate in the House of Commons, he tried to prevent the House from pronouncing judgment by dissolving it forthwith: a gross and flagrant contempt of Parliament without precedent and without equal in the whole history of the British Commonwealth. "Parliament must decide"; but when it showed signs of deciding against Mr. King, he tried to prevent it from deciding at all. "Off with its head!"

And just by way of showing that he had not repented of this performance, Mr. King, on January 25, 1940, called Parliament together, informed it, in a long speech, that he proposed to dissolve it almost at once, moved adjournment, tried to prevent the leaders of the other parties from replying by pointing out that the motion to adjourn was not debatable, and wound up by dissolving before the session had lasted five hours, and before supply or essential amendments to the Elections Act could be voted, another insult to Parliament absolutely without precedent in the annals of the British Commonwealth.

Senate Reform

As a reformer of Parliament, Mr. King's record is not less notable. In the opening speech of his 1925 election campaign, at Richmond Hill, September 5, 1925, he denounced the Senate as undemocratic, declared his government's conviction that "one of the great necessities of the time is Senate Reform," and announced that all future Liberal appointees to the Upper House would be pledged to support **any** proposals for Senate Reform which Mr. King's government **might introduce.** In the light of what followed, this would have been a safe enough pledge. For neither then nor at any time since has Mr. King uttered so much as one syllable to tell the public what he proposed to do to the Senate.

In 1925, Senate Reform was "one of the great necessities of the time," one of the four great urgent national issues which brooked no delay and on which Mr. King sought a mandate from the Canadian people. Now, twenty years later, Mr. King does not even mention it. For fifteen years of the twenty, Mr. King has been in office, with a clear majority. For ten years he has had an overwhelming majority. He has not so much as lifted an eyebrow to bring about any kind of Senate Reform.

Mr. King, down almost to the outbreak of this war, was a notorious isolationist. His policy was "no commitments." (See, for example, his speech in the House of Commons, May 24, 1830, **Hansard**, p. 3178.) He was also a fervent admirer of Mr. Chamberlain's policy of appeasement.

Foreign Policy

Mr. King delights to proclaim himself the champion of democracy. He aspires to the leadership of the "small nations." Czechoslovakia was a democracy, one of the most complete democracies in Europe. Czechoslovakia was a small nation. But when Czechoslovakia was sentenced to death at Munich, September 30, 1938, what did Mr. King say? He cabled Mr. Chamberlain as follows: "The heart of Canada is rejoicing tonight at the success which has crowned your unremitting efforts for peace. May I convey to you the warmest congratulations of the Canadian people, and with them, an expression of their gratitude, which is felt from one end of the Dominion to the other. My colleagues in the government join with me in unbounded admiration at the services you have rendered mankind. Your achievements in the past month alone will assure you an abiding and illustrious place among the great conciliators whom the United Kingdom and the British Commonwealth of Nations and the whole world will

(Continued on Page 5)

CANADA

The People's Page

The Truth About Tory Espionage

President of the Ontario Provincial Police Association Makes Sworn Affidavit

The charges made by E. B. Jolliffe, CCF opposition leader in Ontario, in a radio address on May 24 have been fully substantiated by one of the most reliable and generally respected men in the Ontario Police Force. His affidavit respecting the activities of W. J. Osborne-Dempster follows:

COPY

DOMINION OF CANADA
PROVINCE OF ONTARIO
COUNTY OF YORK

To Wit:

IN THE MATTER OF the Ontario Police and one William J. Osborne-Dempster.

I, John Alvin Rowe, a constable of the Ontario Provincial Police, do solemnly declare that:

1. I have been a member of the Ontario Provincial Police and employed by them continuously for nearly twenty-three years, that is to say since October, 1922. I recently resigned from the Provincial Police of my own free will. My record with the police has been without any blemish during these years.

2. I have been advised by Wm. H. Stringer, Commissioner of Police for Ontario, that he was sorry to see me going and that a certificate of good character was in the process of being made in the lettering department at the East Block and that it would be a nice thing to frame. He added that it was not given to very many of the men excepting the old-time constables with good records.

The Special Branch

3. On June 30th, 1943, I was instructed by the Deputy Commissioner McCready to report to Inspector Ward at 18 Surrey Place and he supervised the removal by me in a police truck of all the contents of the office of the Anti-Sabotage Division at 18 Surrey Place to a basement underneath the Criminal Investigations Offices in the main building of the Parliament Buildings. I carried out the instructions and the whole office was dismantled and the contents removed with the exception of one electric fan.

4. Some time between the above date and the month of November, 1943, I was instructed to go to the Special Branch in connection with the loss of an electric fan and I observed that the office was apparently not in use as there was no furniture or equipment there.

5. On or about the first week in November, 1943, I was instructed by the Deputy Commissioner McCready to secure a police truck and supervise the removal of the files from the place in the main building where I had put them and return them to the Special Branch at 18 Surrey Place and I carried out these instructions.

6. About the middle of November, 1943, when my previous work as lecturer, organizer and observer of the A.R.P. was finished I was told by Deputy Commissioner McCready under whose direct control I had been working to proceed to an office known as the Special Branch. I was told by Deputy Commissioner McCready that my task would be to assist with the filing, clerical work and typing and that the officer in charge of the office was a man by the name of William J. Osborne-Dempster. I reported to this Special Branch which consisted of offices over the Highway Department paint shop at 18 Surrey Place and remained there doing clerical work until some time near the beginning of February, 1944.

Secret Reports to Gladstone Murray

7. I typed out a large number of reports for William J. Osborne-Dempster. These reports were stamped secret and confidential,

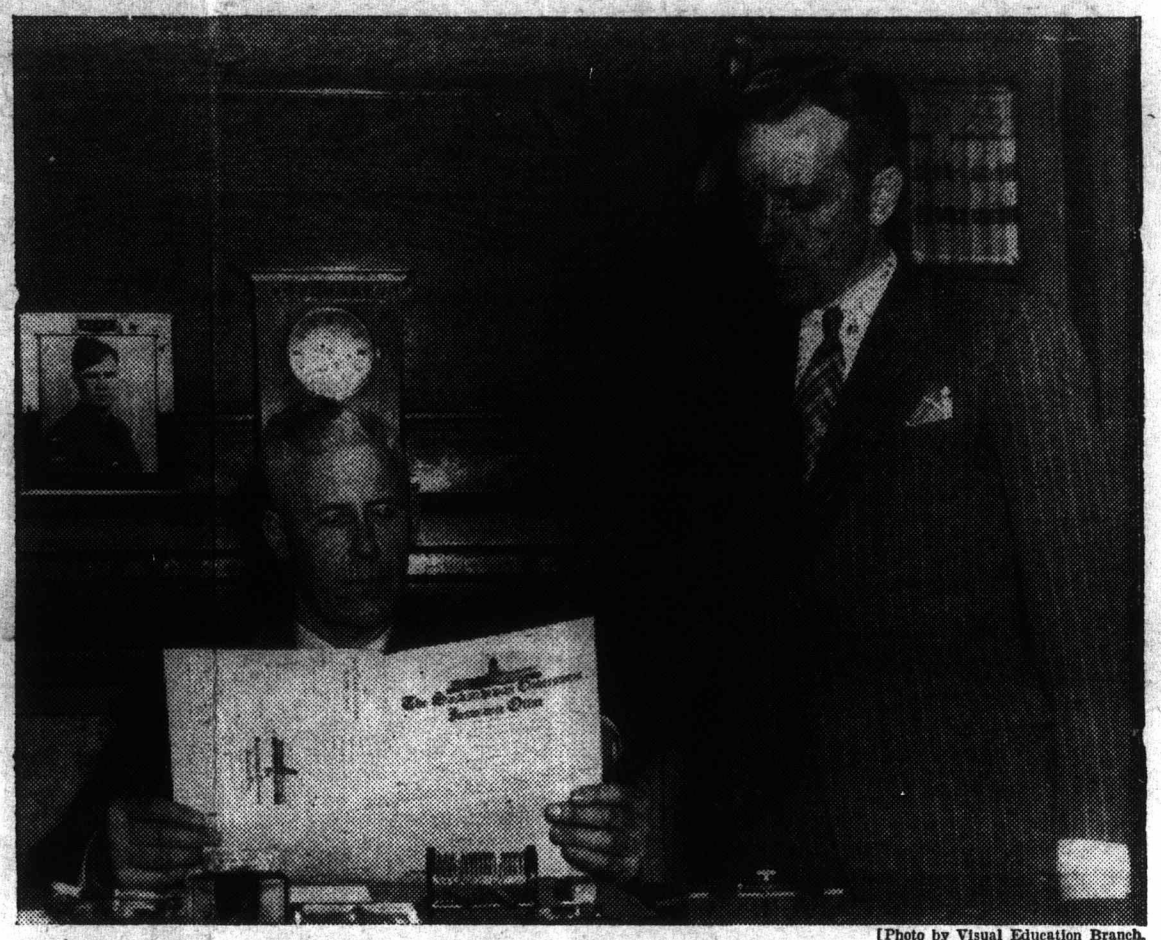
Continued on Page Eight

JOHN A. ROWE



Has Had Many Special Assignments

Minister of Social Welfare Buys First Insurance Policy



[Photo by Visual Education Branch.

First purchaser of a Saskatchewan Government Insurance Office fire insurance policy was Hon. O. W. Valleau, minister directing Saskatchewan's new development in social ownership of fire, automobile and casualty insurance. He is shown being presented with his policy by M. F. Allore, manager of the Government Insurance Office.

Reveals Tory Plot

Highly Respected Police Officer has Unblemished Record with Ontario Force

John A. Rowe, Provincial Police Constable at District Headquarters No. 5 (Toronto) is president of the Provincial Police Association, affiliated with the Ontario Police Association.

He has been with the Provincial Police Force since 1922 when he joined at Owen Sound and was posted to Kitchener. In 1927 he was promoted to the rank of Provincial Constable and transferred to Windsor from Dunnville where he had been a license inspector under the O.T.A.

During his 23 years of police duty with the provincial force he has been given numbers of special assignments, such as duty at Cornwall as constable in charge of controlling liquor traffic between Quebec and the U.S.A.

When stationed at Collingwood from 1936 to 1939 he received commendation from the premier's office on the occasion of a spectacular chase after two escaped convicts from the Guelph Reformatory. He caught up with the convicts when he placed six out of eight shots in their gas tank while he was driving over 75 miles per hour.

Crack Shot

Constable Rowe is a crack shot, with 24 shooting trophies, and is also known for athletic achievements in police games. In 1944 at St. Catherines he attained a record of the first rapid fire possible in the history of the Police Revolver Association of Ontario. His record was six perfect shots on a two inch bull's eye at a range of 60 feet, time around 20 seconds.

His record with the Provincial Police Force is free from any "Black mark" and he is known by his fellow men and has been mentioned by his superiors as having an unblemished record with the Force.

Constable Rowe was a special organzier with ARP between 1942 and 1943 when he acted as organizer, observer and lecturer.

He is an active member and elder in Don Mills United Church, Toronto, where he assists the Superintendent of the Sunday School and sings in the Church choir. He is married and has two sons and two daughters.

Flood of Applications For Govt. Insurance

Rates Compare Favorably with Other Companies. Earnings Will Benefit all Citizens of the Province

REGINA, June 1.—The Saskatchewan Government Insurance Office was officially opened last week and is ready for a full volume of business, it has been announced. With organization of its office facilities completed, the Government Insurance Office staff is now hard at work catching up with the large number of applications for fire, automobile and casualty insurance which have been flooding in from all parts of the province in recent weeks.

M. F. Allore, Government Insurance Office manager has announced that organization of the basic office staff has been completed, and that representatives and agents are now being appointed, to service the public throughout the province.

Big Demand

According to Mr. Allore, there is a big demand for policies offered by the Government Insurance Office.

"We have already a tremendous file of applications from all parts of the province," he said. "Our staff is working hard and long to supply policies to these people. Each day's mail brings another flood of inquiries from wide-awake Saskatchewan people who know the value of doing business with their own organizations."

Insurance rates will compare favorably with those of any company in the province, said Mr. Allore. The unearned premium reserve will be the property of the public of Saskatchewan, he added. Every policy will be guaranteed by the province. Applications will be accepted only on the basis of sound underwriting practices, and there will be no racial discrimination in the granting of insurance.

Valleau Takes First Policy

First resident of the province to take out a government insurance policy was Hon. O. W. Valleau, minister in charge of the Government insurance Office.

His comment on operation of this new government venture was: "The people of Saskatchewan can indeed be proud of this stride forward in economic progress. This new landmark in social ownership is being ably administered, and the farmers and workers of Saskatchewan will soon feel the benefits resulting from the use of Saskatchewan's own insurance service."

Saskatchewan's Own Insurance Service

Complete Coverage

Accident — Automobile
Fire — Theft
Guarantee
Liability — Plate Glass

Having been granted the Regina district agency for

Saskatchewan Government Insurance

I am prepared to write policies in any of these lines of Insurance.

Reasonable Rates - Sound Policies
Full Protection

Earl J. Magwood - Agent
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144716

Wednesday, June 6, 1945

Revenu

Meet Mr. King

Continued from Page Four

continue to honor. On the very brink of chaos, with passions flaming and armies marching, the voice of reason has found a way out of the conflict which no people in their heart desired, but none seemed able to avert. A turning point in the world's history will be reached if, as we hope, tonight's agreement means a halt in the mad race of arms, and a new start in building the partnership of all peoples. May you have health ond strength to carry on your great work to its completion."

"Peace in Our Time"

Not content with this, he must needs rush off, the same day, to perform a premature partial unveiling of the National War Memorial, in the presence of the German Consul-General, specially invited. The Memorial was still under construction. The official unveiling was still nearly eight months away. But Mr. King could not wait. Having collected the German Consul-General, the French Minister and the British Acting High Commissioner, he placed a ladder against the Memorial, mounted it, pulled a string which swung two of the figures into position, climbed down a few steps, announced to the crowd that "The two figures of peace and liberty are now in place," climbed down the rest of the way, and embarked on a hand-shaking expedition. He knew, says the newspaper account, that Britain and Germany were pledged to peace, so "there was special significance and special warmth in the handclasp which he exchanged with Eric Windels of the German government.' (**Globe and Mail**, October 1, 1938.) And after all that, Mr. King actually had the nerve to tell President Benes, in the presence of both Houses of the Canadian Parliament, that "Canada never recognized the Munich Agreement!"

The Great Appeaser

It might be supposed, however, that Mr. King had subsequently repented of his pre-war errors. Not at all. On March 19, 1943, he took special pains to tell the House of Commons that he stood by his speech of May 24, 1938, from which he quoted the most striking passage (**Hansard**, p. 1404). And on April 20, 1945, on his way to San Francisco, he paused in Chicago to inform the world that it had not done justice to Mr. Chamberlain; that that much maligned man had been "unfortunate in having a National government. One side neutralized the other and nothing was done. Had Britain had a Conservative government they would have armed for all they were worth. Had they had a Liberal government they would have followed conciliation for all they were worth." Mr. King's statements about the composition of the Chamberlain government are wildly inaccurate; but the really shocking thing about this pronouncement is the revelation that in Mr. King's opinion Mr. Chamberlain did not go far enough in appeasement. A Liberal government would have gone farther. The conclusion is inescapable: Mr. King, himself the leader of a Liberal government, would have gone farther. In other words, Mr. King publicly proclaims that he has learned nothing, less than nothing, from five and a half years of war! The ghost of the deceased Neville Chamberlain, sitting crowned upon the grave thereof, asks the people of Canada to return him to power, particularly because of his special experience, knowledge and competence in foreign affairs!

National Unity

His own herculean labors in this sacred cause are Mr. King5s favorite theme; and if you would see his monument, look about you, at a Canada torn and riven as never before since Confederation. For twenty five years appeals to French-Canadian nationalism and isolationism were the stock in trade of the Liberal party in Quebec. Those appeals Mr. King connived at. Those appeals put Mr. King in power and kept him there. Mr. King and his lieutenants did not create the prejudices they exploited so successfully; but they made them a thousand times worse, and Canada will reap the fruits of their efforts for many a year to come. But does Mr. King show even the grace of remorse? Not he! In an interview with the Ottawa **Journal**, August 5, 1944, he blandly declared that the thing which had pleased him most in his twenty-five years of leadership was "the steady improvement in the unity of this country. . . . . These five years of war have revealed a greater expression of Canadian unity than has ever before been shown. . . . It is tremendously pleasing." Such sublime self-deception leaves one speechless.

That is Mr. King. The electors of Prince Albert have a unique opportunity to render a matchless service to the people of Canada by retiring him, at long last, and forever, to the obscurity from which he should never have emerged.

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MEIGHEN PAPI

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CANADA

144717

July 9, 1945.

Dr. Eugene Forsey,
5 Lakeview Terrace,
Ottawa, Ontario.

My dear Eugene:

I am very grateful to you for sending me the issue of "Saskatchewan Commonwealth," with your political biography of Mackenzie King. It is the best—indeed the only—resume of the whole sad, sinister history of this man's breaches of faith that I have seen for many a day. What he has been able to put over on the Canadian people in the way of sheer false pretenses and fraud is really beyond the boundaries of amazement. There has been a calamitous weakness in the way of opposition, and this applies to more Parties than one.

Have not seen you for a long time and do hope you will call when you are in the City—especially before lunch.

Yours sincerely,

AM/E.

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144718

3 Lakeview Terrace,
Ottawa, July 10, 1945.

Dear Mr. Meighen,

Do you happen to know Cecil A Wright, K.C., Editor of the Canadian Bar Review? If so, could you lend him your copy of my memorandum on Clokie's book? My own one and only copy is at present lent to someone else, and I don't know when I shall get it back. My reason for wanting Mr. Wright to see my memorandum is that he reviewed the book, not very favourably, but rather too favourably, in the January number of the Canadian Bar Review, where I have only just read it.

Incidentally, in that memorandum there are some omissions and one or two mistakes. From information I have received from the Privy Council Office, I gather that my statement (on the first page, I think) about the British Government refusing to make Parliament for the amending Acts in 1920 and 1924 is too sweeping; it only deferred action pending further discussion. Also, towards the end, in a note on p. 187, a propos of Clokie's statement about compulsory military service being introduced in 1940, I stupidly put "for overseas service" when I should have put for home service.

Clokie says

I have found two further mistakes in Clokie: p. 116:/Senators must be 35 years of age! P. 209: There were 101 disallowances to (and including) 1924, not 100; and there have been 11 in the years 1925-1943, not 8. Perhaps you would be kind enough to have Miss Edmondson make the necessary corrections.

If you don't want to lend your copy, just let me know, and I'll make a note to send mine to Wright when I get it badk. I understand that R.A. MacKay, of Dalhousie and the Department of External Affairs, is to have a devastating review in the next Canadian Journal of Economics and Political Science, which should be out the end of this month; but it is possible the review will be delayed till the November issue.

Lederle was in the other day and told me about the progress of his book on the organization of Canadian political parties. At the suggestion of several critics, he is broadening it to include provincial parties. He is being pressed hard by King's hangers-on to strike out various judgments on that worthy, all amply documented. The position of the critics seems to be that academic objectivity and impartiality cannot be preserved unless every criticism of King is balanced by some criticism of a Conservative leader! So trifling a matter as mere evidence does not appear to trouble these gentry at all. Lederle is going on to Toronto in due course, and will undoubtedly call to see you. I have urged him very strongly to pay no attantion to any exhortations to water down what he says of King; I thought it well to warn you so that you could add your urgings to mine.

Clokie's book is beginning to bear its evil fruit. Professor Brown, of the University of Toronto has written an otherwise admirable little booklet on Canadian democracy in action, in which the sections on the machinery of government are taken almost holus-bolus from Clokie, with the results which might be imagined. I wrote Brown, listing the mistakes; he thanked me warmly; but what he proposes to do about it I don't know.

I need hardly say that I am deeply disappointed by the results of the election. I was convinced that King would get soundly thrashed at last, as, in fact, he did in English Canada; but I had not really supposed either that he would be able to hold Quebec as he did, or that he would get anything like the number of Ontario seats he did. I am beginning to be afraid I shall not live long enough to see his downfall. How the Canadian people can tolerate his constant succession of graceful tributes to his own nobility, chivalry, magnanimity,

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disinterestedness, self-sacrificing devotion to the cause of the "humble poor", and all the rest of it, let alone his other conduct, passes my comprehension. I note, by the way, that in the preface to the American edition of King's latest volume of speeches, Mr. Eric Estorick (whoever he may be) says that King "is now Prime Minister for the fifth time." I am writing to tell him a few plain truths on this.

Yours sincerely,

Eugene Forsey

Rt. Hon. Arthur Meighen, P.C., K.C.,
320 Bay Street,
Toronto, Ontario.

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144720

July 12, 1945.

Dr. Eugene Forsey,
5 Lakeview Terrace,
Ottawa, Ontario.

My dear Eugene:

I just received yours of 10th on my return from New York this morning. Miss Edmondson is making the changes suggested, and I am sending my copy to Mr. Wright today, asking him to be good enough to return same.

I am very interested in what you say about Lederle's forthcoming book. The principal activity of King and his staff is to preserve the great man from criticism. I shall be glad to see Mr. Lederle when he calls. So far as I am concerned he can criticize Conservative Leaders all he likes so long as he is faithful to history. The only sacrosanct creation we have is Mr. Mackenzie King.

What do you think of his retaining a man as Minister of Defence who has twice sought a seat in Parliament in vain; who had none during one Session of Parliament, and who plainly isnot to have one when Parliament meets again? This is a flagrant flouting of the Constitution. How well I recall his loudly-thundered doctrine that the Cabinet is but a Committee of Parliament! The doctrine is wrong, but it certainly is a Constitutional requirement that a Minister of the Crown must have a seat in Parliament, or must have one opened for him and be elected therein within a reasonable time.

Yours very truly,

AM/E. Arthur Meighen.

P.S.--Changes made in my copy of the Clokie memorandum are as follows:

Page 1, line 3 - Deleted the words "refuse, in 1920 and 1924"

(over)

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and inserted "in 1923 and 1924 defer action pending further discussion".

Page 22, P. 187, 2nd line - deleted word "overseas" and substituted "home."

L. M.

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144722

3 Lakeview Terrace,
Ottawa, Ontario.

July 11, 1945.

Rt. Hon. Arthur Meighen, P.C., K.C.,
320 Bay Street,
Toronto, Ontario.

Dear Mr. Meighen:

In my letter to you yesterday, I quite forgot to mention something which I think will interest you.

Some little time ago, the War Information Board arranged to have 25 representative Canadians connected with various organizations and semi-public bodies go over to England to visit the troops waiting for repatriation, and inform them about events in Canada in the various fields with which the various representatives were especially familiar. Each of the people invited was to be paid, of course, by his own organization, though the Government was to provide actual out-of-pocket expenses up to a certain limit. (I understand that the prospect was that the organizations would have to pay part of the expenses also.)

The official invitations went out. Corbett of the Adult Education Association, Dick Davis of the Canadian Youth Commission, and, I understand, Grattan O'Leary, were among those invited. Our Congress was invited to nominate someone, and asked me to go, but personal reasons made my acceptance impossible. Some of the people concerned were actually in Halifax, ready to board ship, when the whole thing was countermanded.

From a reliable source, yesterday, I learned that what happened was this: At the last moment, McNaughton saw the list. When his eye lit on Grattan O'Leary's name, he flew into a temper, declared he would not have that Tory so-and-so go over there at all, and, in fact, would not have any of them. I am informed that Gratten had an official letter, commending him to the good offices of all and sundry in the Armed Forces, and that the Government people pestered him until he (very foolishly) handed it over. I have no doubt that if, as and when, the matter is raised in the House, King and Company will deny the whole thing, and that they are now cabbagging all the documentary evidence in order to make their denials stick. I have warned some of our people of this. They

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Rt. Hon. Arthur Meighen,
Toronto, Ontario.

July 11, 1945.

scoffed at the idea, but I think you will agree that such an eventuality is perfectly possible.

Yours sincerely,

Eugene Forsey

Eugene Forsey

P.S. You will be amused to hear that yesterday I had a telephone call from an official in the Privy Council Office asking me where he could find, easily, a list of all Ministers since (I think) 1917! He didn't want to be bothered going through the Parl. Guides. I suggested the Canada Year Book. This anecdote, of course, is for your eye and ear alone. I expect to pick a good deal of information out of that Office and shouldn't want my amusement to reach their ears.

E. A. F.

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144724

(Your own comments are a classic.)

P.S. So glad you liked my article on King. It was written by request of the Saskatchewan Commonwealth. The one notable omission (apart from those made necessary by considerations of space) is King's tariff record. Unfortunately, I had no time to check carefully enough on this to be very positive and precise. As luck would have it, a day or so later King provided exactly what I wanted. In his speech at London, he proudly boasted of the things he had put on the free list last year; and the list he gave was very nearly identical with the promise of 1919; I used this in a speech here, and called it "exceeding the speed limit"; but I would have given anything to have had it in time for the article.

George Hoadley wants me to do a full catalogue of King's outrages (rather a large order!). I'm afraid I can't undertake that even on the scale he has in mind; but I am keeping careful files, and may be able to do a partial catalggue from time to time, and to distribute it where it will do most good.

E. A. D.

Your letter, as always, most kind. Shall look forward to seeing you.

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144725

C
O
P
Y

3 Lakeview Terrace,
Ottawa, July 7, 1945.

The Editor,
The Gazette,
1000 St. Antoine Street,
Montreal, P. Q.

Sir,

In your issue of to-day, Mr. Frank L. Kluckhorn, writing on the political situation in Australia following the death of Mr. Curtin, says that the Duke of Gloucester, the Governor-General "has the constitutional right to dissolve the parliament and order elections" because of Mr. Curtin's death, but "is expected merely to concur in the selection by the Australian Labor Party next Thursday of the new prime minister."

The Duke of Gloucester has no more "constitutional right" to dissolve the Australian parliament and order new elections at this moment than Mr. Kluckhorn has himself. In strict legal theory, the Crown or its representative has the power to dissolve parliament at any moment. But constitutionally this power can be exercised only on the advice of Ministers. If the Duke of Gloucester wanted to dissolve the Australian parliament now, he would have to find a Cabinet prepared to advise the dissolution. Clearly, no Labour Cabinet would be prepared to tender such advice. The Duke would therefore have to ask the Opposition to form a Government and advise dissolution. If he did this, it would be a flagrant piece of partisanship and a gross breach of the Constitution.

The death of a Prime Minister does not, of course, provide the slightest ground for dissolving Parliament, and never, in the whole history of British Cabinet government, either in Britain or overseas, has dissolution taken place for any such reason. The constitutional procedure is simply for the Crown or its representative to select a new Prime Minister from the ranks of the party in power. Nowadays, ordinarily, the party itself, by choosing a new leader, indicates to the Crown the person it must choose, In Australia, under the Labour party, this is the invariable procedure. In Britain, no Prime Minister has died in office for a very long time; but several have resigned because of ill health, and sometimes the Crown has itself chosen from among several leading members of the majority party or has asked and accepted the advice of the retiring Prime Minister. The most notable recent cases are the appointment of Mr. Stanley Baldwin in 1923 (when the King chose him in preference to Lord Curzon), and the appointments of Mr. Baldwin in 1935 and Mr. Chamberlain in 1937, when the King appears to have followed the advice of the retiring Prime Minister; in none of these cases did the majority party itself select a new leader. In Canada, the last case of a Dominion Prime Minister dying in office was that of Sir John A. Macdonald, in 1891, when the Governor-General appears to have acted on his own initiative in summoning Sir John Thompson, Minister of Justice, who declined office and advised the appointment of Sir John Abbott, advice which was promptly accepted. When Sir Robert Borden retired because of ill health, in 1920, the members of his party furnished to him their first and other choices, with reasons, and left the final recommendation of a successor to him. It should, of course, be added that a retiring Prime Minister has no right even to offer advice to the Crown as to his successor, let alone to have it accepted. He offers advice only if asked, and even then the advice may be disregarded. The one basic requirement is that the Crown must find a Prime Minister who can command a majority in the House of Commons.

Yours truly,

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144726

3 Lakeview Terrace,

Ottawa, July 16, 1945.

Dear Mr. Meighen,

I must be losing my mind! Of course I knew about Thompson, and only mental decay can explain my forgetting about him. It is particularly unfortunate, as in his case there is no doubt at all that the Governor-General chose his successor; at least, from what I have been able to discover in Aberdeen's reminiscences and elsewhere, that is the case. Exactly what happened when Abbott retired (he resigned a month or so before his death) I can't find out, though I have poked about a good deal in the Archives, trying.

Cahan, incidentally, told me that he had it from Thompson, or someone to whom Thompson told it, that Macdonald, a short time before his collapse, said to Thompson, "Thompson, when I am gone, you must all rally around Abbott. He is your man." Then, a few days later, he said: "Thompson, the other day I told you you must rally around Abbott. I was wrong. He's too damned selfish." What part if any, these remarks played in Thompson's advice to Stanley to send for Abbott, it would be interesting to know.

I intend to do an article on this whole business of the part the Crown plays in choosing a new Prime Minister, and should like to send it to you for your comments before I submit it to any editor. I have not been able to get much on Tupper's succession to Bowell, incidentally. The usual version, that Bowell, when Tupper was brought in as Secretary of State and Leader of the House, agreed that at the end of the session he would retire in Tupper's favour, Bowell himself appears to have flatly denied. The Governor-General's letter books in the Archives are maddeningly silent on the whole business.

As to that business about the War Information Board: I got it from a C.C.F. man, who certainly intended that it should go to the C.C.F. Members. I shall find out whether they intend to use it; if not, I shall certainly be perfectly willing to let you make any use of it you see fit. The thing should not be allowed to pass without a crushing attack, as you say; but I feel in honour bound to let the C.C.F. people have first whack at it, especially as my informant would never have dreamt that his remarks to me would get to any Conservative quarter. I dare say Jim Macdonnell, or some other of your people, has already heard the tale, anyhow. If you hear it from any other quarter, and hear doubts expressed of its authenticity, you are quite at liberty to say that you have heard it from someone whose reliability you think you can count on. The only thing I am really afraid of about the whole thing is that King and Co. have now succeeded in destroying all the documentary evidence, and so will be able to brazen it out. They did substantially that in connection with a CBC series of broadcasts I had some connection with; in that case there were no documents, as far as I know; but the denials were forthcoming all right, in the teeth of most precise and circumstantial accounts I had from people directly concerned.

You or I could easily draft a King speech on the McNaughton business, i.e., the speech King would make if anyone else were doing what he's doing now. I suppose he will try to wriggle out by quoting precedents. Hardy, the Parliamentary Librarian, tells me

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he was not defeated, either.

two Ontario provincial Ministers, defeated in the general election of 1898, hung on without seats till some time in 1899. I have not checked this yet. He also cited Templeman's case; but this won't do (I think he had taken it from Keith, who, he admitted, was not a safe source); Templeman was defeated in the general election of October 26, 1908, but elected in a by-election early in 1909. His certificate of election is dated February 17, 1909, and he took his seat March 2. You will recall Sévigny's case: defeated in the general election of December 1917, he resigned March 7, 1918; clearly this is no good to King, though I suppose he will try to use it. Gladstone, according to Professor Swift MacNeil, was out of the House, while Secretary of State for the Colonies, from December 1845 till July 1846; but of course (assuming the dates are correct; I haven't yet checked them) this is not a parallel case either, as, when Gladstone took office, a general election was approaching, and it would practically have been waste of time for him to stand in a by-election. King's long suit will probably be the case of C.F.G. Masterman, appointed Chancellor of the Duchy of Lancaster, with Cabinet rank, in Asquith's Cabinet, February 12, 1914; defeated in a by-election in Bethnal Green, February 19; defeated in a second by-election, May 23, at Ipswich; resigned office February 1, 1915. But of course a Chancellor of the Duchy, even with Cabinet rank, is a very different matter from a Minister of National Defence, especially in wartime. I hope, however, that any of the Opposition who take this matter up will be thoroughly primed. I intend to hunt up some more precedents and do a memorandum on the thing. The whole question, of course, hinges on what is "a reasonable time". Clearly, the interpretation must to some extent vary with circumstances. If this were peacetime, and McNaughton were, let us say, President of the Privy Council, or Secretary of State, then a further delay in finding him a seat might, on the Masterman precedent, be allowable; but in the actual circumstances, the thing takes on a very different complexion. I think also the fact that one of McNaughton's defeats was in a general election might be held an important difference from Masterman's case. Should be interested to hear your view on this.

Thanks very much for sending the Clokie memorandum to Mr. Wright.

Judith Robinson wants to reproduce part of my article on King. I think I shall let her do it; indeed, I don't see that I could really stop her! However, she very kindly asked my permission. I shall try to see that she puts in a note on the tariff business.

Yours sincerely,

Eugene Forsey

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144728

July 17, 1945.

Dr. Eugene Forsey,
5 Lakeview Terrace,
Ottawa, Ontario.

My dear Eugene:

I just received yours of 16th. Am glad to have the further detail re Sir John Abbott. Had a lingering notion that he resigned, or may have resigned, before his death, and am pleased to have that point cleared up.

I saw Jim Macdonnell today and felt justified in reading to him the paragraph of your previous letter regarding War Information Board. I made very clear to him, of course, that he was not to use it in any way until I had your authority to permit him to do so, and you can depend absolutely that he will not.

I also gave him the copy of the paper containing your review of King's performances. If you have another copy of this that you can spare me, I would be glad to get it.

Now, as to the McNaughton case. I think you have the subject properly analysed. Was surprised to know there was a precedent in England as extreme as the Masterman incident. You are entirely right, though, that every case must be judged on its own merits, and there is a world of differente between retention of an office that really is a sinecure and has really no Departmental importance, and retention of the Ministership of Defence. The contrast is all the more impressive when the Minister of Defence hangs on in war time; and still more, when, having been absent as a non-Member of the House throughout one Session, he now evidently proposes to remain Minister through at least part of another, while still out of Parliament.

You will note as well that there is absolutely no instance of a man being caried on after two defeats and into another by-election attempt.

(over)

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144729

My knowledge of the Bowell, Tupper transition is solely from memory. I do know, however, from memory, that there was a revolt within the Cabinet while Bowell was Prime Minister. You will recall, yourself, that Bowell made the statement (perhaps not publicly, but no doubt he made it) that he had found himself in a "nest of traitors." What probably occurred was that dissatisfaction with Bowell as Prime Minister having developed within the Cabinet, it was agreed that Tupper should be sent for to become Secretary of State and Leader of the House of Commons. I have been enquiring in my own mind for some years as to just when Bowell went to the Senate. Possibly he went at the time Tupper entered the House to become its Leader, or at the time Tupper was sent for. This, of course, can easily be examined. Then, afterwards, and in sight of an early election, the revolt took more decided form and as a result Bowell was forced to resign as Prime Minister, and Tupper was chosen. It is not at all likely that Bowell was asked for, or gave, any advice, to the Governor-General. Keep in mind, of course, that I am speaking by no means in positive terms, but only piecing together my recollections, and venturing what is little better than surmise. I do know from my friend, Colonel Hugh Clark, who was a friend of Bowell's, that the latter never got over his resentment.

Yours sincerely,

AM/E.

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144730

3 Lakeview Terrace,
Ottawa, July 19, 1945.

Dear Mr. Meighen,

Thanks for your letter.

Barnstead, Deputy Provincial Secretary of Nova Scotia, also wrote me about my howler. I assured him you had pointed it out, and said if someone would write in to the Gazette doing likewise I'd make public confession to a stupid lapse of memory, and point out how the proceedings in that case strengthened my contention, as, of course, they do.

Shall let you know as soon as possible about the War Information Board business.

Enclose another copy of my article on King. Had thought of sending one to Jim Macdonnell, but wondered whether he would find it too strong meat!

Your comments on the McNaughton case are very valuable.

Bowell was in the Senate when Parliament opened early in 1893. Foster was leader of the House before the revolt, and again after till Tupper got in

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for the Cape Breton seat. I have just checked on this.

144731

In great haste,

Yours sincerely,

Eugene Forsey

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144732

July 21, 1945.

Dr. Eugene Forsey,
5 Lakeview Terrace,
Ottawa, Ontario.

My dear Eugene:

I just received your two letters of 11th. Would like to be able to send the information regarding War Information Board's conduct to somebody who could make good use of it when the House meets, but, of course, will not do so without your permission. I do not see any reason, though, why permission should not be given, because it would be utter folly to let this fool escapade pass unnoticed, or pass, indeed, without a crushing attack.

Apparently they do not like work in the Privy Council Department.

Referring to your letter to the Gazette, I fear you have made one mistake anyway. You say "In Canada, the last case of a Dominion Prime Minister dying in office was that of Sir John A. Macdonald, in 1891." From memory I feel certain that his successor, Sir John Abbott, also died in office. Certainly he either died in office or resigned as death was approaching. Anyway, I know that Abbott's successor, Sir John Thompson, died in office. He was over in Britain as Prime Minister and dropped dead in Windsor Castle.

Your last sentence, I think, would have been better if it had closed as follows:—"The Crown must find a Prime Minister who has a reasonable prospect of commanding a majority in the House of Commons."

Last copy returned as requested.

Yours very truly,

AM/E
Encl.

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CANADA

144733

3 Lakeview Terrace,
Ottawa, Ontario.

July 23, 1945.

Dear Mr. Meighen:

The Ottawa Journal on Friday had a front page note headed, "McNaughton Doubles Seatless Record of Sir Wilfrid". It noted McNaughton has now been without a seat for eight months, and said that the previous record belonged to Laurier, "who was appointed to the Cabinet . . . in early October of 1877, but did not enter the House until early February of the next year. Twenty days after his Cabinet appointment Sir Wilfrid lost his byelection in Drummond-Arthabaska. He won his seat in the following general election, four months later."

I at once wrote the Journal pointing out that Skelton says Laurier was appointed Minister of Inland Revenue, October 8, 1877; that the Parliamentary Guide shows Laurier defeated in Drummond-Arthabaska, October 27, 1877, and elected in Quebec East, November 28, 1877, the general election following on September 17, 1878.

The interesting thing about the Journal item is: where did they get it? I am perhaps unduly suspicious, but it occurs to me as quite possible that it came from the East Block as part of a campaign to get the public so thoroughly bemused and bewildered that they will be willing finally to take King's word or any fairy tale he chooses to tell them on the subject.

Yours sincerely,

Eugene Forsey

Eugene Forsey.

E P Taylor
re Insurance

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244734

3 Lakeview Terrace,
Ottawa, Ontario,
July 25th, 1945.

Messrs. J.M. Dent and Sons (Canada) Limited,
215-219 Victoria Street,
Toronto, Ontario.

Dear Sirs,

I enclose your account with postal note for 50 cents in payment.

Mr. Woodley's pamphlet is interesting and useful. But should you contemplate a second printing, there are a number of vague or dubious statements, and many outright errors.

P. 19: Mr. Woodley's phrasing leaves the impression that there were Clergy Reserves in Lower Canada as well as Upper Canada. Speaking from memory, I think this is not so. The point should be checked.

P. 19: Mr. Woodley does not make it clear that there were two Councils, Executive and Legislative. Their personnel was much the same, but legally they were distinct; and it was the executive Council which "seized certain revenues", etc.

P. 28: "The recommendations of the Quebec conference were submitted in due course to the legislatures of the various provinces and were the subject of lengthy debates. . . . In the end Nova Scotia and New Brunswick supported the recommendation while Prince Edward Island and Newfoundland withdrew from the scheme."

As Mr. Woodley can find out by reference to the Journals of the various Legislatures, or, more conveniently, to the paper by the late Hon. Norman Rogers in vol. III of the Proceedings of the Canadian Political Science Association, 1931, pp. 213-17, these statements are highly inaccurate. The Quebec Resolutions were submitted to and approved by the Legislature of the Province of Canada. They were never submitted to the Legislature of New Brunswick. The Government which favoured them went to the country first and was resoundingly defeated. They were never submitted to the Legislature of Nova Scotia, except that they were laid on the Table. There was no debate on them. The defeat of the New Brunswick Government removed the question from the realm of practical politics for the time being. Tupper merely asked for, and got, a resolution in favour of Maritime Union as a necessary step towards the larger scheme. The Quebec Resolutions were submitted to and rejected by the Prince Edward Island Legislature. In Newfoundland discussion was postponed. Later, after a change of Government in New Brunswick, the Legislatures of Nova Scotia and New Brunswick authorized the appointment of delegates to a new Conference in London, where the London Resolutions, differing substantially from those of Quebec, were framed and became the basis of the British North America Act. The late W.F. O'Connor's Report to the Senate, 1939, has much corroborative detail.

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144735

Messrs. J.M. Dent and Sons (Canada) Limited,
Toronto, Ontario.

July 25, 1945.

P. 33, line 7: A Parliament does not "hold office". The proper term here is "last".

Pp. 33-4: Mr. Woodley makes much of the fact that the British North America Act assigns to the Dominion all powers not specifically given to the provinces, while the United States Constitution does the opposite. This is true. What he omits to state is that judicial decisions have practically reversed the situation on both sides of the border; so that the United States central authority now has far larger powers than the Fathers meant to give it, and ours has far smaller. Mr. Woodley can verify this in almost any of the recent literature on the subject; he could get a full list of articles on the subject from Professor F.R. Scott of McGill University. There is not the slightest question about the fact that both Constitutions have, in this matter, been stood very nearly on their heads. There can also be no question that this fact is important, and ought to be mentioned in a pamphlet like this. The havoc wrought upon our Constitution by judicial decisions is the main reason for the existence of the formidable constitutional difficulties which face us in the post-war period.

P. 37: How does the provision of the British North America Act that money bills must be recommended by the Governor-General "safeguard the people"? It prevents private members from having a gay time with the public revenues and expenditures, and so probably saves the people money. But Mr. Woodley's statement, in the context, rather suggests that the requirement that money bills must originate in the House of Commons is a threat to popular liberties, a threat removed by the further provision on which I have just commented.

P. 37: "Article 133 of the Act gives official recognition to the French language." This is misleading. The Act gives only limited official recognition to the French language. True, Mr. Woodley's quotation immediately following makes this clear to the careful reader. But too many people are likely to read only the first sentence, and to assume that the Act gives the two languages equal official status, all across the country.

P. 38: I am not sure whether Mr. Woodley means the passage in the middle of the page, beginning "This is a formal and legal way", to be a summary of the B.N.A. Act, Section 93, or simply of sub-section 2 of that Section. In either case it is wrong. The Section means exactly what it says: Provincial control over education subject to certain provises. The first of these is set forth in sub-section 1 in clear terms. The second appears in sub-section 2. It confers on Protestant Schools and Catholic Schools and School Boards or Commissions in Quebec the same status as Separate Schools and Separate School Boards in Ontario. The third and fourth provises, which Mr. Woodley does not mention, appear in sub-sections 3 and 4, and provide for Dominion intervention to preserve (and if necessary restore) the rights given by the first two sub-sections. Mr. Woodley misconstrues the second sub-section and then proceeds to make the whole section flow from that.

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Toronto, Ontario.

July 25, 1945.

P. 39: Mr. Woodley states that when a Cabinet loses the support of the House of Commons it resigns, "and a new government is put in power." This overlooks the important fact that, in most circumstances, a Cabinet defeated in the House, may get a dissolution of Parliament, in which event it does not resign, but remains in power during the general election, which decides whether it shall go or stay. The proceedings in the Ontario case this year (which, of course, took place after Mr. Woodley wrote) illustrate this point and its importance.

P. 39: Mr. Woodley says that before bills "are finally passed by the House of Commons," they are "submitted to the Senate for possible revision." This is wrong. A bill introduced into the House of Commons goes through first reading, second reading, committee and third reading, and is then formally "passed" by the House. It <u>then</u> goes to the Senate, where it goes through a similar process. If the Senate passes it without amendment, <u>it does not come back to the House at all</u>; it goes straight to the Governor-General for the royal assent. If the Senate amends the bill, then it <u>is</u> sent back to the House, where the Senate amendments are considered. If the House accepts the amendments, then the bill goes to the Governor-General for the royal assent. If the House rejects the Senate amendments and persists in its rejection, either the Senate must give way or the bill falls to the ground. Sometimes the House and Senate compromise, the House accepting part of the Senate amendments and the Senate not insisting on the rest; then the bill goes to the Governor-General for the royal assent. Bills (except money bills) may, of course, originate in the Senate; and then the whole process is gone through in reverse.

I fully recognize that Mr. Woodley cannot go into all this. But he could say: "When a bill has been passed by the House, it goes to the Senate, which can amend it or reject it. No bill can become law unless it has been passed by both Houses." That would be brief and accurate, and may be what Mr. Woodley meant. What he <u>says</u>, namely that a bill goes to the Senate before it reaches its final stage in the House, is simply untrue. Even if his statement was merely meant to suggest that all bills come back to the House after going to the Senate, it is still untrue.

P. 39: "In all other provinces . . . the second house has ceased to exist." There never was a second house in British Columbia, Alberta, Saskatchewan or Ontario.

Pp. 50-1: The phrase "British citizenship" is, I suggest, dubious. The usual term is not "British citizen" but "British subject". Incidentally, as Mr. Woodley's own page 52 notes, the status "British subject" does not "admit to all the privileges of civic life in Canada". Various categories of British subjects, even of British subjects born in Canada, cannot vote; and in most municipalities voting is restricted in various ways.

P. 51: Mr. Woodley's final "requirement" is curiously phrased. Grammatically, it would appear to involve a declaration by the applicant for naturalization of an intention "not to be a married woman, a minor or of

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Toronto, Ontario.

July 25, 1945.

unsound mind". In any event, it suggests that a married woman cannot apply for naturalization; this may be correct; I don't know. At least the passage should be clarified.

P. 52: Within the last year, the provincial franchise has been extended to all over 19 in Alberta and all over 18 in Saskatchewan.

P. 52: The account of the position of Canadians of Oriental race is vague and mystifying. The exact position is: In British Columbia, Canadians of Japanese, Chinese or Hindu origin are not entitled to vote in either Dominion or provincial elections unless they served in the last or the present war. Outside British Columbia, under the Act of 1944, the Dominion franchise is withheld from Canadians of Japanese origin who resided in British Columbia on July 1, 1938 and at the outbreak of the war with Japan, no matter what province they now reside in, unless they have served in the Canadian armed forces in the last war, the present war or any future war in which Canada may be engaged. Goodness knows this is complicated! But if Mr. Woodley wants to mention the business at all, he should surely say something more than he does. I find it very difficult to understand what his present phrasing means.

P. 60: "When an election takes place the leader of the party which wins the most seats is requested by the Governor-General to become Prime Minister." It would be better to say "ordinarily requested." In 1925, the Conservatives, under Mr. Meighen, won 116 seats, the Liberals, under Mr. King, 101. Mr. King was Prime Minister when the election took place, and remained Prime Minister till defeated in the House ten months afterwards. This sort of thing could easily happen again; it has happened often in Australia. As long as the Prime Minister can command support in the House, it does not matter whether he heads the largest party.

P. 60: "The next strongest group becomes the official opposition." Again it would be better to insert "ordinarily". In 1921, the Liberals got 117 seats, Progressives 64, Conservatives 50. The Progressives declined to become the official Opposition, and the Conservatives took that position.

P. 61: "Ballots are signed secretly and independently." Ballots are not "signed" at all. If they were, of course the ballot would cease to be secret. What is meant by saying they are "signed" "independently" I don't know.

P. 69: The Statute of Westminster does not contain one syllable on the subject of the Dominions' right to "control their own foreign relations", or anything remotely bearing on the point.

P. 69: The agreement about the appointment of Governors-General is that each Governor-General is now appointed by the King on the sole advice of the Cabinet of the Dominion concerned. Mr. Woodley's statement is (roughly speaking) a statement of the position which obtained for many years before the agreement in question; see Sir Robert Borden's Memoirs.

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Toronto, Ontario.

July 25, 1945.

P. 70: The Statute of Westminster does not contain a clause "which prevents the amendment of the Canadian constitution unless the provinces of the Dominion desire to bring this about." It contains a clause (Section 7, sub-section 1) providing that "Nothing in this Act shall be deemed to apply to the repeal, amendment or alteration of the British North America Acts, 1867 to 1930, or any order, rule or regulation made thereunder". This, as is manifest, does not even mention the provinces. There is not even a custom or convention of the Canadian Constitution making provincial consent necessary to an amendment. The amendment of 1943, for example, was passed on the request of the Dominion Parliament alone. There is no evidence that the provinces were even consulted; and the province of Quebec strongly protested.

P. 70: Strictly, Mr. Woodley should note that we now have a fairish number of Ambassadors; whether they have all been appointed since he wrote, I don't know.

P. 87, last line but one: The provincial power over education is, as already noted, subject to certain provisos. This fact should be indicated here.

P. 88, foot of the page: The Statute of Westminister does not say one word about the appointment of the Governor-General, and the actual practice is again misstated. Nor does the Statute make any mention of the King being "recognized as King of the Dominion personally" (whatever that may mean), "not by virtue of his relation to the British Government" (whatever that may mean).

Yours truly,

Eugene Forsey.

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144739

July 26, 1945.

Dr. Eugene Forsey,
3 Lakeview Terrace,
Ottawa, Ontario.

My dear Eugene:

That is a very interesting episode recited in yours of 23rd. The Journal got its material somewhere, and it is inconceivable it got it anywhere except at a source that had an interest in bolstering up the King side of the McNaughton situation. I am sure the Editor will feel rather badly on realizing how far he was out.

Kindest regards,

Yours sincerely,

AM/E.

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144740

3 Lakeview Terrace,
Ottawa, July 27, 1945.

Dear Mr. Meighen,

In the last week I have heard two stories, or rather what I am sure are two versions of the same story, which King is evidently spreading around about the affaire McNaughton.

The first version is that, until King himself gets a seat, he is not really Prime Minister (!) and cannot act as such, and so cannot ask McNaughton to resign.

The second is that, until King gets a seat himself, a feeling of delicacy (!) prevents him from saying anything to McNaughton about the necessity of his finding a seat.

The second story I am practically certain emanates from King's entourage; and both bear all the marks of the same origin.

One hardly knows what to admire most: the profound constitutional knowledge, the self-abnegation with which King is refusing to perform any public duties till Glengarry has said its say, the exquisite refinement of sensibility, or the bland assumption that McNaughton is incapable of understanding anything for himself. You may imagine the comments I made to my two informants.

Incidentally, this particular doctrine seems to have blossomed since 1926. You will recall that after the election of 1925, King made no bones about accepting the resignations of most of the Ministers who were defeated (Graham was the only exception); and he certainly did not take the line that he was incapable of functioning as Prime Minister until he secured a seat.

If anything is to be said on this subject by your party, I hope to goodness they will give you the drafting of it. Anyone else is almost sure to muff it. This is not a reflection on the intelligence or ability of the others; but no one can approach you in capacity or experience in such matters.

Yours sincerely,

Eugene Forsey

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144741

3 Lakeview Terrace,
Ottawa, August 14, 1945.

Dear Mr. Meighen,

Looking through Morley's Gladstone, vol. I, I find that Gladstone took office as Secretary of State for the Colonies, December 22, 1845 (p. 285), and that he remained without a seat up till and after the Cabinet's resignation, July 5, 1846 (p. 293), making no attempt to get a seat, though Morley says (p. 288) that he "naturally felt it his absolute duty to peep in at every chink and cranny where a seat in Parliament could be had." I think it worth noting, however, that Gladstone had a seat when appointed to the Cabinet, a fact which marks off his case from McNaughton's; that he was not Secretary of State for War in the midst of a war; and that, altogether, he held office without a seat for only a trifle over six months. It is noteworthy also that Morley's comment (p. 288) is: "There can be little doubt that in our own day a cabinet minister without a seat in either House of parliament would be regarded, in Mr. Gladstone's words, as a public inconvenience and a political anomaly too dark to be tolerated."

Of course since then we have had the Masterman case; but even so these words may be of use, and in any event your people should be primed with the reference.

Yours sincerely,

Eugene Forsey

Copy sent to J. M. Macdonnell
Aug. 16/45.

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144742

August 16, 1945.

Dr. Eugene Forsey,
5 Lakeview Terrace,
Ottawa, Ontario.

My dear Eugene:

Thanks very much for your letter of 14th. I appreciate your sending this information to me and am passing it on to J. M. Macdonnell.

Yours sincerely,

AM/E.

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144743

3 Lakeview Terrace,
Ottawa, August 31, 1945.

Dear Mr. Meighen,

Have you seen the article in this month's (September's) Reader's Digest on King, by Stanley High? It is a rehash, for the most part, of Ludwig's stuff. I am proposing to answer it, by letter to the publication, with a copy to the author, enclosing my Saskatchewan Commonwealth article. This will make it possible to publish my letter without High's permission.

The reason I am bothering you is that the article asserts: "In World War I, 98 percent of those called for military service in anti-English Quebec asked for and received exemption. This time more than 100,000 French-Canadians volunteered." You are much more familiar than I with the facts as to the last war, and I wondered if you could, without too much trouble, let me have the facts as to the number of French-Canadians who volunteered in the last war, and the proportion to the total number in our armed forces then; also as to the accuracy of that 98 per cent.

King's terms of office keep blossoming like Aaron's rod. According to this article, he has now been Prime Minister five times! The last time I saw it (in the Preface to an American edition of his speeches, I think) it was four. I suppose within a few months it will be six, the sixth period starting with his return for Glengarry.

We have a new daughter, born August 22; both doing excellently.

E.A.J.

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144744

September 1, 1945.

Dr. E. A. Forsey,
5 Lakeview Terrace,
Ottawa, Ontario.

My dear Eugene:

I just received your letter of 31st. Had heard of this Stanley High article, but have not yet read it and do not know that I will. What you quote from it is enough to poison any person.

I am sure you have seen the figures which I got from the Defence Department for one of the speeches I made in South York. Anyway, the speech is enclosed. This, however, is by no means the whole story, nor does it measure up to what you want.

There has been a book published by the Government of Canada giving a full account of Canada's participation in the last War. I am sure from memory that there are several volumes--in fact, too many. But every detail that can be got will be in that book. Have been trying, since your letter arrived, to think of the name of the author or editor, but cannot. However, you can easily locate the book by phoning the Secretary of the Defence Department or by going to the Parliamentary Library.

I am confident you will find there the figures as to French-Canadian enlistment in the last war and probably the figures as to the very large numbers who were actually conscripted in the last war, many of whom reached the front, and many thousands more of whom were through the final

(over)

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Appeal Tribunal (Judge Duff) and mostly trained and available for service when the war ended.

You know, of course, that the King Government has refused to give French-Canadian enlistments in this war--and for reasons that are not far to seek. They chose rather to slip false information into the empty-headed Ludwig or Stanley High.

I wish I could do more to save your time, but really I have nothing available here.

Yours sincerely,

AM/E.

P.S.--Congratulations on the second daughter. Will be very glad some day then I can see the family.

A. M.

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144746

September 15, 1945

Dr. Eugene Forsey,
3 Lakeview Terrace,
Ottawa, Ontario

My dear Eugene:

At last I have a letter from Cecil A. Wright, K.C. and I am taking the liberty of sending it to you.

Will retain your own manuscript here until you are next in town, unless you want me to send it down.

The truth, of course, is that Cecil A. Wright, K.C. has been caught in the act of posing as a reviewer when he knows little or nothing about the subject reviewed. It is simply grotesque to describe your exposure or the greater part of your exposure of Clokie's blunders as microscopic. What is microscopic is Clokie's knowledge of the Canadian Constitution and Parliamentary practice.

Yours truly,

AM/ER
Enc.

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144747

3 Lakeview Terrace,
Ottawa, Ontario.

Sept. 17, 1945.

Rt. Hon. Arthur Meighen, P.C., K.C.,
320 Bay Street,
Toronto, Ontario.

Dear Mr. Meighen:

Thank you very much for Mr. Wright's letter, and your somewhat acid comments on it. My own reflections on his description of Clokie's book as "semi-popular" are:

(1) I was not aware that the Canadian Bar Review indulged in long and elaborate reviews of semi-popular books.

(2) Clokie himself does not give one to understand that the book is semi-popular, and I fancy he would be anything but pleased by the description. It seems to me quite clear from his preface that he intended it to serve as a textbook, and I have no doubt it will so serve, perhaps not in law schools, but certainly in faculties of Arts.

(3) I know of no reason why even a semi-popular book on a subject like this should have license to indulge in glaring inaccuracies and childish misconceptions. Indeed, I should have thought that a semi-popular or popular book should, if anything, lay rather special emphasis on accuracy. Of course, such a book need not have what Clokie calls "the trappings and minutiae of academic scholarship, such as footnotes, citation of authorities on each point, etc.", but that is a totally different matter.

(4) If, however, Mr. Wright thinks otherwise, the least he should do is to warn his readers that the book he is reviewing should not be taken too seriously; that its accuracy on many points is questionable; or even, if he felt so inclined, that it is even an "1867 and All That".

It is really deplorable the excuses people put up for this kind of slap-dash production. Two prominent members of a certain University faculty have offered me as an excuse or defence of Clokie that at any rate he had the "guts" to produce something on the subject, which is more than any of the rest of us have. I can think of several terms more appropriate than "guts". It would be interesting to have a psychiatric explanation of this singular notion that there is some special virtue in splashing ink onto paper.

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144748

Rt. Hon. Arthur Meighen,
Toronto, Ontario.

Sept. 17, 1945.

Incidentally, I have seen since Clokie wrote two booklets on Canadian Civics written for the schools of two large provinces, and both contain some shocking howlers. One of them (which in most of its chapters is very good and very well written) borrows most of its howlers from Clokie, but adds twice that the committee stage of a bill comes before second reading. The other appears not to have drawn on Clokie, but on some other and unknown mine of misinformation. I suppose it will all be grist to the mill of King and his successors, but it opens up a horrid prospect of miseducated youth. The author of the first pamphlet, who is I think a Conservative, is a friend of mine. I sent him a list of his mistakes, which he acknowledged appreciatively. What he proposes to do about it, I don't know. I wrote the other gentleman's publishers and they said they had forwarded my comments to the author, but I have heard nothing further.

I owe you an apology for not thanking you for your previous letter, but I have been so busy with the new baby that I have had no further opportunity to tackle Mr. Stanley High. When I do, I shall send you a copy of my comments.

Yours sincerely,

Eugene Forsey

Eugene Forsey.

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September 19, 1945.

Dr. E. A. Forsey,
3 Lakeview Terrace,
Ottawa, Ontario.

My dear Eugene:

I have read with intense interest your letter of 17th. It always does me good to study any analysis you make. This one is particularly thorough.

You go through very much of the same harrowing experience as was my lot through life. We are all wrong at times, and certainly I have been, but given opportunity for study and a reasonable volume of practical contact with trial and error, I can hardly think you would render a wrong judgment on any subject.

Your case against this man Wright is so good that I felt like sitting down at once and dictating from it a letter to Wright himself. It occurred to me, though, that possibly you were writing him, and if so, he would have a clear and deadly case of plagiarism against me. Please let me know, and also whether you feel it would be wise for me to bother with him.

If you can, I would like to know the Conservative who was the author of the article you refer to. I think probably I could size up his qualifications. Also be sure and send me your assassination of Stanley High. When I get it, I intend to write Mrs. Wallace, who, with her husband, owns the Reader's Digest, and tell her what I think of certain of its contributors, especially High. I think I told you Mrs. Wallace is a second cousin of mine, although I never saw her. Reader's Digest has been going down.

Yours very truly,

AM/E.

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3 Lakeview Terrace,
Ottawa, Ontario.

Sept. 21, 1945.

Rt. Hon. Arthur Meighen, P.C., K.C.,
320 Bay Street,
Toronto, Ontario.

Dear Mr. Meighen:

Your letter of the 19th was as usual much too kind.

I had not thought of writing Mr. Wright; I don't know whether it would be worth while your bothering with him or not. On the whole, I should think it would serve very little purpose, except to add one more to the already fairly extensive list of enemies both you and I possess. That might be a work of supererogation. However, I have no very strong opinion one way or the other, and should think it is really entirely a matter for your own judgment. I do not know Mr. Wright and know really nothing about him. I notice that I did not return his letter, but I enclose it now.

The author of the first booklet I referred to is Professor George Brown. Apart from the sections on the constitution, the booklet is excellent; clear, well written, balanced, and scarcely open to any adverse criticism even from the most captious. But the sections on the constitution are certainly open to a good many objections, nearly all of which can be summed up by saying that Brown took Clokie at face value. I enclose a copy of the notes I did on the pamphlet. They were written, I think, early in June. Do not bother to return these notes or the ones on Clokie. The only reason I troubled you to send your copy of the latter to Mr. Wright was that my own copy was at the time on indefinite loan.

I hope to get at Mr. Stanley High next week. I had no idea who owned the Reader's Digest, let alone that one of the owners was a relative of yours. I suppose these attempts to catch up with the efforts of King's propaganda agencies are really futile, as so many assiduous purveyors of his own special distortions of history are at work that panting correction toils after him in vain. I fear that not reason but sheer ill-temper and exasperation provoke me to

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Rt. Hon. Arthur Meighen,
Toronto, Ontario.

Sept. 21, 1945.

these repeated efforts, but it is always possible that someone somewhere will catch something from them.

Yours sincerely,
Eugene Forsey
Eugene Forsey.

P.S. (From House of Commons Debates, Sept. 20, 1945, p. 329.)

"Mr. M.J. Coldwell (Rosetown-Biggar): May I direct a question to the Minister of Labour, of which I sent him notice earlier to-day. Will the minister table the interim or completed report of the survey on post-war employment prospects made by his department last year, which on March 23 last he stated was incomplete? Further, will he also table the report which I understand was made in August last by an interdepartmental committee, appraising employment prospects in war and civilian industry.

"Hon. Humphrey Mitchell (Minister of Labour): I want to thank my hon. friend for giving me notice of this question; but I think he will agree that it has become an established precedent in this house that memoranda submitted to a minister by officials of his department are not subject to being tabled."

Is Mitchell's statement correct? He said nothing of this kind on March 23; just that the report was incomplete, and that "when it is completed I shall give further consideration to the request of my hon. friend." (to table the report).

P.P.S. I was so shocked and sorry about poor Mr. LaSueur. I liked him so much. Dr. Bruce told me what was the matter.

E. A. F.

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MEMORANDUM
ON
"CANADIAN DEMOCRACY IN ACTION"

P. 10: Hitler's main private army was the Brown Shirts (S.A., Sturm Abteilungen, Storm Troopers). The Black Shirts were Mussolini's. Hitler had also, of course, his special S.S. (Schutz Staffel) Black Shirt Corps; but I think this was developed later. Anyhow, it certainly was not the main body of his armed followers.

P. 26: (a) The King, in Britain, often does not either open or close a session, but has those acts performed by a Commission. In Canada, both in the Dominion Parliament and provincial Legislatures, the Governor-General and Lieutenant-Governors often appear in Parliament several times during the session, to give assent to bills.

(b) Ordinarily, the debate on the Address in Reply to the Speech from the Throne is the first business of the session; but not always or necessarily. In 1926, in the Dominion House, Mr. Lapointe first moved a motion affirming the Government's right to continue in office; this took the place of the usual pro forma Bill No. 1, An Act Respecting the Administration of Oaths of Office: and the motion was actually discussed. It should also be noted that, as in Ontario at the recent session, other business may be taken up and dealt with before the debate on the Address is finished.

P. 27: The whole body of members on the Speaker's right is not "His Majesty's Government." Only the Ministers are entitled to that designation. The rest of the members on the Speaker's right are the supporters of His Majesty's Government.

P. 28: (a) Defeat on a Government measure may be considered by the Government as equivalent to a vote of want of confidence. But it may not. Sir John A. Macdonald's Government, in the years just after Confederation suffered at least six defeats on Government Bills, none of which it took as votes of want of confidence. It also suffered six other defeats on other motions, which, again, it decided to treat as

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votes of want of confidence. It is true that in no instance was a Government Bill actually rejected; but even if it had been, the Government could have decided that the Bill was too unimportant to be worth regarding as a ground for resignation or advice to dissolve. In the case of the Interest Bill, 1870, the Government, after suffering two defeats on motions to recommit, dropped the Bill, though it remained on the Order Paper as a private member's bill, and ultimately was given the three months' hoist by the Speaker's casting vote. The point is one which might become of some importance if no party had a clear majority, as a minority Government might then follow the example of the British Labour Government of 1924, and pay no attention to a whole series of defeats. It always rests with a Government to decide whether a defeat on any motion is or is not of sufficient consequence to warrant resignation or advice to dissolve.

(b) It is not only defeats on Government measures which may be taken as votes of want of confidence. (Note also for P. 34.) Defeats on motions to adjourn the debate, or to adjourn the House, or to adopt or amend the Address, or to go into Committee of Ways and Means, or to go into Committee of Supply, may, if the Government so chooses, be so considered. Also, the Opposition can move direct motions of censure or want of confidence, e.g., on the Address, on going into Supply, on going into Ways and Means (amendment to the Budget), or, as in 1926, on a motion to adopt the report of a Committee.

(c) If a Government is defeated on a motion of censure or want of confidence or anything which it considers equivalent, it may either resign (in which case there will be no election unless the new Government feels itself unable to carry on satisfactorily in the existing House), or advise the Governor-General or Lieutenant-Governor to dissolve Parliament, in which case (if the advice is accepted) the existing Government retains office unless it is defeated in the ensuing election. The wording in the text certainly does not make this clear. If, as may easily happen in both the Dominion and the provinces in the next few years, no party has

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a clear majority in the House, we may often have, as both Britain and Australia in similar circumstances often have had, a defeated Government resigning and a new Government taking office and carrying on in the existing Parliament; indeed, we may often have this performance repeated several times in a single Parliament, as in Britain in 1852-1857, and in Australia over and over again. (See my article in the latest issue of the Canadian Forum.) It seems worth while to try to prepare the public for this possibility, and not to encourage it in the totally mistaken notion that the defeat of a Government in the House necessarily almost certainly means a fresh election. It is certainly worth while to make clear that a single Government may last through several Parliaments (as Macdonald's did from 1878 to 1891, or Laurier's from 1896 to 1911), and that a single Parliament may see several Governments, as in the cases referred to just above.

(d) Private members' bills often deal with matters of public or general interest, and, if passed, appear among the Public and General Acts. I suggest that it might be made clear what "private matters" means; examples might help. It is certainly not true to say that on private members' bills members may vote as they please; that is only so if the Government "takes off the Whips", which it does not always do; e.g., Mr. Woodsworth's private member's bill in 1932 to repeal the then Section 98 of the Criminal Code, a bill opposed by the Government, whose supporters voted to refuse leave to introduce. Incidentally, this particular stage of a bill is omitted in the description on pp. 29-30. Passage of a private member's bill which the Government opposed would be a Government defeat, and might bring about resignation or dissolution.

Pg 29: (a) Line 3: The words "the other two" overlook the fact that there may more than three parties in all. It might also be pointed out that only one party forms the official Opposition; and that this one is not necessarily the largest part on the Opposition side (as, for instance, in 1922-1925, when the Conservatives, with

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80 members, were the official Opposition, while the Progressives, with 64, were not).

(b) Committee of the Whole comes after second reading, not before. Note also for p. 30.

(c) It would seem well to indicate that in Committee of the Whole the bill is discussed section by section. It might also be well to mention here the Committee of Supply and Committee of Ways and Means.

P. 30: It might be well to state more precisely the rules governing the length of speeches: forty minutes for everyone, except the Prime Minister; the Leader of the Opposition; a Minister moving a Government Order; a member speaking immediately after such Minister, and in reply to him; a member moving a vote of want of confidence; a Minister speaking directly after such member and in reply to him; all this subject to closure, which limits speeches to twenty minutes and brings the debate to a close at 2:00 a.m. of the following day.

P. 31: (a) The Speaker can be, and has been, overruled by simple majority. In 1926, he was overruled, on a most critical matter, by a majority of 2 votes.

(b) It might be well to note that in Committee of the Whole (including Supply and Ways and Means), the mace rests under the edge of the table.

P. 32: (a) When an election takes place, the existing Government may be sustained; in this case, there is no necessity for the Crown to call on anybody. The existing Government just stays where it is, as Laurier's Government did after the elections of 1900, 1904 and 1908. If the existing Government is clearly defeated (i.e., if another party gets a clear majority), it resigns, and the Crown then calls on the leader of the party which has secured the clear majority. If no party gets a clear majority, then the existing Government (even if it has not the single largest group) may retain office till Parliament meets, and, if Parliament supports it then, may retain office till Parliament defeats it, when it may resign or advise

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dissolution. Mr. King followed this course in 1926. His party came out of the election with only 101 seats to the Conservatives' 116; but no party had a clear majority. On the other hand, if no party has a clear majority, the Government may resign, as Mr. Baldwin did in 1929, when the Labour party very nearly got a clear majority. His comment was, "Whatever the people of this country want, it is perfectly clear they don't want me." If the Government chooses to resign, then the Crown must call on the Leader of the Opposition, whose party might have fewer members than the Government's party. All this, again, may be of some importance after the present Dominion and Ontario elections. Mr. King, or Mr. Drew, may fail to get a clear majority, but may get the largest group; but either might choose to resign; the Crown would then have to call on the leader of the next largest group, even though that group might be smaller than the one whose Government had just resigned. In view of widespread popular misconceptions on the subject, it might be as well to add that the retiring Prime Minister cannot offer advice as to his successor, and that the Crown is not at liberty to pick and choose among the Opposition parties. It would therefore not be constitutionally possible for Mr. King, for example, if he came out of the election with the second largest group, while Mr. Bracken came out with the largest, and Mr. Coldwell with the third, to resign and to advise the Governor-General to send for Mr. Coldwell. The Governor-General's duty on Mr. King's resignation would be to send for Mr. Bracken. Mr. King would have no right even to proffer advice unless specifically asked; and the Governor-General would have no right to accept any advice except to send for Mr. Bracken.

P. 33: (a) In the 1867 Dominion Cabinet, the personages described here as "Secretary for Canada" and "Secretary for the Province" were actually called the "Secretary of State for Canada" and the "Secretary of State for the Provinces".

(b) The personage here called "Minister of National Health" is actually called "Minister of National Health and Welfare".

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Pg. 34: (a) The Canadian Privy Council never meets. The Clerk of the Privy Council is most emphatic on this point.

(b) It might be well to note that not only do ex-Ministers remain members of Parliament till an election is held, but, if a Government gets a dissolution, the Ministers remain Ministers right through the election, and until the Government resigns (whether as a result of defeat in the election or in the House, or because of internal dissensions in the Cabinet). I have found the most extraordinary misconceptions on this point, even among very intelligent and well educated people.

(c) It is not true that the Crown can never refuse a Cabinet's advice. See my Royal Power of Dissolution of Parliament in the British Commonwealth; note Mr. Churchill's very emphatic statement on this point, March 29, 1944 (British Hansard); and note the Tupper-Aberdeen crisis of 1896, where Joseph Chamberlain and the British Government of the day, Laurier and his Government, and Mr. Meighen, have all upheld Aberdeen.

(d) Note this in regard to the statement that the Crown has only two rights. Note also the Crown's power to choose a Prime Minister in certain circumstances. For a concise summary of the constitutional position on this point, with references, see the speech of the Hon. H.A. Bruce in the House of Commons, last December 5.

Pg. 35: It should be made clear that, in a multiple-party House, where no party has a clear majority, though the Crown's power is, as stated, much increased, the Crown cannot, as was suggested during the recent Ontario crisis, on the defeat of the Government, call on the Leader of the Opposition to form a coalition. It can suggest a coalition; but that is all. Its duty is simply to call on the Leader of the Opposition to form a Government. What kind of Government rests ultimately with the Leader called on.

Pg. 36 Has India a "problem of federalism and parliamentary government"? Certainly not in the same sense as Australia, where a federal system of responsible government is already established.

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P. 60: (a) Senators must be thirty years of age, not thirty-five.

(b) They must have real property, free of mortgage, to the amount of $4,000, and total real and personal property, free of all debts, to the amount of $4,000.

P. 61: (a) From 1867 to 1924, inclusive, there were 101 disallowances, not 100. An Ontario Act of 1910, reported at p. 98 of Dominion-Provincial Legislation, vol. II, is not listed in the table at the end of that volume.

(b) In the years 1937-1945, the Canada Gazette lists 11 disallowances of Alberta Acts: 3 in 1937, 2 in 1938, 2 in 1939, 3 in 1941 and 1 in 1943.

(c) It might be well to mention the power of reservation of provincial bills by the Lieutenant-Governor for the signification of the Governor-General's pleasure. There have been 65 reservations. (The list in the Tables in Dominion-Provincial Legislation is incomplete and erroneous.) Only 14 of the bills received the Governor-General's assent. The last cases were the three Alberta bills in 1937.

(d) It is just possible that it might be well to mention the Lieutenant-Governor's power to refuse assent outright. This has been exercised 26 times, the last case being just a week or so ago, in Prince Edward Island. As far as I know, this power has usually been exercised on the advice of the provincial Cabinet. The only cases I know of where the Lieutenant-Governor has refused assent on his own responsibility are in Prince Edward Island in 1924 and 1945. There is also a very curious provision in the Constitution of British Columbia which empowers the Lieutenant-Governor to return bills for reconsideration. This is always done on the advice of the Cabinet. Down to 1941, 87 bills had been so returned; one, in 1938, was rescinded at the Lieutenant-Governor's suggestion.

(e) It might be well to note the special powers given the Dominion to protect the Separate Schools, and to note briefly the Manitoba School Question.

(f) It might be well to note that Lieutenant-Governors can be removed and that two have been.

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Pg 67: The Canadian Government can make any treaties it pleases. The difficulty is that, in matters under provincial legislative jurisdiction (which includes most labour matters, though not all; e.g., labour on Canadian vessels on the high seas is a Dominion matter), it cannot pass laws to carry out the treaties.

Pg 72: Some note of the Padlock Act of Quebec, still on the Statute Book, might be appropriate here, just to show what can happen even in Canada; how the safeguards here described can be set aside.

Pg 75: Judges of the County Courts can be, and have been, removed by the Dominion Government without any Address from both Houses of Parliament. An Address would be required to bring about the removal of judges of higher courts.

Pg 80: Appeals to the Privy Council in criminal cases have been abolished. Appeals in civil cases could be abolished whenever the Dominion Parliament (not Government) wished. A Bill to do it was introduced into the House of Commons just before the war by Mr. Cahan. The Government referred it to the Supreme Court, which said it was within the powers of the Dominion Parliament. An appeal to the Privy Council for its opinion on this bill was stopped by the outbreak of war.

Pg 84: The reference to parishes in New Brunswick as rural municipalities is a trifle misleading. They exist only as divisions of counties. There are no parish councils, or anything of the sort. The parish is purely an electoral division of the county.

Pg 88: There is a Minister of Municipal Affairs in Quebec, and has been for some time.

Pg 91: The "commission" in Montreal is properly called the Executive Committee, and consists of Councillors elected to the committee by the Council; it is thus not the same as the Boards of Control in Ontario cities.

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P. 109: The Statute of Westminster does not contain a word about appeals to the Judicial Committee of the Privy Council. The statement about abolishing appeals whenever Canada wishes appears in the Report of the Imperial Conference of 1926. The Statute of Westminster, by removing certain limitations on the power of Parliament, made possible the abolition of appeals.

P. 110: The correct name of the air base is Goose Bay.

SUPPLEMENTARY COMMENTS

P. 18: I think the point about the importance of teaching English might be even more strongly made. For English-speaking Canadians, English is the tool for thought. Unless they can speak and write decent, clear, simple English, they will lack the tool for thinking about public questions. They won't have the foggiest notion what "social security" is about, for example, because they won't know the meaning of either word. Anyone who thinks this is fantastic should try teaching at McGill: I used to have to define the meaning of legislature, legislative, legislation and legislator for second year students, year after year, and for native, Anglo-Saxon Canadians of very decent intelligence at that! And even then some of them would get it all wrong.

P. 22: Might be worth while to mention explicitly that Black Rod exists and goes through his/ceremonies in Canada too.

P. 116: The cartoon seems to me open to some objection. It smacks of the American holier-and-more-sensible-than-thou attitude towards Europe. I feel sure any European would resent it.

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P. 41: Under the amendment to the Dominion Election Act, c. 26 of 1944, section 7, the interval between nomination day and polling day is four weeks.

P. 44: Saskatchewan [illegible] has lowered the voting age to 18.

(Have since discovered that Alberta, in 1944, lowered the age to 19, not 18, as stated in the text of the booklet.

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144762

September 24, 1945.

Dr. Eugene Forsey,
5 Lakeview Terrace,
Ottawa, Ontario.

My dear Eugene:

I received yours of 21st. Your reasoning seems to me quite right and I do not think there is any value in trying to shame further Mr. Wright.

Have read very carefully the notes you have made on "Canadian Democracy in Action." These are excellent and show great thoroughness in your researches. You have put yourself in a position, as an authority on this subject, to be of very marked value to Canada. I presume and hope you sent a copy to Professor Brown. The wording of your notes clearly indicates that such was the purpose.

I follow the various pages of your notes without any disagreement at all. Toward the end of page 4 you say: "If the existing Government is clearly defeated (i. e., if another party gets a clear majority), it resigns..... ....." No doubt this is the better practice, but is it not true that a defeated Government can wait and meet Parliament if it wishes? Should it choose to do so its duty is to call Parliament without undue delay. In this I may possibly be wrong, but I was of the impression that while the better practice was to resign immediately, such a practice had not risen to the status of a Constitutional obligation.

On page 7 you say: "The only cases I know of where the Lieutenant-Governor has refused assent on his own responsibility are in Prince Edward Island in 1924 and 1945." This may be so in the case of a Government Bill, but in Manitoba in 1914 the Lieutenant-Governor definitely refused assent to an Order-in-Council proroguing Parliament, and did so on his own responsibility.

On page 8 you say that the Dominion cannot pass laws to carry out Treaties if such Treaties deal with subjects that are strictly within Provincial jurisdiction.

(over)

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I presume this is the law since the Privy Council decision on the Bennett legislation. I argued in the Senate, in the Session of 1935 I think it was,--at all events, when the legislation was before us--that the Dominion had such power. We were then dealing with the Hours of Labour legislation. I cannot put my hand on this debate, but I think I made a strong case and I am certainly not satisfied that the Privy Council decision was right. It has always seemed clear to me that in their decision on the Bennett legislation they were seeking not to fly in the face of Canadian opinion as seemed to be demonstrated in the intervening election, and as also was indicated by the presence, against the legislation, of Counsel for all our Provincial Governments. For the life of me I cannot see how Canada can join with other countries in a united endeavour to have uniform principles apply to labour hours and other labour rights, if after we make Treaties, we have to depend on Provinces to ratify them or to make them effective. In a word, I have never been able to reconcile my own thinking with the Privy Council Judgments at that time. The time will come when they will be embarrassing.

Yours very truly,

AM/E.

P.S.--On the point as to a Government's right to withhold from Parliament a memorandum prepared by officers, I do not doubt for a minute but what the practice to withhold it has become now pretty firmly established. The "public interest" humbug has worked overtime for many years. Certainly there is no way of compelling a Government to produce it. Even if an Order for production were passed by Parliament, this Government would pay no attention to such Order.

I am not disposed to think that a very strong case, however, can be made on the subject, based on the practice of former Governments. If I can get anything here in Toronto to help me, I shall write you again very soon.

A. M.

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3 Lakeview Terrace,
Ottawa, September 26, 1945.

Dear Mr. Meighen,

I thought I had told you that I sent a copy of my notes on "Canadian Democracy in Action" to Professor Brown himself. Anyhow, that is what I did. I ran into him at Kingston, shortly afterwards, and he expressed appreciation of what I had written. Unfortunately, he was deep in conversation with someone else at the time, and I had no chance of seeing him again. So I do not know what, if anything, he proposes to do about the matter.

In regard to your notes, I have only one or two comments.

(a) On the procedure when a Government is absolutely defeated at the polls: Strictly, I think you are quite right; certainly I do not think that one could say it was unconstitutional for a Government to remain in office and summon Parliament promptly, even though some other party had obtained a clear majority; there might be circumstances in which this course would be necessary because of some peculiar difficulties (e.g., if the victorious party were unprepared to take office promptly, and asked the existing Government to carry on). But I very much question whether, in the absence of some such extraordinary circumstances, this will ever happen. There is now an unbroken chain of British precedents since 1868: 1874, 1880, 1886, 1924 and 1945. In 1929, though the Labour Party did not get a clear majority, it came so near it, that Mr. Baldwin at once resigned without meeting the new Parliament. The only cases in Britain since 1868 where a Government emerging from the elections in a minority has met the new Parliament are those in which no party had a clear majority or anything approaching a majority: 1885, 1892, 1923. In general, I think the same has been true in Australia and Canada (Commonwealth, States, Dominion and provinces), though I speak without having looked up all the cases. It is a nice point when a particular practice hardens into a constitutional rule or convention. I should say this one was pretty close to the hardening point.

(b) As to refusal of assent, I was referring only to refusal of assent to bills. I was not aware of the Manitoba case you mention of refusal of assent to an Order-in-Council; but that is really, I think, a separate matter, rather more akin to refusal to sign special Lieutenant-Governor's warrants. Of this last there have, I know, been several cases, notably in British Columbia in the successive rows McInnes got himself into from 1898 to 1900; I have heard that Dr. Bruce, when he was Lieutenant-Governor of Ontario, refused to sign certain warrants presented to him by Mr. Henry. I want to ask him about this some day. I have also heard rumours that a Lieutenant-Governor of Saskatchewan did likewise.

(c) As to the treaties, I fully agree. I recall your speech in the Senate, and thought, and think, you were perfectly right. I think the Privy Council decision was bad law and bad policy; I always have thought so; I confess also to sharing what I understand is R.B.'s opinion that the case for the Dominion was badly put, probably deliberately so. All I was concerned to state in my comments on Brown, however, was the actual state of the law as I understood it; and unfortunately the British North America Act, unless I am much mistaken, means, to a Court, what the Privy Council says it means.

I think the time has already come when the judgment in the Bennett cases is embarrassing, and worse is in store. The present Government, in its proposals to the Dominion-provincial Conference, skirts gingerly around the question, the most it commits itself to

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being that it is willing to listen to any proposals anyone else may wish to make on the subject. Characteristic Kingly courage! I am perfectly convinced that we shall yet reap a bitter harvest from this as from so many other actions of King's; but, quite clearly, his motto is, "Après moi, le déluge."

I am grateful for your comments on Humphrey Mitchell's reason for withholding from the House the results of his post-war employment survey. I can see that certain departmental memoranda might well be withheld; but a survey of the employment prospects of all the firms in the country employing 200 or more workers would, I should have thought, hardly have come in that category. I think it is also significant that he shifted his ground between March and September. I suspect the reason was that the survey did not provide adequate ground for the loud boasts of this Government about the marvellous results which will accrue from its policies.

You may perhaps be interested to see the Memorandum I did on the other school pamphlet on civics. It is an extra copy, so don't bother to return it.

Yours sincerely,

Eugene Forsey

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September 27, 1945.

Dr. Eugene Forsey,
5 Lakeview Terrace,
Ottawa, Ontario.

My dear Eugene:

Thanks very much indeed for your letter of 26th. I have not the least doubt you are right in every comment you make in this letter.

As yet I have not been able to get anything from the Library here to help me on the matter of Hon. Humphrey Mitchell's pronunciamentum.

Was glad indeed of the privilege of reading you s to J. M. Dent & Son, of the 25th July. It is difficult to understand why people will rush into print before they have made a thorough study of their subject. The recklessness with which amateurs plunge into authorship is almost as marked as the corresponding levity and self-confidence with which so many run for Parliament.

Yours very truly,

AM/E.

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Vol. 61 OCTOBER, 1945

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Professor of Jurisprudence in the University of Oxford

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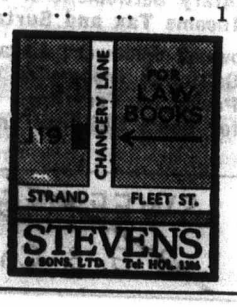

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NOTES.

1939—1945.

The past six years have been the most dramatic in all English history, but from the standpoint of the law perhaps the most striking feature has been the calm, unchanging character of British justice. Never during these years has the administration of the civil law been halted or suspended. It is true that in London the Royal Courts of Justice were struck more than once by German bombs, but cases continued to be heard there, sometimes in the ordinary Courts and sometimes in the cellar. In spite of difficulties of travel the King's judges went on Assize even as they had gone in the days of Henry II, although some of the ceremonies had to be abandoned. Now the sound of the trumpets will be heard again, and the church bells will ring for the Assize sermon. In 1940 preparations were made for a new method of administering civil justice in case part of the country were invaded or the air-raids should cause a breakdown of communications, but fortunately it never became necessary to put it into practice. This unused statute will, however, stand in the books as a reminder that the British people had determined that civil justice should continue to be administered even while they were fighting with their backs to the wall.

But although the character of British justice remained unchanging during these six years, this does not mean that the law remained unchanged. More than 400 public statutes were enacted by Parliament during the war period; the great majority of these were concerned, of course, with the prosecution of the war and with the conditions created by it, but there were others of a more permanent character. The complete sovereignty of Parliament was illustrated by the fact that it was enabled to continue its life from year to year after the five years of its ordinary statutory existence had expired. From the constitutional standpoint the most radical innovation is to be found in the United States of America (Visiting Forces) Act, 1942, which provided that members of the United States forces who were charged with having committed civil crimes in Great Britain should be tried by American military

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Courts and not by the British criminal Courts. For centuries liberty in this country has been protected by the rule that, even during war, members of the armed services are subject to the ordinary law of the country and are to be tried for civil crimes by the civil Courts, so that the 1942 Act constituted a revolutionary change. The innovation has been amply justified in practice, but it is to be hoped that a similar Act will never again be found necessary.

In spite of the war Parliament found time to deal with matters that affected the ordinary life of the country. Of these statutes by far the most important was the Education Act, 1944, which has completely remodelled the system of education in England. It is interesting to remember that during the last war Parliament enacted the Education Act, 1918, which did much to improve the education of the children: now a further step has been taken which will cover both juvenile and adult education. From the social standpoint the Catering Wages Act, 1943, which regulates wages and conditions in that unregulated industry, is of particular importance. Perhaps lawyers will be most interested in the Law Reform (Contributory Negligence) Act, 1945, which applies the Admiralty rule to common law actions as recommended by the Law Revision Committee, and in the Law Reform (Frustrated Contracts) Act, 1943, which provides the necessary adjustments when a contract has been frustrated.

From Parliament we can turn to the Courts: they were far from inactive during the war years for more than 1,500 cases have been reported. Unlike the last war, there have been few cases of importance dealing with international or prize law as most of the questions which then concerned the Courts were finally settled at that time. Nor have there been any cases of constitutional importance. The much discussed *Liversidge* v. *Anderson* [1942] A. C. 206 merely concerned the interpretation of the particular words in Regulation 18B which gave the Secretary of State power to intern persons when he had 'reasonable cause to believe' that they had been recently concerned in acts prejudicial to the public safety. If the House of Lords had interpreted these words as meaning that the Secretary of State's acts were subject to judicial review, then the immediate consequence would have been the issue of a new regulation in more precise terms, because such reviews would have been impossible from the practical standpoint in war time. The remarkable thing is not that the right of individual liberty had to be infringed in these cases, but that the total number of persons interned even for a short period under 18B was less than 1,800. Of greater interest are the cases dealing with the ordinary civil law, for many of them are of outstanding importance. It is only possible to list a few of these here. *Sedleigh-Denfield* v. *O'Callaghan* [1940] A. C. 880 (nuisance); *Crofter Hand-Woven Harris Tweed Co., Ltd.* v. *Veitch* [1942] A. C. 435 (conspiracy and restraint of trade); *Gold* v. *Essex County Council* [1942] 2 K. B. 293 (liability of hospitals); *Perrin* v. *Morgan* [1943] A. C. 399 (interpretation of wills); *Bourhill* v. *Young* [1943] A. C. 92 (liability for shock); *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour, Ltd.* [1943] A. C. 32 (overruling the rule in *Chandler* v. *Webster*); and *Stirling* v. *Director of Public Prosecutions* [1944] A. C. 315 (application of section 4 of the Criminal Appeal Act,

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1907) are perhaps the outstanding cases, although it would be possible to add many more to the list.

Legal procedure has been affected by two considerations during the war. The first was to give some protection to persons who had been handicapped by circumstances arising out of the war. To do this the Courts (Emergency Powers) Acts, 1939 and 1948, provided that remedies should not be enforceable without leave of the Court. Similarly, the Liabilities (War-Time Adjustment) Acts, 1941 and 1944, were planned to help the debtor who might otherwise be made bankrupt. The second consideration was to simplify procedure, especially because of the man-power shortage. For all practical purposes juries have disappeared in civil cases, while the Defence (Administration of Justice) Regulations have reduced the jury in all criminal trials, except for treason or murder, from twelve to seven. Moreover, if a member of the jury dies or cannot continue to serve in the course of a trial the number may be reduced from seven to five. Some of these alterations may become a permanent part of the law as they have proved convenient in practice, but the major problem concerning costs remains to be solved.

But it is only when we turn from statutes and cases to Orders, Rules and Regulations that we can fully realize the changes which the war has introduced into the ordinary life of the country. Most of the emergency law, though by no means the whole of it, has been made under the Emergency Powers (Defence) Acts, 1939 and 1940, which empower His Majesty by Order in Council to make such regulations as appear to him to be necessary or expedient for securing the public safety, the defence of the realm, the maintenance of public order, and the efficient prosecution of the war. On the face of it these Acts would seem to have transferred complete legislative capacity to the Executive, but the power has not been used in this unlimited manner. The decision when legislation is to be made in statutory form by the King-in-Parliament and when it is to be made as an Order in Council has not always been an easy one to make: perhaps it may be said that questions of principle, especially those that might be considered controversial, have been referred to Parliament while the more technical and detailed questions have been dealt with by Orders, including under that term regulations and rules. But even with this limitation the scope of these Orders has been an enormous one, and there is hardly any part of the life of the country which they have not touched. In six years nearly 9,000 Statutory Rules and Orders have been issued, although some of these, of course, are only concerned with minor amendments. It is not always easy to find the relevant Order which one is seeking, but efforts have been made to classify and index them and to bring them up to date from time to time. It would not be difficult to point to a number of these Orders which, in the event, were unnecessary, and a few which might be considered foolishly meddlesome, but on the whole it is remarkable to think that so vast a task has been performed with so little friction and hardship. The *Manual of Modern Law*, published under the auspices of The Law Society, has drawn a fair picture of the system in these words (at p. 151): 'The system established by the emergency Acts and Regulations will be seen in totally wrong perspective if looked at purely as a system of control. If the statutory provisions are casually considered,

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they may have a negative or restrictive appearance, but if viewed fairly as a whole it will be seen that the aim of the emergency legal system is constructive, and the prohibitions themselves have as their object the organization of the resources of the country for war on a national basis'. This total organization of the country for war, while still maintaining the basis of law and order, is a remarkable achievement which has not been sufficiently recognized.

It is interesting to note that even during the war years the future development of English law was not forgotten. The Company Law Amendment Committee, under the chairmanship of Mr. Justice Cohen, has made recommendations which, if translated into law, will be useful in strengthening the control to be exercised by the shareholders, and in increasing the amount of information to which they and the general public will be entitled. At the same time Lord Rushcliffe's Committee has made its report concerning the legal aid to be given to poor persons: if these recommendations are adopted a profound and salutary change will have been made in the administration of justice in this country. The Uthwatt and the Scott reports, to give them their popular titles, will, if accepted in whole or in part, do much to improve the conditions of living in the cities and the countryside. The Birkett Committee, which is considering the law of defamation, has not as yet made its report, but when it does, the least satisfactory branch of the law of tort will probably be reformed.

This brief summary of the history of English law during the war years shows that the ancient tag *inter arma leges silent* has been proved false in this country, and that, even during the year when Great Britain and the Empire alone faced the greatest military tyranny in the history of the world, the common law continued on its calm and unbroken way. Changes there have been, as there must be in every living thing, but the basic principles of the law have remained untouched—freedom for the individual, equality before the law, and justice for all men.

In English law prior to 1925 the rule was that the right of succession on death, whether testate or intestate, depended on proof that the successor was alive at the moment when the person, from whom it was claimed that he took, had died. If it could not be proved that the one survived the other then the succession failed. The problem usually arose in the case of a common disaster, but it might also occur under other circumstances, as, for example, where one of the persons had died in a foreign country at an unknown time. The most serious difficulty arose where A and B had had mutual claims to succeed the one to the other, and it could not be proved which had survived: in these circumstances neither could inherit from the other. Cases of great hardship arose under this rule, especially where A and B had made joint wills providing that the estate of each should eventually go to C. To remedy this defect in the law Parliament enacted section 184 of the Law of Property Act, 1925, which provides that: 'In all cases where, after the commencement of this Act, two or more persons have died in circumstances rendering it uncertain which of them survived the other or

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others, such deaths shall (subject to any order of the Court), for all purposes affecting the title to property, be presumed to have occurred in order of seniority, and accordingly the younger shall be deemed to have survived the elder'. It was generally thought that this section had solved the vexed question of the *commorientes*, but the circumstances of the recent war have given rise to a new problem, *viz.*, if two persons are killed by the same bomb, so that they may be said, in popular language, to have died simultaneously, is section 184 applicable? This question has been answered in the affirmative by the majority of their Lordships in the House of Lords in *Hickman* v. *Peacey* (1945) 61 T. L. R. 489.

In this case two brothers, each of whom had left a legacy to the other in his will, were killed in 1940 when a high explosive bomb, bursting within a house, destroyed a shelter to which they were in the habit of going. In the Court of first instance, Cohen J. held that the younger brother must be deemed to have survived the elder, but the Court of Appeal (Luxmoore L.J. dissenting) reversed his decision, holding that as the two brothers had died simultaneously, section 184 was not applicable as neither could be said to have survived the other. The House of Lords, again by a majority, reversed the judgment of the Court of Appeal.

The majority based their judgments on two grounds which must be carefully distinguished: (a) that section 184 was applicable in all cases where it could not be proved that one person had survived the other, and therefore was applicable to cases of simultaneous death, and (b) even if section 184 was not applicable to cases of simultaneous death, nevertheless it could not be proved that the deaths had been simultaneous, and therefore the section was applicable to the present case.

The first ground depends on the method of interpretation applied to the words of the statute. From the standpoint of strict grammar it cannot be said that it is 'uncertain which of them survived the other or others', if it can be proved that two persons have died simultaneously. This narrow interpretation leads, however, to the conclusion that the Legislature had failed to provide a remedy in just those cases which are most likely to arise under modern circumstances,—deaths in an aeroplane crash or a motor car collision, as well as in a bomb explosion. This may be said to be more than an ordinary *casus omissus*, for on no rational ground that any one has ever suggested could Parliament have intended to give a remedy when the order of death was uncertain but to refuse one when the deaths were simultaneous. Lord Macmillan therefore reached the conclusion (at p. 492) that: 'I prefer to read the enactment as meaning that, where the circumstances are such that it is not possible to say with certainty that one of the victims survived the other, there is then uncertainty which survived the other. Clearly you cannot say with certainty that one of the victims survived the other if your belief is that both died at the same time, if that be possible'. Similarly, Lord Porter said (at p. 497): 'Speaking for myself, I should be inclined to read the section, even without the previous history, as presenting only two alternatives—namely, (1) an ability to show the order of death, or (2) uncertainty. . . . It seems to be concerned with survivorship or no survivorship, and not to be concerned with some *tertium quid* which is neither the one nor the other'.

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In his dissenting judgment Viscount Simon L.C. held that there was no justification for reading into the section a second alternative condition which was not there. He said (at p. 490): 'The circumstance that Parliament provides for what is to happen if one condition is fulfilled is no reason at all for saying that Parliament has impliedly expressed the view that another and different condition can never arise. A rule of racing which provided that, where the judge was uncertain which of two horses passed the winning post first, the younger horse should take the prize, would not prevent the sharing of the prize in a dead-heat'. With all respect, it is difficult to believe that the stewards of the Jockey Club, being a body of practical racing men, would ever reach such a conclusion, for it is never possible for any judge to say with certainty that a dead-heat has occurred. The human eye obviously is not able to give a definite answer, and no camera could be sufficiently accurate. It is only necessary to refer to the well-known case of the horse which won the race because it was bitten on its nose by a mosquito as it came down the straight. A dead-heat occurs in racing when it is uncertain which horse has won the race, and not when it is proved with mathematical certainty that the horses have passed the winning post at the same instant of time. If the Lord Chancellor's analogy is applied to the present case, it might be argued that it supports the conclusion, reached by the majority of their Lordships, that Parliament must be assumed to have included simultaneous deaths within the purview of the statute.

The second ground on which the majority of their Lordships based their judgments was that it could not be proved that the deaths had been simultaneous in the present case. In a popular sense the two brothers had, of course, died at the same time, but was this the sense in which survivorship should be measured? Lord Simonds expressed this difficulty when he said (at p. 499): 'It helps me not at all to hear that the expression "at the same time" must be understood according to the common understanding of mankind. . . . In one context seconds, even minutes, even parts of a day may be disregarded; in another the difference of a small fraction of a second may be all-important'. In his dissenting judgment the Lord Chancellor said (at p. 491): 'I recoil from the proposition that two soldiers, standing shoulder to shoulder in the same trench when a high explosive shell drops between them and blows them both to smithereens, cannot rightly be held by a Court of law to be proved to die at exactly the same moment', but would his answer necessarily have been the same if one soldier were one foot from the bomb and the other thirty yards away? In one sense these deaths would be simultaneous, but in another they would not be, because it would take an ascertainable instant of time for the blast to travel thirty yards. Lord Wright in his dissenting judgment says (at p. 493) that 'the decision in this appeal depends on a finding of fact', but, with all respect, the finding of fact only becomes relevant when the Court has determined which facts are material, this being a question of law. In the present case the majority of their Lordships have held that for the purpose of section 184 two deaths cannot be said to have been simultaneous if there is a fraction of time between them, while the minority, in Lord Wright's words, have reached the conclusion that they are simultaneous if they occur at 'the same moment' in the sense used by

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'the hypothetical plain man'. Logically it cannot be shown that the one answer rather than the other is either right or wrong, because either interpretation can reasonably be attributed to the words, depending on the conclusion which it is desired to reach. Lord Simonds in justifying his conclusion that proof of simultaneous death is impossible says (at p. 499) that, 'in coming to such a conclusion I would reject the suggestion that it is that of a metaphysician rather than of a lawyer, unless indeed metaphysic here includes logic'. This, if we may say so, is true, but perhaps it suggests that logic has played a larger part in determining the conclusion than in fact it has. It may be respectfully suggested that the strength of the majority judgments depends, not so much on any superiority of logic, as in the practical common-sense of the result they reach.

Is the doctrine of common employment applicable in a case where the employee, whose employment began before 1941, is prevented from leaving his employment (except with the permission in writing of a national service officer) by the provisions of the Essential Work (Coal-mining Industry) (No. 3) Order, 1941? In *Alexander* v. *Tredegar Iron and Coal Co., Ltd.* (1945) 61 T. L. R. 481, counsel for the appellant argued that, as the doctrine of common employment was based on an implied term in the contract of employment that the employee contracted with reference to the risk of carelessness on the part of a fellow employee, this must be subject to the implication that the employee was free to leave his employment on proper notice in the event of his not being satisfied of the skill and care exercised by his fellow workmen. The House of Lords unanimously refused to accept this argument, Viscount Maugham saying (at p. 484): 'I do not think that it can be correct to say that the rule, well settled as it now is, must be regarded as being essentially based on the continuing freedom of the workman to leave the employment'. He pointed out that in no one of the very numerous reported decisions on common employment had it been held that the rule was inapplicable on the ground that the freedom of the workman to leave the employment was for some reason suspended, as, for example, in the case of seamen who had signed on for a lengthy voyage. Similarly Lord Wright, after remarking that 'it is difficult to understand why a doctrine so severely attacked has survived so many years', said (at p. 485): 'The implied term which the law has accepted is indeed theoretical and has little relation to fact, but I am not prepared to extend the theory or fiction beyond its present artificial and arbitrary limits. The new proviso which it is sought to introduce is too far removed from any conceivable contemplation of the parties'. One fiction was enough for their Lordships: they were not prepared to accept a second fiction qualifying the first one.

In the present case as the workman had been in the service of the respondents for many years before the Essential Work Order had come into force the contract of employment was a voluntary one. Their Lordships refused to express an opinion whether the result would be the same in the case of a workman who was originally directed to an employment under the Essential Work Order. In such a case it might be said

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that the workman had not voluntarily accepted the risk of his fellow workmen's negligence. Lord Simonds, however, made the interesting point that this argument might lead to an attack on 'the citadel of the master's vicarious responsibility' itself. He said (at p. 486): 'Is he [the master] to be responsible for the acts of those servants of whom he cannot without permission of the national service officer be rid, but rest under a new responsibility to his own servants because they cannot, if they would, be rid of him?' Carried to its logical conclusion the argument would therefore lead to the startling result that the whole doctrine of *respondeat superior* had been rendered invalid by the Essential Work Order, a result which would affect, not only the common employment cases, but the whole law of tort.

Perhaps no recent case has so startled the legal profession as has *Cowen* v. *Cowen* (1945) 61 T. L. R. 525, in which the wife's petition for nullity for wilful refusal to consummate the marriage, on the ground that the husband had insisted on using a contraceptive when having intercourse with her, was granted by the Court of Appeal. In the Court of first instance ((1945) 61 T. L. R. 475) Pilcher J. had dismissed the wife's petition on the ground that: 'So far as I am aware, the question of fact for consideration in every nullity case is simply whether or not the marriage has been consummated, and the party who wishes to establish that the marriage has been consummated has, so far as I know, always had to show that there has been some effective penetration of the female organ by the male organ. Once he has established that there has been complete penetration he has made out his case, and that quite irrespective of whether an appliance like a sheath has been used which would effectively prevent one of the purposes for which marriage was ordained—namely, the procreation of children'. The Court of Appeal, in a judgment read by du Parcq L.J., held that penetration was not consummation, and that sexual intercourse could not be said to be complete 'when he [the husband] artificially prevents that natural termination, which is the passage of the male seed into the body of the woman. To hold otherwise would be to affirm that a marriage is consummated by an act so performed that one of the principal ends, if not the principal end, of marriage is intentionally frustrated'.

The Court of Appeal based its judgment in large part on the ground that a contrary conclusion would subject a wife, who objected to contraceptives, to an intolerable injustice because if she refused intercourse in these circumstances she would have no answer to a petition by the husband that she had wilfully refused to consummate the marriage. With all respect it does not necessarily follow that because penetration with a sheath, voluntarily submitted to, is held to be consummation, therefore refusal to submit to this practice must constitute wilful refusal to consummate the marriage. Thus a marriage may be voluntarily consummated in an air-raid, but it does not follow from this that a refusal to consummate a marriage in those circumstances must be held to be a wilful refusal.

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The present decision may give rise to difficult cases. A and B marry, agreeing that A shall use a contraceptive as there is hereditary insanity in B's family. After ten years B objects to the use of contraceptives. Will it be held that B is entitled to a decree of nullity if A refuses to give up the practice, or will it be held that there is a continuing reasonable ground for continuing the practice so that, although the marriage will never be consummated in the full sense, nevertheless a decree of nullity will be refused? In the present case the wife had agreed to the practice while they lived in Persia, as it would have been difficult for her to have a child in that country; if they had remained there for thirty years, until she had passed the age of child-bearing, would it be held that the marriage had never been consummated?

The present decision leaves unanswered the question whether a petition for nullity will be granted when it is the wife who uses the contraceptive. On the one hand it may be argued that this will not be a ground for nullity because du Parcq L.J. has said that 'the passage of the male seed into the body of the woman' makes the act complete; on the other hand reliance may be placed on the reference made in the judgment to *Coote's Practice of the Ecclesiastical Courts* (1847) where the precedent alleges that the petitioning wife was 'willing to be carnally known in order to become a mother'. If she takes steps to prevent herself from becoming a mother has she not prevented the marriage from being consummated?

It has been suggested that the present case may encourage collusive petitions because, in cases where no children have been born of the marriage, a wife can always allege that her husband has insisted on using contraceptives, and, unless he denies it, no one can prove that her statement is not true. It is doubtful whether there is any serious danger of such a practice developing, especially in view of the recent extension of the grounds for divorce, but the fact that it may be so easy to obtain a decree of nullity on this ground does cast some doubt on the conclusion reached in the present case.

In view of the emphasis placed by the Court of Appeal on the procreation of children as the principal end of marriage, will the next step be to grant a decree of nullity where sterility in the man or woman has been proved? In the past, as du Parcq L.J. points out, it has been impossible to prove sterility, but to-day this can be done in many cases and therefore no difficulty of proof need arise. The judgment says that 'there are obvious reasons of a religious and social character why sterility should not of itself be a sufficient reason for a decree of nullity', but the reasons are not stated, so that it is impossible to say how they differ from those that have been applied to the present case. It may be suggested, however, that if it is held that a marriage is not consummated because a husband (or, perhaps, a wife) voluntarily renders himself sterile, it is not a far step to hold that a marriage has not been consummated where sterility, whether voluntary or involuntary, exists, because in both cases 'the principal end of marriage'—in the words of the Court of Appeal—has been frustrated.

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In *Beard* v. *Beard* [1945] 2 A. E. R. 306 the Court of Appeal (Scott and Lawrence L.JJ., Vaisey J. dissenting) had to decide a problem which had given rise to conflicting decisions in the Court of first instance. The question was whether a matrimonial wrong, insufficient of itself to entitle the injured spouse to a decree of divorce, nevertheless sufficed to remove the bar effected by a previous condonation, and thus to revive the original right of the injured spouse to a decree by reason of the former wrong. The petitioner had condoned his wife's adultery, but after they had lived together again for three weeks she deserted him. Thereupon the petitioner presented a petition for divorce based on his wife's adultery. Hodson J., in the Court below, had refused to grant the petition, holding that no desertion short of the statutory three years could revive the original right of the injured spouse to a decree by reason of the former wrong, but the Court of Appeal allowed the petitioner's appeal.

The fundamental question in the case, as Lawrence L.J. said (at p. 315), was whether condonation was absolute and unconditional, with the result that the doctrine of revival of matrimonial offences had no practical existence, or whether it was conditional and capable of revival by offences of a less serious nature which would not by themselves give ground for divorce. In deciding this question it was necessary for the Court to consider not only the cases decided since the Matrimonial Causes Act, 1857, came into effect, but also the earlier decisions of the Ecclesiastical Courts. The conclusion reached by Scott L.J., who analysed the decisions in detail in his judgment, and by Lawrence L.J., was that condonation had always been regarded as conditional. The principal question having been answered in the affirmative, the next question was, What matrimonial offence would bring the doctrine of revival into operation? The answer to this was, any matrimonial misconduct which was inconsistent with matrimonial duty. It would follow from this that any desertion, long or short, of sufficient reality for the Court to take cognizance of it, would constitute a matrimonial offence. As Scott L.J. said (at p. 310): 'The notion that desertion differs in kind according as it is long or short, and that it does not constitute a "matrimonial offence" unless it continues for some period specified in some statute as entitling the Divorce Court to make some decree, is, I think, a misapprehension due to confusion of thought'. Their Lordships therefore held that the respondent's desertion, even though for a period of less than three years, had revived her condoned matrimonial offence.

Vaisey J. dissented on the ground that condonation means that the marriage is 'reconsummated, reconsecrated, and in the fullest sense rehabilitated'. The doctrine of revival, which his Lordship found 'less easy to explain and to justify', was historically a rule of pleading and of evidence: 'all that the revival did was to allow the condoned offence to be brought, as it were, into the picture of the conjugal relationship'. Thus evidence of a condoned act of cruelty could be given to complete the picture of a recent act of cruelty, which, standing by itself, might seem to be less serious. The doctrine of revival could not affect the principle that condonation was 'absolute and unconditional, so as to render the offence incapable of being revived in any circumstances whatsoever'. The learned judge reached the conclusion that 'the principle

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of revival exists, but has become of extremely limited application, and in any case does not apply here'.

With all respect, it may be suggested that there is some difficulty in accepting this interpretation of the law. In the first place it would mean that no doctrine in English law has ever been so completely and hopelessly misnamed, for the principle of revival, according to this view, does not revive anything: it merely allows the condoned offence to be used as the most limited kind of evidence. In the second place, this interpretation is contradicted by most of the cases cited by Scott L.J. Thus, to give only one example, in *Newsome* v. *Newsome* (1871) L. R. 2 P. & D. 306, Lord Penzance said (p. 311): 'When the husband is restored to his original position the law implies forgiveness, but forgiveness of a peculiar character, because it is coupled with the condition that the husband shall not in future be guilty of any marital offence'. It may be said that these statements are *dicta*, but they are *dicta* of a weighty kind for they explain the principle on which the rule was said to be based. In the third place, the interpretation of the doctrine in terms of evidence seems to break down when cruelty revives adultery or adultery revives cruelty. How can cruelty, however often repeated, complete the picture of adultery? Save in the most exceptional circumstances, the one can never be evidence of the other.

The learned judge concluded his judgment with a strong plea, on the ground of public policy, that the doctrine of revival should be limited as narrowly as possible. As he pointed out, 'in the circumstances of the present time, there must be many husbands and wives who have erred and been taken back, and I cannot but think that it would be in the public interest that they should hold their forgiving spouses upon a firm rather than a precarious tenure'. On the other hand, it may be equally true that many spouses might not be prepared to be forgiving if the doctrine of revival were abolished for they might be willing to forgive conditionally but not absolutely. Here, as in many other matrimonial problems, there seems to be much to be said on both sides of the question.

Evershed J.'s judgment in *Westminster Bank, Ltd.* v. *Riches* (noted *supra*, at p. 220) has been affirmed by the Court of Appeal [1945] 2 A. E. R. 111. On the main question whether interest awarded under the Law Reform (Miscellaneous Provisions) Act, 1934 (c. 41), s. 3, was subject to income tax the Court had no difficulty in reaching the same affirmative conclusion as had the learned judge in the Court below, but it had more hesitation in holding that a defendant who is required by the order of the Court to pay a judgment debt for a fixed sum (which includes interest) can be said to be making a payment of interest when he pays that sum and is therefore under a duty to subtract the income tax. As du Parcq L.J. said: 'My doubt was not as to the right of the Crown to demand tax, but as to the duty of the debtor to deduct it. . . . I find some difficulty in saying that payment of a judgment debt is payment of interest, even when an examination of the record shows that the debt includes interest. Since interest as such is not due and owing, it is difficult to see how what the debtor pays can be called interest.' The

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learned Lord Justice was also affected by the inconvenience of deciding a question of liability to income tax in proceedings in which the Crown was not a party, but, although still doubtful, he held that this view might be too technical and he was prepared to concur in the opinion that Parliament intended the deduction of tax to be obligatory on the payor under rule 21, even when the interest payable was included in a judgment debt.

Counsel for the appellant argued that as the judgment provided for payment of the 'interest' in a single sum, it could not be regarded as a recurrent payment so as to bring it within rule 21 of the All Schedules Income Tax Rules, but as Cohen J. pointed out 'such interest must be deemed to have accrued during the whole of the period so specified, notwithstanding that it only becomes payable in one sum by reason of the exercise by the judge of the discretion conferred on him by the section'.

In *Johnson* v. *Hill* (1945) 61 T. L. R. 398 the Court of Appeal had to solve a problem which, as du Parcq L.J. said, logically seems to be insoluble. The plaintiff, a widow whose husband, a leading aircraftsman in the R.A.F., had been killed through the negligence of the defendant's servant, brought an action under the Fatal Accidents Act, 1846, and the Law Reform (Miscellaneous Provisions) Act, 1934. The question to be solved was whether in determining the amount of the damages payable by the defendant, the probability that the plaintiff was likely to benefit by the grant of a pension should be taken into consideration. On principle it ought to be, because in assessing damages any reasonable expectation of benefit is relevant, except money paid under a policy of insurance upon the life of the deceased which is covered by the special provisions of the Fatal Accidents (Damages) Act, 1908. But the difficulty in the present case was that the amount of the pension to be granted would itself depend on the amount of the damages awarded, for under Article 56 (1) of the Royal Warrant (December 4, 1943) the Minister of Pensions was instructed to 'take the compensation into account against the pension or gratuity in such manner and to such extent as he may think fit . . .' The difficulty was solved in the present case by taking into consideration the payments which had already been made by the Minister, and by calling a senior clerk from the Ministry of Pensions to give evidence concerning the practice followed by the Minister of making certain minimum grants whatever compensation may have been awarded. It is on this ground that *Baker* v. *Dalgleish* [1922] 1 K. B. 373, must be distinguished, for in that case no evidence of any practice of the Admiralty in assessing the pension was given.

Re Carlton (1945) 61 T. L. R. 523 is an illustration of the well-known rule of statutory construction that a statute will not be construed in such a way as to lead to an absurd result if a more rational meaning can be given to it. The applicant claimed a declaration that he had acquired British nationality when his father, in the year 1910, was granted a certification of naturalization under the Naturalization Act, 1870, even though he, the applicant, was at that date over twenty-one years of age.

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Section 5 of that Act provides that 'Where the father or the mother being a widow has obtained a certificate of naturalization in the United Kingdom, every child of such father or mother who during infancy has become resident with such father or mother in any part of the United Kingdom shall be deemed to be a naturalized British subject'. The applicant argued that as he was the child of such a father, and had become resident during infancy, his case fell within the literal terms of the statute, and that it was not permissible to read into the Act a further provision that at the time of the father's naturalization the child must be an infant. The Court of Appeal, in affirming the judgment of Cohen J. [1945] Ch. 280, held that the applicant was not entitled to a declaration as section 5 only applied to children who were infants at the date of the naturalization of their parents. Lord Greene M.R. said that in the context of this section the word 'child' must mean 'infant child', just as, in the case of a shipwreck, the expression 'Women and children first' was not meant to include a person of forty because he could say 'I am the child of my parents'. To give the word 'child' the wide meaning contended for by the applicant would lead to the strange result that an adult son forty or fifty years of age might suddenly find 'to his surprise, and possibly to his indignation', that British nationality had been forced on him because his aged father had obtained a certificate of naturalization.

In his judgment in the Court below Cohen J. had referred to the fact that the cross-heading in the statute reads 'National status of married women and infant children', and had based his construction of the section in part on this. In the Court of Appeal the Master of the Rolls said that, although in his experience cross-headings had been accepted and examined without question by the Courts, it was unnecessary in the present case to consider the legitimacy of that practice, and therefore he would make no pronouncement concerning it. He wished to make it clear, however, that this did not mean that he dissented from the view expressed by the learned Judge.

The Naturalization Act, 1870, has been replaced by the British Nationality and Status of Aliens Act, 1914, which leaves no room for doubt on the point at issue in *Re Carlton*, but that fact could not affect the interpretation of the 1870 Act.

If the Divisional Court had not decided *Stoodley* v. *H. D. Thomas and Sons, Ltd.* [1945] K. B. 418 as it did, the number of prosecutions under section 2 (2) of the Merchandise Marks Act, 1887, might have increased in a truly alarming manner. This section provides that 'Every person who sells . . . any goods or things to which any . . . false trade description is applied . . . shall . . . be guilty of an offence against this Act'. The company, who were sellers of milk, kept a milk account book in which they purported to record the quantity of milk delivered to each purchaser on each day, and at monthly intervals the account book was presented to the purchasers who paid the amount claimed as due. The purchasers had not, in fact, received the quantity of milk entered in the account book. On these facts an information was preferred against the company charging it with having sold milk to which a false trade description was applied contrary to section 2 (2) of the Merchandize Marks Act,

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1887, but the justice dismissed the information. The appeal, by case stated, from his decision was dismissed by the Divisional Court. Atkinson J. held that no offence could be committed under this sub-section unless the false trade description did exist and was applied to the goods at the time of the sale. In *Budd* v. *Lucas* [1891] 1 Q. B. 408, it had been held that the delivery of an incorrect invoice with the goods might constitute a false trade description of the goods delivered, but in the present case the account book was presented after the milk had been delivered and consumed. If this had been held to be a false trade description, then every bill containing an error would fall within the same category, even if it were not presented until months after the sale had been completed. Such a result could not have been within the contemplation of Parliament when it enacted the Merchandize Marks Act, 1887.

In previous notes in this *Review* it has been suggested that the rule of English law that a defendant cannot be retried on the same charge when his original conviction has been quashed on appeal is of doubtful validity, as in the great majority of the cases this means that a guilty man has escaped punishment owing to an error of law. This principle has not, as far as we know, been accepted by any other legal system in the world. *R.* v. *McMinn* (1945) 61 T. L. R. 285 succeeds in carrying the principle one step further. The defendant, who had been convicted on a charge of larceny, asked that another offence, in respect of which the usual form had been served on him by the police, should be taken into consideration in determining the sentence. Having been duly sentenced, the defendant thereafter gave notice of appeal against his conviction of larceny, the appeal was allowed, and the conviction and sentence quashed. He was thereupon charged with the second offence, which he had admitted in open Court, and was committed for trial to the Assizes. On being arraigned, he entered a plea of *autrefois convict*, and Lewis J. instructed the jury to find that the defendant had already been convicted and therefore could not be tried again. The learned judge held that the defendant had stood convicted of the second offence on his own confession and had been in peril of an increased sentence on account of it, even though, in the event, the sentence had been quashed. No one can grudge the defendant his bit, or his bits, of good fortune, except perhaps the victim of his crime, but some doubt may be expressed concerning the validity of a principle which leads to such an odd result.

Section 1 (1) (*a*) of the Prevention of Fraud (Investments) Act, 1939, makes it an offence to 'carry on the business of dealing in securities except under the authority of a principal's licence' issued by the Board of Trade. In *R.* v. *Hamid* (1945) 61 T. L. R. 522 it was proved that the applicant had invited persons to subscribe towards the share capital of companies to be formed, although he held no licence from the Board. Having been convicted of contravening the Act, he appealed on the ground that the Act was confined to dealings in shares of an existing

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corporation, but the Court of Criminal Appeal held that this limitation could not be read into the statute. A person who offered to sell securities was 'dealing in securities' even though they did not exist at the time when the offer was made. As Wrottesley J. pointed out, if the narrow construction contended for by the applicant were accepted, then 'the obvious mischief to be cured by the Act' would fail to be covered by it.

Is a driver of a motor-car who falls asleep while driving guilty, either under section 11 or section 12 of the Road Traffic Act, 1930, of unlawfully driving a motor-vehicle in a manner which is to the danger of the public or without due care and attention, and without reasonable consideration for other persons? In *Kay* v. *Butterworth* (1945) 61 T. L. R. 452 the Divisional Court held that the answer was in the affirmative because if a driver felt that drowsiness was overtaking him it was his duty to stop until he had recovered himself and had become fully awake. Humphreys J. was careful to point out that this principle was not applicable to a case where the driver became unconscious through sudden illness, because in such circumstances the result could not be attributed to any fault of his own.

The important point decided in *R.* v. *Architects' Registration Tribunal, Ex p. Jaggar* [1945] 2 A. E. R. 131 was that the tribunal of appeal, whose duty it was to determine whether the applicant was entitled to be registered as an architect under the terms of the Architects (Registration) Act, 1931, could not look at and use documents for the purpose of questioning the applicant unless the documents were disclosed to the applicant. As the tribunal was acting in a quasi-judicial capacity it was not entitled to receive evidence which the applicant was not given a full opportunity of answering. This conclusion may prevent a tribunal from obtaining confidential reports which might be of value to it in reaching a decision, but this consideration cannot affect the general principle. Lewis J. distinguished *R.* v. *The Archbishop of Canterbury* [1944] K. B. 282 on the ground that in that case the Archbishop was under no obligation to act in a quasi-judicial manner, and that therefore he was not bound to divulge to the person whose case he was hearing certain confidential information he had received.

What is the proper interpretation of the word 'between' when used in a will? By a strange coincidence this question fell to be decided in two recent cases. In *Re Alcock* [1945] Ch. 264 the testatrix left the residue of her estate 'to be divided equally between my nephew S and the three children of my cousin who resides at X absolutely'. In fact, the cousin had four children, but this error and the odd wording of the will were both due to the fact that the will had been prepared in haste during the testatrix's last illness. Evershed J. held that 'four' must be read for 'three' as the reference to three was clearly a mistake, there being no possible ground on which the Court could choose three out of the four children to be legatees under the will. On the principal question

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whether the nephew should receive one-half or one-fifth of the residue the learned judge held that as the nephew and the cousin's children belonged to the same generation and the evidence showed that the testatrix was on the same terms of friendship with all of them, the proper interpretation was that each of the five was to receive an equal share.

In *Re Daniel* [1945] 2 A. E. R. 101 the testatrix directed that the residue of her estate 'be equally divided between my sister M, should she predecease me her children to benefit in her share, the children of my deceased sister E, and the children of my deceased brother T'. E left three children and T two children. Vaisey J. held that the residuary estate should be divided into three equal parts; as the share to be taken by the living sister M was to be divided among her children in case she should have predeceased the testatrix, therefore it was reasonable to assume that the testatrix must have intended the same thing to happen in the case of the children of the other sister and of the brother.

Although the word 'between' was interpreted differently in these two cases, the learned judges, if we may say so, obviously reached a correct conclusion in each of them, as there was a difference in the context in which the word was used. These cases illustrate the odd practice followed by the Courts in the construction of wills, for in both cases counsel cited, and the judges had to consider, a list of precedent cases in which the word 'between' had been interpreted, together with citations from *Hawkins on Wills* (3rd ed.) and *Jarman on Wills* (7th ed.), and an interesting reference to the *Oxford Dictionary* in which the history of the word was traced from Anglo-Saxon times to the present day. As it is unlikely that either testatrix had any knowledge of any of these authorities, or was an expert in Anglo-Saxon, it is fortunate that their Lordships found that they were free to interpret the wills on common-sense grounds.

In *Re Fry* (1945) 61 T. L. R. 449 Vaisey J. had to determine the validity of a clause in a will which provided that 'it shall be a condition appurtenant to the taking of the gift of my estate . . . that the person so taking shall take and continue to bear my surname'. In the circumstances of the case the person taking was a married woman who asked by this summons whether and to what extent this condition was operative. Vaisey J., after pointing out that a 'name' clause was a well-recognized provision which was valid when applied to a man, held that the provision was inoperative in the case of a woman because, although it could not be said to be actually in restraint of marriage, nevertheless a prospective husband might object to changing his own name or to his wife using a different one from his. In any case, the use of different surnames by a man and his wife could not fail to be productive of many embarrassments and inconveniences, and therefore a condition which might cause such a situation must be held to be inoperative on public grounds. In his judgment the learned judge was careful to point out that there might be an exception to this general rule where there was some special reason as, for example, where the woman legatee was the sole surviving representative of some notable family.

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An interesting point concerning auction sales was decided by Romer J. in *Phillips* v. *Butler* (1945) 61 T. L. R. 477. The defendant employed an auctioneer to sell certain property, the sale to be subject to the National Conditions of Sale, clause 1 (3) of which provides that the purchaser must pay the deposit mentioned in the special conditions, and sign the memorandum indorsed thereon, immediately after the sale. At the sale the property was knocked down to the plaintiff, and he and the auctioneer thereupon signed two copies of the memorandum, but as the plaintiff had forgotten his cheque book the auctioneer said that it would be satisfactory if the plaintiff sent him the cheque by post the next day. The next day, before the cheque reached the auctioneer, the defendant notified him that his authority to sign any memorandum or to contract for the sale of the property was withdrawn. As a defence to the plaintiff's action for specific performance the defendant asserted that the auctioneer had no authority to sign the memorandum until payment of the deposit, and that there was therefore no memorandum within section 40 (1) of the Law of Property Act, 1925. The learned judge held, however, that at a sale by auction a contract comes into being when the hammer falls, and that the auctioneer's authority to sign on the vendor's behalf arises so soon as the contract is concluded, and is an irrevocable authority. The contract does not depend for its completion on the payment of the deposit. If thereafter the purchaser fails to pay it then the vendor may treat the contract as having been repudiated, but unless that happens the contract remains on foot and subsisting.

The Bill of Rights, 1688, declares 'that levying of money for or to the use of the Crown, by pretence of prerogative, without grant of Parliament, for longer time, or in other manner than the same is or shall be granted, is illegal'. In *Yoxford and Darsham Farmers' Association, Ltd.* v. *Llewellin* (1945) 61 T. L. R. 461 the plaintiffs argued that a direction under the egg-marketing scheme set up by the Eggs (Control and Prices) (Great Britain) Order, 1944, was invalid as being in conflict with this provision. Croom-Johnson J. held, however, that payment of a levy into a pool, no part of which was directly or indirectly received by the Crown, was not in contravention of the Bill of Rights.

In *Hannah* v. *Peel* (1945) 61 T. L. R. 502 Birkett J. was confronted with the problem of extracting from the authorities some basic principle for deciding between the competing claims of the finder of a chattel (whose owner is untraceable) and of the person on whose land it is found. Everyone will agree with the learned judge that the problem is a difficult one. Professor Goodhart made a careful analysis of it in his *Essays in Jurisprudence* (1931), Chap. IV, to which Birkett J. referred. Briefly, the facts in *Hannah* v. *Peel* were as follows. In 1938 the defendant acquired the freehold of a house but never occupied it. In 1939 it was requisitioned under the Defence Regulations. In 1940 the plaintiff, who was lawfully on the premises as a member of the R.A., who were in occupation under the requisition, found a brooch which, as the owner

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of it was undiscoverable, he handed to the police. Ultimately, they delivered it to the defendant and he sold it. The plaintiff sued the defendant in trover and was held entitled to recover the amount for which it had been sold. Birkett J., after a full examination of the decisions, relied mainly on *Bridges* v. *Hawkesworth* (1851) 21 L. J. Q. B. 75. He discussed the various explanations of that case that have been made in later decisions or have been suggested by writers, but he accepted the *ratio decidendi* actually given by Patteson J. in the case itself—that the goods were never in the custody of the shopkeeper nor within the protection of his house before they were found by the plaintiff. With respect to this branch of the law, we have submitted elsewhere that the result of the authorities is that the possessor of land is presumed to be owner of any goods on, in or under the land, but that this presumption is rebuttable by evidence that the possessor of the land had no manifest intention to exercise control over the particular thing in question. Now the cases indicate that this presumption is founded upon possession of the land itself. Here the defendant never had possession of the land before the plaintiff found the brooch, and it is respectfully suggested that the learned judge might have based his decision on that simple ground, without praying in aid *Bridges* v. *Hawkesworth* which, in agreement with Professor Goodhart, we think might well be overruled.

P. H. W.

The recent decision of the House of Lords in *Commissioners of Inland Revenue* v. *Oswald* (*Trustee of the Cosier Settlement*) [1945] 1 A. E. R. 641 has revolutionized the law relating to the liability to income tax of the persons 'by or through whom' *capitalized interest* is paid when the final settlement is made.

The system of 'deduction of tax at source' in the British Income Tax Code is well known; in its application to payments of interest the statutory position is, briefly, as follows: Where yearly interest etc. is *wholly* payable out of profits and gains brought into charge to income tax, the person liable to make the payment is entitled to deduct the income tax appropriate thereto and retain the same to his own use: Rule 19, All Schedules Rules, Income Tax Act, 1918.

Where, however, the interest is *not* payable, in whole or in part, out of profits so brought into charge, the person 'by or through whom' the payment is actually made must deduct income tax at the rate in force at the time of payment; this tax *has to be paid over by him to the Crown*, by way of a direct assessment, since the payer has borne no tax which could serve as a set-off: Rule 21, All Schedules Rules, *ibid.* It sometimes occurs in such cases that the payment is made not by the mortgagor but by his agent, *e.g.* solicitor, who is then the person accountable to the Crown. In the application of these rules to capitalized interest the Courts have hitherto held that, upon each capitalization of interest, the provisions of Rules 19 or 21 are brought into force so that the borrower is entitled or bound to deduct the tax appropriate thereto leaving no further liability to be accounted for to the Crown when the capitalized interest is *in fact* paid: see *Commissioners of Inland Revenue* v. *Laurence Graham & Co.* [1937] 2 K. B. 179, followed by the Court of Appeal in the instant case, [1944] 1 A. E. R. 426.

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In the note on *Oswald's Case* at 60 L. Q. R. 224 it was observed that the point that there had in fact been no *actual* payment of interest upon capitalization, but merely a *notional* one, did not appear to have been considered by the Court. It was on this very ground, however, that the House of Lords found unanimously in favour of the Crown. The facts in the instant case are not very material to the question of the principle involved save that the amount handed over by the mortgagor's representatives when the reversionary interest fell in was less than the aggregate of the capitalized interest and the original loans. The Crown claimed tax on the difference between this aggregate and the original principal on the ground that it represented 'interest' which—not being payable out of profits brought into charge—was assessable under Rule 21 (cf. *supra*) at the time of *actual payment*; this contention had been rejected by the Court of Appeal for the reasons given above, *viz.* briefly, that as the interest included in the aggregate sum had already suffered tax by deduction, no further charge could be levied in respect of this interest.

In *Paton* (*as Fenton's Trustee*) v. *Commissioners of Inland Revenue* [1938] A. C. 341—noted at 54 L. Q. R. 482–4—it had been held, in considering a claim under section 36 (1), Income Tax Act, 1918, which provides for repayment of interest paid in full to a bank out of profits brought into charge to tax, that the section is operative only where there has been an *actual payment* of interest by the borrower. Where, in accordance with the custom of bankers, the bank had debited the unpaid interest at half-yearly rests and had carried it forward as part of an aggregate interest-bearing debt, it was held that this debiting of interest —without there being any net credit lodgments to the bank account— did not amount to a *payment* of interest so that the relief given by the section was inoperative.

The principle in *Paton's Case* was held to be equally applicable where interest under a mortgage deed was capitalized, as in *Oswald's Case*. Put simply, a mortgagee capitalizes interest because the mortgagor has *not* in fact paid it (see *Re Jauncey* [1926] 1 Ch. 471, 476); capitalization is neither a form of payment nor a substitute for payment, since the interest still remains unpaid though it is impressed with a new quality, *viz.* it carries interest on itself as though it were capital: see *Re Morris* [1922] 1 Ch. 126, 133.

Since, therefore, capitalization of interest was not the equivalent of an actual payment, it followed that neither the mortgagor nor his agent had any right to deduct income tax under Rules 19 or 21 (cf. *supra*) each time that the interest was capitalized; accordingly, when the capitalized interest was *in fact* paid, or handed over, to the mortgagee it could not be said to have legally borne tax. Consequently that portion of the aggregate sum paid to the mortgagee which was in excess of the principal advanced must be held to represent interest from which tax was deductible under Rule 21 at the rate in force at the time of actual payment, for there was, in the instant case, no taxed fund out of which it was payable.

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The true meaning of the term 'controlling interest', as employed in taxation statutes in regard to the position of directors *vis-à-vis* their company or of one company as respects another, has twice had to be determined in recent years by the House of Lords. In *British American Tobacco Co. Ltd.* v. *Commissioners of Inland Revenue* [1943] A. C. 335—annotated at 58 L. Q. R. 21 and 59 L. Q. R. 107—it was held that the term 'controlling interest' was not one of 'art', but fell to be interpreted according to its ordinary meaning so that one company could be regarded as having a controlling interest in another if it had a bare majority of the voting power, whether directly or indirectly through subsidiary companies; it was not necessary that the 'interest' should be of a proprietary nature, *i.e.* by a direct holding of shares.

In *Commissioners of Inland Revenue* v. *J. Bibby & Sons, Ltd.* [1945] 1 A. E. R. 667 (H. L.)—facts and decision in the lower Court noted at 60 L. Q. R. 224—the issue was whether ordinary shares, which alone carried votes, held by directors as trustees under a settlement could be taken into account with other shares held in their own right in order to determine whether they held a majority of the shareholding and could thus 'control' the company by their ability to cause resolutions to be passed at a General Meeting. For the Crown it was argued that shares held by directors as trustees could only be taken into account if they had a predominant beneficial interest in them. The House of Lords unanimously held that *all* shares registered in the names of a company's directors must be taken into account in determining whether they had a 'controlling interest'; the company, in General Meeting, had to act on votes given by registered shareholders, although the latter, as trustees, might owe some duty to outsiders to vote in a different way.

The Court of Appeal, whose decision was affirmed, had excepted from the principle laid down above the case of a director who was a *bare trustee*, since he had to vote according to his beneficiary's directions. The law Lords, however, expressly reserved their opinion on this point, which was not before them in the instant case, since the directors had some, though a remote, beneficial interest in the shares they held as trustees.

It is interesting to note that the Income Tax Act, 1945—which deals with allowances to trading concerns in respect of post-war capital expenditure—defines 'control', in relation to a body corporate, as the ability of a person to see that the affairs of such body *are conducted in accordance with his wishes*, either by the holding of shares, the possession of voting power, the articles of association, etc.: see section 68 (1).

A. F.

Important points of principle in relation to the statement of cases for the opinion of the High Court by the Appeal Commissioners, under the Income Tax Acts, were determined in two recent surtax cases, *viz. Burston* v. *Commissioners of Inland Revenue* (*No.* 1) [1945] 2 A. E. R. 61 and *Burston* v. *Commissioners of Inland Revenue* (*No.* 2) (1945) 61 T. L. R. 391.

Where the taxpayer or the Crown is dissatisfied with the decision of the Appeal Commissioners as being erroneous in point of law, he can require a case to be stated for the opinion of the High Court, provided

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that dissatisfaction is expressed *immediately* after the determination of the Commissioners *and* that he gives notice within twenty-one days demanding that a case be stated: see section 149 (1), Income Tax Act, 1918. In *Burston* (*No.* 1) a case was properly demanded and a decision on the question of principle involved given in favour of the Crown: see (1942) 24 Tax Cas. 285. The case was, however, remitted to the Appeal Commissioners for them to determine whether some abatement in the amount of income assessed should not be made; this latter question was duly considered and a decision again given in favour of the Crown. Some ten months later the unsuccessful appellant expressed his dissatisfaction with the decision, and on his demanding a case be stated this was done by the Appeal Commissioners. Upon the supplemental case coming before the Court, the Crown raised a preliminary objection that it had been stated in excess of the jurisdiction of the Appeal Commissioners, since the procedure as to time, etc. laid down by section 149 (cf. *supra*) had not been followed; to this it was rebutted that the supplemental case was really part of the original case, as to which all procedural requirements had been complied with, so that there was no need for dissatisfaction, etc. again to be expressed immediately following the second determination of the Appeal Commissioners. As Macnaghten J. pointed out, the statement of supplemental cases under the Income Tax Acts is by no means uncommon, and he laid it down that all the requirements of section 149 as to the time within which dissatisfaction must be expressed and a case demanded must be adhered to as regards a supplemental case equally as much as in relation to the original case; in the result he upheld the Crown's preliminary objection. The decision of the Appeal Commissioners had been given *by post* and the learned judge made it clear that dissatisfaction therewith could be regarded as given *immediately* provided this was given, also by post, as soon as the notification of the decision was received by the appellant.

Section 21, Finance Act, 1922, provides, in certain circumstances, for the apportionment of a company's income among its members in such a way as to be included in their total income for the purposes of surtax; any surtax so payable is charged on the member in the company's name and the tax is payable by the latter; notice of the apportionment is served on the company, to whom a right of appeal to the Special Commissioners was given. By section 19 (5), Finance Act, 1936, the Crown is given power to recover surtax, assessed on a company under the 1922 Act, from the member concerned. In *Burston* (*No.* 2) the appellant had appealed against the amount of income apportioned to him under the 1922 Act, but his claim was rejected by the Special Commissioners on the ground that the company had not objected to the apportionment and that it *alone* had any right of appeal in respect thereof. This view was upheld by Macnaghten J., who pointed out that, otherwise, further appeals might lie to different tribunals in respect of the same subject of assessment, *i.e.* by the company to the Board of Referees (paragraph 2, First Schedule, Finance Act, 1922), and by the member direct to the High Court (section 149, Income Tax Act, 1918). The fact that the surtax assessed on the company might be recoverable by the Crown from the member concerned could not be said to give him, by inference, any statutory right of appeal.

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In *Regional Properties, Ltd.* v. *Oxley* (1945) 61 T. L. R. 568, the House of Lords has thrown welcome light into one of the many dark corners of the Rent Restriction Acts. As the law stood before this decision, if a tenant of a house with a standard rent of £150 agreed to pay a rent of £100 during the war and £150 thereafter, the landlord could charge him £150 as soon as his contractual tenancy determined, even if the war was still in progress: *Capital and Counties Properties, Ltd.* v. *Butler* [1944] K. B. 730; 114 L. J. K. B. 68, C. A. If, on the other hand, the lease had provided that the rent should be £150 but that the tenant could deduct £50 as long as the war continued, the tenant could refuse to pay more than £100 during the war even if his contractual tenancy came to an end; the right of deduction was one of the 'terms and conditions of the original contract of tenancy . . . consistent with the provisions of' the Act of 1920, which section 15 (1) of that Act authorized him to carry over into his statutory tenancy (*Bryanston Property Co. Ltd.* v. *Edwards* [1944] K. B. 32; 113 L. J. K. B. 161, C. A.), thus contrasting with the previous example, where there was a reddendum *simpliciter* and no separate right which could be carried over under section 15 (1). In the *Oxley Case*, similar principles were applied by the Court of Appeal to a right to make a deduction for prompt payment: [1944] K. B. 733 n; *ante*, p. 18. The House of Lords has now reversed the decision of the Court of Appeal in the *Oxley Case* and overruled the decision in the *Bryanston Case*. Even if such provisions for reduction can be regarded as separate terms of the tenancy distinct from the clause providing for payment of the rent, they are inconsistent with the provisions of the Act with regard to the rent payable by a statutory tenant. The Act has a complete scheme for the amount of rent payable under a statutory tenancy, into which provisions as to rent cannot be imported from the contractual tenancy. Both Lord Macmillan and Lord Porter expressed agreement with the view taken by Maugham L.J. in *Phillips* v. *Copping* [1935] 1 K. B. 15 at 24, that section 15 (1) does not extend to rent at all.

R. E. M.

In *Cole* v. *Harris* [1945] 2 A. E. R. 146, the majority of the Court of Appeal (Lawrence L.J. dissenting) put *Neale* v. *Del Soto* [1945] K. B. 144 (*ante*, p. 222) into its proper perspective. The question was whether a tenant could claim that he held 'part of a house let as a separate dwelling' (and so be protected by the Rent Restriction Acts) if his demise included not only the exclusive right to occupy certain rooms in a house but also the right to use other rooms jointly with the landlord. The answer is that it depends upon the nature of the shared rooms. If one of the shared rooms is a room such as a kitchen which may be described as a living room or dwelling room, the Acts are ousted. If, on the other hand, the only rooms shared are rooms such as a bathroom and lavatory which cannot be described as living rooms, the Acts may apply. Curiously enough, this test, which formed the *ratio decidendi*, does not appear to have been suggested in argument: see *per* Lawrence L.J. at p. 149. Since the only room shared was a combined bathroom-lavatory it was held that the Acts applied. The judgments of the majority (MacKinnon and Morton L.JJ.) satisfactorily dispose of any suggestion

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that *Neale* v. *Del Soto* laid down a rule that a tenancy could not be protected if there was a sharing of any part of the accommodation essential to the conception of a dwelling. Leave to appeal to the House of Lords was granted, but apart from the considerable social disturbance which would be caused by any different result, the decision of the Court of Appeal may, with respect, be said to be so bottomed on good sense and a wide view of the purpose of the Acts that it is difficult to believe that there is any serious chance of it being reversed.

R. E. M.

The decision of the Court of Appeal in *Re Compton* [1945] Ch. 123, reversing Cohen J. at [1944] Ch. 378 (*ante*, p. 20), will probably be as welcome to the learned judge at first instance as it is to the Chancery Bar. The point in issue was whether a testamentary trust for the education of the descendants of three named persons was a charitable trust. On the one hand, such a trust lacks the public element normally required, yet on the other hand, a long line of cases has established, somewhat anomalously, that a trust for the relief of poor relations may be charitable, and by analogy the same should apply to a trust for the education of relations. The choice accordingly lay between applying the analogy and so preserving consistency with the anomaly at the expense of principle, and emphasizing the principle by curtailing the anomaly. Cohen J. thought that the authorities bound him to choose the former course, but the Court of Appeal felt at liberty to choose the latter. Although invited to overrule the 'poor relation' cases, Lord Greene M.R. refused to do so and contented himself with declining to extend them; Finlay and Morton L.JJ. agreed. By reiterating the need for a public element in charitable trusts, *Re Compton* provides welcome assistance in the task of predicting on which side of the line the Courts will place any of the infinite variety of trusts conceived by testators.

R. E. M.

In *Re Tree* [1945] Ch. 325, an attempt was made to extend the principle of *Re Compton* (*supra*) to a trust for assisting the Empire emigration of those who resided in Hastings in or prior to 1880, or their descendants. Evershed J. had little difficulty in holding that the context, coupled with financial limitations on the help to be given in any individual case, sufficed to show that the trust was limited to assisting poor persons. It was less easy, however, to dispose of the argument, based in part on *dicta* in *Re Compton*, that if a trust for the descendants of certain named persons is not charitable, the same must apply to a trust for descendants where the ancestors are ascertained by reference to their living in a particular place at a particular time. The learned judge rejected this contention on the ground that whereas in *Re Compton* the ancestors were individually selected by the testator, in *Re Tree* they were determined by the application of the impersonal test of residence. It is true that in each case a descendant who claimed a benefit under the trust must do so on the ground that he was descended from a particular

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person, so that in this sense the test was personal, but the essential difference between the two modes of selecting ancestors made it possible to say that there was present in *Re Tree* the public element which was lacking in *Re Compton*.

R. E. M.

Re Cohn [1945] Ch. 5 (noted *ante*, p. 122) is that rare phenomenon, a satisfactory case on classification in the conflict of laws. A mother and daughter, both domiciled in Germany but resident in England, were killed in an air raid on London in circumstances rendering it uncertain which of them survived the other. The daughter was entitled to movables under her mother's will if, but only if, she survived her mother. The question was whether to apply the English presumption that the elder died first (section 184 of the Law of Property Act, 1925), or the German presumption that the deaths were simultaneous. The German presumption is contained in Book I, Chapter I, Article 20 of the German Civil Code. Formerly it applied only if the deceased persons perished in a common disaster, and did not apply, for instance, if one was killed in battle on the Eastern Front and the other about the same time on the Western Front. Its scope was widened in July 1939 by a new Article, which provides that: 'If it cannot be proved that of several deceased persons or persons declared dead one has survived the other, it is presumed that they have died simultaneously.'

It was argued for those interested in the daughter's estate that English law as the *lex fori* governed, and therefore that section 184 of the Law of Property Act applied. But Uthwatt J. rejected this argument. The question was not 'Did the daughter survive the mother?' but 'Is the administration of the mother's estate to proceed on the footing that the daughter survived the mother or on the footing that she did not?' The mode of proving any fact bearing on survivorship must be determined by the *lex fori*, but the effect of any fact so proved must be determined by the *lex domicilii*. The only fact proved was that it was uncertain who survived. The statutory presumption in section 184 of the Law of Property Act was not a rule of evidence but a rule of substantive law, and therefore it did not apply to a case where the succession was governed by German law.

Turning to Article 20 of the German Civil Code, the learned judge thought that it was part of German substantive law, and not part of the German law of evidence, and therefore applied to the case. The mode of reaching this result is instructive and satisfactory. The learned judge did not decide that Article 20 was part of German substantive law merely because the corresponding provision in his own law was part of English substantive law; on the contrary, he expressly said that he approached the law of Germany 'unhampered' by section 184 of the Law of Property Act. Nor did he decide that Article 20 was part of German substantive law because he was told so by German expert witnesses. He reached that conclusion for himself by examining the terms of the Article and its context in the German Code, uninfluenced by any classification placed upon it by German Courts or by the classification which he had already placed upon section 184 of the Law of Property Act.

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The case suggests some interesting problems. Suppose that the deceased persons had been domiciled in some country where the presumption of survivorship is, in the opinion of the English Court, part of the foreign law of evidence. Presumably no presumption at all would apply to the case; not the English presumption, because it is part of English substantive law; not the foreign presumption, because it is part of the foreign law of evidence and therefore not applicable in an English Court. Or suppose that the deceased persons were domiciled in different countries, and that the laws of those countries have different presumptions of survivorship: which law governs? Suppose, for instance, that A, a man aged fifty, domiciled in France, dies in an air raid, having left all his movables to B, and that B, a woman aged forty-nine and a half, domiciled in England, dies in the same air raid, having left all her movables to A. By English law A (the elder) is presumed to have died first, but by French law B (the female) is presumed to have died first (French Civil Code, Article 722). Presumably the Court would hold that the question whether A survived B must be governed by English law, because the succession to B's movables is governed by the law of her domicil, and that the question whether B survived A must be governed by French law, because the succession to A's movables is governed by the law of his domicil. The result would be that neither party could succeed to the other's movables and that both must be presumed to have died intestate. Now suppose that A (the Frenchman) died unmarried and without near relatives and that his movables are claimed by the French Treasury. In this situation the English Court prefers the claim of the Crown, because it does not admit that the foreign Treasury claims by way of succession at all (*Re Barnet's Trusts* [1902] 1 Ch. 847; *Re Musurus* [1936] 2 A. E. R. 1666). Yet it is difficult to see how the claim of the Crown could be substantiated, because the Crown can only claim under English domestic law, and by English domestic law A did not die intestate, because B is presumed to have survived him.

J. H. C. M.

Nullity Jurisdiction and Remarriage During Voidable Marriage.

Mason v. *Mason* [1944] N. I. 184 is of great interest to English lawyers because it contains the most elaborate discussion since *Salvesen* v. *Administrator of Austrian Property* [1927] A. C. 641 of the difficult question of jurisdiction to annul a marriage, and because it decides a point in the law of marriage on which there appears to be no previous authority. The suit was a woman's petition for nullity of marriage on the ground of bigamy. The parties were born in London of London parents and were domiciled in England. In 1932 the husband married his first wife, and on July 10, 1934, obtained from the English Court a decree *nisi* for nullity on the ground of her incapacity to consummate the marriage. Exactly six months later, on January 10, 1935, he married the petitioner in Scotland, evidently believing himself free to do so, but the decree *nisi* was not in fact made absolute until January 21, 1935. One child was born of this second marriage in 1936. In 1940

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the husband obtained an appointment in Northern Ireland and moved there with his wife and family, without, however, losing his English domicil. In 1941 relations became strained and the parties separated, but both continued to live in Northern Ireland. Up to the date of the hearing of the petition the husband used to visit the wife at week-ends. In order to put a stop to these unwelcome visits she filed her petition for nullity, alleging that the husband's first wife was alive at the date of the ceremony. The husband did not appear. The Lord Chief Justice sent the papers to the Chief Crown Solicitor, who appeared by the Attorney-General.

(1) The first question was whether the Court had jurisdiction, both parties being domiciled in England and only resident in Northern Ireland. On this matter, as is well known, there is a divergence of opinion. In his argument in favour of the jurisdiction, the Attorney-General put the opposing views very clearly as follows: 'On the one hand it is said that the doctrine of domicil as the foundation of jurisdiction in suits for dissolution was not developed until after the abolition of the ecclesiastical courts and was not settled law until *Le Mesurier* v. *Le Mesurier* [1895] A. C. 517; that the basis of that doctrine is that such suits affect status; that suits for a declaration of nullity involve status to a similar degree; and accordingly that domicil should be the test of jurisdiction in nullity suits. In support of this view reliance is placed principally on (i) the decision in *Salvesen's Case, supra*; (ii) the decision in *Inverclyde* v. *Inverclyde* [1931] P. 29. On the other hand it is said that in *Salvesen's Case* the House of Lords while holding that the Court of the domicil was competent did not decide that its jurisdiction was exclusive; that in the *Inverclyde Case* Bateson J. misapplied the decision in *Salvesen's Case*, and was in error in regarding a decree annulling a voidable marriage as in substance a decree for dissolution; that the balance of authority favours residence as a basis of jurisdiction in nullity suits; and that by reason of the manner in which the ecclesiastical jurisdiction was transferred the Courts cannot now substitute a new basis of jurisdiction without statutory authority'.

In England the current of authority has flowed strongly in favour of the second view (*White* v. *White* [1937] P. 111; *Easterbrook* v. *Easterbrook* [1944] P. 10; *Hutter* v. *Hutter* [1944] P. 95) and the Lord Chief Justice accepted it and held that he had jurisdiction. He pointed out that in Ireland, as in England, the law as to matrimonial disputes was formerly administered exclusively by ecclesiastical courts, which exercised jurisdiction on the basis of residence over suits for divorce *a mensa et thoro*, nullity, restitution of conjugal rights and jactitation of marriage, but not of course for dissolution. He next traced the steps whereby this jurisdiction was transferred by statute to the High Court, a process parallel with the development in England. He then reviewed the English cases from *Niboyet* v. *Niboyet* (1877) 4 P. D. 1 to *Easterbrook* v. *Easterbrook* [1944] P. 10. In *Salvesen's Case, supra*, at p. 671, Lord Phillimore delivered a *dictum* which has caused much trouble. He said: 'In my opinion the Wiesbaden Court was the only competent Court for these parties'. In some quarters this *dictum* was assumed to state a rule of general application denying that jurisdiction could exist in a nullity suit without domicil. *Rayden on Divorce* (4th ed., p. 15) says that the explanation of this *dictum* 'is that the

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Court of the domicil has a superior claim in questions of status to other Courts and is therefore the only Court competent to pronounce a decree which is conclusive everywhere, and not that the jurisdiction of the Court of the domicil is exclusive of all other Courts'. In the instant case the Lord Chief Justice rejected this explanation. He advanced the interesting alternative theory that Lord Phillimore's words must be taken to refer to the circumstances of the *Salvesen Case*, where perhaps neither party had a residence outside their domicil sufficient to found a nullity suit. 'For my own part I would prefer to interpret them as purely parenthetical words, expressly referring only to the judgment of the Wiesbaden Court, and not intended to be generalized into a principle at variance with the authorities to which I have referred.' The Lord Chief Justice concluded this part of his judgment by quoting and rejecting the views of Professor Cheshire (*Private International Law*, 2nd ed., pp. 337—339) and Professor Read (*Recognition and Enforcement of Foreign Judgments*, pp. 232—252) that residence does not suffice to confer jurisdiction in a nullity suit.

Academic lawyers may regret that ecclesiastical views on jurisdiction should be fastened by statute on modern Courts so as to prevent the free development of this branch of the conflict of laws. They may also feel that the law would be more elegant if domicil were the exclusive test of jurisdiction in suits for nullity, as it unquestionably is in suits for dissolution. But the fact must be faced that Lord Phillimore's *dictum* has never been accepted by the profession in England (*Easterbrook* v. *Easterbrook, supra*; *Hutter* v. *Hutter, supra*; *Rayden on Divorce*, 4th ed., pp. 14—17) or Scotland (*Lendrum* v. *Chakravarti* [1929] Sc. L. T. 96; *Macdougall* v. *Chitnavis* [1937] S. C. 390).

Perhaps the following argument affords some justification for exercising nullity jurisdiction on wide grounds. If the English Courts have jurisdiction to determine the validity of the marriage of A and B as incidental to the determination of some other question, even though A and B are domiciled and the marriage was celebrated abroad, it would surely be inconsistent to refuse jurisdiction in nullity proceedings framed to raise the issue directly between the parties. That English Courts do possess this jurisdiction to determine incidentally the validity of a foreign marriage cannot be denied. If an English testator leaves property to the child of a foreigner (*Re Paine* [1940] Ch. 46); if a person accused of bigamy pleads that his first marriage was void (*R.* v. *Naguib* [1917] 1 K. B. 359); if a wife sues her husband for maintenance in a Court of summary jurisdiction and the husband pleads that the marriage is void (*Papadopoulos* v. *Papadopoulos* [1930] P. 55); if a wife petitions for judicial separation or restitution of conjugal rights and the husband pleads that the marriage is void (*Chetti* v. *Chetti* [1907] P. 67; *Nachimson* v. *Nachimson* [1930] P. 217): in all these cases the English Court will determine the validity of the marriage, though the marriage took place and the husband was domiciled abroad. If the Court of the domicil has already pronounced on the validity of the marriage, no doubt the English Court would follow that pronouncement. But in the far more common case where no pronouncement has been made in the domicil, the English Court will determine the validity of the marriage for itself. It would surely be pedantic and inconsistent for the Court to tell the

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parties 'We will determine the validity of your marriage if you petition for judicial separation, but not if you petition for nullity'. Perhaps a nullity decree would not be universally recognized unless pronounced in the domicil; but at least it would bind the parties and entitle them to marry again in England.

(2) Having decided that he had jurisdiction, the Lord Chief Justice next had to consider whether the facts entitled the petitioner to a decree. She alleged that her marriage was bigamous because at the date of the ceremony her husband's decree annulling his first marriage had not yet been made absolute. Now it is well settled that if the first marriage is valid, a second marriage celebrated before the decree absolute for divorce is bigamous. It is equally well settled that if the first marriage is void, the second marriage is not bigamous and is valid. And it seems clear on principle that if the first marriage is voidable, a second marriage celebrated before it is annulled is bigamous, though apparently no authority can be cited for this proposition except a *dictum* in an Irish case: *B.* v. *B.* (1891) 27 L. R. Ir. 587, 608. But it is well settled that, in so far as it affects the status of the parties, a decree annulling a voidable marriage relates back to the date of the ceremony: *Newbould* v. *Att.-Gen.* [1931] P. 75. And the actual decree in the instant case, following the common form, pronounced the first marriage 'to be and to have been absolutely null and void' and declared that the husband 'was and is free from all bond of marriage' with the first wife. What, then, is the position if the validity of the second marriage is not raised until after the first has been declared null and void *ab initio*? This question appears to be destitute of authority. *Geary on Marriage and Family Relations* (pp. 84, 220) says that the second marriage would 'perhaps' be validated by the retrospective nature of the nullity decree; but this is queried in *Rayden on Divorce* (4th ed., p. 478). The Lord Chief Justice decided that the second marriage was valid because the husband must be regarded as an unmarried man at the date of the ceremony. He found strong confirmation for this view from section 57 of the Offences against the Person Act, 1861, which defines the crime of bigamy, and the proviso to which declares that the section shall not extend to 'any person who, *at the time of such second marriage*, shall have been divorced from the bond of the first marriage, or to any person whose former marriage shall have been declared void by the sentence of any court of competent jurisdiction'. The fact that the italicized qualification refers to decrees for divorce but not to decrees for nullity, which are separated by the disjunctive 'or', is surely highly significant.

The Attorney-General suggested in argument that if the petitioner could not prove that the respondent's marriage with her was bigamous, she might still be entitled to relief on the ground that at the date of the ceremony the respondent was incapable of contracting a valid marriage. But the Lord Chief Justice rejected this argument on the ground that 'it would be quite inconsistent to hold that the former marriage was void from the date of the ceremony and yet that that same former marriage created in the respondent a legal disability to contract a new marriage several years later'. At the end of the judgment he expressed satisfaction at not being compelled to give effect to an unmeritorious claim, which if successful would have bastardized the only child of the marriage.

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Suppose that the child of the second marriage had been born between the date of the ceremony and the date of the decree absolute for nullity. Suppose further that the status of the father, the mother and the child had been in issue during this interim period. Any Court must have held that as the father's first marriage was still subsisting, his second marriage was bigamous and void, and therefore that the child was a bastard. But if the status of these parties had been in issue after the decree absolute, the result would have been quite different. The second marriage would have been valid from its commencement, and the child would have been held legitimate. It is odd that a decree absolute annulling the marriage of A and B should have the effect of validating the previous marriage of B and C and legitimating their child D; but the result seems to follow inevitably from the retrospective nature of the decree. The reason why nullity decrees are retrospective is that the church refused to admit that a marriage can be good for a time; it must be 'for ever or never'. It is submitted that at least in the case of a voidable marriage, the retrospective operation of a nullity decree ought to be abolished by statute. Apart from the effect of the decree, a suit for nullity in the case of a voidable marriage has a much closer affinity to a suit for divorce than to a suit for nullity in the case of a void marriage. The marriage continues to subsist until a decree for nullity is pronounced; only the parties can avoid the marriage; after the death of one of the parties no one can attack the validity of the marriage; the complaining spouse can choose whether or not to avoid the marriage; if he delays his choice too long he may be met by a plea of laches. All these considerations point to the conclusion that a suit for nullity in the case of a voidable marriage is in substance a suit for dissolution, and only in form a suit for nullity.

Moreover, since 1857 it is no longer true that a marriage must be for ever or never. The policy of the State is to recognize and provide facilities for divorce. If the question of nullity in the case of a voidable marriage be looked at broadly from the point of view of social justice and expedience, free from preconceived ecclesiastical ideas, there seems no reason to distinguish between adultery and refusal or incapacity to consummate the marriage: they ought both to be treated on the same plane as matrimonial offences with the same legal consequences.

The retrospective nature of a nullity decree sometimes leads to practical difficulties and even to injustice. Three recent examples must suffice. In *Dodsworth* v. *Dale* [1936] 2 K. B. 508 the husband obtained a nullity decree twelve years after the ceremony on the ground of his wife's incapacity. The Inland Revenue Commissioners claimed a refund of the income tax allowances which had been credited to him as a married man. In *Re Eaves* [1940] Ch. 109 a testator gave property to his widow and son upon trust for the widow during her widowhood and subject thereto upon trust for the son absolutely. The widow remarried and agreed to the property being handed over to the son. Twelve years later she obtained a decree of nullity on the ground of her husband's incapacity. She thereupon claimed a declaration that she was entitled to a life interest in the property on the ground that her widowhood had never determined. In both these cases the Court was fortunately able to avoid an inequitable result by holding that transactions completed during the voidable marriage cannot subsequently be set aside. Had

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the suit for nullity been in form as well as in substance a suit for dissolution, the two claims would of course have been unarguable. In *Treby* v. *Treby* (1939) 87 L. J. Newsp. 77, the husband obtained a decree of nullity on the ground of his wife's refusal to consummate the marriage. Shortly after the ceremony a child had been born as a result of premarital intercourse. As the decree related back to the date of the ceremony, the effect was to bastardize the child. In *Mason* v. *Mason* the retrospective nature of the decree had the effect of saving the status of the child. In *Treby* v. *Treby* the effect was the reverse. It is submitted that on balance justice and convenience require that the effect of a nullity decree in the case of a voidable marriage should be assimilated to that of a decree for dissolution.

J. H. C. Morris.

Holdsworth's History of English Law: A Bibliography.

Since the publication of a draft bibliography of *Holdsworth's History of English Law* (*ante*, p. 184), additional information has been received from many sources, notably the Codrington Library at Oxford and the Library of the Harvard Law School. Even with this help, I cannot pretend to have reached finality,[1] but it is hoped that for most practical purposes the details given below will prove accurate and complete; they do not include the editions published at Boston, U.S.A., to which Professor Plucknett refers (*ante*, p. 229). The bibliography is followed, as in the draft, by a check list.

Bibliography.

Vol. I.

1st edition: May 28, 1903.

2nd edition: October, 1914. This edition is not dated, but the later editions give the date thus. A few corrections in the text have been made and additional references given.

3rd edition: July, 1922. This is a completely rewritten version.

4th edition: October, 1927. A few corrections and additions in the text and notes have been made, and four pages of Addenda and Corrigenda added.

5th edition: June, 1931. This seems to be merely a new impression and not a new edition at all; the text appears to be identical with that of the 4th edition.

6th edition: 1938. A few more corrections have been made in the text, and the Addenda and Corrigenda now occupy thirteen pages.

Vol. II.

1st edition: March 25, 1909. The 3rd and 4th editions state that this was 'First Published May, 1903,' but this is incorrect: see the 2nd edition and the Prefaces to Volumes I and II.

2nd edition: October, 1914. The date is given thus in the 3rd and 4th editions, but as July, 1914, in the 2nd edition itself;

[1] While this note was in proof I accidentally discovered that a 3rd edition of Vol. IX had recently made an unheralded appearance.

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Vols. I and III suggest that October is the more probable. A few corrections in the text have been made and additional references given.

3rd edition: March, 1928. This is a rewritten book, ninety pages longer than the 1st edition.

4th edition: 1936. Some corrections have been made and cross-references inserted; and there are ten pages of Addenda and Corrigenda.

Vol. III.

1st edition: March 25, 1909. The date is given thus in the 2nd edition but as May, 1903, in the 3rd and 4th editions, and March, 1908, in the 5th edition. 1903 and 1908 seem improbable: see note to Vol. II, 1st edition.

2nd edition: October, 1914. The edition is not dated, but the 3rd and 4th editions give the date thus; the 5th edition gives December, 1914. A few corrections and additional cross-references seem to be the only changes.

3rd edition: March, 1928. This is a rewritten version, sixty-three pages longer than the 1st and 2nd editions. The 5th edition gives the date as February, 1923, but March, 1928, as stated in the 4th edition, seems the more probable, for this is the date of the 3rd edition of Vol. II.

4th edition: 1935. This has four pages of Addenda and Corrigenda, but otherwise appears to be identical with the 3rd edition. The date is given by the 5th edition as March, 1934, but this seems incorrect: see, *e.g.*, the Preface, dated October, 1934. Possibly March, 1935, is the right date.

5th edition: 1942. Some inaccuracies have been corrected and cross-references added, and there are eight pages of Addenda and Corrigenda.

Vol. IV.

1st edition: March 18, 1924.

2nd edition: 1937. This has five pages of Addenda and Corrigenda. The Preface suggests that in Vols. IV, V and VI the text has otherwise remained unchanged.

Vol. V.

1st edition: March 18, 1924.

2nd edition: 1937. This has six pages of Addenda and Corrigenda.

Vol. VI.

1st edition: October 6, 1924.

2nd edition: 1937. This has four pages of Addenda and Corrigenda.

Vol. VII.

1st edition: November 26, 1925. Some copies are undated.

2nd edition: 1937. Some misprints and inaccuracies have been corrected, cross-references inserted, and a correction made at p. 45 in the author's estimate of Lord Mansfield's influence on the law. No table of Addenda and Corrigenda has been added.

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VOL. VIII.

1st edition : November 26, 1925. Some copies are undated.

2nd edition : 1937. It is not clear whether any alterations have been made in the text, which clearly remains substantially unchanged. There are two pages of Addenda and Corrigenda.

VOL. IX.

1st edition : April 29, 1926.

2nd edition : December, 1938. One page of Addenda and Corrigenda seems to be the only change.

3rd edition : 1944. The one page of Addenda and Corrigenda has become three, but otherwise there seems to be no change.

VOLS. X, XI, XII.

1st edition : 1938.

CHECK LIST.

Volume	*Latest edition*	*Editions substantially identical save for Addenda and Corrigenda*
I	6th ed. 1938 ..	5th ed. 1931; 4th ed. 1927; 3rd ed. 1922.
II	4th ed. 1936 ..	3rd ed. 1928.
III	5th ed. 1942 ..	4th ed. 1934; 3rd ed. 1928.
IV	2nd ed. 1937 ..	1st ed. 1924.
V	2nd ed. 1937 ..	1st ed. 1924.
VI	2nd ed. 1937 ..	1st ed. 1924.
VII	2nd ed. 1937 ..	1st ed. 1925.
VIII ..	2nd ed. 1937 ..	1st ed. 1925.
IX	3rd ed. 1944 ..	1st ed. 1926; 2nd ed. 1938.
X	1st ed. 1938 ..	—
XI	1st ed. 1938 ..	—
XII	1st ed. 1938 ..	—

R. E. MEGARRY.

The official opening of Parliament on August 15 last when His Majesty the King attended to read his "Speech" was a morning dress affair—I was told by His Majesty's own wish. Arranged when the laying down of arms by Japan had not been anticipated so soon the austerity of the occasion was broken, in the matter of dress, only by the robes of the new Lord Chancellor, those of the Bench of Bishops, and of the representatives (nine) of the puisne judges summoned by writ in accordance with age-long precedent although of course not Peers of Parliament. The judges' historic presence was preserved but at the expense of their historic judicial dress. Someone had laid it down that they should wear broadcloth Court dress with trousers, silk gowns, long wigs, and white bibs. On what other occasion have Judges ever worn that style? It is, of course, the costume of King's Counsel when arguing cases before the House of Lords, but has it ever before been that of a judge? With the short or tie wig it is the ordinary working dress of the Lords Justices,

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and of the judges of the Chancery and the P. D. and A. Divisions and some (not all) of the King's Bench when dealing with divorce cases on circuit. Lately in Lancashire, I was told that at one time the *nisi prius* judge on circuit when trying civil cases used to sit in a black silk gown, but I have not been able to examine into the accuracy of that piece of information. Originally in the annual ceremonial service in the Abbey and the procession at the Law Courts on the reassembly after the long vacation—both an innovation in my time—the judges of the Chancery Division and the one puisne judge of the P. D. and A. Division came, it is true, in black silk gowns and long wigs but wearing beneath full Court clothes with knee breeches, silk stockings and buckled shoes. Much later they all blossomed out into the full scarlet robes of their brethren of the King's Bench: some of us regretted the change not because of any comparison, invidious or otherwise, but for the sake of the preservation of outward marks of historic origins. The black silk robe for everyday use in Court is by far more comfortable than the hot and unwieldy skirts of the King's Bench, although in the Crown Court it would be unthinkable: but from where did he who thought out the clothing directions for His Majesty's judges on August 15 get his ideas? Let us hope that the 'nine black crows', as we were dubbed by an irreverent friend of mine after the ceremony, will be replaced next time by individuals clad in the brighter, ceremonial, and perhaps more inspiring scarlet and ermine worn on previous Parliamentary openings.

R. P. C.-J.

THE HANGING JUDGE.

In the church at Steeple Aston, Oxfordshire, there is a grandiose monument to Sir Francis Page, and to his second wife. He was Baron of the Exchequer, 1718 to 1726, Judge of the Common Pleas, 1726 to 1727, and of the King's Bench, 1727 till his death in 1741. He had this great monument, by Scheemakers, set up in his lifetime, and to make room for it had several ancient memorials destroyed. Possibly, as he contemplated it, he may have thought that it would preserve a memory of his greatness when the couplet written by Pope in 1733 was lost in oblivion :—

'Slander or poison dread from Delia's rage,
Hard words or hanging if your judge be Page.'

Any such complacent reflection would have been disturbed if he could have foreseen that two more of the great writers of the age were to leave him in the literary pillory. In 1744 Johnson, in his life of Savage, when describing his trial for killing James Sinclair in a tavern brawl, says that Page 'treated him with his usual insolence and severity'. And in 1749 Fielding, in *Tom Jones* (Book VIII, Chap. 11), puts into the mouth of Partridge a denunciation of the brutality of Page when trying a horse-stealer.

Page became a Bencher of the Inner Temple in 1717, and so remained until, in the manner of the time, he departed in 1718 to Serjeants Inn on being made a Judge. The Records of the Inner Temple contain yet another damning tribute to him. In 1725 Ann Temple, one of the Inn's foundlings, had her thigh broken by Page's coach running over her. The Benchers voted £5 5s. to the apothecary who had attended her, and in

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1782 a further £5 0s. 4d. to another apothecary 'for medicines for the girl who was hurt by the coach of Mr. Justice Page running over her, by the prescription of a physician called in by Mr. Justice Page, upon the refusal of Mr. Justice Page to pay the bill; the same to be paid by the Sub-Treasurer, and the Sub-Treasurer to attend Mr. Justice Page with this order to know his pleasure therein'. But Page had no pleasure therein, and still refused to pay.

His second wife, who reposes in marble beside him at Steeple Aston, was Frances, daughter of Sir Thomas Wheate, Bt., of Glympton Park, about four miles to the west. Portraits of Sir Francis and Lady Page, by Jonathan Richardson (1665–1745) hung on a wall in Glympton House until they were sold by the then owners in 1944. The picture of the Judge has now been acquired by a Bencher of the Inner Temple and given to that Honourable Society.

* * * * *

A more famous, or more infamous, hanging judge, who was a member and Bencher of the Inner Temple, was Jeffreys. He was elected a Bencher in 1678, but departed in 1680 on being made a Serjeant. In 1687 the Benchers had his portrait painted by Kneller, at a cost of £50, and it was hung in the Hall. After the Revolution it was removed and stored in the chambers of Mr. Holloway, a Bencher. In 1694, Jeffreys's son and successor petitioned the Bench to be allowed to have his father's portrait. The Benchers agreed to this, and it was taken to Acton Park, near Wrexham. In 1702 the second Lord Jeffreys died, childless and insolvent. At the sale of his belongings the portrait was bought by a neighbour, Mr. Yorke of Erthig. It now hangs in the house at Erthig Park.

I like to think that possibly some day this picture may come back to the Inner Temple. In the magnificent new Hall, which Mr. Hubert Worthington, A.R.A., has already planned for us, perhaps Jeffreys and Page may hang on the wall side by side. And perhaps their spirits may meet there and cap one another's stories of brutality on the Bench.

F. D. M.

Oxford and Cambridge.

The following are two passages from the *Report of the Royal Commission on the University and Colleges of Oxford*, published in 1852. 'The education imparted [at Oxford] is not such as to conduce to the advancement in life of many persons except those intended for the Ministry of the Established Church. Many are now called to the Bar, and raised to the highest judicial functions, who have not been members of any University, and a large proportion of those barristers who have achieved an academical education are said to be Cambridge men' (p. 18). 'The connexion of Oxford with the Profession of the Law is also unsatisfactory. The number of barristers not educated at either University is increasing, and of those who have graduated the majority are of Cambridge' (p. 71).

That the great majority of Oxford men in the first half of the nineteenth century became parsons is undoubtedly true. My own beloved College, Trinity, has a privately printed *List of Admissions in the Nineteenth Century* (the life-work of 'Creeper' Green). That shows that

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of 1,010 men who matriculated from 1801 to 1850 no less than 520 (including Cardinal Newman) took Orders, while only seventy-one (including Lord Selborne) were called to the Bar.

What may be the present proportions of barristers hailing from Oxford, and Cambridge, and from neither, cannot be ascertained. But perhaps an examination of the figures among those 'raised to the highest judicial functions' may indicate an approximate answer to that inquiry.

In the *Law List* for 1944 there are set down in the House of Lords the Lord Chancellor and seven Lords of Appeal in Ordinary. In the Court of Appeal there are the Master of the Rolls and six Lords Justices. In the Chancery Division there are five Justices. In the King's Bench Division there are the Lord Chief Justice and seventeen Justices. In the Probate, Divorce and Admiralty Division there are the President and seven Justices. The total of all of these is forty-six.

Of these forty-six eight had not the happiness of being at Oxford, nor were they at Cambridge. Of the remaining thirty-eight there were twenty-five at Oxford and thirteen at Cambridge.

If these figures are any guidance to the 'Profession of the Law' in general the strictures of the Commissioners of 1852 on both Universities ('the number of barristers not educated at either University is increasing'), and upon Oxford ('of those who have graduated the majority are of Cambridge') seem to be not at all deserved now.

In 1906 it was possible for the Court of Appeal to consist of three Senior Wranglers (Romer, Stirling and Fletcher Moulton). A few years earlier it could consist of three rowing blues (Esher and A. L. Smith, of Cambridge, and Chitty, of Oxford). In the life of Lord Sterndale, in the last supplement of the *D. N. B.*, I was able to write—'When he presided in the Court of Appeal and his colleagues were Bankes L.J. and Scrutton L.J. he overtopped them, but there must have been nearly nineteen feet of them altogether'. On March 28, 1945, Morton L.J. and I were sitting together to hear interlocutory business. When we rose he remarked to me, 'I wonder if there has ever been a Court of two judges both of whom had the same initials.'

F. D. M.

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THE INTERNATIONAL VALIDITY OF DIVORCES.[1]

FEW will disagree with the passage from Lord Westbury's speech in *Shaw* v. *Gould*,[2] in which he said :

> 'Marriage is the very foundation of civil society, and no part of the laws and institutions of a country can be of more vital importance to its subjects than those which regulate the manner and conditions of forming, and, if necessary, of dissolving the marriage contract.'

If this is true, and it seems to be more true now when so many of the other props of civilization have been weakened, it follows that any legal doctrine which may operate to render uncertain the status of divorced persons, and which may, therefore, prejudice the stability of a later marriage by either party, is a social evil that calls for the intervention of the law reformer. Divorce, since it disintegrates the family unity, is, of course, a social evil in itself, but it is a necessary evil. It is better to wreck the unity of the family than to wreck the future happinesss of the parties by binding them to a companionship that has become odious. Membership of a family founded on antagonism can bring little profit even to the children, but though divorce is unavoidable, we can at least do our best to ensure that there is no uncertainty in the status of the members of the family after the decree absolute. In the normal case, when the family has its roots solely in England, there is no uncertainty. According to the law by which they are exclusively governed, the husband and wife are single persons, free to marry again, and despite the dissolution of the marriage their children are legitimate. Children born of a second marriage by the husband or wife will also be legitimate. The validity of the decree, in other words, is undoubted throughout England and Wales, the only area in which it is likely to be questioned. But that is not enough in these days of international marriages, due to easy travel, world trade and such recurrent phenomena as armies of occupation.

A decree of divorce should have an extra-territorial effect, for if its validity is not recognized in another country with which one or both of the parties are connected, as, for example, by nationality, the evil consequences are both obvious and deplorable. If, for instance, the English wife of a French national obtains a divorce in England, the country of domicil, and if the validity of the decree is repudiated by French law, the parties are regarded as unmarried in England, but as married in France. From this fact a most embarrassing situation may arise.[3] The husband, for instance, may remarry, and thus have two wives, the first lawful in France, the second lawful in England, a privilege, however, that has its drawbacks. Should he cohabit with his first wife in Paris his morality is untarnished according to French law, but it exposes him to a divorce suit in England for adultery if he acquires an English

[1] This article, in a much abbreviated form, was delivered as an inaugural lecture at All Souls College, Oxford, on June 8, 1945.

[2] (1868) L. R. 3 H. L. 55 at p. 83.

[3] Cp. the remarks of Lord Lyndhurst in *Warrender* v. *Warrender* (1835) 2 Cl. & F. 561.

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domicil of choice. If, on the other hand, he is content with his second wife, but is indiscreet enough to take a holiday in Paris, his adultery with his lawful English wife will expose him to a civil action for damages by his French wife.[4] He is an upright member of society in England, but a bigamist in France. Children of his second marriage are legitimate by English law, illegitimate by French law.

This is a bizarre situation, but it is one that can well arise by the inter-action of the English and certain foreign systems of Private International Law. Phillimore, writing in 1861, deplored what he described as the 'great and lamentable discord, both in the opinions of the jurists and the decisions of Courts' upon the vital question whether a dissolution of marriage in one State was valid in another.[5] Discord still exists, and the burden of this article is, first, to explain its cause, and then to suggest that it might be lessened by legislation.

It must be admitted that the stage is well set for discord. Since marriage creates a status that may be said to affect religion, eugenics, public morals, even racial purity, it is not surprising that a comparative survey of the divorce laws of the world proves what a 'staggering diversity' exists.[6] In some countries, such as Italy, Spain, Malta, Quebec and the Argentine, divorce *a vinculo* is forbidden, but separation allowed; in others, mainly Slavonic and Scandinavian, separation is forbidden but divorce allowed; in others, including the United States, England, Belgium and Holland, both these remedies are possible. Even where divorce is allowed the method of obtaining it varies. In the vast majority of countries a judicial process is necessary, but in Denmark, Iceland and Czecho-Slovakia it is in certain circumstances a matter for the administrative authorities,[7] while in certain units of the British Empire, such as the Isle of Man, Quebec, and Newfoundland, the only possible procedure is a private Act of Parliament. Then again there is wide disagreement as to the causes for which divorce is obtainable. In New York there is only one statutory cause, adultery, in Pennsylvania there are seven. In Czecho-Slovakia there are nine causes, including 'bad, disorderly, immoral life', and also what is euphemistically called 'invincible aversion'. In France, the most common ground for divorce is *injure grave*, grievous wrong, a delightfully elastic term which has been held to include such indecorous acts as the writing of an insulting letter, the refusal to have the children baptized, the disagreeable spying upon the wife's movements by a jealous husband, or even an accusation of conjugal infidelity.[8] The polygamous marriages recognized by Islam also raise peculiar problems. Thus, to take only one instance, a Moslem may effect an irrevocable divorce by declaring three times at short intervals an intention to terminate the marriage tie. It is not surprising, therefore, that the various systems of Private International Law, faced with this sea of conflicting views, show a certain discordance.

[4] Amos and Walton, Introduction to French Law, p. 66.

[5] Commentaries upon International Law, Vol. IV, p. 323.

[6] Rabel, 28 Iowa Law Review, p. 192.

[7] Until 1944, a marriage was dissoluble in Russia by the administrative authorities, but the decree of the Presidium of the U.S.S.R. of July 8, 1944, altered this. This provides that a divorce suit shall be heard in the public Courts (Art. 23).

[8] Amos and Walton, *op. cit.* p. 70; 28 Iowa Law Review, pp. 300–2; Burge, Colonial and Foreign Law, Vol. III, p. 831.

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In order to understand the extent to which England is at variance on the matter with certain other countries, it is necessary to state in outline the English rules of Private International Law relating to divorce. There are two separate questions which it is essential to keep distinct.

First, the question of jurisdiction, which subdivides into two questions :—

What renders the English Court competent to entertain a suit for divorce?

What, in the eye of English law, renders a foreign Court competent to grant a divorce that will be recognized as valid in England?

The second question concerns the choice of law, *i.e.*, if a Court possesses the requisite jurisdiction, what domestic system of divorce law must it apply to the case?

1 (A). JURISDICTION OF THE ENGLISH COURT.

What was necessary to render an English Court competent to entertain a petition for divorce was a question that did not arise until 1857, when the Matrimonial Causes Act enabled a marriage to be dissolved by judicial process. Before that time English Courts had no power to dissolve a marriage. Originally, matrimonial causes were subject throughout Christendom to the exclusive jurisdiction of the Ecclesiastical Courts from whom an appeal lay to the Pope. These Courts were empowered to grant judicial separation, but not divorce, for the Canon law which they administered regarded marriage as a sacrament and incapable of dissolution except by death. After the Reformation, the position remained the same except that the English Ecclesiastical Courts became separate national tribunals with an appeal to the Crown. They still granted judicial separation, but divorce was obtainable only by a private Act of Parliament. Their jurisdiction depended upon residence. A decree of judicial separation granted by the Bishop in respect of persons resident within his diocese was recognized as valid by other diocesan Courts. Since, therefore, divorce was a new judicial remedy introduced in 1857, the Court to which the jurisdiction of the Ecclesiastical Courts was transferred was unguided by precedents when required to determine the conditions upon which they were competent to grant the remedy. The reverse question—when will the English Court recognize a foreign decree of divorce?—had arisen in a few cases before 1857. The most famous of these was *Lolley's Case* in 1812,[9] where all the judges unanimously expressed their opinion that no decree of any foreign country could dissolve an English marriage, but this decision, though it was followed in 1831,[10] was the subject of frequent and adverse criticism,[11] and according to its modern interpretation all that it in fact decided was that the decree was invalid in England unless the parties were actually domiciled in the foreign country.[12] Even in 1857, judicial opinion was strongly inclining to the view that a foreign divorce should not be recognized in England unless the parties were domiciled in the country in which it was decreed. Mere residence there was insufficient. As regards the competence of the

[9] (1812) 2 Cl. & F. 567 (n).
[10] *M'Carthy* v. *Decaix* (1831) 2 Russ. & M. 614.
[11] *Warrender* v. *Warrender* (1835) 2 Cl. & F. 488.
[12] *Shaw* v. *Gould* (1868) L. R. 3 H. L. 55 at p. 76, *per* Lord Chelmsford. *Harvey* v. *Farnie* (1880) 5 P. D. 153; affirmed (1881) 6 P. D. 35; affirmed (1882) 8 A. C. 43.

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English Court, the substantial controversy was whether residence in England sufficed to found jurisdiction or whether domicil was essential.[13]

The sufficiency of domicil in England at the commencement of the suit was established in 1859,[14] but whether anything else sufficed long remained a matter of doubt. In a case in 1860 the Court assumed jurisdiction on the ground that the parties, though domiciled abroad, were British subjects and had been married in England.[15] In another case in the same year the suit was entertained on the ground that the respondent wife had appeared without protest.[16] These decisions, however, stand alone and have never been treated with respect. On the other hand, the claim that residence in England sufficed to give jurisdiction was felt to have considerable weight, and it was not until comparatively recent times that it was repudiated. Westlake was certainly justified in his statement, made in 1880, that the Court possessed jurisdiction if at the time of the suit the husband was resident in England 'not on a visit or as a traveller, and not having taken up residence for the purpose of obtaining a divorce'.[17] This vague doctrine had been laid down in 1861,[18] but it derived its main support from the decision of the Court of Appeal in *Niboyet* v. *Niboyet* in 1878.[19] In that case a Frenchman, who had been married to an Englishwoman at Gibraltar in 1856, resided in England as French consul from 1862 to 1869, and again from 1875 until the presentation by his wife of a petition for divorce. The consular office of the respondent incapacitated him from acquiring a domicil in England, and therefore the question was squarely raised whether his residence subjected him to the divorce jurisdiction of the Court. Sir Robert Phillimore in the Court below,[20] and Brett L.J. in the Court of Appeal denied this, but the majority of the Court of Appeal, James and Cotton L.JJ., gave an affirmative answer. The reasoning of these two judges appears to have been that, since the husband was resident in England, his adultery was a matrimonial matter that would have entitled the Ecclesiastical Courts before 1857 to exercise jurisdiction in a petition for judicial separation, and this jurisdiction, enlarged by the new remedy of divorce, was exercisable by the Civil Court.

Such was the state of the law until the decision of the Privy Council in 1895 in *Le Mesurier* v. *Le Mesurier*.[21] In that case, the Supreme Court

[13] *Shaw* v. *Gould* (1868) L. R. 3 H. L. 55, at pp. 85, 91. It is curious that the advocates of the residence view did not rely upon the rules that governed a private Divorce Act in the House of Lords. This proceeding, though legislative in form, was essentially judicial. The House had its own law and practice on the matter and acted as a Court of Justice. One of the inviolable rules was that no petition for any Bill of Divorce should be presented unless an official copy of a definitive sentence of divorce *a mensa et thoro* in the Ecclesiastical Court was delivered at the Bar of the House. Presumably, therefore, the House was willing to act if the parties were resident in England, and, if this were so, the civil Court which had succeeded Parliament as the tribunal for trying petitions of divorce, might have reasonably claimed the same freedom.
[14] *Ratcliff* v. *Ratcliff* (1859) 29 L. J. P. & M. 171; *Tollemache* v. *Tollemache* (1859) 1 Sw. & Tr. 557.
[15] *Deck* v. *Deck* (1860) 2 Sw. & Tr. 90.
[16] *Callwell* v. *Callwell* (1860) 3 Sw. & Tr. 259.
[17] Private International Law (2nd ed.) p. 41.
[18] *Brodie* v. *Brodie* (1861) 2 Sw. & Tr. 259.
[19] (1878) 4 P. D. 1.
[20] Foote suggests that James and Cotton L.JJ. were more anxious to avoid the rule that a foreign consul cannot acquire a domicil in England, than to base jurisdiction upon mere residence; 5th ed. p. 152.
[21] [1895] A. C. 517.

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of Ceylon had refused to entertain a suit for divorce, because the parties, though resident within the jurisdiction, were domiciled in England. This decision was affirmed by the Privy Council, which repudiated *Niboyet* v. *Niboyet* and laid down the general proposition that ' according to international law the domicil for the time being of the married pair affords the only true test of jurisdiction to dissolve their marriage '. The Privy Council in this case was of course administering Cingalese, not English, law, and technically, the only effect of its decision was that according to the law of Ceylon jurisdiction to grant divorce rests exclusively in the Court of the domicil.[22] Nevertheless, having regard to later cases,[23] there is no possible room for doubt that the rule laid down represents the law of England. England may be the country where the parties reside, or of which they are nationals, or where the marriage was celebrated, or where the matrimonial offence was committed—but none of these facts founds jurisdiction in divorce.

1 (B). Recognition of Foreign Decrees.

It is unnecessary to discuss the circumstances in which a foreign decree of divorce will be recognized as valid in England, since it has been the rule for the best part of a century that no divorce is regarded as valid unless it has been granted in the country where the parties were domiciled at the time of the suit,[24] or, if granted elsewhere, unless its validity is recognized by the *lex domicilii*.[25] In fact, it was the existence of this unbending rule that made the judges reluctant to claim jurisdiction for the English Court on mere residence.[26]

2. Choice of Law.

If a Court, whether English or foreign, possesses divorce jurisdiction as being the Court of the domicil, the next question is—what system of domestic law must it apply? There are several possibilities. The *lex loci contractus*, the *lex loci delicti*, the law of the place of residence, the personal law, the *lex fori*. As regards the first, the law has never agreed with Selden that ' marriage is nothing but a civil contract '.[27] It is nearer the truth to say with Ames C.J. that : ' Marriage, in the sense in which it is dealt with by a decree of divorce, is not a contract, but one of the domestic relations. Though formed by contract, it signifies the relation of husband and wife, deriving both its rights and duties from a source higher than any contract of which the parties are capable, and as to these uncontrollable by any contract which they can make '.[28] In a word, it is essential to distinguish the contract itself from the status that it creates. The *lex loci celebrationis* determines no doubt whether the contract was formally valid in its inception, but the mere place of celebration cannot confer upon the local law a continuing right to regulate the future status of the parties irrespectively of the country in which they may establish their home. Again, English law pays no attention to the law either of

[22] Cook, Logical and Legal Bases of the Conflict of Laws, pp. 458–9.
[23] *Bater* v. *Bater* [1906] P. 209.
[24] *Dolphin* v. *Robins* (1859) 7 H. L. C. 390; *Harvey* v. *Farnie* (1882) 8 A. C. 43.
[25] *Armitage* v. *Att.-Gen.* [1906] P. 135.
[26] *Manning* v. *Manning* (1871) L. R. 2 P. D. 223, *per* Lord Penzance.
[27] Table Talk (1892 ed.) p. 109.
[28] *Ditson* v. *Ditson* (1856) 4 Rhode Island 87; Beale's Cases, Vol. I, p. 352.

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the place of residence or of the place where the matrimonial offence was committed. The choice therefore lies between the *lex fori* and the personal law, which expression means, according to the English doctrine the law of the parties' domicil, but the law of their nationality according to the doctrine of many foreign countries.

As regards a divorce suit in England, the rule is that English domestic law is applied as being the *lex fori*. This, of course, happens to coincide with the *lex domicilii* of the parties, since jurisdiction is not assumed unless the domicil is English.

As regards the recognition in England of a decree granted by the Court of the foreign domicil, English law does not inquire what particular domestic legal system has been applied, but is content that the divorce has been granted in the domicil of the parties, or that its validity is recognized by the law of that domicil. In fact, it will often happen that the law applied will not be merely the domestic law of the foreign forum, but a combination of the *lex fori* and the *lex patriae*.

The outstanding feature, then, of the English doctrine is that the domicil of the parties governs divorce. This, in effect, means the domicil of the husband, for it is a rule of English law to which there is no exception whatsoever, that a wife cannot in any circumstances, not even after a judicial separation, either acquire or retain a separate domicil of her own.[29] It is this rule which only too frequently causes the first of the two hardships that according to the present submission require removal, namely, the hardship suffered by the Englishwoman who, having married a domiciled foreigner, is the victim of desertion. Let us suppose that a domiciled Englishwoman marries in England a man domiciled abroad, and that after a period of cohabitation in England the husband forms an adulterous union with another woman and leaves the country with her. What can the wife do? Since she necessarily takes the domicil of her husband her only remedy lies in the country of that domicil. This may be at the other end of the world. It may be a country where divorce is not allowed at all, or not allowed for the reasons that seem compelling to English eyes, or a country where nationality, not domicil, is the basis of divorce jurisdiction. Even the continued residence of the husband in England does not improve matters, much less mend them. If, to take the facts of the *Niboyet Case*, the husband with a French domicil lives in England in adultery with other women for a matter of twenty years, the English Court is still powerless to dissolve the marriage. The wife must face the trouble and expense of taking her chance in the French Court. The same situation occurs if the husband, though possessing an English domicil at the time of the marriage, has now acquired a fresh one abroad. Even worse, perhaps, is the case where he disappears completely, so that the wife, able and willing may be to meet the expense of pursuit, cannot ascertain the country of her own domicil. To describe the situation of the wife as intolerable is an under-statement. Several attempts have been made by English judges to devise a remedy by regarding the pre-marriage domicil of the wife as sufficient to found jurisdiction,[30] but they have now been finally repudiated.[31] Except for two statutory

[29] *Cook* v. *Att.-Gen. for Alberta* [1926] A. C. 444; *H.* v. *H.* [1928] P. 206.
[30] *Stathatos* v. *Stathatos* [1913] P. 46; *Montaigu* v. *Montaigu* [1913] P. 154.
[31] *H.* v. *H.* [1928] P. 206; *Herd* v. *Herd* [1936] P. 205.

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modifications the rigour of the English doctrine remains unabated—a divorce is obtainable only in the domicil of the husband.

The statutory modifications are these :—

First, the Matrimonial Causes Act, 1937, provides that where a wife has been deserted by her husband, and the husband was immediately before the desertion domiciled in England or Wales, the Court shall have jurisdiction for the purpose of any proceeding concerned with divorce, annulment of marriage, judicial separation and restitution of conjugal rights. This is a step in the right direction, but it does not meet the case where the husband is domiciled abroad at the time of desertion.

The second statute is the Matrimonial Causes Act, 1944, a purely temporary measure necessitated by the numerous marriages between Englishwomen and Allied service men resident but not domiciled in England. It provides that in the case of a marriage celebrated on or after September 3, 1939, between a husband domiciled 'at the time of the marriage' outside the United Kingdom, and a wife who was immediately before the marriage domiciled in England, the High Court shall have divorce and nullity jurisdiction as if the parties were at all material times domiciled in England. This is a distinct improvement upon the 1937 Act, since it is not confined to desertion.

A word may now be said as to the reception by other legal systems of the English doctrine that divorce proceedings depend upon domicil. In Scotland the search for the correct principle has been protracted, for divorce *a vinculo* has been one of the matrimonial remedies in that country since the middle of the sixteenth century, and it was only after a long flirtation with dubious principles that the Courts adopted the English doctrine. At first they were content to assume jurisdiction on the bare ground that the adultery had been committed in Scotland, provided that the respondent was personally cited within the territory. Jurisdiction was also assumed if the respondent had been resident in the country for forty days preceding the issue of the summons.[32] About the middle of the nineteenth century, however, these rules were abandoned and replaced by the doctrine of the matrimonial domicil, or as it was often called 'the domicil of the marriage'. This expression indicated a connection with a country of a less enduring nature than that required by English law to constitute domicil. 'The true inquiry', said Lord Justice-Clerk Inglis in 1862, 'in every such case is where is the home or seat of the marriage for the time—where are the spouses actually resident if they be together—or if from any cause they are separate, what is the place in which they are under obligation to come together, and renew or commence their cohabitation as man and wife?'[33] There is much to be said for this doctrine, since it follows the Continental view that domicil means the habitual home of the parties, but it was regarded by the Courts as lacking precision,[34] and it was finally repudiated as a ground for divorce after *Le Mesurier* v. *Le Mesurier* in 1895.[35] In that case the Privy Council considered in detail the Scottish decisions and anathematized their

[32] Duncan & Dykes, Principles of Civil Jurisdiction, p. 160.
[33] *Jack* v. *Jack* (1862) 24 D. 467.
[34] *Pitt* v. *Pitt* (1862) 2 M. (H. L.) 28; *Stavert* v. *Stavert* (1882) 9 R. 519.
[35] [1895] A. C. 517.

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doctrine as impracticable. Within a few years of this decision the Scottish Courts had adopted the English doctrine.[36]

That doctrine has also been adopted in the units of the British Empire outside the United Kingdom in which *divorce a vinculo* is a possible remedy,[37] though a statutory modification enables persons domiciled in England to obtain divorces in India on the ground of their residence there.[38]

So also, the rule that on the surface at any rate is firmly established in the United States is, to quote an Idaho judge, 'that the law of the place of the actual *bona fide* domicil of the parties gives jurisdiction to the proper Courts to decree a divorce for any cause allowed by the local law'.[39] There appear, however, to be two wide divergences between the American and the English doctrines.

First, not only must the parties have established their domicil, *i.e.*, their permanent home in the State where the proceedings are instituted, but in addition at least one of them must have actually resided there for a fixed period immediately preceding the suit. The periods vary from six weeks in Nevada to three years in Connecticut.

The second American departure from the English doctrine is that either party may acquire a domicil separate from that of the other, and, having done so, may obtain a divorce from the Courts of this separate domicil. This raises the pretty problem of Private International Law whether a divorce obtained in the domicil of one of the parties only is to be recognized as valid in the domicil of the other? It might be urged with some force that a State can alter the status only of persons domiciled within its territory, so that, for instance, a petitioner wife will become a single woman in her domicil, but the husband will remain a husband in his. Another way of putting it is this : The marriage status is regarded by the law as a *res* situated in the country of the domicil. What, then, happens to this *res* when the wife obtains a separate domicil? Does she leave it behind, does she take half with her, or does she become a sort of tenant by entirety of it with her husband?[40] One answer has been that half goes with her, so that only her half is destroyed by the divorce and her husband remains a husband. But, as one commentator has asked, 'who is the wife of this married man?'[41] and small wonder is it, that an irritated judge inquired whether one of the Siamese twins can be severed from the other without the other being severed from that one.[42] However, there is no longer any controversy. The recent decision of the Supreme Court in *Williams and Hendrix* v. *North Carolina*,[43] demonstrates the solution that has been reached, and illustrates the two divergences of American law from the English doctrine.

[36] *Mandesson* v. *Sutherland* (1899) 1 F. 621. On the whole subject, see Duncan and Dykes, *op. cit.* pp. 161–6.
[37] Jurisdiction and Recognition in Divorce and Nullity Decrees, edited by W. Latey, p. 26.
[38] Indian and Colonial Divorce Jurisdiction Act, 1926, which had been extended to Kenya and the Straits Settlements.
[39] *Stewart* v. *Stewart* (1919) 32 Idaho 180.
[40] Vreeland, Validity of Foreign Divorces, p. 28, cited 28 Iowa Law Review, p. 203.
[41] Goodrich, Conflict of Laws, p. 292.
[42] Judge Carter in *Dunham* v. *Dunham*, 162 Ill. 589, commenting upon the statement that one State cannot affect a *res* situated in another State.
[43] (1942) 63 Sup. Ct. 207.

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Williams married X in North Carolina in 1906 and remained domiciled with her in that State for thirty-four years. He moved to Nevada in May, 1940, and there obtained in August of the same year a divorce from X. There had been no personal service on his wife. Mrs. Hendrix, who had been domiciled with her husband, Y, in North Carolina for twenty years, moved to Nevada in May, 1940, and obtained a divorce from Y on October 4, 1940. There had been no personal service on her husband. Williams married Mrs. Hendrix in Nevada on October 4, and returned with her the same day to North Carolina. Both were indicted in North Carolina for bigamy, and convicted. They appealed to the Supreme Court.

No bigamy has been committed if the Nevada divorce was valid in North Carolina. The American Constitution requires that one State shall give 'full faith and credit' to the judicial decree of another State, provided of course that the latter possessed jurisdiction to issue the decree. The majority of the Supreme Court held that a State is competent to alter the married status of a spouse domiciled within its jurisdiction, even though the other spouse is domiciled in a sister State and does not appear in the proceedings.

At first sight this is a startling decision, since it seems to empower a State, at the instance of a person temporarily within its jurisdiction, to alter the status of a person domiciled within a sister State. The Supreme Court, however, gave its decision upon the hypothesis that each spouse had acquired a *bona fide* domicil in Nevada. The prevailing view, therefore, except in Illinois, has been that the Courts of sister States in the Union are not obliged to recognize the decree of divorce if they find as a fact that the petitioner was not domiciled in the granting State.[44] This view has now been confirmed by the Supreme Court itself. Williams and Hendrix were re-tried for bigamy in North Carolina, and, upon it being found by the jury that neither of them had acquired a domicil in Nevada, were again convicted. Upon appeal to the Supreme Court this conviction was upheld by a bare majority of four to three.[45] 'North Carolina was entitled to find, as she did, that they did not acquire domicils in Nevada, and that the Nevada Court was therefore without power to liberate the petitioners from amenability to the laws of North Carolina governing domestic relations.'[46]

What emerges from this litigation is that the States which are competitors in the migratory divorce business, such as Nevada, Idaho, Kansas and Florida, subscribe outwardly to the principle of domicil but in practice cast it to the four winds. By no stretch of the imagination can it be suggested that the residence in Nevada of either Williams or Hendrix was accompanied for a single moment by the intention to remain there indefinitely. Their residence was obviously and cynically transient. The wonder is that any judge brought up in the common law tradition can be persuaded to grant a divorce in such circumstances. No doubt the rule requiring a fixed period of residence is partly to blame. Once proof has been given of the necessary residence, the Courts apparently show no

[44] *Esenwein* v. *Esenwein* (Pa. 1944) 35 A. 2d. 335; *Bowditch* v. *Bowditch*, 314 Mass. 410, 50 N. E. 2d. 65 (1943); *Hooker* v. *Hooker*, 130 Conn. 41, 32 A 2d. 68 (1943); *Wolff* v. *Wolff* (N.J. Ch. 1943) 34 A 2d. 150; *Re Bingham's Will*, 265 App. Div. 463, 39 N.Y.S. 2d. 756 (1943).

[45] *Williams and Hendrix* v. *N. Carolina* (*No.* 2) [1945] S. C.

[46] *Ibid. per* Frankfurter J.

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inclination to consider the issue of domicil unless it is raised *ab extra*. Of this there is little chance. In the majority of cases the proceedings are collusive, the vital statement on the record that the petitioner intends to establish a home in the forum is allowed to pass unchallenged, and the decree follows as a matter of course. Thus, in some States at least, residence supplants domicil as the test of divorce jurisdiction.

It is important to appreciate what the effect is in England of a divorce obtained in, say, Nevada, upon a residence falling short of domicil. This depends upon the place where the husband is domiciled.

If he is domiciled in another State in the Union, English law, applying the rule in *Armitage* v. *Att.-Gen.*, adopts the view that the law of that State takes of the matter. A Nevada decree is valid or void in England according as it is valid or void in the domicil of the husband. The practical difficulty here is that only a hypothetical answer can be given to this question, for everything turns upon the view that a jury would take if required to determine the petitioner's domicil in the forum of the divorce.

If the husband is domiciled in England or in some other country where domicil is the test of jurisdiction, the divorce is invalid. If he is domiciled in some country where nationality is the test of divorce jurisdiction, the decree will be valid in England if its validity is recognized by the *lex patriae*.

Having seen the nature of the common law doctrine and the area of its operation, it is now necessary to compare the Continental approach to the subject. It is generally said that most Continental countries submit divorce to the national law of the spouses, but this, as we shall see, though substantially true with regard to choice of law, does not accurately represent the jurisdictional practice.[47] The three questions that merit attention are these:

When will a foreign Court assume jurisdiction in divorce?
What system of law does the Court apply if it assumes jurisdiction?
When will a foreign Court recognize a divorce obtained in England as being the country of domicil?

1. *When will a foreign Court assume jurisdiction in divorce?*

The ineluctable nature of the English doctrine stands out in vivid contrast with the Continental practice which follows no single principle, but admits that nationality, or domicil or even something less than domicil, may suffice to found divorce jurisdiction. Generally, indeed, a Court is prepared to assume jurisdiction on alternative grounds, such as nationality or domicil. The countries may be roughly divided into three groups.

First, the majority of countries, including France, Germany, Switzerland, Denmark and Sweden, allow their nationals to take proceedings in the national Courts even though domiciled elsewhere, and regardless of the fact that the divorce may not be recognized in the country of the domicil.

[47] Except where otherwise stated, I have relied upon Jurisdiction and Recognition in Divorce and Nullity Decrees, edited by William Latey. This consists of answers given by foreign jurists to questions formulated at the Oxford Session of the International Law Association, 1932.

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Secondly, there are several countries in which jurisdiction will be assumed on the ground of domicil, or upon something very similar to the English conception of domicil. The nearest approach to the English rule is found in Belgium and Switzerland. In Belgium the Courts have jurisdiction over foreigners as well as over nationals if the husband is domiciled in Belgium. The Swiss Code provides that a foreigner may petition for divorce in the place where he is domiciled in Switzerland;[48] while the Danish Courts are competent if the respondent is domiciled in Denmark. In France such idolatrous respect has been shown for nationality that for a long time the Courts refused to entertain suits for divorce by aliens, but in the last fifty years they have assumed a facultative jurisdiction whenever it is clear that relief is unobtainable elsewhere. Considerable latitude is left to the judge. He will be more ready to act if the marriage was solemnized in France, or if both parties have submitted to the jurisdiction, but in all cases he will require proof of something more than temporary residence in France, and even so will not grant relief if the respondent proves that there is a foreign domicil where proceedings may be instituted.[49] These rules obtaining in France, Denmark and Switzerland are certainly less stringent than the English doctrine, especially as there is no exact correspondence between the English and foreign conception of domicil, but their application is unlikely to produce many decrees that will be denied effect in England.

But thirdly, the Courts of certain countries assume jurisdiction on grounds that fall so far short of domicil that their decrees cannot possibly command recognition in England. Chief among these is Holland, whose Courts are competent if the husband has his principal place of residence, or, failing this, his actual place of residence, in Holland. These expressions are admittedly vague and lacking in precision, but it is generally agreed that they envisage a residence which does not necessarily constitute domicil. Again, in Czecho-Slovakia, jurisdiction exists if the last joint domicil of the parties was in that country. If, for instance, the husband, after being domiciled in Czecho-Slovakia, obtains a new domicil elsewhere, his wife, if she does not follow him, may obtain a divorce in the Czech Court. Sweden has departed even further from the English doctrine, for the divorce jurisdiction of its Courts is exercisable if the respondent is living in Sweden.

It is clear, then, that there are many Continental decrees which are necessarily invalid in England, because they are based, either on the mere nationality of one or both of the parties, or upon a residence that falls short of domicil.

2. *What system of law does the Court apply if it assumes jurisdiction?*

Until something more than a century ago the entire Continent accepted Savigny's view that the *lex fori* must exclusively be applied in a suit for divorce. This view has now been almost totally abandoned and has been replaced by what may be called the doctrine of cumulation or of coalescence, dependent upon a synthetical process which incorporates both the *lex fori* and the national law of the parties. Each of these laws must admit the possibility of divorce, each must admit the cause upon which

[48] La loi Federale of June 23, 1891, 7 h.
[49] Arminjon, Precis de Droit International Privé, Vol. III, p. 28; Surville, Cours Elementaire de Droit International Privé, pp. 439–40.

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the petitioner relies. This principle was adopted by the Hague Convention of 1902 which was originally signed by thirteen Continental States.[50] It does not operate, of course, in those countries where the doctrine of *renvoi* is accepted. A French Court, for instance, if petitioned to divorce two British subjects domiciled in France, will find that English law refers the matter to French law. The Court will therefore accept this reference and will exclusively apply its own system of domestic law.

3. *When will a foreign Court recognize a divorce obtained in England as being the country of domicil?*

There is little that need be said about this. If the parties are British subjects, there is general agreement that a divorce granted in the British territory to which the parties belong, is valid in all other countries. If one of the parties is not a British subject, the most general rule is that the divorce will not be recognized unless, in accordance with the doctrine of cumulation, it is granted for a cause good by the national law. The outstanding exception is Swiss law, which is content that the cause is good by the *lex fori* alone.[51]

The most pervading feature then, of Continental law, in the sphere both of jurisdiction and of choice of law, is the preponderance of nationality over other factors. England stands for domicil, generally speaking the Continent stands for nationality. This conflict inevitably creates that unfortunate situation in which persons divorced in one country are regarded in another as still married. The question, therefore, naturally arises whether domicil should be discarded as the English test, or, if not discarded, should be modified. To reach a decision on this it is first necessary to compare the respective merits of nationality and domicil.

The English preference for domicil is based upon practical and realistic grounds. As properly and originally understood, the country of the domicil means the country in which the husband has established his permanent matrimonial home and the centre of his married life. This fixes the community which he has elected to join. 'That', said Brett L.J., 'is the community in which he is living at home with intent that among or in it should be the home of his married life.'[52] What more appropriate forum can be found for the determination of any question affecting the status of the parties? This is the place where they would naturally expect their matrimonial differences to be composed, where the settlement of their status is of the greatest public concern, and where the most effective decree can be given. If it could be assumed that the place where the parties have established their home always represented their domicil, the English doctrine that domicil governs divorce would scarcely be open to attack. Unfortunately, however, such assumption is no longer possible. There are at least three reasons for this.

The first is the technical doctrine that the domicil of origin revives upon the abandonment of a domicil of choice. If, for instance, a married couple, whose domicil of origin is English, have had a domicil of choice in France for the greater part of their lives, but have now abandoned that country for good with the intention of settling in some country other

[50] It was later denounced by five countries—France, Belgium, Switzerland, Sweden and Germany.
[51] Federal Law of June 25, 1891, 7 g.
[52] *Niboyet* v. *Niboyet* (1878) 4 P. D. at p. 13.

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than England, the rule is that their English domicil of origin revives until they have established their new home. In the meantime, therefore, the English Court administering English law can alone grant them a divorce, despite the fact that they may have left England many years ago and may never intend to return. In fact, the doctrine of revival may ascribe to a man a domicil in a country in which he has never been present. He may, for instance, be born in Calcutta with an English domicil of origin by reason of the fact that his father, a business man resident in India, is domiciled in England. If twenty-two years later he acquires, and retains for thirty years, a domicil in France, but then abandons that country with intent to find a new home on the Continent, he temporarily becomes subject to English law.

Secondly, the Courts have taken the view that even a prolonged residence in a country will not give a man a domicil there if his apparent intention is ultimately to return to the country from which he originally came.[53] Thus, if an English business man goes to Brazil in his youth, and later marries and buys a ranch upon which he lives with his family, his sanguine expectation of a return to England when he has made his fortune is sufficient to prevent his acquisition of a Brazilian domicil.

Thirdly, the Courts in recent years have insisted that the domicil of origin is more enduring than a domicil of choice, and that it cannot be shaken off unless the intention to abandon it is supported by almost overwhelming evidence. Thus, in one case, a Glasgow man with a Scottish domicil of origin came to Liverpool in 1890, saying that he would never set foot in Glasgow again, an intelligible resolution which he in fact carried out. He lived in Liverpool for the last thirty-seven years of his life, but was nevertheless held to have died domiciled in Scotland.[54]

A further defect in the English doctrine is that the ascertainment of a man's domicil depends to a somewhat exaggerated extent upon the ascertainment of his intention, that most elusive of all factors. One result of this is that only too often a practitioner finds himself unable to express an assured opinion upon the place of domicil, for the evidence adduced in this type of case generally ranges over a wide field, and one of the imponderables is to predict its effect upon the Court.

These imperfections suggest the inquiry whether there is anything to commend nationality as the appropriate test for questions of divorce. As is well known, its claims have been most loudly voiced by the Italian School. The vital feature of any legal system, it is said, is that it is a manifestation of personality, or, in other words, of nationality. Any legal rule which expresses this nationality, such as one fixing the age of majority, and which has therefore taken into account the physical and racial characteristics of the nationals and such factors as the climate and temperature in which they live, ought to govern them throughout their lives and throughout their wanderings. Divorce is alien to the Italian temperament, and therefore it is in the nature of things that a Neapolitan who moves to the more stimulating climate of Alaska and settles there for life should remain tied to his American wife. This enthusiastic romanticism, suitable to a people struggling to attain its national freedom, is not practical politics in the world of to-day. Neither are these

[53] *Jopp* v. *Wood* (1865) 4 De G. J. & S. 616; *Winans* v. *Att.-Gen.* [1904] A. C. 287.
[54] *Ramsay* v. *Liverpool Royal Infirmary* [1930] A. C. 588.

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theorists altogether consistent, for if their premise is correct, surely the conclusion ought to be, once a national always a national. Yet they admit that their doctrine gives way to a change of nationality, which in some cases is a comparatively quick process, but not to a change of domicil, fortified though this may be by a lifetime's residence in the new country. Moreover, if nationality determines status, a matrimonial remedy unknown to the national law should not be administered anywhere. Yet Italian Courts grant judicial separation affecting both personal and proprietary rights, though such a limited divorce may not be recognized in the country to which the parties belong. But, however unsound the idolatry of nationality may be, the fact remains that it has gained strength during recent years, mainly perhaps because of the desire of the emigration countries to secure for the fatherland the foreign acquisitions of their nationals.

Moreover, the submission of divorce questions to national law would cause great complexity in cases where the country of nationality comprises different systems of municipal law, as is true of the British Empire and the U.S.A. The expression 'national law' when applied to a British subject is meaningless. It is one system in England, another in Scotland, another in Queensland and so on. In such a case it becomes necessary to fall back upon domicil in order to determine the applicable law, a solution which in other departments of law has led to fantastic results.[55]

As compared with domicil one undoubted merit of nationality is that it is easily ascertainable. This, however, is offset by the fact that, while in the English view the parties can possess only one domicil, they may have, and often do have, different nationalities. This has caused complications. The position in French Private International Law, for instance, seems to be this:[56] If the parties, whether French or alien, have different nationalities from the time of their marriage, the juristic view is that the husband's law should govern, since the wife ought to realize when she marries that his law will govern the effects and duration of the marriage. But the juridical solution is that the national law of either party is operative. Thus, if a Frenchwoman marries an Italian and retains her nationality, as she is now permitted to do, she can obtain a divorce in France though this remedy is not recognized by Italian law. This solution is also applied where one of the parties acquires a separate nationality after the marriage. In the well-known *Ferrari Case*,[57] A Frenchwoman became an Italian national upon her marriage to the Count of Ferrari. After being judicially separated in Italy, she recovered her French nationality and obtained a divorce in the French Court, despite the fact that the unfortunate Count would continue in the eye of Italian law to possess the status of a married man until his French divorced wife should die. The Hague Convention of 1902 attempted to unravel this tangle by providing that in the event of different nationalities the law of the last common nationality should prevail. To meet the case where there has never been a law common to both, the unratified Conference of 1928 proposed that both laws should be applied cumulatively, a solution which, with the inclusion of the *lex fori*, might involve the consideration of three

[55] Cp. *Re O'Keefe* [1940] Ch. 124.
[56] Arminjon, *op. cit.* Vol. III, paras. 39–40; Surville, *op. cit* paras. 301–3; 28 Iowa Law Journal, pp. 319–20.
[57] Clunet (1922) 714.

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legal systems.[58] The complication caused by the parties possessing different nationalities arises equally under the American doctrine by which they may have different domicils, but a far more serious complication, and one from which both the English and American systems are free, arises where either party has a dual nationality, or perhaps no nationality at all.

On the whole, then, it is difficult to resist the conclusion that both on theoretical and on practical grounds, domicil provides a sounder test than nationality for determining the personal law. This, however, is not to say that the disregard of nationality by English law ought to be maintained. It is unthinkable that the doctrine of domicil should be discarded in favour of the nationality doctrine, but this does not rule out the possibility of amending English law so as to permit at least a limited effect to the factor of nationality. If to do so would extend even in a modest degree the extra-territorial recognition of divorce decrees and would diminish the number of cases in which parties are regarded as married in one country but unmarried in another, it could scarcely be denounced as subversive. Of course, the only sure way of improving the present position is to secure international agreement on the lines of the Hague Congresses, but this will no doubt be outside the realm of practical politics for at least a generation. A spirit of give and take, a readiness to compromise—those essentials to any freely negotiated agreement—will probably be conspicuous for their absence until the bitterness engendered by two wars has had time to disappear. The only practical solution is to attempt by legislation to reduce the number of cases in which hardship is caused. The need for this may not seize the popular imagination, but it will at least do no harm to suggest a possible line of action. There are three problems to consider :—

The deserted wife.

The English refusal to recognize a decree of divorce unless it is obtained in the country of the husband's domicil.

The non-recognition by certain foreign countries of English decrees.

A. *The deserted wife.*

This is the most urgent of the three problems. The doctrine that the wife takes the domicil of the husband rests upon the basis that it is her duty to accompany him wherever he may establish the matrimonial home, but, as Phillimore said over sixty years ago, this basis is destroyed if he commits an offence which renders cohabitation morally, and perhaps physically, impossible. In such an event it is almost axiomatic that for the purpose of obtaining justice, for the purpose of securing to her a practicable remedy for an obvious wrong, she should if necessary be able to establish a separate forensic domicil.[59] Otherwise, the husband will be free to take advantage of his own wrong. This has been the view taken by many countries. In at least six Continental countries,[60] in each of the States of Australia, in Natal,[61] in those Provinces of Canada where divorce

[58] 28 Iowa Law Journal, p. 214.

[59] Commentaries on International Law, Vol. IV, p. 326.

[60] Czecho-Slovakia, Denmark, Holland, Hungary, Sweden, Switzerland.

[61] See also the Matrimonial Causes Act, 1939 (South Africa), by which a wife may sue for divorce etc. in the Province where she has been ordinarily resident for one year immediately preceding the date of the action, provided that at that date the husband is domiciled in the Union.

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is recognized and in the United States of America, a wife is allowed to possess a separate domicil for the purpose of obtaining matrimonial relief. In the United States this privilege is not confined to a deserted wife, nor is it in certain Continental countries.[62]

Broadly speaking, there appear to be two systems. In one, followed for example in Sweden and the U.S.A., the wife is allowed either to acquire a fresh domicil at will, or, upon the acquisition of a fresh domicil by the deserting husband, to retain that which she possessed immediately before the desertion. The other system allows only the retention of the pre-desertion domicil. Thus, the Tasmanian Act of 1919, which typifies the statutes found in the other Australian States with the exception of Western Australia, runs as follows :—

> 'A deserted wife domiciled in Tasmania at the time of desertion shall be deemed for the purposes of the Act to have retained her Tasmanian domicil, notwithstanding her husband may have, since the desertion, acquired a foreign domicil.'

In Western Australia, on the other hand, a husband guilty of desertion is deemed to have retained his Western Australian domicil. This seems to be an innovation of doubtful wisdom, for if a deserting husband were to acquire a domicil in, say England, and he or his wife were to obtain a divorce from the English Court, the decree presumably would not be valid in Western Australia, since, according to the law of that State, the husband would be regarded as still domiciled there. The Canadian legislation conforms to the general pattern, since it requires that the husband, prior to his desertion, should have been domiciled in the Province where the wife takes proceedings.[63] The rule in Natal is that if a spouse has resided in that Province for four years and has been deserted there for an uninterrupted period of eighteen months, a suit for divorce shall not be defeated by any change in the domicil of the deserting spouse.[64]

The salient features, therefore, of the English and Dominion legislation, are that the wife must sue for divorce in the country where she has been deserted, and must prove that her husband was domiciled there at the time of his desertion. The one exception to this latter requirement is the English Matrimonial Causes Act, 1944, which as we have seen is a merely temporary measure. This insistence that the time of desertion should determine the domicil seems to be an unnecessary limitation. The paramount aim of each State is to protect its own subjects by affording a remedy for a deserted wife, and this aim will not be fully attained unless account is also taken of the wife's domicil at the time of marriage. The present legislation is limited to the rather unusual case where the husband, domiciled in England, deserts his wife and then acquires another domicil. But what so frequently happens is that a foreigner domiciled abroad, marries an Englishwoman in England, lives with her there for a short time and then returns alone to his own country. In these circumstances the wife is remediless in England. Again, even if a deserting foreigner has cohabited with his wife in England for a considerable time, it may be very doubtful whether he ever acquired an English domicil. Thus, it would seem that the English domicil of the woman at the time of her

[62] *E.g.* Switzerland, where the wife can acquire a separate domicil if she is 'entitled to live apart from her husband', Federal Law of June 25, 1891, s. 25.

[63] Dominion Act, 1930, c. 15.

[64] Law No. 18 of 1891; Pollak, The South African Law of Jurisdiction, pp. 169–70.

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marriage is a factor that should not be overlooked, and it is submitted that a new enactment might profitably be passed to the following effect :—

> Any wife who is deserted by her husband, and who was domiciled in England either immediately before her marriage or immediately before desertion, shall be entitled to petition for divorce in England.

Another matter requiring statutory intervention is the validation in England of decrees of divorce granted to deserted wives under the existing Dominion legislation. Suppose, for instance, that a husband, domiciled in Tasmania, deserts his wife and acquires a fresh domicil in Ceylon. As the law stands at present, it seems that, unless the principle of *Armitage* v. *Att.-Gen.* applies, a divorce obtained by the wife under the Tasmanian statute cited above will not be regarded as valid in England, since it was not granted in the domicil of the husband.

B. *The English refusal to recognize a decree of divorce unless it is obtained in the country of the husband's domicil.*

As we have seen, the main reason why certain foreign divorces are regarded as invalid by English law is that they have been granted by the national Court of one or both of the parties which does not happen to be the Court of the husband's domicil. English lawyers are convinced that the sounder basis of divorce jurisdiction is domicil, not nationality, but a large part of mankind holds a different view, and if the widest possible recognition of the unmarried status of divorced persons is in the general interest, as surely it is, then to limit this recognition by an obstinate and unyielding adherence to a legal doctrine, however sound, is a policy that has little to commend it. The injustice, we might almost say the absurdity, of the present position is only too apparent.

> A Danish national marries an Englishwoman and acquires a domicil either in England or in some country other than Denmark. He later obtains a divorce from the Danish Court.

If we compare the husband and wife so far as their freedom of action is concerned, we shall see how the scales are weighted against the latter. The status of the husband as a single man and his freedom to remarry will be regarded as unquestionable, not only in Denmark but also in most other Continental countries. It is true that English law regards him as a married person and is prepared to treat him as a bigamist should he remarry, but this need cause him little concern if he is discreet in his movements. How much more melancholy is the future of the wife. In England, to which country she will in all probability return, she is still regarded as a married person. If she remarries and is fortunate enough to escape prosecution for bigamy, the children of her second marriage may ultimately suffer from the fact that they are illegitimate. Of course, if the case of the deserted wife is solved by statute she could in our hypothetical case no doubt obtain a divorce in England, but it would be better to save her the trouble and expense of this if a reasonable method of recognizing the Danish decree can be found. If the case is reversed by supposing that a domiciled Englishman is divorced by his Danish wife in her national Court, it is true that English divorce proceedings are available to him, but here again it seems useless that he should be put to this trouble. It is, therefore, submitted that inconvenience would be diminished and no

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obvious harm caused by an enactment providing that a foreign decree of divorce, granted in accordance with the *lex fori* by the Court of the country of which the parties are nationals, shall be regarded as valid in England.

Professor Gutteridge suggested some years ago that an international agreement to this effect should be made. He proposed, to cite his own words, 'that the concurrent jurisdiction of the Courts of the nationality and the domicil should be recognized, not only in the strict sense of the word, as meaning competence to adjudicate, but in an effective sense, as power to adjudicate in accordance with the *lex fori*'.[65] The present suggestion is that this concurrent jurisdiction should be unilaterally recognized by England. If this were done provision would have to be made for the case wherein each party is of different nationality. Would it be better to adopt the simple rule that the husband's nationality alone shall be considered, or to follow the French rule by which the national law of each party is of equal competence? The latter choice might produce a result which at first sight seems preposterous.

> A male British subject, domiciled in England, marries a United States citizen, domiciled in Illinois, who retains her nationality. She resides for six weeks in Nevada, obtains a divorce there and resumes her permanent residence in Illinois. The decree, as we have seen, may be recognized as valid in Illinois, but owing to her English domicil it is, of course, invalid by the existing English law. The adoption of the French doctrine would perhaps oblige English law to recognize the divorce under the suggested enactment, on the ground that the decree was given by the national Court applying the national law.

Is such a result preposterous? On the one hand, there is not much to be said for a law which allows a domiciled Englishman to be divorced for a cause which is regarded in England as totally inadequate, perhaps even outrageous. Moreover, unless a further safeguard were provided, it might enable the English domiciled husband to take advantage of the more amenable national law of his wife, and there secure a divorce that would not be granted in England. On the other hand, there is much to be said for facing realities, which in the supposed case are that the wife, so far as her own future is concerned, has effectually ceased to be the wife of that husband. It is only the husband who is forced to lead an unreal existence until he takes the necessary proceedings in the country of his domicil. However, although the question is one for the sociologist, rather than for the lawyer, it would probably be better to enact the simple rule that the husband's nationality alone shall be considered. This scarcely seems one of those cases in which the demand of sex equality is impressive.

C. *The non-recognition by certain foreign countries of English decrees.*

If one of their own nationals is a party to the suit, the Courts of most Continental countries repudiate an English decree of divorce, unless, in accordance with the doctrine of cumulation, it has been granted for a cause that is sufficient by the national law of the foreigner. The obstacle to recognition, in other words, is not want of jurisdiction, but the wrong choice of law. For example :—

> A Frenchman, domiciled in England, marries an Englishwoman,

[65] 19 B. Y. B. I. L. p. 38.

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and later obtains a divorce from the English Court on the ground of his wife's insanity. French law regards the divorce as invalid, since it denies that insanity is a sufficient cause for the dissolution of a marriage.

This withholding of recognition is probably not serious in practice. It causes no excessive hardship to British subjects, for, to take the example just given, the wife possesses the status of a single person in the eye of English law, and the fact that she is regarded by French law as still married is normally not a matter of serious moment. Again, where the wife is the foreign party, she will not always retain her foreign nationality. Furthermore, the conflict between the country of nationality and of domicil will not frequently occur, since in most cases the cause for which the English decree was granted will probably be recognized as sufficient by the foreign law.

Nevertheless, if the law were altered with regard to the English recognition of foreign decrees, it might also be advisable to require an English judge to ensure that his decree will have extra-territorial effect. The obvious corrective is to adopt the doctrine of cumulation. If the most important Continental legal systems are examined in order to ascertain whether they recognize a foreign divorce of their own nationals, and if Hungary which refuses recognition in all cases, and Italy and Spain where divorce is unknown, are ruled out, it will be found that foreign decrees based on domicil are recognized, provided, however, in every case, except Switzerland and possibly Denmark, that the reason for the divorce is a valid cause by the national law. All that would be required, therefore, to make the position more satisfactory would be a short section providing that, where the husband is the national of a country which does not recognize divorces granted in the domicil according to the *lex fori*, his marriage shall not be dissolved unless the cause for divorce is a valid cause both by English law and by the national law of the husband. If this alteration in the law were made, and if the English Court were required in accordance with the second suggestion to recognize decrees granted by the national Court, the effect where a foreigner married an Englishwoman would be to give the parties an option—they could obtain a divorce either in the Court of foreign nationality according to the *lex fori*, or in the English Court according to the *lex fori* and the law of nationality.

The question remains whether it would be wise to replace domicil by residence with the view of securing more uniformity in the recognition of divorce decrees. Two distinguished jurists have suggested that an international agreement on this basis would be helpful. Professor Gutteridge proposes :—

> 'That for the purpose of establishing the existence of competence in suits for divorce or separation the existing definitions of the term "domicil" should be ignored, and that habitual residence within the territory of the Court for a fixed period should be required in the case of spouses of foreign nationality who resort to the Courts of their domicil. The period required should be such as will suffice to prevent the possibility of migration from one country to another with the object of establishing a domicil.' [66]

[66] 19 B. Y. B. I. L. p. 38.

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Dr. Rabel, after denying that the Continental principle of nationality offers a solution, says :—

> 'Reforms can consist of a very simple development. The requirement of a minimum residence time is to-day the chief vehicle for correcting the scope of divorce jurisdiction.' [67]

These two suggestions are apparently divergent. Professor Gutteridge's view seems to be that, not domicil alone, but domicil reinforced by actual presence for a fixed period, shall found jurisdiction in divorce. It is submitted with the greatest respect that to qualify in this way the basic principle of domicil would be a retrograde development. This principle rests upon the most substantial and solid of grounds, that it is the place where the family has its roots and its real permanent home,[68] which fixes the venue for the administration of matrimonial remedies. If domicil—domicil in its real sense, not in its Nevada variety—is the sound test, why discredit it by requiring an additional and superflous element? It does not necessarily follow that a country has ceased to be the permanent home of married parties merely because they have resided elsewhere for the last three years. If two professors, one from Oxford and the other from Harvard, exchange appointments for three years, there is no reason why either should be precluded from obtaining a divorce in his domicil.

If Dr. Rabel's proposal, on the other hand, is that residence for a fixed period should alone suffice to found jurisdiction, it is open to the objection that it discards the claim of a country to regulate the status of persons living permanently within the territory. Would it, for instance, be either expedient or seemly that divorce proceedings should be available in Massachusetts to the Oxford professor at the end of his visit to Harvard? Temporary residence is an unsatisfactory test of competence to adjudicate a question of permanent status. Again, what are the criteria of residence? Does the possession of a dwelling-house constitute residence? Is a place of business sufficient? What if a man divides his time between dwelling-houses in two countries? These and other similar questions would tend to raise difficult problems.

Dr. Gutteridge's suggestion is that domicil without recent residence should not suffice for jurisdiction in divorce; Dr. Rabel's, that residence for a fixed period independently of domicil should suffice and that in this case the *lex fori* should be the appropriate law. It is submitted that a far more satisfactory solution is that suggested by Professor Cook.[69] His proposal, in effect, centres upon the distinction between jurisdiction and choice of law. There is no obvious objection to a divorce being obtainable in the country of residence; what is objectionable is that a divorce should be granted there for a cause not recognized by the personal law of the parties. The essential consideration is the alleged matrimonial offence, not the Court in which the offence is proved. Proof of adultery ought to be the same all the world over. That an English wife, after a few weeks' residence in Nevada, should be able to obtain a divorce there on the ground of her husband's moody taciturnity, which seems to have been the gravamen of Mrs. Hendrix's complaint, would indeed be intolerable; but even the most scrupulous of moralists could scarcely nurture a grievance if the English wife were allowed to obtain from the Nevada Court a divorce

[67] 28 Iowa Law Review, p. 223.
[68] See *per* Jackson J. in *Williams and Hendrix* v. *N. Carolina* (1942) 63 Sup. Ct. 207.
[69] The Logical and Legal Bases of the Conflict of Laws, pp. 457–68

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upon grounds recognized by her English *lex domicilii*, provided, of course, that her husband was personally cited. To allow this would not be to flout the claims or to subvert the social policy of the country of domicil. It would merely give the parties an alternative place where the machinery for enforcing the *lex domicilii* could be put in motion. The one necessary qualification is that both parties should be personally amenable to the jurisdiction of the Court, *i.e.*, in effect that the respondent should be served personally in the country where the proceedings are instituted. It is submitted, therefore, that an enactment to the following effect would innocuously extend the international validity of divorces :—

> A decree of divorce granted to parties by a Court of the country where they are resident shall be recognized as valid in England, provided that the cause for which the decree was granted is sufficient by the personal law, and provided that both parties were personally subject to the jurisdiction of the Court.

This suggestion, if adopted, would remove the necessity for a re-definition of domicil, an almost insuperably difficult task. The chief anomaly of the present English doctrine is that a man is not regarded as domiciled in the country where he has long resided if he harbours a vague intention of returning to his place of origin upon the occurrence of a contingency at some indeterminate date in the future, but this rule would cease to encumber the sensible administration of divorce law if residence were made an alternative basis of jurisdiction.

By way of summary it may be useful to show in tabular form what the state of the law would be if the suggestions made in this article were adopted.

I. DIVORCES IN ENGLISH COURTS.

Jurisdiction.	*Choice of Law.*
(1) Husband domiciled in England.	English law.
(2) Deserted wife who was domiciled in England immediately before marriage or immediately before desertion.	English law.
(3) Husband a foreign national, but domiciled in England.	English law and the national law.
(4) Parties resident but not domiciled in England.	English law and personal law.

II. RECOGNITION OF FOREIGN DECREES.

Jurisdiction.	*Choice of Law.*
(1) Husband domiciled in the foreign country.	*lex fori.*
(2) Husband a national of country where decree given.	*lex fori.*
(3) Parties resident, but not domiciled, in the foreign country.	*lex fori* and personal law.

G. C. CHESHIRE.

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AFTER-CONDUCT OF DISCHARGED OFFENDERS.

FROM every quarter session, from every assize, comes the same story. In dreary procession, lads and young men file through the dock, most of them charged with breaking and entering shops, warehouses and dwellings, and stealing therein goods, sometimes of great and sometimes of trifling value. The great bulk of them plead guilty, and the special calendar reveals that most of them have graduated through all the degrees open to the juvenile criminal, such as dismissal on payment of costs, probation, approved school, Borstal. But even more startling and far more distressing are the cases of young fellows from respectable homes, and earning good wages, probably in a reserved occupation, who nevertheless go forth on these errands, in order to get cigarettes or alcohol, or the easy money which comes from selling them.

Then there is that new phenomenon and by-product of conscription—the deserter. Some of these are merely the graduates in crime referred to above, no more able to benefit from military or naval discipline than from the freedom of civil life. Others are those who cannot stand absence from home, and having deserted, find that they cannot live without crime, because they have no ration cards.

It would not be surprising if, after a while, judges who sit and endeavour by probation, Borstal or imprisonment, to deal with this procession, should feel despair creeping over them.

In the past judges have, I believe, been known to make cynical observations on the long and meticulous history of the individual, prepared for the use of the Court by the police, or the probation officer. But one does not hear such observations now. The judge grasps at anything which will enable him, when the day is over, even to hope that he has rescued one young fellow from that downward path which leads through Borstal to penal servitude or preventive detention.

Here, in England, the pressure of war has put an end to those rather formidable collections of figures, the Criminal Statistics for the year. General impressions must therefore take their place; and the result is not reassuring. So nothing but welcome can be extended by lawyers in England to the Department of Criminal Science Faculty of Law, in the University of Cambridge, for calling forth and publishing as the fifth volume in English Studies in Criminal Science, such a book as 'After-Conduct of Discharged Offenders', by Sheldon and Eleanor T. Glueck.[1] Professor Glueck of the Harvard Law School, and his wife as research associate in criminology of the same school, have obvious credentials which distinguish their work from that of mere philanthropists. In a foreword, Mr. Justice Frankfurter, of the Supreme Court of the U.S.A.,

[1] After-Conduct of Discharged Offenders. By Sheldon Glueck, Ph.D., LL.M., Professor of Criminal Law and Criminology, Harvard Law School, and Eleanor T. Glueck, Ed:D., Research Associate in Criminology, Harvard Law School. With a Foreword by Dr. Felix Frankfurter, Justice of the Supreme Court of the United States, and a Preface by Professor P. H. Winfield, K.C., LL.D. (Cantab.), Hon. LL.D. (Harvard), F.B.A., J.P. London: Macmillan & Co. Ltd. xvi and 110 and (index) 4 pp. (8s. 6d. net.)

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describes them as fruitful workers in a resistant vineyard. Professor and Mrs. Glueck have been working in this vineyard since before 1930, when they published the first of five volumes dealing with what happened afterwards to the young men and women who had passed through penal institutions in the U.S.A. The very names of their studies are instructive: Five hundred Criminal Careers (1930); One thousand Juvenile Delinquents (1934); Five hundred Delinquent Women (1934); Later Criminal Careers (1937); Juvenile Delinquents Grown Up (1940); Criminal Careers in Retrospect (1943).

To collect, therefore, in just over one hundred pages, the synopsis of so long and careful a series of studies, is a task calling for judgment and concentration. The material is that provided by one State in the U.S.A., Massachusetts, and accordingly, the authors have to take account of an element which is largely absent in England—Nativity—that is to say, whether the delinquent is the native-born child of foreign-born parents; and also of mobility to a degree quite unknown in this country.

The method of approach is first to study the surroundings of delinquents and criminals. Is there mental disease, or defect in the home? Were they educated? Was there control by either parent or both? Were they the children of foreign-born parents? This last appears to have been a very common feature inducing delinquency both in childhood and in adult stages. Were the parents living together? Were the parents themselves or was the family criminal? Was the family prosperous financially? or living on the brink of poverty? Relative to this, was the father a skilful and so a reasonably well-paid man, or a mere unskilled labourer? What of their houses—are they decent homes or slum dwellings?

To all these questions the answers are what one would expect. Little criminals are generally begotten, born and reared in dirty slum surroundings, and of parents who are biologically and morally poor stuff. It cannot now be said that young criminals are in the main diseased or defective. Still, the inquiries of the authors appear to show that the young criminal is less clever than his honest counterpart. Only one-third of the young criminals were up to normal standards of intelligence; and one in five were mentally defective.

But all this merely explains and accounts for the tragic crop which the police harvest. And the cure for it is not in the hands of judges, however humane, however enthusiastic. The next stage is an inquiry into the effect which the regime imposed in the juvenile Court has on the product when it emerged, and here we have something more nearly concerning the judicial function. The test period taken was a mere five years. But the result was, by itself, sufficient to justify all the expenditure of time, trouble and money incurred. The institutions in question were roughly, it appears, the equivalent of our Borstal institutions. And claims were made and used to be believed that 80 to 90 per cent. of the young persons dealt with were weaned from a life of crime. The authors discovered that on the contrary nearly 90 per cent. were failures. It is not therefore surprising to find that in the States there is a move in the direction of preventing delinquency, rather than of curing it. So far as England is concerned, in the absence of figures one has need to be careful, but I am not afraid to say that, at any rate during the war years, the results of Borstal treatment in this country are hopelessly unsatisfactory,

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at any rate, for boys. And many judges now refrain from sending to Borstal any boy with a good home; and prefer a sentence of say ten months in a prison, in view of the careful classification employed there, and the reduced chances of contamination.

Then comes the question of parole, in principle the same as our probation, or at any rate freedom on licence, that is to say, serving part of the total sentence imposed by the Courts in supervised freedom. Here it is not surprising to find that for three lads who emerged from this parole period without failure, only two got through the next five years without a lapse.

To compare these results with somewhat similar figures in this country, the quarter sessions of the county of Stafford have of recent years pursued a forward policy in the matter of probation and supervision; and not long since decided to look into the results of this policy. Figures were got out covering the period from 1939, and they are kept up to date. They show that thirty-one persons out of forty-four went successfully through periods of two or three years' probation. As regards behaviour since probation, thirty-two are recorded as satisfactory as far as is known, at least one case which failed to get through probation being unsatisfactory after a term at Borstal. The material being collected here is at any rate a beginning, however humble, along the lines indicated by the authors.

But the authors have not contented themselves with this kind of statistic. Their inquiries show the effect of teaching a trade, and of the healthy employment of the hours of recreation. Such things make the law-abiding life more attractive than the law-breaker's life.

The problem provided by the mobility of the criminal classes in the States is one with which we in England are hardly faced at all. In Great Britain neither distance nor the border between England and Scotland or Northern Ireland afford any real difficulty in the way of crime detection or the treatment of criminals, at any rate, so far as the writer of this article can see. South Ireland is another matter.

What of the next ten years after the first five? There is, it appears, a definite tendency to give up crime, or at any rate, serious crime. The drunken become more often drunken. But the criminal tends to give up such crimes as housebreaking, though he may continue to commit offences against the family. He tends to give up associating with other criminals.

Two things emerge plainly. One is the importance of getting the young man who emerges from prison, or its equivalent, into the world, work at adequate pay. Few things are more difficult. There was a certain large borough in the Midlands of England where the Recorder, during the worst days of depression and unemployment between the wars, was accompanied on the bench by the borough justices at quarter sessions. They were not permitted to take any part in the trial: yet when it became a question of what was to be done in the case of a young offender, the Recorder had only to inquire whether employment could be found, to be told that of course it could and would be. As times grew worse, and unemployment more rife, the Recorder was able to reflect ruefully that in order to be perfectly sure of a good job at good pay in that great borough only one thing was necessary—the applicant must have been convicted at quarter sessions, and probably of a felony. Truly they that are whole need not a physician, but they that are sick. Yet what would that Recorder have

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said, faced with a young offender who had taken to crime because, after a blameless life, he had lost a chance of a job through the preference of a young burglar to himself for employment? Nevertheless, this is probably the most important single thing in the whole problem, as the following story will show. A young prisoner, on his discharge, told the Governor of a prison in the Midlands that he had learnt his lesson. And nothing would induce him to commit any more crime. He had been a model prisoner. With the money provided by the Society he bought a small car for his work. But the money would not run to licence or insurance. He resolved to 'chance his yard arm' and took a party to a race meeting. After two or three such jobs he would be able to pay for licence and insurance. His luck was out and he was caught first time. The police did not press the case, knowing all the circumstances. But the justices naturally took a serious view of the case. The result was that the would-be-penitent was back in prison with a substantial sentence, and with all the remission he had earned on his previous sentence still to serve. The former model prisoner was now a rebel, and likely to earn no more remission. The Governor expostulated with him, but in vain. However, the Prison Commissioners were approached by the Governor, and agreed not to cancel the remission of his former sentence. With the sentence itself they could not interfere. When the Governor informed the man of this he broke down, and again became a model prisoner. When he left, the Governor besought him to commit no more follies like the last. That man not merely made good; he repaid every penny found on his discharge. And the last time I heard of him he had sent as much again in money 'to help some other poor devil in the like case'. The happenings in that case cheered that Governor through many failures.

It is not to be wondered at that the Gluecks devote a good deal of attention to this thorny topic of employment for the discharged prisoner. For if those who leave the prison doors can be divided into those who might be rescued from a life of crime, and even want to escape from it, on the one hand, and those whom nothing will keep from crime in the long run, the one essential thing for the former is that they should be able to earn their own livings, and that of their families, as can the vast bulk of society. In point of fact, this ten-year span synchronized largely with the economic depression which swept the United States in an even more severe form than England. In spite of it the authors found increasing stability in the economic status of their cases during the third period of five years, *i.e.*, 1931–2 to 1936–7. More and more men turned their wages over to their wives—generally the men retained during the third period the gains achieved in the second.

So far the collection of knowledge. Next comes the question how it is to be used. The authors are concerned firstly to show the dangers which flow from slackness in the parole system on the part of the supervisors. One interesting discovery was that of eight parole officers whose results were checked, one was substantially more successful than others. And they discovered exactly the same thing in the story of another group. Here is a line of inquiry for those of us who are concerned with probation committees and their works. What was the secret possessed by those two successful officers? Was it due to zeal, sympathy or personality? Can the necessary quality be transmitted from the successful to the unsuccessful?

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This, however, is a matter for the consideration of justices, and particularly those who are responsible for the probation system. What comfort have the authors for judges? They claim that by correlating the make-up and surroundings of different classes of offenders with their reaction to different types of treatment, they can equip the judges with a kind of yard stick. This involves weighing the various elements which, according to the authors, should be considered by the judge, in deciding whether the culprit is likely to respond to parole. Here some rather remarkable results emerge. For instance, the seriousness of the charge appears to make very little difference; on the other hand, the character of the culprit for industrious habits is most potent.

The other thing which emerges clearly is that lack of maturity and failure to grow to full stature in mind and character is the underlying cause of recidivism, so much so that the years from twenty-five to thirty-five seem to the authors the most critical period in the lives of criminals. During this period a number of offenders seem to grow up and pass out of the criminal class.

Many of the inferences drawn by the authors from the analysis of the statistics are matters affecting, not so much judges, as the Home Office and the Prison Commissioners. For they tend to show that the use a man will make of his parole, which corresponds to our remission of sentence, can be predicted with reasonable certainty by reference, not merely to behaviour in reformatory or prison, though this is important, but also to various features of the culprit's career before incarceration, such as his age when the first offence was committed, and his character for industry. Moreover, the authors are extremely critical of those States in the United States where 'parole is little more than an additional device enabling experienced criminals to be incarcerated for shorter periods than the sentences imposed by the Courts through easy manipulation of the too loosely articulated cogs in the machinery of criminal justice'.

One cannot help hoping that those in the Home Office responsible for our penal system will read and take to heart this observation. If the authors are anything like right, the Prison Commissioners may largely be wasting their time in granting remissions to such persons.

The authors do clearly suggest that by the study of material such as they have studied, a judge can be equipped with a prognostic method, enabling him to choose between such persons as he should deal with by probation, institutional or prison treatment.

They claim for their latest study, Criminal Causes in Retrospect, that it shows how to classify offenders according to the treatment to which they are likely to respond. Into their calculation psychiatry comes; but the authors recognize that in Courts which have no psychiatrist to aid them, or consult them only in exceptional cases, some other factor less predictive, but more easily obtainable, might be employed. There is no doubt that there are cases in which our Courts might obtain assistance of this kind from the probation officer, who has supervized the individual concerned.

Inevitably in such a book, the doctrine of responsibility prevailing in our Courts comes under consideration and even under fire. But this review is no place for canvassing the soundness of a criticism which, after all, is only to be found in a footnote. The authors look forward to a time

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when the trial on the question of guilt or innocence having been concluded, the sentence should be dealt with by a tribunal composed of a psychiatrist or psychologist, a sociologist and the trial judge.

If the practice of psychiatry can make a substantial contribution to the prevention of crimes and the cure of criminals, there lies an enormous and unworked field for its employment in the population of our prisons and penal institutions. Till now it lies somewhat under a cloud so far as the English Courts are concerned. From time to time gentlemen are called with somewhat shadowy qualifications to try and persuade judges that well-to-do criminals need not be sent, like their humbler brethren, to prison for serious offences, generally of a sexual nature. It is not thus that the judges of this country are to be persuaded of its efficacy.

If the Governors of our prisons were to be offered *carte blanche* and the fairy's wand, I know, because I have asked most of them, what is the first great change they would all demand. It would be new buildings and facilities, enabling them to draw out and exploit the better side of the prisoners, by affording them the chance of useful work, requiring skill and inducing pride. The 'honour parties' working outside the prison, the employment of prisoners on war work, have introduced a real ray of hope into the prison, without the relaxation of the discipline which is essential. Such reforms may not lend themselves to dramatic appeals, such as are used in connection with corporal punishment. But they would lead somewhere.

In conclusion, English readers with experience of the subject-matter may think that the authors lay too much stress on the curative side of penology, and too little on the deterrent effect of a stern system of punishments, not merely on criminals, but as a background on all of us.

Such readers may also claim that to some extent the judge has a duty to translate into action the righteous indignation which bursts forth from society in the case of certain crimes, such as cruelty to children, the rape of innocent girls, the embezzlement of the savings of the poor. And the authors appear to reck little of this aspect of a judge's duty.

But they do open the door to hope, and they appear to offer solid reasons for the institution of methodical inquiries, which will neither be too difficult nor too costly for a society like ours.

F. J. Wrottesley.

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PRESUMPTIONS AND BURDENS

MUCH confusion is often caused by failing to recognize the different senses in which the words 'presumption' and 'burden' are used. Nearly fifty years ago Professor Thayer of Harvard analysed the position,[1] but his work is little known in this country and the confusion has persisted. Recent cases tend more and more to show that the division of presumptions into presumptions of fact and presumptions of law should be discarded. That division is comparatively modern in English law and should be replaced by a division into provisional presumptions, compelling presumptions, and conclusive presumptions. Burdens should not be left in a heterogeneous mass but should be divided into legal burdens, provisional burdens, and ultimate burdens. Before I criticize the existing position, I propose to state the meaning of the new distinctions.

1. *Legal Burdens.* When the law puts on a party the burden of proving a certain fact in issue as a condition of giving him judgment, that burden never shifts and must be discharged or he will fail. For instance, when the issue is whether the prisoner is guilty of murder; or of receiving; or whether the defendant was negligent; or whether the ship was unseaworthy; or whether the goods were lost without the default of the bailee; or whether the will was the last will of a free and capable testator; the law places the burden of proof on the person who puts forward the proposition. This is the *legal* burden of proving the fact in issue. The incidence of it does not depend on whether the averment is positive or negative, for that can be varied by a change of language. It depends on the rules of substantive law which in this regard are ultimately the expression of public policy, as Professor Stone has recently pointed out.[2]

2. *Provisional Presumptions and Burdens.* In order to discharge a legal burden, the person on whom it lies will often prove relevant facts or rely on presumptions from which he asks the Court to infer the fact in issue which he has to establish in order to succeed. In the instances I have taken he will prove that the prisoner killed a man; or was found in possession of goods recently stolen; or that the thing which caused the accident was under the control of the defendant; or that the ship was lost within a short time of sailing; or that the goods were stolen; or he will rely on the presumption that the testator was of testamentary capacity. Those relevant facts or circumstances are often said to raise a 'presumption' or make a '*prima facie*' case, and so they do in the sense that from them the fact in issue *may* be inferred, but not in the sense that it *must* be inferred unless the contrary is proved. The Court will decline before the end of the case to rule whether the fact in issue should be inferred. It will leave it to the other party to take his own course. He may seek to repel the inference by argument, as by submitting that the facts proved

[1] Preliminary Treatise on Evidence, Chapters 8 and 9.
[2] Professor Stone in 60 L. Q. R. 262.

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only raise a suspicion as distinct from a legitimate inference; or by contradicting the evidence; or by giving evidence of other facts to explain why the fact in issue should not be inferred; or by raising suspicions which counter-balance the presumptions. As the case proceeds the evidence may first weigh in favour of the inference and then against it, thus producing a burden, sometimes apparent, sometimes real, which may shift from one party to the other as the case proceeds or may remain suspended between them. The party on whom it rests must call evidence or take the consequences, which may not necessarily be adverse: for the place where the burden eventually comes to rest does not necessarily decide the issue: because at the end of the case the Court has to decide as a matter of fact whether the inference should be drawn or not. These presumptions and burdens are therefore *provisional* only. It is a mistake to raise these provisional presumptions into propositions having the force of law. They are recognized by the law but their force depends on ordinary good sense rather than on law. They are only guides to the Court in deciding whether to infer the fact in issue or not. The degree of probability needed to establish an inference varies. When considering the guilt of a person accused of an offence of a criminal nature, the Court requires a high degree of probability. It must be satisfied beyond reasonable doubt. On all other issues, whether in civil or criminal cases, the Court is satisfied with a moderate degree of probability. It is sufficient if there is a greater probability on one side or the other; but if at the end of the case the evidence is so evenly balanced that the Court cannot come to a determinate conclusion, the *legal* burden comes into play and requires the Court to reject the inference.

3. *Compelling Presumptions.* It often happens that a party proves facts from which the Court *must* in law draw an inference in his favour unless the other side proves the contrary or proves some other fact which the law recognizes as sufficient to rebut the inference. For instance, once money is proved to have been received by a public servant from a person who is seeking a Government contract, it is deemed to have been received corruptly unless the contrary is proved; or, once a child is proved to have been born in wedlock, it is presumed to be legitimate unless the other side prove non-access or incapacity by the husband; or when two people die at about the same time, the younger is presumed to have survived the elder, unless it is proved that the elder survived the younger. These presumptions differ from provisional presumptions in that they have the compelling force of law; and whereas provisional presumptions give rise to provisional burdens within a single issue, a compelling presumption gives rise to a separate issue on which the *legal* burden is on the other side.

4. *Ultimate Burdens.* Where the ultimate decision of a case depends on the determination of a number of separate issues, the burden on the ultimate issue needs to be distinguished from the burden on the separate issues. For instance, where a holder sues an acceptor of a bill of exchange, the ultimate decision depends on whether he is a holder in due course; or where charterers claim against shipowners for failure to load, the ultimate decision depends on whether the owners broke their contract. At the outset the plaintiff will often content himself by proving facts, or relying on admitted facts, from which the Court *must* in law draw an

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inference which will decide the case in his favour unless the defendant proves some other facts. For instance, the plaintiff will prove that he is the holder of the bill and that the defendant signed it as acceptor: or that the ship did not arrive within the contract time. Those facts are often said to raise a '*presumption*' or make a '*prima facie*' case, and so they do and of a compelling kind, because from them the Court not only *may*, but *must* in law decide the case in favour of the plaintiff unless the defendant makes good a defence such as fraud in the negotiation; or that the contract was frustrated by destruction of the ship. That is a separate issue on which the legal burden is on the defendant. If he discharges it, the Court *must* in law decide the case in favour of the defendant unless the plaintiff makes good a reply such as value in good faith subsequent to the fraud; or that the destruction of the ship was due to the owner's fault. That again is a separate issue and the legal burden of proving it is on the plaintiff. So on, to and fro, the legal burden of proof on each separate issue is on the party who has by law to establish it in order to succeed, and the ultimate decision will depend on which of the parties has in his turn discharged the legal burden resting on him. This shifting to and fro is often described as a shifting of the burden of proof and so it is, but it is a shifting of the *ultimate* burden: and the *compelling* presumption and circumstances, which produce the shift, have the force of law. The burden of proof on each of the separate issues is a legal burden which never shifts.

5. *Conclusive Presumptions.* It is a misuse of language to speak of any presumption being conclusive, but the meaning is clear enough. On proof of certain facts the Court must draw a particular inference, whether true or not, and it cannot be rebutted. For instance, once it appears that a deserting husband has been certified as a lunatic for any part, maybe only a week, of the three years preceding the petition, the Court must find him not guilty of desertion for that period, however strong the evidence of desertion may be for the remainder of the period for which he was sane.

Now let me turn to the existing distinctions.

(1) *Presumptions of Law and Presumptions of Fact.* The distinction is not clearly drawn in the books, but it would appear that presumptions of law are presumptions of general application recognized by the law; whereas presumptions of fact are presumptions from the facts of a particular case. The division is unsatisfactory because the line between them is difficult to draw and it does not connote any difference in the legal effect of the presumptions. On the one hand take the presumption of negligence in cases of *res ipsa loquitur*; and the presumption of unseaworthiness in case of loss shortly after sailing. Both are recognized by the law but they are classed as presumptions of fact and are provisional only. On the other hand, take the presumption that a man intends the probable consequences of his acts; and the presumption of death after seven years' absence. Both are classed as presumptions of law, but they also are provisional only. For instance, when the legal burden is on a party to prove a specific intent, such as an intent to prefer creditors, or an intent to resist arrest, or the intent to injure involved in conspiracy, the presumption that a person intends the probable consequences of his acts may carry little weight; and when a husband has

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deserted his wife for seven years, and she has made no inquiries as to his whereabouts, the fact that she has no reason to believe him to be living within that time may be insufficient to persuade the Court to presume his death. Then again there are some presumptions of law the effect of which appears to vary according to the issue in which they arise. For instance, the presumption of sanity appears to be a compelling presumption in criminal cases where the legal burden is on the accused who pleads insanity to prove it, whereas it appears to be only a provisional presumption in probate cases where the legal burden is on the person who propounds a will to prove sanity; and the presumption of innocence appears to be a compelling presumption in criminal cases where the legal burden is on the prosecution of proving guilt, whereas it appears to be only a provisional presumption in divorce cases where the legal burden is on the petitioner of negativing collusion. The correct view probably is that these presumptions of sanity and innocence are in all cases provisional only, and that the decisive factor is the legal burden. Once it is seen that there are many presumptions of law which are provisional only and have therefore the same effect as presumptions of fact (which are always provisional) there is no useful purpose to be served by maintaining the distinction.

(2) *Burdens.* Whilst the trouble about presumptions is that they have been grouped into unscientific categories, the trouble about burdens is that the different categories are not commonly distinguished at all. In familiar cases one finds judges reported as saying that the burden of proof may shift during the course of a case, without noticing that it is only provisional or ultimate burdens which may shift. The legal burden never shifts. Many errors have occurred because judges have not kept the distinction in mind and the position has had to be put right by appellate tribunals. The leading example occurred in an action on a marine policy where the defence was unseaworthiness.[3] The judge directed the jury that the fact that the ship was unable to proceed shortly after sailing, gave rise to a presumption of unseaworthiness which shifted the burden of proof and threw it on the assured. On appeal, this was held to be a misdirection, because the legal burden remained throughout on the underwriters. The presumption of unseaworthiness in such a case is a provisional presumption only. Another notable example occurred in a murder case.[4] The judge directed the jury that, once the accused was proved to have killed the deceased, it was presumed to be murder unless he proved he was not guilty; and the direction was approved by the Court of Criminal Appeal. The House of Lords reversed the decision, pointing out that the legal burden was on the prosecution to prove the guilt of the accused and it never shifted. The presumption from the fact of killing, like the presumption from being found in possession of goods recently stolen, is provisional only and gives rise to a provisional burden. It is not compelling and does not give rise to a legal burden. Another striking example occurred when the Ceylon Legislature enacted that 'when any fact is especially within the knowledge of any person, the burden of proving that fact is on him'. A judge trying a criminal case interpreted that as meaning that the legal burden was on

[3] *Pickup* v. *Thames Insurance Co.* 3 Q. B. D. 594.
[4] *Woolmington's Case* [1935] A. C. 462.

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the accused to prove he had not committed the offence.[5] The Privy Council pointed out that that is not the law. The burden referred to in the enactment is provisional only. It cannot supply the want of necessary evidence. A recent example occurred in an *obiter dictum* when a Lord Justice drew a parallel between the burden arising in cases of *res ipsa loquitur* and the burden on a bailee of proving that the goods were lost without his fault.[6] He said they were the same doctrine. In truth, the one is a provisional burden and the other a legal burden, and the difference may often be decisive. It is unnecessary, however, to multiply illustrations. The confusion has often been pointed out. The only way to avoid it, whenever the words 'burden of proof' are used, is to make clear which particular sense is intended.

(3) *Conflicting Presumptions.* The existing distinction has led to difficulties when presumptions have come into conflict. For instance, when a man has gone through a ceremony of marriage with three women and is charged with bigamy in marrying the third during the life of the second, there may be a presumption of innocence on the occasion of the second marriage so as to presume its validity (classed as a presumption of law) which may conflict with a presumption in favour of the duration of life of the first woman (classed as a presumption of fact). Any nice discussion on conflicting presumptions is foreign to English law. The preferable approach in such a case would be to recognize that the presumptions are provisional presumptions only which can and should be discarded when they conflict, leaving the issue to be determined by the jury on the facts, the legal burden being in the last resort decisive.

The reader will have noticed that the illustrations in this article are all taken from familiar cases, but I have not given the references to many of them. This is because I am concerned here, not with particular branches of law, but with a new set of distinctions running through the whole law, in an attempt to remove the confusion produced by the old.

A. T. Denning.

[5] *Attygalle* v. *The King* [1936] A. C. 338.
[6] *Easson* v. *L. N. E. Ry.* [1944] 1 K. B. at p. 423.

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LANGUAGE AND THE LAW—IV.

(*Continued from p.* 303.)

§ 6. Interpretation.

THIS is a convenient heading under which to gather some remarks on interpretation in general and certain matters connected therewith. These will concern (1) the 'proper' meaning of words, (2) definition, (3) intended, comprehended and ordinary meaning, (4) logical implication, (5) literal and ulterior meaning, and (6) the transition from implied terms to rules of law. Considerations of space forbid detailed discussion of the legal rules of interpretation.

(1) The 'Proper' Meaning of Words.

There is a famous passage in *Alice Through the Looking-Glass* (Chapter VI), where, to Humpty Dumpty's claim to use words in unusual senses, Alice made what may seem to the ordinary person to be an unanswerable objection. 'The question is', said Alice, 'whether you *can* make words mean different things.' 'The question is', replied Humpty Dumpty, 'which is to be master—that's all.' Humpty Dumpty's theory was that supported by Locke, who laid it down that the significance of all words is perfectly arbitrary, and that every man has an inviolable liberty to make words stand for what ideas he pleases.[1] This admirable statement has fallen on many deaf ears, and Ogden and Richards have again to deplore 'the curious instinctive tendency to believe that a word has its own true or proper use'.[2] Scientifically speaking, words have no true or proper meaning, except in two senses. First, words have an ordinary—*i.e.*, commonly-accepted—meaning. The ordinary meaning need not be current among the community as a whole: it may be confined to a particular section of the community, such as educated persons, business men, scientists or lawyers. (For instance, a lawyer may say that the proper meaning of the word 'contract' does not include contract bridge, meaning that it does not include it in the technical language of the law.) Second, the particular person who uses a word may assign to it a special meaning; the 'proper' meaning of the word for his purpose is then this assigned meaning. Apart from such ordinary or assigned meanings words have no 'actual', 'correct', 'essential', 'grammatical', 'legitimate', 'literal', 'natural', 'necessary', 'rational', 'real', or 'reasonable' meaning (all of which adjectives are common in legal literature). Similarly, 'historical', 'etymological', 'wide', 'narrow', 'strict', 'metaphorical', 'technical' and 'legal' meanings are all varieties of ordinary or assigned

[1] Essay Concerning the Human Understanding 3. 3. 8. B. Russell (Analysis of Mind 189–90) denies that words are conventional, but all he means is that language is part of the environment in which we grow up: we do not deliberately adopt it. This is true, but not a contradiction of the proposition that there is no connection between words and referents save in the mind.

[2] The Meaning of Meaning 123; cp. *ibid.* 206–7.

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meaning. Historical or etymological meaning is simply the ordinary meaning of the word, or of the parts from which it is compounded, at some period of the past. It is an unreliable guide to the present meaning of a word, because meanings change.[3] 'Technical' (including 'legal') meaning is that current among a special class of persons; 'legal' meaning may also indicate a determination on the part of lawyers to read words in a particular way although they know that the user did not intend them to bear that meaning. 'Strict', 'narrow', and 'wide' refer to the denotation of ambiguous words, again as a matter of use. 'Proper' as contrasted with 'metaphorical' means the original meaning of a word as opposed to its transferred meaning; the expressions are acceptable provided that it is remembered that metaphorical meaning may overshadow or even wholly oust 'proper' meaning and so become the chief or only meaning. For example, many words for non-empirical facts or for values began as words for empirical facts; and it would be pedantic to assert that the 'proper' meaning of all such words is an empirical one (*e.g.*, that 'right' and 'wrong' properly mean straight and twisted). As one writer puts it, 'if we started on the principle of restricting words to their so-called proper meaning, and pursued this theory to its logical conclusion, we should ultimately reduce language to the few inarticulate ejaculations from which it began'.[4]

If a writer uses the phrase 'proper meaning' otherwise than in the sense of ordinary or assigned meaning, past or present, he must be using the phrase not scientifically but emotively, to express what he considers *ought* to be the ordinary meaning. Thus if a lawyer writes: 'The proper meaning of "implied contract" is contract implied in fact, not quasi-contract', he does not express what is now the invariable usage of lawyers (for in fact their usage does not always conform to this), but simply states what in his view should be the usage. The writer thus dresses up an expression of emotion to make it look like a proposition of fact, for he avoids the use of the optative 'ought' and uses instead the apparently factual 'is'. We all use this device, and it is often successful in winning agreement; but it is also the source of much fruitless controversy. For the mode of statement often tempts others to dispute the suggested 'proper meaning' as though it were a matter of fact, instead of a mere matter of choice of words.

It may be added that we may sometimes stigmatize a phrase as 'improper' because it seems to indicate that the species denoted by it belongs to a genus to which the species is not in fact regarded as belonging. Thus the phrase 'involuntary bailee', though much used, is 'improper' in the sense that an involuntary bailee is not a bailee *simpliciter*. So, a void contract is not a species of contract, a warranty *ex post facto* is not a species of warranty, and a service tenancy (in one sense of that phrase) is not a species of tenancy. We can call such phrases 'improper' or 'misnomers' without implying that words have inherently-proper meanings.

[3] This was recognized by Kindersley V.-C., when he said: 'It is not necessary to go into the derivation of the word, for that sort of reasoning would not assist in the administration of justice': *Barrett* v. *White* (1855) 24 L. J. Ch. 724 at 726. '[Nephew] is derived from the Latin *nepos*, signifying a grandchild, but it is clear that such an interpretation could not now be given to the word': *per* Lord Cranworth L.C. in *Crook* v. *Whitley* (1857) 7 De G. M. & G. 490 at 494–5.

[4] George Willis, The Philosophy of Speech (London, 1919) 167.

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The worst form of the proper-meaning error is the supposition that words have not merely proper meanings but single proper meanings. On this view, every ambiguous word necessarily has one of its meanings 'proper' and one 'improper', and the task of science is to find out which is which. It is submitted that an example of this error occurs in Sir John Salmond's discussion of ownership. Salmond points out, correctly, that we speak sometimes of owning a right and sometimes of owning a thing; these two senses of the term he distinguishes by the useful names 'incorporeal ownership' and 'corporeal ownership' respectively. He then proceeds: 'If we look, therefore, no deeper than the mere usages of speech, it would seem as if the subject-matter of ownership were sometimes a material object and at other times a right. This, of course, would be a logical absurdity. Ownership may conceivably be in all cases a relation to a material object; or it may in all cases be a relation to a right; but it cannot be sometimes the one and sometimes the other'.[5] The author evades the supposed difficulty by saying that incorporeal ownership is ownership in the proper sense and that corporeal ownership is only a figure of speech, a metonymy. The truth is, however, that the difficulty does not arise. The supposed difficulty appears to arise from an assumption that there is some single entity in the universe, *ownership*, which cannot be defined in contradictory ways. This is an error. 'Ownership' is a word symbolizing an idea, and this idea, the meaning of the word, may and does vary according to context. There is therefore no logical absurdity in defining the word 'ownership' in two different ways. It may be added that Salmond's mode of escaping from his self-made difficulty is particularly unfortunate because it seems to suggest that incorporeal ownership is the original idea and corporeal ownership an extension of it, whereas the reverse is the case.

Realization of the fact that words have no inherently-proper meanings has great importance for the student of jurisprudence, because it enables him to write off almost the whole of the vast and futile controversy concerning the proper meaning of the word 'law',[6] as well as many others of less magnitude. In the realm of constitutional law, not only students but law lords need to be headed off the verbal question whether Canada is properly called a federation.[7] In the law of wills, a rule that badly needs attention from the semantic point of view is the rule stated by Wigram in the following words: 'Where there is nothing in the context of a will from which it is apparent that a testator has used the words in which he has expressed himself in any other than their strict and primary sense, and where his words so interpreted are sensible with reference to extrinsic circumstances, . . . the words of the will shall be interpreted in their strict and primary sense, and in no other, although they may be capable of some popular or secondary interpretation, and although the most conclusive evidence of intention to use them in such

[5] Jurisprudence (7th ed.) 279, § 87.

[6] The controversy is discussed in an article to be published in the British Year Book of International Law for 1946.

[7] The hare was started by Viscount Haldane L.C. in *Att.-Gen. for Australia* v. *Colonial Sugar Refining Co.* [1914] A. C. 237 at 252–3, contrasting what he called the 'loose' sense of the word 'federal' with 'the natural and literal interpretation of the word'.

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popular or secondary sense be tendered'.[8] It will be seen that this rule does not merely prefer the strict and primary meaning of the words to some special meaning adopted by the testator alone: it even prefers it to the 'popular' meaning of the words, which is another kind of ordinary meaning. Hence the rule amounts to a statement that one kind of ordinary meaning is automatically and as a rule of law to be preferred to another kind, without regard to the particular meaning that was probably intended by the testator, and this merely because the former kind is supposed to be the 'strict and primary' meaning. It is assumed that the two kinds of meaning can be separated clearly enough for the purpose of applying the rule. Enough has already been said to indicate that the distinction is not nearly so clear as the wording of the rule would seem to suggest; also, recent cases indicate that the authority of the rule is less secure than was formerly supposed.[9]

A somewhat surprising challenge to Humpty Dumpty's assertion of human mastery over words came recently from no less a judge than Lord Atkin. This was in *Liversidge* v. *Anderson* (1941),[10] where the question was whether the words 'If the Secretary of State has' in a statutory regulation could be read as meaning 'If the Secretary of State thinks he has'. Lord Atkin said: 'I know of only one authority which might justify the suggested method of construction'. He then quoted Humpty Dumpty as being this one authority, and added: 'After all this long discussion the question is whether the words "If a man has" can mean "If a man thinks he has". I am of opinion that they cannot, and that the case should be decided accordingly'. With all respect to Lord Atkin, this rejection of Humpty Dumpty's doctrine is not happily phrased. It is not true to say that the one phrase cannot mean the other. If, for instance, the regulation had expressly stated that the words 'If the Secretary of State has' as used in the regulation meant 'If the Secretary of State thinks he has', then the one phrase would mean what is ordinarily meant by the other. Again, if the regulation had used the phrase 'If the Secretary of State thinks he has' several times, and then, in the crucial clause, used the phrase, 'If the Secretary of State has', it might be clear from the general context that no change of meaning was intended. What Lord Atkin probably meant to convey was that the one phrase did not normally mean the same as the other, and that there was nothing in the regulation to lead to the conclusion that their meaning was intended to be the same. The majority law lords took the opposite view on the latter point.

The denial that words have a proper meaning, independently of ordinary, assigned and desired meaning, is liable to be misunderstood unless certain qualifications are expressly stated. It is not denied that a writer ought generally to take meanings as he finds them. An important function of language is to communicate thought, and it can serve this function only if there is a general measure of agreement upon the meanings of words. Humpty Dumpty laid himself open to the charge of vexatiously and quite unnecessarily changing in his own speech the ordinary meaning of words. Even where some change in established

[8] Wigram, Extrinsic Evidence in Aid of the Interpretation of Wills, Proposition II.

[9] See, *e.g. Perrin* v. *Morgan* [1943] A. C. 399.

[10] [1942] A. C. 206 at 245.

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usage is called for, it is not desirable to give a word a new meaning so divorced from its traditional meaning as to make the new use of the word aesthetically offensive to many people. Still less is it justifiable to debase the language by turning words of precise meaning into mere synonyms for other words, as, for instance, in the schoolgirl's use of the word 'chronic'.

(2) Definition.

The function of definition is to explain the meaning of words. We do not learn the meaning of all words by definitions, for definition presupposes the existence of an understood language. In childhood we learn the meaning of such words as 'red' by being shown the objects to which they are to be applied; and in fact the names of colours remain indefinable throughout life. Most words, however, admit of being replaced by groups of other words. This process is called definition. As Ogden and Richards put it, definition is the substitution for the symbol to be defined of a symbol or symbols that can be better understood. It involves the selection of known referents as starting-points, and the identification of the referent of the *definiendum* by its connection with these. For instance, a referent may be located by its similarity to another referent, by its relation in space or time to another referent, or by its being the cause or effect of another referent.[11]

This view of definition throws overboard the theory initiated by Aristotle and widely accepted after his day. The latter theory supposes that there is only one true definition of every unambiguous word, namely, *per genus et differentiam*.[12] The view now accepted is that words have no 'true' definition and that it is possible and permissible to define variously, one definition being proper for one purpose, another for another. Genera and species are no longer regarded as an objective and rigid ordering of nature; they are seen to be no more than subjective conveniences of classification. Being man-made they are mutable, and it is possible to regard the same thing as belonging to distinct genera. Thus 'man' may be defined not only as a rational animal (the classical definition) but as a rational biped. Or, altering the *differentia*, he may be defined as a talking animal, an acquisitive animal, an imaginative animal, an artistic animal, a moral animal, a laughing animal, a weeping animal, or a superstitious animal. None of these definitions explains perfectly all uses of the word 'man', for the word may be applied to a lunatic, a deaf mute, a pauper, a philistine, an egoist, a hypochondriac, and so on. Conversely, these definitions may to some extent fit some of the lower animals. This trouble with words has already been observed: there is always the possibility of dispute as to the limits of their application, and no definition can get rid of this possibility.

The above view as to definition also involves a rejection of Aristotle's doctrine of essences. Aristotle taught that essences are fixed in nature, and that a definition is a phrase signifying this essence. On this view

[11] Ogden and Richards, *op cit.* 110, 113 ff. (The authors give a special heading to 'legal relations' (p. 120), but the treatment is not helpful.) For a previous statement of a similar view see Locke, *op. cit.* 2. 3. 10.

[12] *I.e.* by stating the genus of which the word to be defined is the species, and then stating the difference between this species and others of the same genus. Thus 'man' is (genus) animal, (difference) rational: man is a rational animal.

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it is possible to dispute about 'true' definitions as though they are matters of fact. We now know that 'essence' simply means 'important feature', and that what is important is a subjective or emotional matter. No definition ever states the sum total of the qualities that seem to go to the being of a thing; it always involves a selection from those qualities, and the exact selection made depends very much upon the purpose of the definition.

These considerations reinforce the conclusions previously advanced in the discussion of 'proper meaning'. Every definition of a word is a definition of (i) its ordinary meaning, or of (ii) its specially-assigned meaning, or of (iii) its desired meaning. The only scientific dispute over definitions is a dispute over (i). Obviously there is no point in disputing (ii), and a dispute over (iii) is, except to the extent that common premises are agreed, a conflict of value-judgments, not a scientific dispute. As to (i), it is frequently possible to settle the dispute by taking a number of admitted referents of the word and abstracting from them enough of their common features to explain the use of the word. It must, however, be remembered that the number of features abstracted must often be a matter of choice, that words may have two or more ordinary meanings, and that every word is of doubtful application in marginal cases. Those who dispute about definitions and forget these points are wasting their time.

It is next to be observed that many questions and disputes that seem to be concerned with the empirical world are in fact concerned only with definitions. For instance, every question in the form 'What is . . .?', or 'What is the nature of . . .?', or 'What is a . . .?', or 'What is the nature of a . . .?' (followed in each case by the name of a class, quality or relation) is a request for a definition of a word. It is not a request for information about the empirical world, except to the extent that such information may happen to be furnished in the course of the definition. Examples of such questions are: 'What is an atoll?' 'What is a unicorn?' 'What is cause?' 'What is the nature of law?' 'What is possession?'[13]

Similarly, every inquiry into 'the nature of' (or, 'the essential nature of', 'the fundamental nature of') a class, quality or relation is a search for a definition; and every dispute about 'the (essential, fundamental) nature of' a class, quality or relation is a dispute about a definition. It is not an inquiry into, or dispute about, facts, except to the extent that it concerns the ordinary or assigned meaning of words. If this were generally realized the world would be saved much pseudo-philosophy.[14]

The only exception to the foregoing propositions is where the word in

[13] It is true that the answer to the question 'What is an atoll?' does not merely supply a definition of the word 'atoll'; it also gives information about part of the earth's surface. The context in which the question is asked and answered implies an understanding that atolls exist—*i.e.* that the description of an atoll is true of part of reality. But the context in which the question 'What is a unicorn?' is asked and answered would not, usually, imply an understanding that unicorns exist, and if it did the understanding would be false. Comparing these two questions, it is evident that a question of this form is invariably a request for a definition but not invariably a request for information about the empirical world. It is the latter only if the word in question happens to symbolize an empirical fact.

[14] See, generally, Ayer, Language, Truth and Logic, 64–5; Richards, Interpretation in Teaching, 354–5.

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question is independently defined, so that there is no dispute about its application. Thus an inquiry into the nature of atolls, if there is no dispute as to which territorial formations are denoted by this word, would be a scientific investigation, for there are data to be observed. But an inquiry into the nature of atolls, or of law, or of possession, if the word in question is not independently defined, is not a scientific or factual inquiry, except to the extent that it is an inquiry into verbal usages.

Lest all this be thought to be tilting at windmills, it may be well to consider in greater detail a specific example of confusion between definitions and non-verbal facts. Let us take the usual legal or jurisprudential discussion of 'the nature of' possession. As already stated, this discussion is in reality a discussion of the definition of the word 'possession'. This, however, is not the way in which the participants usually regard it. They seem to think that in discussing 'the nature of' possession they are discussing, at least in part, some non-verbal fact. This assumption underlies the division of possession into 'possession in fact' and 'possession in law'. Although the meaning of 'possession in fact' is variously interpreted, the usual assumption is that possession in fact is, as the name implies, possession that is somehow visible in the facts of the case. Let us consider how far this assumption is true. To start with, we may picture a situation that raises difficulties in applying the idea of possession. In describing this situation it will be necessary to use words, but the reader is asked to imagine the scene in a non-verbal way, in order to reproduce as nearly as possible the raw material with which we have to deal. *A* has a pocket-book containing his name and address and some banknotes. He unknowingly drops it on the street and walks on. Many people pass, and eventually *B* finds the pocket-book and forthwith decides to keep it for himself. *B* gives it to his son *C* to hold for him, but shortly afterwards *C* is pursued by bandits, who succeed in wresting the pocket-book from him. This is the factual situation, and we have to apportion the possession of the pocket-book between *A*, *B*, *C* and the bandits. In doing this, since we are speaking of possession in fact in the sense above described, we have to do without the various rules that have been developed on the subject by different legal systems. Probably it will become clear after a moment's thought that the difficulty in the way of determining who at any moment has possession of the pocket-book is not a difficulty in ascertaining facts, for the material facts are practically all given, but is a difficulty in knowing what is meant by the word 'possession'. 'Possession' is an abstract word of somewhat vague meaning. A theory of 'possession in fact' seems to be one of two things: either a statement of the way in which, in the view of the writer, the word 'possession', or the phrase 'possession in fact', ought to be used (which is not a statement of fact at all, but a value-judgment), or else a statement of the way in which the word 'possession' is ordinarily used by non-lawyers (which is a statement of fact only in the sense that it is a statement of verbal usage). If the particular theory of possession in fact is intended as the latter, a statement of the layman's meaning of 'possession', the writer ought, if he is honest, to recognize that his theory is incapable of solving any of the difficult problems that arise in law-suits, for the simple reason that the layman has no clear idea of what he means by 'possession'.

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Consider, in the light of this analysis, Sir John Salmond's treatment of possession. His treatment is singled out for discussion because the well-deserved esteem of the work in which it appears has made it the usual student's introduction to the theory of possession. Salmond begins by distinguishing between possession in fact and possession in law, and supposes that possession in fact is 'the truth of things'; it is possession 'in truth and in fact'; it is 'fact' in contrast to 'law'.[15] Having rubbed this well into the reader, Salmond suddenly calls possession in fact a 'conception'. This it certainly is, and of course a conception is a fact, so that the learned author is perhaps safe from the charge of self-contradiction. But it may be doubted whether he is safe from the charge of having misled the unwary reader. For if possession in fact is a conception, and so a fact, possession in law is also a conception, and so also a fact. Thus the contrast of 'law' and 'fact' breaks down.

One way of restoring it would be to say that possession in fact is the conception found among laymen, while possession in law is the conception found among lawyers. If this is the meaning, one would expect a work on Jurisprudence to be concerned with possession in law, that is, with possession as a technical legal term. Yet Salmond professes to concern himself only with possession in fact. It may also be noted that his discussion of it is far richer and more precise than a layman's discussion of it would have been.

To add to the perplexity, Salmond expressly denies that there are 'two ideas of possession, a legal and a natural'. He admits that 'were this so, we could dispense altogether with the discussion of possession in fact'—because then it would be our duty as lawyers to pay attention to the legal meaning only. But in reality, he says, 'there is only one idea, to which the rules of law do more or less imperfectly conform. There is no conception which will include all that amounts to possession in law, and will include nothing else, and it is impossible to frame any definition from which the concrete law of possession can be logically deduced. Our task is merely to search for the idea which underlies this body of rules, and of which they are the imperfect and partial expression and application'. When Salmond says that there is no legal idea of possession, his statement is true only if the word 'idea' be taken to mean a single, neat, compact idea, capable of being expressed in a short sentence. It is perfectly true that there is no legal idea of possession of this kind. A complicated legal idea of possession there certainly is, though it varies from one branch of the law to another, and even within the same branch of the law, according to the purpose of the particular rule. It comes to this, therefore, that Salmond's theory of possession in fact is really a simplified and idealized theory of possession as he finds it in the legal system. It is the legal theory of possession with its inconsistencies smoothed away. Such a theory is not an adequate statement of the law, and it is very improperly called a statement of fact. It is either an elementary statement of the law, perhaps useful for the beginner but misleading if not carefully stated, or a statement of the ideal towards which in the writer's opinion the law ought to develop.[16]

[15] Salmond, Jurisprudence (7th ed.) § 94.

[16] The confusion above considered runs throughout Salmond's treatment of possession. Thus in § 95 (7th ed.) he debates the question whether incorporeal possession is possession 'in truth'. In § 104 he takes objection to Savigny's theory that possession at its

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(3) Intended, Comprehended and Ordinary Meaning.

Ogden and Richards seem to treat meaning as though it were a single relation. But 'meaning' is a word of many meanings, and to search for *the* meaning of meaning is (if it be not undue temerity in a lawyer to say so) to fall into error from the start. In the present division of this article it is proposed to examine three important varieties of meaning, and to show their importance for the work of the lawyer. They are: (1) the intended meaning, the meaning intended by the speaker or writer; (2) the ordinary meaning, the meaning that would be attached to the words by the ordinary hearer or reader; and (3) the comprehended meaning, the meaning actually attached to the words by a particular reader or hearer, *e.g.*, one to whom the words were particularly addressed. Where misunderstanding occurs, (1) differs from (3).

(1) It is not often that the law addresses itself purely and simply to meaning in the first sense, the intended meaning. It does so, however, in the law of deceit, for here the requirement of a fraudulent state of mind means that the Court must, where the words are equivocal, look to the sense actually intended.[17] It is submitted that meaning in sense (2), the ordinary or 'reasonable' meaning of the words, is not in issue, except as evidence of what the defendant probably intended and what the plaintiff probably understood. For, on the one hand, a defendant who has 'paltered in a double sense' cannot excuse himself by showing that the meaning applied by the plaintiff to his words, being the meaning that he hoped the plaintiff would apply, was an 'unreasonable' one.[18] And, on the other hand, however reasonable the plaintiff was in attaching the untrue meaning to the defendant's statement, if the defendant did not intend his words to be taken in that sense, there is no deceit because there is no guilty mind.

In wills, statutes, deeds, written contracts and other formal documents, the general theory is again that the Court is concerned with the meaning

commencement and possession in its continuance are made up of different elements, appearing to think that this is somehow a logical impossibility. 'Savigny's theory . . . tells us, at the most, how possession begins, and how it ceases; but we wish to know what it essentially and continuously *is*'. In § 101 he distinguishes between immediate and mediate possession; on his own previous statement this is a discussion of 'possession in fact'; yet he declares that 'a test of the existence of a true mediate possession is to be found in the operation of the law of prescription'. To a casual reader it is most confusing to be informed that rules of law are a test of what exists in fact.

[17] *Per* Lord Blackburn in *Smith* v. *Chadwick* (1884) 9 App. Cas. at 201; *per* Bowen L.J. in *Angus* v. *Clifford* [1891] 2 Ch. at 472; *per* Atkinson J. in *Halifax Building Society* v. *Salisbury* [1939] 4 A. E. R. at 452.

[18] *Contra*, Winfield, Text-Book of the Law of Tort (3rd ed.) § 116, who lays it down that 'if the statement is ambiguous, the true interpretation of the authorities seems to be that the plaintiff must prove (i) that the statement was reasonably capable of bearing the meaning which he attached to it; (ii) that he understood it in that sense; and (iii) that the defendant made use of the ambiguity with the express purpose of deceiving the plaintiff'. This implies that a plaintiff cannot succeed in deceit although the defendant meant him to understand the statement in the way in which he did understand it, unless he shows also that the statement was reasonably capable of bearing the particular meaning. It is respectfully submitted that there is not this requirement. Of course, the Court may be slow to believe that the defendant meant or hoped that his words would be understood in an 'unreasonable' way, and it may also be slow to believe that the plaintiff did understand them in an 'unreasonable' way. But if the evidence is clear, the question what was the reasonable interpretation of the words is surely irrelevant. What matters, ultimately, is what the parties in fact intended and understood respectively, not what a reasonable man would have intended or understood. The words of Lord Selborne L.C. in *Smith* v. *Chadwick*, 9 App. Cas. at p. 191, are, it is submitted, not inconsistent with this view.

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of the author or authors, but this is seriously qualified by a refusal (in general) to look at certain classes of extrinsic evidence (that is, evidence outside the document itself) for the purpose of ascertaining the author's intention. The result is a tendency to look only at the meaning of the words *as words*—that is, not at the actual personal meaning of the author but at the usual meaning in which the words that expressed the actual meaning are commonly employed. But it is always the duty of the Court, within the limits set by the law of evidence, to go behind the dehumanized dictionary-meaning to what the assertor was actually trying to express. As F. C. S. Schiller put it (he was not speaking of legal interpretation, but his words have a strong interest for the lawyer):—

> 'It is the desire to communicate meaning which dictates the choice of the words used, and ultimately controls their meaning. For the original compilers of dictionaries get the word's meanings from an examination of the passages in which it has been used in print. Nevertheless, the meaning (or meanings) as formulated in a dictionary never can be an absolute and infallible guide to actual usage. It represents merely the *average* meaning, with which the word has been used in the past, and the probable meaning, with which it will be used in the future; but it cannot prohibit its modification. To understand any particular sentence, we may have (as every schoolboy translator has painfully to discover) to go beyond anything we find in our dictionaries, and in any case we have to select the "right" meaning from those given, and to adjust their *dicta* to our special problem. No critic of a bad translation would allow the excuse that the wrong meanings given to the mistranslated words had been found in a dictionary.'[19]

On the whole the Courts realize pretty well the dangers of blind adherence to dictionaries. Thus it is laid down as one of the governing rules of interpretation that words are not to be looked at in isolation but their meaning is to be gathered from their context: *noscitur a sociis*. Moreover, in the case of wills and contracts, evidence is admissible, within certain limits, to show that words were used in a special meaning that is not their ordinary one. There are instances, however, where the Courts fall far short of the ideal of interpretation as the ascertainment of meaning. A striking case of this sort is *Re Gale* (1941),[20] where the testator, who had lived with an unmarried woman and had had four children by her, died leaving her certain property 'during her widowhood'. Farwell J. held that the gift failed, because a woman who had not been married could not be anyone's 'widow'. This astonishing refusal to exercise intelligence in the construction of language cannot fairly be said to represent the customary attitude of judges; yet, though not the rule, it may be said, without disrespect, to be too frequent an exception.

(2) There are some cases where the Court is concerned solely with the ordinary meaning of words, and frankly disavows any intention to look

[19] Formal Logic 17. At one place Ogden and Richards seem to deny that meaning in one sense of the word is a personal matter, for they say (p. 103): 'A symbol refers to what it is actually used to refer to; not necessarily to what it ought in good usage, or is intended by an interpreter, *or is intended by the user* to refer to'. It is probably my deficiency, but I do not understand this, and the discussion that precedes and follows it seems in my humble opinion to confuse meaning with truth.

[20] *Re Gale*, *Gale* v. *Gale* [1941] Ch. 209.

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at the meaning of the speaker or writer, or even at the understanding of those to whom the words were intended to be addressed. Illustrations occur in the law of defamation, but the precise rules are too complicated to be gone into here.

(3) We pass to the third kind of meaning, the meaning attached to language by the hearer or reader. There are several situations in which this is the kind of meaning that is important in law. Thus, the question whether an offer is made or acceptance given depends, at least in part, on the question what the other party reasonably understands. So also do the questions of innocent misrepresentation and estoppel. In such cases there are two matters to be considered : first, what the hearer understands by the words, and second, whether his understanding is 'reasonable'—*i.e.*, whether it conforms to what the ordinary person, or the judge himself, would have understood in the circumstances. Thus, this type of meaning is a compound of senses (2) and (3).

To say that the Court in a particular case is concerned with the ordinary meaning of words (sense (2)) does not solve all difficulties, for the Court may have to select between different ordinary meanings current in different circles; or, in the case of phrases, it may have to select between the meaning built up from a consideration of the words taken separately, and the meaning of the phrase as a whole. Good illustrations are supplied by two cases decided on the Merchandise Marks Act, 1887. By section 2 (1) (*d*) of the Act it is an offence to apply 'any false trade description' to goods; and similarly, under section 2 (2) it is an offence to sell goods to which a 'false trade description' has been applied. Now before a description can be pronounced to be true or false its meaning must be ascertained, and the ascertainment of meaning may depend upon the group of people whom one takes as interpreting the words. This is illustrated by *Lemy* v. *Watson* (1915),[21] where the Court had to choose between a meaning current among vendors and a meaning current among purchasers. The facts were that small fish caught off the coast of Norway were sold in tins under the description of 'Norwegian sardines'. The word 'sardine' had come to England from France, being the French name for a pilchard. English usage had confined it to small fish, *i.e.*, young pilchards. There were no pilchards in Norwegian waters, and the so-called Norwegian sardines were brisling. This was well known in the trade, but was not known to the purchasing public. The public was unaware that the fish so sold were different from the French sardine, and for the most part did not know that the French sardine was a pilchard. In these circumstances, was the epithet 'Norwegian sardines' false as applied to these fish? It was held that it was, and that an offence had been committed.

It is hardly necessary to point out that the decision is not an authority for saying that French usage, the usage of the country of the word's origin, is to be preferred to English usage, or that original usage must be preferred to current usage, or that the meaning built up from the words taken separately is necessarily to be preferred to the meaning of a phrase taken as a whole. All that the case decides is that under the Merchandise Marks Act the buyers' usage must be preferred to the sellers' usage. If this be the *ratio decidendi*, a *dictum* of Lord Reading C.J. in the course of

[21] [1915] 3 K. B. 731.

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his judgment is open to some objection. Referring to the fish sold under the name of Norwegian sardines, he said : 'They were not sardines in fact because they were not the small pilchard which is the sardine proper, and even with the prefix "Norwegian" it was false in fact to say that these fish so prepared were Norwegian sardines. It is true they were Norwegian, but they were not sardines'. In criticism of this it may be said that when there is a conflict of linguistic usage, as there was in this case, it is begging the question to assert that the goods were or were not something or other. The question whether the goods were or were not *x* is, in the absence of an agreed definition of *x*, a verbal, not a factual question, and it can be resolved only by deciding which usage is to prevail. Nor did it help to say that the goods were not sardines 'in fact', or not sardines 'proper', because this was true only on the assumption that the French (*i.e.*, the buyers') usage was to be adopted in preference to the sellers' usage. Finally, it was misleading to suggest that goods that are not 'sardines' *simpliciter* may not be 'sardines' qualified by an epithet like 'Norwegian'. They would be, if that were the understanding of the buyers. As Darling J. put it :

> 'There are many erroneous terms consecrated by common use. One which has been mentioned in the course of the argument, a glaring instance, is the term "Bombay ducks" as applied to an Indian fish, and it is agreed that if anybody ordered Bombay ducks and somebody supplied him with ducks from Bombay the contract to supply Bombay ducks would not be fulfilled. Another obvious instance is eau de Cologne. Whatever eau de Cologne may be, as to which I know nothing, it certainly is not water from the Rhine. If eau de Cologne were ordered and you simply supplied a gallon of water from Cologne that would not fulfil the contract. Another instance where anybody would understand what was meant is if you spoke of Roman pearls. They are not pearls with which any oyster has anything to do, nor do I know that they are Roman. They indicate something which is probably neither Roman nor a pearl, just as it was said by a well-known historian that the Holy Roman Empire had for its chief characteristic that it was neither holy nor Roman nor an empire. One other instance occurs to me of a term consecrated, if I may say so, by common user which does not indicate the true fact, and that is when people speak as they commonly do of the judicial ermine, meaning merely any white fur when worn by a judge. These expressions have become conventional terms, and are, I think, instances of a trade description lawfully and generally applied.'[22]

In the other case, *Fowler* v. *Cripps* (1906),[23] the substance sold possessed the qualities indicated by the descriptive words taken separately, but the description was nevertheless misleading to the ordinary purchaser. The facts were that Glauber's salt was sold under the name of 'soda crystals'. It was proved in evidence that both Glauber's salt and washing soda are salts of soda in crystalline form; but the description 'soda crystals' was by the usage of the trade of manufacturing chemists applied only to washing soda. It was therefore held that an offence had been committed. Wills J. said : 'The fact that a

[22] [1915] 3 K. B. at 752–3.
[23] [1906] 1 K. B. 16.

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description as applied to particular goods is scientifically correct will not prevent it from being a false trade description'. While respectfully agreeing with this, it must be pointed out that the words 'scientifically correct' mean only 'in accordance with the linguistic practices of scientists'. They do not mean that a scientist can pronounce upon the 'correctness' of ordinary verbal conventions.

Similar problems arise under the Food and Drugs Act, 1938, s. 8 (1), whereby it is an offence to sell food that is not of the nature, substance and quality demanded. At first sight it may appear that the question whether an article of food is of the nature, substance or quality demanded is wholly a scientific one, for are not 'nature, substance and quality' matters of objective fact? But on further reflection it will be seen that the question is only partly scientific, being in part linguistic. The question 'What, in ordinary language (including scientific language) is the description of the article that has been sold?' is a scientific one, to be settled by examining the thing that has been sold. But the question 'What is the meaning of the words used by the purchaser, and does the thing sold (as already examined) conform to this meaning?' is linguistic. In practice, the difficulty that the judge experiences in deciding cases under the Act is always on the linguistic question, for the scientific one can be accurately answered by the evidence of analysts.

Particularly interesting as illustrations of the linguistic difficulty are the 'cordial' cases of the war now ended. Before the war it was the almost invariable practice of manufacturers of the drinks called cordials to put into them substantial quantities of sugar. It appears that the word 'cordial' originally signified what is now called a liqueur, but in the course of time it came to be applied to non-alcoholic beverages containing this substantial quantity of sugar. The sugar took the place of alcohol in giving the beverage the stimulating effect that justified its name. After the outbreak of the war, when sugar became scarce, so-called cordials were put on the market that contained no sugar or alcohol, being sweetened with saccharin, and the question accordingly arose whether they could properly be sold as 'cordials'. This question illustrates three of the perennial problems of interpretation. (1) In the first place, it illustrates the difficulty of choosing between 'essence' and 'accident' in definition. It was open to the vendors of the so-called cordials to admit that a very large proportion of the drinks sold as cordials before the war did contain sugar, and yet to argue that this fact was a logical accident, the essence of 'cordials' (as the term was understood immediately before the war) being that they were sweet; on this view a drink sweetened with saccharin is a cordial. (2) Second, it illustrates the difficulty caused by an incipient change of meaning. At the outbreak of the war a drink containing a large percentage of sugar was clearly a cordial, although that was not the original meaning of the word. Had the practice of selling saccharin 'cordials' gone on long enough without legal proceedings being taken, it would have been easy to hold that the word 'cordial' had undergone yet another change of meaning. The difficulty arose from the fact that the attempt to change the meaning of the word was nipped in the bud. (3) The third difficulty, which if satisfactorily solved might also for legal purposes solve the other two, is the difficulty of evidence. It is clearly settled that the question of the meaning of a word like 'cordial' in cases under the Food and Drugs Act is not one of law to be decided exclusively by the judge's own view of language, but is a question of fact to be decided (chiefly) by evidence. It is true that the judge is entitled to use his own knowledge of the meaning of words, even if that knowledge is a specialized one[24]; also, he may look at dictionaries. But, in addition, it is always open to the parties to give evidence on the meaning of the words. What kind of evidence, then, is to be tendered? This is the crux of the difficulty in cases under the Food and Drugs Act. To formulate more precisely the question for decision in cases under the Act, it is what the hypothetical purchaser who demands (say) 'cordial' expects to receive. To begin with, it would seem that the question is not what a particular actual purchaser expected to receive, for, on the one hand, his expectation may have been quite 'unreasonable', *i.e.*, unusual, and, on the other, he may not have realised the full implications to the ordinary person of the word he was using. He is entitled to expect an article that he can himself properly resell as 'cordial', and the fact that he does not know the ordinary meaning of the word, and is himself quite satisfied with what he gets, is immaterial. The question, then, turns on the expectation of the hypothetical purchaser. But the hypothetical purchaser is an abstraction, who cannot be put into the witness-box. How is the judge to be made to understand the mind of this abstract entity? Scientifically, the proper thing to do would doubtless be to issue a questionnaire to some hundreds or thousands of people who are likely to buy the commodity in question, carefully selected so as to be representative of the community as a whole, and to ask the judge to go by the majority of their answers. This method has not hitherto been suggested in a Court of law, and would quite possibly be regarded as violating the rules of evidence. An alternative method, less accurate but more in accord with ordinary Court practices, would be to draw a number of witnesses at random from the nearest Clapham omnibus; but again no attempt has been made to do this. In practice, the only evidence to which the Court listens is that of a few so-called experts. Thus, in *Sopers* v. *Johnston* (1944),[25] which was a civil action for breach of a warranty of compliance with the Food and Drugs Act, the judge listened to evidence of the meaning of the word 'cordial' tendered by (among others) a public analyst and a manufacturer of 'soft drinks'. Neither of these persons can well be regarded as representing the ordinary member of the buying public.

In prosecutions under the Act a particular difficulty has arisen. By section 81 (1), 'in any proceedings under this Act, the production by one of the parties of a document purporting to be a certificate of a public analyst in the prescribed form . . . shall be sufficient evidence of the facts stated therein . . .' It might be thought that this provision was confined to statements of scientific fact made by the analyst, resulting from investigations that he has been trained as a scientist to make. However, the Courts have extended it to opinions given by the analyst as to the proper (*i.e.*, ordinary) use of words, such as the question whether a particular product is properly called a cordial.[26] One cannot help

[24] *R.* v. *Field* (1895) 64 L. J. M. C. 158; cp. Bell, Sale of Food and Drugs (11th ed.) 97.

[25] [1944] 2 A. E. R. 42, affirmed *ibid.* 586.

[26] *Broughton* v. *Whittaker* [1944] 1 K. B. 269, following *Bowker* v. *Woodroofe* [1928] 1 K. B. 217, where Avory J., at p. 225, characterized an analyst's certificate that a

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feeling that this is a confusion between the scientific and the verbal question. The question what such-and-such a product contains is a scientific question, with which the analyst is fitted to deal; but the question whether, given the composition of the product, it is properly called by a certain name, is a verbal question, to answer which the analyst has frequently no better training than the ordinary educated person. Further complexity is caused by the decision in *Collins Arden Products* v. *Barking Corporation* (1948),[27] where it was held that the certificate of the analyst may be contradicted by witnesses, and that in the event of this happening the Court is left to frame its own opinion of what an ordinary person who goes into a shop would mean by the words under consideration in the case (*e.g.*, the word 'cordial'). Unfortunately, the type of evidence adduced in these cases frequently fails to provide an answer to this question.

(4) Logical Implication.

One of the apparent puzzles of mathematics, which a philosopher is called upon to explain, is the almost uncanny way in which its pronouncements, if accurately worked out from correct premises, are verified by the facts of experience. The interior of a box measures 6″ x 6″ x 6″. It is desired to fit 1″ wooden cubes into this box. A mathematician, on being given these facts, predicts that 216 cubes, and no more, will fit into the box. Upon the experiment being performed, the prediction is invariably found to be correct. The mathematician is not surprised, for he asserts that, given the accuracy of the premises, by no possibility can his prediction ever be found to be wrong.[28] This looks like a standing miracle. What is the explanation of it? The answer is that the mathematician's prediction, if his reasoning has been accurate, is invariably correct because it was already contained in the premises from which he started. So long as the premises remain constant the conclusion must follow, because the conclusion is merely a restatement, complete or partial, of the premises. This holds for all mathematical deduction, and indeed for logical deduction in general. Statements of deductive logic are necessarily true for the simple reason that they are tautologies.

The interesting thing is that a person may be aware of certain premises, and understand their immediate 'meaning', without realizing the logical implication that, in fact, is necessarily contained in them. Thus, a person may know the dimensions of a box and know the dimensions of the cubes that are to go into it without knowing how many cubes will fit into the box. The logical deduction, when drawn, may come as a psychological surprise. Yet the proposition deduced was, in a sense, already contained in the known premises.

In some cases logical implication yields quite remarkable consequences.

particular article was not a meat and malt wine as a 'statement of fact'. It is submitted that it was not a statement of fact except in the sense that it was a statement (whether true or not) of the ordinary use of words.

[27] [1943] 1 K. B. 419, distinguished in *Broughton* v. *Whittaker*, last note.

[28] Cases are sometimes put in which the mathematician's result seems at first sight to be falsified in practice, but it will be found that the falsification is only apparent. For instance, it may be admitted that pouring a pint into a pint jug that is already full does not yield two pints in the jug; but the mathematician does not say that it will. He says only that the addition of one pint to one pint will, assuming the continued existence of both pints, result in a total of two pints somewhere.

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Illustrations of this occur in geometry, where the acceptance of a few simple axioms involves acceptance of a complicated logical structure. To take one example: a circle is defined as being bounded by a line, every point in which is equidistant from a certain point within the circle. It is not an obvious consequence of this definition that the length of the circumference bears a constant ratio to the length of the diameter of 3·14159 to 1; yet such is the case. Similarly, it is not obvious to a person who knows the English language but has no mathematical knowledge that every triangle with sides in the proportion 3, 4, 5 is necessarily right-angled. In such cases the consequence follows from the premises and cannot be rejected without self-contradiction; yet the consequence is not, to an ignorant person, psychologically obvious from a bare statement of the premises.

This element of psychological surprise in logical implication is capable of presenting some awkward legal problems, particularly in the case of contracts, where the Courts are accustomed to reject the defence of unilateral mistake. For instance, suppose that *A* offers to employ *B* for a term of five years, commencing at £1,000 a year, with a rise of £100 every year. *B* considers this offer and then counters by proposing that he be paid by the half-year, starting at £475 for the first half-year and rising by £50 every half-year. *B* knows the mathematical implications of this, but shrewdly suspects that *A* does not. The suspicion is well founded, for *A* thinks, as most people would, that the counter-offer is substantially the same as the original proposal, and that the difference relates merely to the time of payment. *A* accordingly accepts the counter-offer. Actually the counter-offer is very much more beneficial to *B* than *A* thought, for it turns out that, by a freak of arithmetic, a rise of £50 every half-year is equivalent to a rise of £200 every year.[29] At the end of five years *B* will have pocketed £1,000 more under his counter-offer than he would have done under the original proposal. Will the Court hold the contract to be void for mistake on the part of *A*? An even more serious question arises in the case of a trick played with geometrical progressions. In *James* v. *Morgan* (1663),[30] a horse was delivered in return for a promise to pay a barleycorn for the first nail in the horse's shoes, doubling it for every nail to the total of thirty-two nails. This amounted to 500 quarters of barley, which was doubtless much more than the promisor expected. On action being brought for the non-delivery of the barley, Hyde J. held the contract to be good, but directed the jury to give only the value of the horse as damages. This solution means in effect that the contract is undone, for

[29] The amounts work out as follows:—

	A's offer.	*B*'s counter-offer.		
		January–June	July–December	Total
	£	£	£	£
1st Year ..	1,000	475	525	1,000
2nd Year ..	1,100	575	625	1,200
3rd Year ..	1,200	675	725	1,400
4th Year ..	1,300	775	825	1,600
5th Year ..	1,400	875	925	1,800
Total ..	£6,000			£7,000

[30] 1 Lev. 111; 1 Keble 569. Cp. *Thornborow* (*Thornborough*, *Thornburgh*) v. *Whitacre* (1706) 2 Ld. Raym. 1164; 6 Mod. 305; 3 Salk. 97, where the plaintiff accepted a similar recompense by way of compromise, and no judgment was given.

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the so-called damages amount merely to quasi-contractual recovery in protection of the restitution interest. It is submitted that this is the desirable result, and that mistake as to the logical implications of a contract, if known to or suspected by the other, ought to have the same effect as a slip of the pen or of the tongue,[31] and render the contract void; at any rate, where the logical implication is substantially different from what was expected by the party under the mistake.

Exceptional cases apart, the Courts will enforce consequences logically implied in the terms expressed in contracts, statutes and other legal documents and transactions, as though they had been expressed *totidem verbis*. Also, consequences may be logically implied not only from the terms of the document taken alone but from those terms taken in conjunction with propositions of fact or rules of law. Thus, speaking of wills, Lord Westbury declared that implication may be founded upon 'a direction to do something which cannot be carried into effect without, of necessity, involving something else in order to give effect to that direction, or something else which is a consequence necessarily resulting from that direction'.[32]

(5) Literal and Ulterior Meaning.

In division (3) of this section we considered the distinction between (1) the intended meaning, (2) the ordinary meaning, and (3) the comprehended meaning. Another distinction must now be made between (*a*) the literal or primary meaning of the words, and (*b*) the ulterior meaning, *i.e.*, the meaning, other than the literal meaning, intended to be conveyed by the speaker when he uttered the words, or the meaning, other than the literal meaning, attributed by a hearer to the speaker.

In some cases ulterior meaning may coincide with logical implication; but the meaning of the two phrases is different. Ulterior meaning is a matter of psychology, not of logic. On the one hand, the logical implication of statements may lie hidden for years, as did the truths of mathematics before they were discovered. On the other hand, the ulterior meaning of a proposition need not be logically entailed in its literal meaning.

The distinction between literal and ulterior meaning applies to each of the three meanings of 'meaning' stated in division (3), this resulting in six possible combinations. For example, a tactless host looks out of the window and says to his guest: 'It has stopped raining'. The guest mistakenly takes this to be an oblique hint that he is desired to leave. Here it may be said that while the meaning of the words to the host is 'It has stopped raining' (intended literal, 1*a*), the meaning to the guest is both this (comprehended literal, 2*a*), and also 'Please go' (comprehended ulterior, 3*b*). If the host meant his guest to make this implication, there would be a fourth 'meaning', namely, an intended ulterior meaning (1*b*). The facts are too scanty for a pronouncement on whether the ordinary onlooker would make the implication (ordinary ulterior, 2*b*), but he would of course understand the literal meaning (ordinary literal, 2*a*).

It may be contended that so-called ulterior meaning as explained above is not meaning at all. In support of this contention it may be

[31] *Webster* v. *Cecil* (1861) 30 Beav. 62; *Hartog* v. *Colin* [1939] 3 A. E. R. 566.
[32] *Parker* v. *Tootal* (1865) 11 H. L. C. 143 at 161.

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said that when the guest reads (or thinks he reads) his host's mind from his words, he might equally have read it from his host's non-verbal acts, like the expression on his face or the impatient tapping of his toe. This kind of meaning is, therefore, not confined to symbols. Also, it may be said that the sentence 'It has stopped raining' does not mean the same as the sentence 'Please go'. In reply, it may be said that although the objections are true in a way they do not affect the proposition that the intention of the host (the state of affairs that he desires to bring about by his words) when he says 'It has stopped raining' may be the same as when he says 'Please go'. Whether or not ulterior meaning is called meaning is simply a question of words.

Ulterior meaning—or, as Wyclif called it, 'ghostly understandynge'—has given rise to a distinct literary form, namely, the parable or allegory. In legal matters it figures prominently in the defamatory innuendo and the construction of documents. To discuss the former in detail would take us off into too specialized a branch of the law, but something may be said upon the latter.

It has already been remarked that the Courts will generally enforce consequences logically implied in the language of contracts, wills, statutes, and other legal documents and transactions. The point now to be noticed is that the legal doctrine of implied terms goes much farther than this. Judges are accustomed to read into documents and transactions many terms that are not logically implied in them. As an academic matter non-logical implication may be classified into three kinds: (i) of terms that the parties (the plural shall throughout include the singular) probably had in mind but did not trouble to express; (ii) of terms that the parties, whether or not they actually had them in mind, would probably have expressed if the question had been brought to their attention; and (iii) of terms that the parties, whether or not they had them in mind or would have expressed them if they had foreseen the difficulty, are implied by the Court because of the Court's view of fairness or policy or in consequence of rules of law. Of these three kinds of non-logical implication (i) is an effort to arrive at actual intention; (ii) is an effort to arrive at hypothetical or conditional intention—the intention that the parties would have had if they had foreseen the difficulty; (iii) is not concerned with the intention of the parties except to the extent that the term implied by the Court may be excluded by an expression of positive intention to the contrary.

Concerning the three kinds of non-logical implication there are the following special remarks to be made. First, the name 'non-logical implication' is intended to indicate that this sort of implication has no *necessary* connection with logic. In any particular case it is possible for a term to be implied both logically and by what is here called non-logical implication. Second, although the line between the three cases can be made sharp as a matter of definition, in practice they merge imperceptibly into each other, because the distinguishing factor, that of probable intent, is a matter of degree. Third, only in case (i) does the implication amount to a declaration by the Court of ulterior meaning in the sense already defined; in the other two cases the so-called implication is in reality an addition by the Court to the meaning of the parties. The present discussion of ulterior meaning will therefore be concluded with

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some remarks on the attitude of the Courts towards non-logical implication of type (i).

Generally speaking it may be said that whenever the Court comes to the conclusion that the meaning of the parties has been incompletely expressed, and that the unexpressed meaning can be gathered from what has been expressed (simply because in the circumstances it is improbable that the parties meant their words to be a complete statement), the omitted words will be supplied. As Lord Westbury put it, 'implication may arise from an elliptical form of expression which involves and implies something else as contemplated by the person using the expression'.[33] But there are some few cases where the Court may refuse to make this form of implication: for instance, it may be excluded by a presumption. An important exclusion of it in the law of wills is in the rule that a will confers no interest by mere implication. Thus, in *Scalé* v. *Rawlins* (1892),[34] a testator devised property to his niece during her life, and after her death '(she leaving no child or children)' he gave the property to his nephews. The niece died leaving children. It was argued that the intention of the testator must have been that if the niece left children they were to have the property, for otherwise there could be no possible reason for making the gift over to the nephews depend upon the niece's not having children. However, it was held by the House of Lords that since no gift to the children was expressed in the will, effect could not be given to any unexpressed intention of the testator. The policy of this strict rule of construction may be doubted, and there is at least one case where it is departed from. If a testator leaves a sum of money 'after the death of *A*' to *B*, the person who would be entitled to the money if the testator died intestate, the Court will imply a life interest in *A*, for otherwise the testator's evident intention to postpone *B*'s enjoyment of the property would fail of effect.[35]

(6) The Transition from Implied Terms to Rules of Law.

We pass to a consideration of non-logical implication of types (ii) and (iii). It is common form among judges to deny that they ever read into a contract or other document anything other than what, in their view, the parties actually intended[36]; and occasionally they have even gone so far as to say that the implication must be collected from the words of the

[33] *Parker* v. *Tootal* (1865) 11 H. L. C. 143 at 161; cp. Jarman, Wills (7th ed.) 601 ff.
[34] [1892] A. C. 342.
[35] Jarman, *op. cit.* 606 ff.
[36] 'An implied warranty, or, as it is called, a covenant in law; as distinguished from an express contract or express warranty, really is in all cases founded on the presumed intention of the parties and upon reason': *per* Bowen L.J. in *The Moorcock* (1889) 14 P. D. 64 at 68; and see the same judge in *Lamb* v. *Evans* [1893] 1 Ch. 218 at 229. 'The Court has no right to imply in a written contract any such stipulation, unless, on considering the terms of the contract in a reasonable and business manner, an implication necessarily arises that the parties must have intended that the suggested implication should exist. It is not enough to say that it would be a reasonable thing to make such an implication': *per* Lord Esher M.R. in *Hamlyn* v. *Wood* [1891] 2 Q. B. 488 at 491; and see the same judge in *Emanuel* v. *La Compagnie Fermière de l'Etablissement Thermal de Vichy* [1889] W. N. 150 at 151. 'Implied obligations in a contract must be governed by the common intention of the parties': *per* Lord Loreburn in *Lyttelton-Times Co.* v. *Warners* [1907] A. C. 476. 'The Court ought not to imply a term merely because it would be a reasonable term to include if the parties had thought about the matter, or because one party, if he had thought about the matter, would not have made the contract unless the term was included; it must be such a necessary term that both parties must have intended that it should be a term of the contract, and have only not expressed it because its necessity was so obvious that it was taken for granted': *per* Scrutton L.J. in *Re Comptoir Commercial Anversois and Power* [1920] 1 K. B. 868; and see the same judge in *Reigate* v. *Union Mfg. Co. (Ramsbottom)* [1918] 1 K. B. 592 at 605, and *Guaranty Trust Co.* v. *Hannay* [1918] 2 K. B. 625 at 664. '*Prima facie* that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying; so that, if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common "Oh, of course!" At least it is true, I think, that, if a term were never implied by a judge unless it could pass that test, he could not be held to be wrong': *per* MacKinnon L.J. in *Shirlaw* v. *Southern Foundries, Ltd.* [1939] 2 K. B. 206 at 227, affd. [1940] A. C. 702.

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document itself.[37] These statements cannot be taken seriously. It is true that the declaration of presumed actual intention is the commonest form of implication; but it is not the only form. Courts frequently import into a document terms that are not logically implied in it, and that the parties probably did not think about: or, to say the least, such terms are imported whether or not in the particular case it is probable that the parties thought about them. Examples of such terms 'implied' into contracts by rules of law are the implied conditions of reasonable fitness and merchantable quality on a contract of sale of goods, the rule that payment and delivery of goods are concurrent conditions, the implied warranty of seaworthiness, the implied condition on the letting of a furnished house that it is reasonably fit for habitation, the implied promise by one who agrees to build a house that the house will be reasonably fit for habitation, the implied promise by a servant not to disclose secret processes, not to hand over to a rival written work completed for the master, and not, while still in his master's employment, to solicit the master's customers to transfer their custom to himself, the implied promise by an employer (in some cases) to furnish work, the implied duty of care in the carriage of passengers and in looking after bailed goods, and the implied promise by a banker not to disclose the state of his customer's account.

The view may perhaps be held that this particular process is not very happily called 'implication'. It is not so much the interpretation of a pre-existing and expressed intent as legislation amending or supplementing the expressed intent. Terms so read into the contract might better be called 'constructive' than 'implied'.[38] However, this is simply a question of nomenclature; and in any case no fixed nomenclature can be maintained in practice, because terms of classes (i) (ii) and (iii) merge into each other. There is no legal difference between the three classes, and the only practical difference is that the Courts are more ready to imply terms of class (i) than of classes (ii) and (iii). Terms of classes (ii) and (iii) are mainly of specified types and are comparatively rarely added to, though it is always open to the Court to add to them.[39] Also, implication

[37] *E.g. per* Lush, J. in *Churchward* v. *R.* (1866) L. R. 1 Q. B. 173 at 211. *Contra, per* Bowen L.J. in *Lamb* v. *Evans* [1893] 1 Ch. 218 at 230; *per* Vaughan Williams L.J. in *Krell* v. *Henry* [1903] 2 K. B. 740 at 749.
[38] So Restatement, Contracts, § 253; Williston, Contracts (revised ed.) § 668; Patterson, 'Constructive Conditions in Contracts' (1942) 42 Col. L. Rev. 903. There is much confusion of terminology. In *Re Cadogan and Hans Place Estate, Ltd., Ex p. Willis* (1895) 73 L. T. 387, Rigby L.J. seemed to say that terms of class (i) were express, and those of class (iii) implied. Cp. Salmond and Williams, Contracts, 2nd ed. 24. In *Williams* v. *Burrell* (1845) 1 C. B. 402, Tindal C.J. recognized that the phrase 'implied covenant', in one meaning, applied to terms of class (i), though he held that it differed in no respect from an express covenant.
[39] Thus in *Aerial Advertising Co.* v. *Batchelor's Peas* [1938] 2 A. E. R. 788, on a contract to advertise by an aeroplane towing trailers, there was held to be an implied promise not to fly during the two minutes' silence on Armistice Day.

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of type (iii) is generally confined to the interpretation of bilateral or multilateral private transactions like contracts. Generally, it is not applied to the interpretation of wills, for the Courts disclaim any jurisdiction to reform wills,[40] except in the exercise of statutory powers. Generally, also, the doctrine of separation of powers prevents the Courts from interfering with legislation otherwise than by declaring the probable or (at most) hypothetical-probable intent of the Legislature. However, in declaring the probable or hypothetical-probable intent of a testator or Legislature the judge naturally tends (however much he may deny it) to go upon his own ideas of policy, convenience or justice. Further, there are certain rules of construction of wills and statutes that may, if desired, be thought of as implied (constructive) terms, such as the rule that 'children' does not include illegitimate children, or that statutes do not bind the Crown in the absence of express words or necessary implication. No doubt the ordinary lawyer would dislike hearing these referred to as implied terms, but they differ in no way from implied terms of classes (ii) and (iii).

This brings me to my last point, which is that it is a matter of taste whether implied terms of classes (ii) and (iii) be styled implied terms or rules of law. They are in fact merely rules of law that apply in the absence of an expression of contrary intent[41]: whether we choose to call them implied terms or not is simply a matter of terminology. Our terminology as we now have it is not consistent, for there are some rules of law that are indistinguishable from implied terms in their practical effect, yet which are never called implied terms. Such, for instance, are the rules of interpretation. So, also, we do not say that the rule that a contract is voidable for innocent misrepresentation is an implied term,[42] although it can be derogated from by agreement; yet some judges and writers have been known to declare that the law of frustration,[43] the duty to disclose in contracts *uberrimae fidei*,[44] and even part of the law of mistake in contract,[45] rest upon implied terms or conditions. With all respect to those who hold a contrary opinion, it is submitted that the question is purely terminological and has (or should have) no practical importance. This submission may be stated a little more fully for the first two of the three departments of law just mentioned.

[40] *Per* Knight Bruce V.-C. in *Bird* v. *Luckie* (1850) 8 Hare 301 at 306–7.

[41] Exceptionally, the rule that the Crown can dismiss its civil and military servants at will, though said to be a term implied into contracts of employment with the Crown, seems to be incapable of being excluded by contrary agreement. See D. W. Logan, 'A Civil Servant and his Pay' (1945) 61 L. Q. R. at 255, 262; *Rodwell* v. *Thomas* [1944] 1 K. B. 596. It would be better not to call it an implied term.

[42] See *per* Luxmoore L.J. in *Merchants' and Manufacturers' Insce. Co.* v. *Hunt* [1941] 1 K. B. 295 at 318; and cp. *Pennsylvania Shipping Co.* v. *Compagnie Nationale de Navigation* (1936) 155 L. T. 294.

[43] For a review of the *dicta* see L. J. Sturge, 'The Doctrine of Implied Condition' (1925) 41 L. Q. R. 170. Lord Wright has rejected the language of implied condition in frustration cases: *Denny, Mott & Dickson, Ltd.* v. *Fraser* [1944] A. C. 265 at 275–6; cp. his address in The Future of the Common Law, 112.

[44] *Per* Parke B. in *Moens* v. *Heyworth* (1842) 10 M. & W. 147 at 157; *per* Lindley L.J. in *Blackburn* v. *Vigors* (1886) 17 Q. B. D. 553 at 578; on appeal, *per* Lord Watson (1887) 12 App. Cas. 531 at 539–40, but see *per* Lord Halsbury L.C. *ibid.* at p. 536; *per* Atkinson J. in *Zurich Insce. Co.* v. *Morrison* [1942] 1 A. E. R. 529 at 535. *Contra*, *per* Fletcher Moulton L.J. in *Joel* v. *Law Union and Crown Insce. Co.* [1908] 2 K. B. 863 at 886.

[45] *Lever Bros. Ltd.* v. *Bell* [1931] 1 K. B. 557 at 584, 595–6, *per* Scrutton and Greer L.JJ.; on appeal [1932] A. C. 161 at 224–7, *per* Lord Atkin.

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(*a*) A problem that may seem at first sight to give practical importance to the issue in the law of frustration is one concerning the interpretation of an arbitration clause. Suppose that a contract contains a clause referring to arbitration all disputes arising 'under' the contract, and suppose that a dispute arises over the question whether the contract has been frustrated: is that a dispute arising 'under' the contract within the meaning of the arbitration clause? In *Hirji Mulji* v. *Cheong Yue S.S. Co.* (1926)[46] the Privy Council held that it was not, but this decision was doubted, *obiter*, by the House of Lords in *Heyman* v. *Darwins* (1942),[47] and Viscount Simon L.C. put his dissent on the ground that discharge for frustration rested upon an implied term in the contract. 'If, . . . when parties have entered into a contract, circumstances arise before the performance of the contract is completed which, in the view of one party, bring the contract to an end by frustration, and, therefore, discharge both parties from further performance, but the other party does not agree, this is a difference about the applicability of the implied term, and is just as much within the arbitration clause as if it were a difference about an express term in the contract.'[48] Lord Wright, however, though he concurred in doubting the *Hirji Mulji Case*, expressly said that his criticism of it did not depend upon the implied term theory of frustration.[49] It is respectfully submitted that this is a perfectly tenable view. It can be held that a dispute as to frustration is a dispute arising 'under' the contract, because it is a dispute concerning the application of the law of frustration to the contractual situation; there is no need to bring in the implied term theory.

Although, as already said, the question is (or should be regarded as) purely one of terminology, there are certain reasons for rejecting the terminology of implied term in cases of frustration. In the first place, although the rubric 'implied term' is a convenient heading for some comparatively minor rules of law, like the implied conditions and warranties on a contract of sale of goods, it is not convenient as a matter of classification to include under it such a large subject as frustration. In the second place, to speak of the discharge of *both* parties on account of frustration as resting on an implied term or condition conceals the fact that their discharge is governed by different principles of law. The discharge of the party whose act becomes impossible of performance rests on the law of impossibility of performance or undue delay; that of the other party rests on the law of failure of consideration. That the principles are different is seen from the fact that sometimes one party is discharged and not the other.[50] A terminology that slurs this over cannot be accounted satisfactory. In the third place, the phrase 'implied term' (or 'condition') has a threefold signification. It is now clear that as applied to the law of frustration it refers to implication of type (iii), but there are some older *dicta* that make it seem to refer to implication of type (i), and this tends to create doubt and confusion in the law. For instance, it is sometimes suggested that a contract is discharged for frustration only where the frustrating event was not contemplated by the parties, for if it

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was contemplated by them, and yet not referred to in the contract, no term relating to frustration can (according to this argument) be implied. This argument was rejected by Goddard J. (as he then was) in *W. J. Tatem* v. *Gamboa* (1939),[51] it is submitted rightly. Discharge for frustration, if we must state it as a matter of implication, rests upon constructive implication, not genuine implication.

(*b*) There appears to be only one case in which a practical consequence was purported to be attached to the so-called 'rule' that the duty to disclose in contracts *uberrimae fidei* rests on an implied term. This was the case of *Pickersgill* v. *London, etc., Insurance Co.* (1912),[52] where the question arose whether an insurer's defence of non-disclosure by the assured was a defence 'arising out of the contract' within the Marine Insurance Act, 1906, s. 50 (2). Hamilton J. held that it was, on the ground that the duty to disclose arose out of an implied condition in the contract. It is submitted that the decision is right but the reason unsatisfactory, for, granting that the duty to disclose can be said to be an implied condition, the implication belongs to type (iii), and is simply another name for a rule of law. The proper reason for the decision is that, on the construction of the section, a defence arising out of the combined effect of the contract (*i.e.*, the agreement) and the rules of law relating to the contract is a defence 'arising out of the contract'. Were the construction otherwise, the section would have no application, for every defence arising out of a contract is at the same time a defence arising out of a rule of law applicable to the contract, even if it be only the rule of law that a defence expressly given by the contract shall be a good legal defence.

In *Merchants' and Manufacturers' Insurance Co.* v. *Hunt* (1941),[53] it was argued that, on the assumption that the duty to disclose is an implied term, it is superseded by an express term covering the same ground as (or being inconsistent with) the implied term.[54] The Court of Appeal did not finally pronounce upon this argument, but Scott L.J. said: 'I am not satisfied that [the] argument on principle is sound. I realize that there are several reported cases in which judges have, in the course of their judgments, expressed an opinion that the duty of disclosure may be regarded as resting on an implied term, but I do not know of any case where the point has come up for actual decision.' It is submitted that in any event the argument has no bearing on the conclusion sought to be deduced from it. Whether or not the law of non-disclosure is stated in the language of implied term, it is evident that the parties are able, if they wish, to contract out of it; and whether they have so contracted out of it is a matter of construction that need not be affected by the terminological question whether or not the law is stated as an implied term.

(*To be concluded.*)

Glanville L. Williams.

[51] [1939] 1 K. B. 132. Criticisms of this decision are considered by Williams in McElroy, Impossibility of Performance, 246.

[52] [1912] 3 K. B. 614.

[53] [1941] 1 K. B. 295.

[54] Cp. the somewhat similar argument raised and rejected on the law of frustration in the *Fibrosa Case* [1942] 1 K. B. 12 at 25–6, affirmed on this point [1943] A. C. 32.

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REVIEWS AND NOTICES.

Book Review Editor: R. E. Megarry.

International Law. Vol. I. International Law as Applied by International Courts and Tribunals. By G. Schwarzenberger, Ph.D., Sub-Dean of the Faculty of Laws, University College. London: Stevens & Sons, Ltd. 1945. xliv and 645 pp. (£3 net.)

This is the first volume of a work which is to be completed in due course by two more volumes; one of these will embody international law as applied in British State practice, and the other international law as applied by Courts within the British Commonwealth and Empire.

When completed the trilogy will constitute a work of great value. Its preparation must have entailed immense labour on the part of the author, but that labour will not have been wasted.

International lawyers nowadays are seeking after knowledge of their subject along the right lines. If international law embodies the rules governing the relations between States, the practice of States—as shown by what they are doing in their treaties and their day-to-day relations, and still more what they ought to do, as exemplified by the decisions in cases brought before national and international tribunals—affords the surest guide as to the correct rule of international law.

The lines on which the author has planned his work are not unlike those of the 'Fontes Juris Gentium' of Professor Viktor Bruns, though fortunately somewhat less ambitious. A knowledge of the practice of States is only to be obtained from the study of a mass of material, a mass so great that it would be beyond the capacity of any single individual to cope with the preparation of a work embodying the practice of all States and the relevant decisions of the Courts of every country. That, no doubt, is why Dr. Schwarzenberger is limiting his second and third volumes to British State practice and to the decisions of the Courts of the British Commonwealth and Empire.

The first half of the present volume embodies the contributions which the decisions of international Courts and tribunals have made to substantive international law. It is grouped into five headings or sections dealing with the foundations of international law, with international personality, with State jurisdiction, with the objects of international law, and with international transactions. No two men's minds work on precisely the same lines, and as yet there is no subdivision of the field which has received universal sanction and general adoption; but Dr. Schwarzenberger's plan is logical and as good as any other. Even if it were not so, there is an admirable index to the book, and with its help no reader will find any difficulty in tracing the treatment of any particular topic which has received elucidation at the hands of an international Court.

Pride of place is given to the judgments and opinions rendered by the Permanent Court of International Justice at The Hague. It is not unnatural that it should be so, for the decisions of the Court have always been prepared with meticulous care and are easy of access. Full account, however, is taken of all the more important awards given by the Permanent Court of Arbitration, especially those where an award embodied a full exposition of the principles on which it was founded, as in the case of Professor Huber's award in the Palmas dispute between the United States and the Netherlands.

The decisions of the Mixed Arbitral Tribunals established after the Treaty of Versailles, and of the Claims Commissions which have functioned at intervals in the course of the last century, are also dealt with, but the value of these two categories of decisions is more difficult to assess. The qualifications of the personnel of these bodies have not always been of the highest, and unfortunately there was no means of remedying the situation when, as often happened, Mixed Arbitral Tribunals gave divergent decisions in similar situations.

The divergencies displayed in the decisions of some of the Mixed Arbitral Tribunals,

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and the line taken in some of the decisions of the various Claims Commissions of the last half century, afford a strong argument for creating some right of appeal from such tribunals to a central body, such as the new World Court to be set up at The Hague. Only once hitherto has anything in the nature of an appeal from the decision of Mixed Arbitral Tribunals been attempted. This was in the later stages of the disagreements that arose out of the Hungarian Optants dispute; by the agreement of April 28, 1930, an appeal was allowed to the Court at The Hague on points of jurisdiction, or on the merits of cases arising out of the Agrarian policy pursued in some of the eastern European countries. One such appeal was taken to the Court at The Hague, but this is sufficient to show the feasibility of giving a right of appeal from decisions of minor international tribunals and thereby avoiding discordant decisions.

The field covered by Dr. Schwarzenberger's book is so great that it is useless to pick out individual statements and criticize them. To do so would merely be to express a view contrary to the writer of the book. On many questions international law is still a sea of which the charts are so imperfect that the possibility must not be overlooked that it might be the reviewer who was wrong and not the author of the book. On matters like the relations between municipal law and international law, or the functions of an international Court with regard to municipal law, topics which are dealt with in Part I, Chapter III, we are still a long way from the emergence of any clear-cut rules. There is general acceptance of the view that international law must prevail over municipal law in the sense that when the municipal law of a country is in conflict with international law it is the duty of the State to bring the former into conformity with the latter, but that affords no warrant for the view that an international Court, even the Permanent Court at The Hague, can adjudicate upon an issue to be determined by national, *i.e.* municipal law. Admirable though it was in many ways, the judgment of the Permanent Court at The Hague in the case of the Serbian and Brazilian Loans (1929 A 20-21) got dangerously near to doing so. Art. 38 of its statute gives the Court no authority to apply municipal law. Nor is this a point on which an agreement between the parties to a dispute could enlarge the Court's powers, any more than an agreement between the parties could make the Court competent to render an advisory opinion. This limitation on the powers of an international tribunal may, at first sight, seem unfortunate; a case like the *Canevaro* award (P. C. A. 1912) shows how necessary resort to an international tribunal may be to prevent a State from evading its obligations under its own law. Nevertheless, in the long run, it will probably be found better that on all matters to be governed by municipal law, the decision of the municipal Courts should be final.

The chapters dealing with sections of international law which are undergoing fairly rapid development afford interesting study. Mention need be made of only two, Chapter IX and Chapter XII. The former deals with international persons other than States and covers such matters as the non-identity of State claims and claims of individuals, the operation of the Calvo clause and the position of individuals as beneficiaries of treaties; the latter deals, among other matters, with the obligation of a State to apply the minimum standards to its nationals.

Part VI of the book is devoted to War and Neutrality. Let us hope that San Francisco and the Atomic Bomb between them have ensured that this part of the work is of less importance for the international lawyer of the future than the earlier chapters of the book dealing with the law to be applied in time of peace. There may be much to be done in clearing up the disputes and the difficulties arising from the present war, but that can be left to Governments and their specialists.

Part VII deals with the law of International Institutions. More than half of its ten chapters are given up to the law of judicial institutions. The remainder is devoted to administrative institutions, to the League of Nations and to the International Labour Office.

One may hazard the view that the post-war world will rely to a greater extent on international institutions than it did during the two decades after the first world war. The trend will be away from nationalism towards internationalism. Consequently, all that can be learned from the international institutions of the past is valuable.

To the League of Nations Dr. Schwarzenberger is less than fair. It is wrong to characterize it as an 'abysmal failure' (p. 458). If the League failed to achieve the great purposes of its founders, it was because want of vision and selfish timidity dominated the policies of the representatives of the Powers during the period before the present war. This criticism, however, is not meant to detract from the usefulness of the chapter on the League. Many of the problems which arose in the course of the activities

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of the great institution at Geneva will inevitably arise in some form or other when the new Charter of the United Nations begins to function. All the guidance that can be obtained from the working of the League at Geneva will be valuable.

The information which Dr. Schwarzenberger has brought together leaves a good impression of the work of the Permanent Court of International Justice. There can be no doubt that in the twenty years of its active life the Court contributed a great deal to the elucidation of the problems which nowadays lead to disputes between States. The Court's decisions show perhaps a slight tendency to over-explanation, but that was probably due only to a desire to help the parties. He is, on the whole, complimentary to the Court. Only once can one see a clear indication that, in his opinion, a decision given by the Court was wrong (*Oscar Chinn Case*, pp. 105–6).

Dr. Schwarzenberger is to be congratulated on this work. It should be of great value to all students and practitioners of international law.

Cecil J. B. Hurst.

The Outlook for International Law. By Professor J. L. Brierly. Oxford: The Clarendon Press. 1944. iii and 142 pp. (6s. net.)

In his admirable lectures given in 1936 at The Hague Academy on the 'Droit de la Paix', Professor Brierly said that 'to despair of the future of international law would be tantamount to despairing of our civilization of which it is one of the essential conditions'. He urges international jurists to take heart in the example of the great Grotius, who had faith in international law though at his time 'non defuerunt qui hanc juris partem ita contemnerent quasi nihil ejus practer inane nomen existeret' (Receuil des Cours, v. 58, pp. 234–235).

His new book Professor Brierly wrote for the 'non-specialist reader'. International law is not 'a mystery about which only professed international lawyers have a right to express an opinion. On the contrary, one of the handicaps that it has always suffered from is the lack of general interest in its problems and of informed criticism of its defects' (p. 2). It is imperative to remove those handicaps. In a paper read by him recently Professor Brierly refers to von Ihering's book 'Der Kampf ums Recht' 'the burden of which was that law is always something that men must be willing to fight for', and adds: 'I am sure that that is true of international law' (International Affairs, 1944, p. 386).

But what is international law? It can be defined as 'the sum of the rights that a State may claim for itself and its nationals from other States, and of the duties which in consequence it must observe towards them' (p. 5). There is 'not very much in the objection . . . to the alleged vagueness and uncertainty of its principles'. 'That is a defect which one may hope will be gradually reduced in importance by the development of international adjudication' (p. 15). 'International law is not simply a subject upon which books are written, but a system that is practised, and to judge the measure in which it is effective it is necessary to watch it in action. Unfortunately, the practice of international law is a matter of which the layman sees little' (p. 13). True, 'States may often violate international law, just as individuals often violate municipal law' (p. 5), but on innumerable occasions they seek guidance in and observe recognized principles of international law.

But international law cannot create—and it is not its function to create—international order. 'Our common phrase "law and order" inverts the true order of priority, both historically and logically. Law never creates order . . . always there has to be order before law can even begin to take root and grow' (p. 74). 'The future of international law therefore depends on the answers that events may give to two vitally important questions about the future of international order. Can we . . . look forward to the establishment of a reasonably secure international order, to some such measure of freedom from fear as we have reached in the State? and if we can, can we also hope that such an order may be a constitutional order?' (p. 75).

The readers of Professor Brierly's book will see how those answers are to be sought. We trust that many amongst them will be lawyers whom the brilliant analysis of the author will help to refute unfounded criticisms of international law, and to explain to laymen that the allegation of 'non-existence' of international law is based on a profound mistake as to its true function.

Vladimir Idelson.

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Justice and World Society. **By Laurence Stapleton. Chapel Hill: The University of North Carolina Press. London: Oxford University Press. 1944. 150 pp. ($2.00; 12s. net.)**

In the evolution of juristic thought the theory of the law of nature has played a vital and indispensable part. At times this part has been dominant, at other times subsidiary, at yet others almost illusory. In the days of Grotius the theory soared to its zenith, in modern days it has tumbled to its nadir, but though it has often entered into periods of eclipse, its sacred flame has never been extinguished. In this book Miss Stapleton heralds a new and more glorious incarnation. She makes a brave attempt to utilize the idea for the needs of world society. Her work is stimulating, her style vigorous and attractive. Above all, to her learning she brings faith in the ideals of humanity. Her contribution to jurisprudence is most valuable, and it is to be hoped that we shall hear much more of her.

The book begins with an introductory chapter in which the author laments the present position of mendicancy into which the theory has been forced. She assigns as the primary cause of this position the undiscriminating zeal of some of the earlier prophets of the moral law who would endow every part of it with the same degree of fixity as belongs to the physical laws. The view of the neo-Kantians, such as Stammler and Charmont, that the law of nature has a variable content, came too late to protect it from the onslaughts of the inexorable 'historicism' which, fostered by such writers as Vico, Buffon and Herder, has opened the door to modern totalitarian doctrine, naked and unashamed.

A writer on the law of nature must needs trace its history. Yet this task is always invidious, for it has been so well discharged by Bryce and Pollock that it is difficult to avoid a mere adherence to their footsteps. From this ordeal Miss Stapleton emerges with flying colours. With the deft hand of an artist she paints for us its several phases, its treatment by the Stoics, its identification by the medieval schoolmen with the Law of God, its adaptation to international relations by the masterly manipulation of Grotius, its points of contact with the philosophy of Locke. She reminds us of the distinction drawn by Aristotle between *το φύσει δίκαιον* and *το νόμῳ δίκαιον*. On two points only is one inclined to join issue with her. (a) She tells us that the fulfilment of the idea, in the eyes of Cicero, demanded a universal equality and universal brotherhood, and follows this up with the remark that 'this sentiment was before long to be powerfully reinforced by the teachings of the New Testament'. Now surely the Christian ethic, though it postulates universal brotherhood, does not postulate universal equality. A truer appreciation is expressed in *Troilus and Cressida*, where Shakespeare puts into the mouth of Ulysses the words—

> 'The heavens themselves, the planets, and this centre
> Observe priority, degree and place'.

(b) She is inclined to overrate the Roman contribution to the growth of the idea. The Romans, with few exceptions, were mere dabblers in philosophy, which they were too 'realistic' to care to understand. But on the whole her account is excellent. She knows how to lay her emphasis in the right place. It is good that she finds space for more than a passing allusion to Burlamaqui, who profoundly influenced Blackstone.

Having sketched in the second chapter the history of the idea of the law of nature, she devotes the third, entitled 'The Human Variable', to a dissection of the philosophy of three of its enemies. Opposed to the idea, she tells us, we find the theory of 'historical relativism'. 'The process of history becomes an absolute which elbows out any moral judgment.' She shows us that their doctrines are perfectly consistent with, and lead inexorably to, Nazism, though probably they would have disliked many of its aspects.

The last three chapters are a brilliant essay in the methods whereby the idea of the law of nature can arise, phoenix-like, from its ashes, to play a yet more glorious part in jurisprudence. Conceding that, dressed in its old garments, it has outlived its usefulness, she summarizes her own philosophy in the words: 'If we can see the Law of Nature as being, fundamentally, an ideal of justice in government rather than a divinely dispensed, mathematically deduced code, the displacement can appear as a creative change in thought. Freely conceived, the Law of Nature is a description of the purpose outside the law for which the law exists, and it is a measure of the moral aim of social action, respect for which can alone entitle any government to the willing allegiance of its citizens'. She appreciates that there are moral postulates which are as fundamental and immutable as physical postulates, that, in Chestertonian phrase, murder, aggression and all cruelty must needs throughout the universe be wrong, but outside those axioms there are many propositions which demand a proof to which they may never attain, but which must remain the quest of the statesmen of all countries. Some things are universal, others variable, and it is the task of the architects of the future of human society to end the antagonism, and ensure the co-operation, between these two. Her optimism is expressed in her words: 'We need not fear that the most extensive inquiry into the variety of political ideals will shake the essential elements of justice'. Her book is one which can only with reluctance be laid down, and, when laid down, continually intrudes itself on a reader's inmost thoughts.

H. G. Hanbury.

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The Royal Power of Dissolution of Parliament in the British Commonwealth. **By Eugene A. Forsey, M.A. (Oxon), Ph.D. Toronto: Oxford University Press. 1943: xx and 816 pp. (21s. net.)**

As I read Dr. Forsey's book, I was reminded of the lesson which the writer on government may learn from John Locke. That famous man wrote two treatises of government. The second treatise we read still with pleasure and instruction and inspiration; the first is not unreadable, but it is almost unread. The reason may be discovered if the contents of the two treatises are considered. In the first, says Locke, 'the false principles and foundations of Sir Robert Filmer, and his followers, are detected and overthrown'; the second 'is an essay concerning the true original, extent and end of civil government'. Now Locke refuting Filmer is exact, intricate, contentious and polemical; Locke expounding his own view of the true doctrine is lucid, illuminating, trenchant and free. The result is that the second treatise is a fruitful garden, the first is a mere battlefield. Dr. Forsey's book follows the method of the first treatise. His Sir Robert Filmer is the late Professor Berriedale Keith. His book was written before Keith's death, but he might well adopt as his justification Locke's own words in the preface to the first treatise. 'I should not have writ against Sir Robert, or taken the pains to show his mistakes, inconsistencies, and want of . . . scripture-proofs, were there not men amongst us who, by crying up his books, and espousing his doctrine, save me from the reproach of writing against a dead adversary'. But the result is that Dr. Forsey's book is, like the first treatise, something of a battlefield, and like a battlefield, instructive but in a destructive sort of way.

It must be conceded, of course, that Dr. Forsey's subject—the constitutional principles governing the exercise of the power to dissolve Parliament—is controversial and the controversies are complicated. No doubt some discussion of Keith's views is necessary—his pre-eminent position as the most learned commentator upon the law of the constitution in the United Kingdom and in the Dominions meant that his views themselves influenced constitutional practice. But in most discussion of the power of dissolution too much energy and too much space have been devoted to doing battle with Keith. This was a criticism which was passed, at 53 L. Q. R. 130, on Dr. H. V. Evatt's *The King and his Dominion Governors*, published in 1936, and it must be repeated of Dr. Forsey's book. There is seldom a page where Keith's name is not mentioned more than once. There is too much of this controversy. Let it be said at once that Keith was dogmatic, provocative, inconsistent, overwhelmingly weighty. But surely the exposition of this subject, and of other aspects of the constitutional structure of the British Commonwealth, would be more illuminating if writers would concentrate upon the facts and the issues, explaining them and discussing them on their merits, and referring to the opinions of other writers in occasional footnotes. Until this is done, the discussion of these topics will be too polemical, too contentious, arid and wasteful. Dr. Forsey's book is, for this reason, not in the first class. The reader gets lost in the skirmishes and refutations. The constitutional issues do not stand out. In this respect Dr. W. Ivor Jennings' single chapter on the personal prerogatives of the Sovereign (chapter xii) in his *Cabinet Government* (1937) still seems to me to provide, in spite of its limited scope, a more illuminating discussion of the subject than is to be found elsewhere.

Dr. Forsey is a Canadian and it is natural that he should spend a good deal of time in the examination of the events of 1926 when Lord Byng, the Governor-General of Canada, refused a dissolution to Mr. Mackenzie King on June 28, and granted a dissolution to Mr. Meighen on July 2. Never, indeed, has the whole story of those days been

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so thoroughly dissected. The Canadian crisis of 1926 dominates the entire book; it occupies almost half of the text (excluding appendices). This means that the consideration of other examples and precedents and of the opinions of constitutional authorities must be briefly done. For my part it is too brief and too summarized to be clear and significant. In this respect Dr. Evatt's discussion of individual cases, though less extensive, was more illuminating.

In the last analysis, therefore, the most important contribution which Dr. Forsey makes is his discussion of the Canadian crisis of 1926. There is, in my view, a risk that the significance of this crisis may be over-rated. It seems to me that the South African example of 1939 where the Governor-General refused General Hertzog's request for dissolution may be of at least as great significance for our subject. It may well be of greater significance, for it is not complicated with additional and almost extraneous constitutional issues as was the case of 1926. Yet Dr. Forsey gives only six pages to the South African example, as against one hundred and twenty or so to the Canadian. It will be wise to get the Byng affair more into perspective soon, but it is probable that this could not be done until it had been treated in almost exaggerated detail.

It seems fair to say, therefore, that the main value of Dr. Forsey's book lies in his treatment of the Byng affair, and here his analysis and exposition are of great interest. The case involved other constitutional issues than that of the refusal of the dissolution to Mr. Mackenzie King, and of its grant to Mr. Meighen. It involved in particular a dispute about the legality of Mr. Meighen's Government. On this latter issue there has been relatively little discussion. It involved points in Canadian law which are of interest but mainly of domestic interest. But the prevailing opinion among constitutional students was that illegality or at least unconstitutional action had occurred. On the former issue of the dissolution, the general view had been, as Dr. Forsey says, 'that Lord Byng's refusal of dissolution to Mr. King and/or his subsequent grant of dissolution to Mr. Meighen were unconstitutional' (p. xiv). Dr. Forsey takes the view, at first sight startling, that Lord Byng's course from start to finish was not only entirely constitutional but essential to the preservation of constitutional liberty.

It may be said at once that Dr. Forsey's discussion of the subordinate constitutional issue—the legality and constitutionality of Mr. Meighen's temporary government—is most valuable and, to my mind, completely convincing. He supports his argument with some interesting examples from the earlier constitutional practice of Canada, and in some ways one might call the thirty odd pages on this point the most original and convincing in the book.

Of the dissolution issues of 1926 it is not so easy to speak. For my part I would agree with Dr. Forsey that Lord Byng's refusal of a dissolution to Mr. Mackenzie King on June 28, 1926, was constitutional. And I am inclined to agree that his grant to Mr. Meighen on July 2 was constitutional. But I believe that a refusal would have been constitutional also and that it would have been the preferable course. (It is sometimes forgotten in the heat of controversy that a refusal and a grant of dissolution in a given case may both be constitutional, though one may be the preferable course.) My view on that point inclines more towards Dr. Evatt's opinion that 'Lord Byng should have refused Mr. Meighen's request for a dissolution and recommissioned Mr. King as Prime Minister, not, of course, imposing any condition of a dissolution, but being reasonably certain that Mr. King would repeat his former tender of advice, upon which a dissolution would ensue' (*op. cit.* p. 62). I cannot agree with Dr. Forsey that the shortness of time which intervened between refusal of dissolution to Mr. King and grant of dissolution to Mr. Meighen is irrelevant (p. 238). On the other hand, Dr. Forsey has convinced me that there is a great deal more to be said in favour of Lord Byng's action in granting a dissolution to Mr. Meighen than I had realised, and I believe his arguments must be considered most carefully before one can decide the question.

The whole subject of the power to dissolve still awaits constructive and comprehensive treatment, and all the more urgently because the Dominions agreed in the resolution of the Imperial Conference of 1926 that 'the Governor-General of a Dominion is the representative of the Crown, holding in all essential respects the same position in relation to the administration of public affairs in the Dominion as is held by His Majesty the King in Great Britain'. I would agree with Dr. Forsey that it does not follow from these words that Dominion usage may not vary from British in some degree (p. 4). What the resolution referred to was 'essential respects'. But I would question the accuracy and the logic of his subsequent sentence: 'An interpretation of the Report which would mean that the Dominions thenceforth would not be able to develop any special usage of their own, but would be bound simply to abide by what has developed

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or may develop in the United Kingdom, would be manifestly inconsistent with the cardinal principle of equality of status'. This is not a matter of status at all; it is a matter of structure. The Dominions were not made subordinate to the United Kingdom because they said voluntarily, as they did in 1926, that a Governor-General shall act in relation to his ministers in a Dominion as the King acts in relation to his ministers in the United Kingdom. No more would Sweden, say, be subordinate to the United Kingdom if it decided that its King should similarly model his behaviour on that of the British King.

Further, I would say that the resolution of 1926 *does* state that the practice of the King in the United Kingdom is the model to be followed. That does not mean, admittedly, that the Dominions must abide only by what has developed or may develop in the United Kingdom. They must abide by what is constitutionally permissible in the United Kingdom, and that includes not only what has happened in the past and what may happen in the future, but also what it would be proper for the King to do in the United Kingdom. A case can occur in a Dominion which has no parallel in the United Kingdom. When it does it must be dealt with according to the principles which would govern the action of the King in such a case in the United Kingdom. That, in my view, is what the resolution of 1926 means. It may be out of date; it may be inappropriate or impracticable. If so, it can be amended. It is, after all, no more than a convention of the constitution of the British Commonwealth; it is not law. It may be amended, as it was formulated, by an Imperial Conference. It certainly leaves much to controversy and doubt. It is difficult, if not impossible, to say in some cases which might arise in the Dominions and even in this country what it would be proper for the King to do. And for this reason it is of the greatest importance that this subject should be expounded lucidly, impartially and constructively.

K. C. Wheare.

The New Law of Education. By D. J. Beattie, LL.M., and P. S. Taylor, M.A. London: Butterworth & Co. Ltd. 1944. xx, 296 and (index) 39 pp. (21s. net.)

This book is the offspring of a successful union between Law and Administration, both the authors being education officers and one of them being a solicitor. The speed with which it appeared after the Education Act, 1944, received the Royal Assent in no way detracts from its accuracy and, while obviously many additions have been made to the law by administrative action since its publication, it remains a sound guide to a complicated statute.

Speaking broadly, there are four classes of people who are brought into contact with the law, as distinct from the practice, of education. There are the experts on administrative law to whom the authors do not profess to appeal more than in a general way; there are the administrators who are no doubt the authors' principal target; there are the members of local authorities in general and of education committees in particular, and finally there are the students. Thus the majority of those who may be expected to refer to a book of this nature are not lawyers. The authors have successfully evaded too legalistic an approach and there is no doubt that the educational administrator will, by using this book as a starting point, be able to find his way through the mass of departmental legislation which has begun to flow. Teachers also should be able to gain a great deal by reading the introduction which consists of an admirable summary of the Act and so to understand the huge framework in which they work. This is equally true of the members of local authorities who take their duties seriously. The authors do not claim, however, that this is a book for students, at any rate until they are advanced: it is much too detailed and, while it contains a complete statement of the law, it does in its phraseology presuppose more than a mere nodding acquaintance with the subject.

Bearing in mind the special nature of its readers, it is suggested that in subsequent editions the book could be made even more useful by the inclusion of brief explanatory matter on one or two subjects. For example, in the section dealing with voluntary schools it would be very helpful to have a financial analysis, if possible in concrete terms, of the incidence of costs of both old and new voluntary schools; in spite of the fact that the authors themselves regard the provisions of the Act covering religious instruction as a fair compromise, it is well known that there are many people who do not so regard them and it is considered that it would not be outside the scope of the work for such

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so thoroughly dissected. The Canadian crisis of 1926 dominates the entire book; it occupies almost half of the text (excluding appendices). This means that the consideration of other examples and precedents and of the opinions of constitutional authorities must be briefly done. For my part it is too brief and too summarized to be clear and significant. In this respect Dr. Evatt's discussion of individual cases, though less extensive, was more illuminating.

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It seems fair to say, therefore, that the main value of Dr. Forsey's book lies in his treatment of the Byng affair, and here his analysis and exposition are of great interest. The case involved other constitutional issues than that of the refusal of the dissolution to Mr. Mackenzie King, and of its grant to Mr. Meighen. It involved in particular a dispute about the legality of Mr. Meighen's Government. On this latter issue there has been relatively little discussion. It involved points in Canadian law which are of interest but mainly of domestic interest. But the prevailing opinion among constitutional students was that illegality or at least unconstitutional action had occurred. On the former issue of the dissolution, the general view had been, as Dr. Forsey says, 'that Lord Byng's refusal of dissolution to Mr. King and/or his subsequent grant of dissolution to Mr. Meighen were unconstitutional' (p. xiv). Dr. Forsey takes the view, at first sight startling, that Lord Byng's course from start to finish was not only entirely constitutional but essential to the preservation of constitutional liberty.

It may be said at once that Dr. Forsey's discussion of the subordinate constitutional issue—the legality and constitutionality of Mr. Meighen's temporary government—is most valuable and, to my mind, completely convincing. He supports his argument with some interesting examples from the earlier constitutional practice of Canada, and in some ways one might call the thirty odd pages on this point the most original and convincing in the book.

Of the dissolution issues of 1926 it is not so easy to speak. For my part I would agree with Dr. Forsey that Lord Byng's refusal of a dissolution to Mr. Mackenzie King on June 28, 1926, was constitutional. And I am inclined to agree that his grant to Mr. Meighen on July 2 was constitutional. But I believe that a refusal would have been constitutional also and that it would have been the preferable course. (It is sometimes forgotten in the heat of controversy that a refusal and a grant of dissolution in a given case may both be constitutional, though one may be the preferable course.) My view on that point inclines more towards Dr. Evatt's opinion that 'Lord Byng should have refused Mr. Meighen's request for a dissolution and recommissioned Mr. King as Prime Minister, not, of course, imposing any condition of a dissolution, but being reasonably certain that Mr. King would repeat his former tender of advice, upon which a dissolution would ensue' (*op. cit.* p. 62). I cannot agree with Dr. Forsey that the shortness of time which intervened between refusal of dissolution to Mr. King and grant of dissolution to Mr. Meighen is irrelevant (p. 238). On the other hand, Dr. Forsey has convinced me that there is a great deal more to be said in favour of Lord Byng's action in granting a dissolution to Mr. Meighen than I had realised, and I believe his arguments must be considered most carefully before one can decide the question.

The whole subject of the power to dissolve still awaits constructive and comprehensive treatment, and all the more urgently because the Dominions agreed in the resolution of the Imperial Conference of 1926 that 'the Governor-General of a Dominion is the representative of the Crown, holding in all essential respects the same position in relation to the administration of public affairs in the Dominion as is held by His Majesty the King in Great Britain'. I would agree with Dr. Forsey that it does not follow from these words that Dominion usage may not vary from British in some degree (p. 4). What the resolution referred to was 'essential respects'. But I would question the accuracy and the logic of his subsequent sentence: 'An interpretation of the Report which would mean that the Dominions thenceforth would not be able to develop any special usage of their own, but would be bound simply to abide by what has developed

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or may develop in the United Kingdom, would be manifestly inconsistent with the cardinal principle of equality of status'. This is not a matter of status at all; it is a matter of structure. The Dominions were not made subordinate to the United Kingdom because they said voluntarily, as they did in 1926, that a Governor-General shall act in relation to his ministers in a Dominion as the King acts in relation to his ministers in the United Kingdom. No more would Sweden, say, be subordinate to the United Kingdom if it decided that its King should similarly model his behaviour on that of the British King.

Further, I would say that the resolution of 1926 *does* state that the practice of the King in the United Kingdom is the model to be followed. That does not mean, admittedly, that the Dominions must abide only by what has developed or may develop in the United Kingdom. They must abide by what is constitutionally permissible in the United Kingdom, and that includes not only what has happened in the past and what may happen in the future, but also what it would be proper for the King to do in the United Kingdom. A case can occur in a Dominion which has no parallel in the United Kingdom. When it does it must be dealt with according to the principles which would govern the action of the King in such a case in the United Kingdom. That, in my view, is what the resolution of 1926 means. It may be out of date; it may be inappropriate or impracticable. If so, it can be amended. It is, after all, no more than a convention of the constitution of the British Commonwealth; it is not law. It may be amended, as it was formulated, by an Imperial Conference. It certainly leaves much to controversy and doubt. It is difficult, if not impossible, to say in some cases which might arise in the Dominions and even in this country what it would be proper for the King to do. And for this reason it is of the greatest importance that this subject should be expounded lucidly, impartially and constructively.

K. C. Wheare.

The New Law of Education. By D. J. Beattie, LL.M., and P. S. Taylor, M.A. London: Butterworth & Co. Ltd. 1944. xx, 296 and (index) 89 pp. (21s. net.)

This book is the offspring of a successful union between Law and Administration, both the authors being education officers and one of them being a solicitor. The speed with which it appeared after the Education Act, 1944, received the Royal Assent in no way detracts from its accuracy and, while obviously many additions have been made to the law by administrative action since its publication, it remains a sound guide to a complicated statute.

Speaking broadly, there are four classes of people who are brought into contact with the law, as distinct from the practice, of education. There are the experts on administrative law to whom the authors do not profess to appeal more than in a general way; there are the administrators who are no doubt the authors' principal target; there are the members of local authorities in general and of education committees in particular, and finally there are the students. Thus the majority of those who may be expected to refer to a book of this nature are not lawyers. The authors have successfully evaded too legalistic an approach and there is no doubt that the educational administrator will, by using this book as a starting point, be able to find his way through the mass of departmental legislation which has begun to flow. Teachers also should be able to gain a great deal by reading the introduction which consists of an admirable summary of the Act and so to understand the huge framework in which they work. This is equally true of the members of local authorities who take their duties seriously. The authors do not claim, however, that this is a book for students, at any rate until they are advanced: it is much too detailed and, while it contains a complete statement of the law, it does in its phraseology presuppose more than a mere nodding acquaintance with the subject.

Bearing in mind the special nature of its readers, it is suggested that in subsequent editions the book could be made even more useful by the inclusion of brief explanatory matter on one or two subjects. For example, in the section dealing with voluntary schools it would be very helpful to have a financial analysis, if possible in concrete terms, of the incidence of costs of both old and new voluntary schools; in spite of the fact that the authors themselves regard the provisions of the Act covering religious instruction as a fair compromise, it is well known that there are many people who do not so regard them and it is considered that it would not be outside the scope of the work for such

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an analysis to be included. More detail on finance generally will no doubt appear in the next edition as the regulations are published by the Ministry, but at present the book is necessarily incomplete. Two small points which could be explained more fully are, first, that assisted schools are a cross between the maintained and independent, although there is no doubt that they rank as independent; and, secondly, that secondary and further education overlap in the ages which they cover and that whole-time education between the school leaving age and nineteen may be provided under section 8 and under section 41.

The biggest test for a book of this kind is its Index. This has been submitted to an exhaustive test which it passes more than adequately and the reader may place every reliance upon it.

P. Astbury Jones.

Matrimonial Causes. **Second edition. By S. Seuffert, of the Middle Temple and South-Eastern Circuit, Barrister-at-Law. London: The Solicitors' Law Stationery Society, Ltd. 1944. xvi and 90 and (index) 18 pp. (10*s.* 6*d.* net.)**

This small book sets out the Matrimonial Causes Act, 1937, section by section with notes, the Matrimonial Causes Rules, 1944, with an occasional note here and there, and in an Appendix, the Supreme Court of Judicature (Consolidation) Act, 1925, Part VIII, and other relevant statutes or parts of them.

The main feature is the notes. They are excellent: so excellent that the reader may have a genuine grievance when he discovers that, with the aid of infinitesimal type, they are squeezed into about twenty-two pages. There have been many important decisions since the first edition was published in 1937. With very few exceptions—such as *Henderson* v. *Henderson* [1944] A. C. 49, where the House of Lords threw some light on the perplexing subject of condonation, and *Joseph* v. *Joseph* [1939] P. 385, which shows how a deserting party may, as it were, turn the tables on a deserted party—they are incorporated in these notes. *Higgins* v. *Higgins* [1943] P. 58 mentioned on pages 4 and 11, is a doubtful authority since *Ainley* v. *Ainley* [1945] P. 27 decided (after the book was published) that condoned adultery is not revived by desertion for a period which is less than the statutory three years.[1] The list of assize towns on page 77 should include Bury St. Edmunds, and after the words 'at Lewes' in Rule 32 (6) (b) the words 'and if the Assize Town is Bury St. Edmunds to the District Registry at Ipswich' should be inserted.

The Matrimonial Causes Rules of 1944 revive memories of bygone days by referring to a wife who 'has sufficient separate estate'. For this reason, if for no other, it would be unfair to criticize the author for saying that 'a guilty wife possessed of a separate estate may be ordered to provide maintenance for the benefit of children of the marriage (*Hering* v. *Hering and Wilson* [1943] 2 A. E. R. 424)'. Did not Mr. Justice Pilcher, who decided this case, speak of 'a guilty wife who is possessed of separate estate'? The only explanation the author can be called on to give is suggested by the insertion of the indefinite article 'a' immediately before the word 'separate'. Not for a moment are these few remarks intended to deny the assistance this book will be to practitioners. To convey a mass of reliable, accurate and correctly arranged information within so small a compass is a remarkable achievement. That one may have to seek the aid of a magnifying glass to reap the full benefit of this achievement is not an inconvenience justly attributable to the author.

L. Crispin Warmington.

Outlines of Lectures on Jurisprudence. **By Roscoe Pound. Fifth edition. Cambridge: Harvard University Press. 1943. London: Humphrey Milford, Oxford University Press. vi and 244 pp. (16s. 6d. net.)**

This book is not so much an outline of lectures as a bibliographical appendix to the other works of Professor Pound, and its value may be deduced from the fact that it represents 'over fifty years' study and forty-three years' teaching of Jurisprudence'.

[1] But see now *Beard* v. *Beard*, *ante*, p. 326.

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The fourth edition was published in 1928, and the fifth reflects the general state of legal theory in 1939, for conditions since that date have made it very difficult to keep in touch with whatever systematic legal thinking has been going on during the past ten years in Europe. And indeed much has been happening in the theory of law recently which finds no place in these pages. Perhaps a little more pruning would have improved the book, but the fault, if such it be, is on the right side. The reader who is not accustomed to such labels as 'neo-idealist social-philosophical school, a logical-psychological relativist idealism' may perhaps be repelled at first, but the headlines to the subdivisions of the works of the various schools should provide him with convenient sign-posts. English readers will find the references to articles in American periodicals particularly useful. As a work of reference, this book should be in every law library; it is indispensable to all who aim at making their way through the vast field of legal theory.

J. W. Jones.

Selection and Tenure of Judges. **By Evan Haynes, Professor of Law, School of Jurisprudence, University of California. The National Conference of Judicial Councils. 1944. xix and 303 and (index) 4 pp. (No price stated.)**

This book. to which Dean Pound has written an Introduction, provides a comparative study of the methods of choosing judges in different countries and their security of tenure when appointed. After a brief introductory survey, there is a useful description of the present position in the United States, with a twenty-four page table dealing with each set of Courts in turn. The book next leaps an ocean and three centuries to 'The Judges under the Stuarts', and then returns to 'The Democratic Revolution in America, 1830–1850'. After a slightly erratic chapter on 'Contemporary English Judges', there is a discussion of 'Other Foreign Systems'; these pages are among the most interesting in the book. The next chapter is entitled 'Are elected judges with short terms more liberal than appointed judges with secure tenure?' (the answer is 'No'), and the book concludes with chapters containing material on the retirement and pensions of judges in the United States and a classified catalogue, sixty-six pages long, of the various articles that have been written on the subject of the book at large; the scope and object of each article is indicated in a few words.

In the result, this book is a little disappointing. As a guide to the raw materials for a book on the subject it is admirable, but as the finished product it is rather scrappy. The author states in his preface that the primary purpose of the book is 'to provide a reasonable full collection in one place, of the essential data bearing on the technique of judicial selection', and this he appears to have achieved. Yet having done this much, many will regret that he did not go one step further and breathe into his somewhat disjointed collection of raw materials the breath of life and organization needed to convert them into a book.

R. E. Megarry.

***The Town and Country Planning Act*, 1944.** **By Desmond Heap, LL.M., L.M.T.P.I., Deputy Town Clerk of Leeds. London: Sweet & Maxwell, Ltd. 1945. xiv and 314 and (index) 12 pp. (21s. net.)**

Anyone who has read Mr. Heap's articles at 9 Conveyancer N. S. 12, 115, will agree that Town Planning is a subject upon which he succeeds in combining accuracy with lucidity. It is unfortunate to have to record that, largely due to difficulties of production, this book is not the unqualified success that might have been expected.

The book falls into four parts. First, there is a twenty-eight page Introduction giving an outline of the Act. In general, this is well done, but the omission of a number of the less important details and the adoption of a more effective type scheme would have done much to make it yield its learning more readily to the neophyte. Secondly, there is a King's Printer's copy of the Act bound up in the text. Thirdly, there is a detailed commentary on the Act, sub-section by sub-section, 168 pages long. Lastly, seventeen pages are devoted to reprinting two statutory rules and orders.

The inconvenience of separating the Act from the notes upon it is obvious. Further, some of the accessories are not as well done as they should be. Thus, the Index gives

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references such as ' acquisition of land, grants toward cost of, [ss. 5, 7], 9, 12, 118, 123 '; this means that reference should be made to pages 9 and 12 of the print of the Act, where sections 5 and 7 will be found, and pages 118 and 123 where the notes on these sections are printed; no reference to the pages in the Introduction is given. Again, the Table of Statutes gives no reference to the principal Act except to state on which page of the print each section is reproduced, nor does it appear to include any references to other statutes mentioned in the text of the Act; and there is no table of statutory rules and orders. The result is that much useful material (the notes are particularly clear and helpful) is presented in a form well designed for concealing its light under a bushel. Printing difficulties these days are notorious (incidentally, the title page places Chancery Lane in ' W.1 ') and this book appeared commendably soon after the Act became law, but from the reader's point of view it will too often prove but another example of more haste, less speed.

R. E. M.

Sutton and Shannon on Contracts. **Third edition. By Ralph Sutton, M.A., K.C., and N. P. Shannon, of Gray's Inn, Barrister-at-Law. London : Butterworth & Co. (Publishers), Ltd. 1944. lxxi and 427 pp. (15s.)**

There is no doubt that this work is much appreciated as an elementary text-book both for its clear statement of principle and its succinct analysis of cases at the end of each article. The new edition is somewhat larger; the chapter on discharge under condition in particular has been rewritten and expanded, and an article added upon the Law Reform (Frustrated Contracts) Act, 1943. The chapter on Statutes of Limitation has also been rewritten.

On reading through the book it is perhaps permissible to feel that its proportions are such that the earlier part devoted to the formation of contract is dealt with somewhat perfunctorily as compared with what follows. The objective interpretation of the phenomena of agreement is, for instance, referred to in a footnote; the section on consideration is severely compressed, and no reference appears to be made to the recommendations of the sixth interim report of the Law Revision Committee.

New cases have been added with discrimination, and the authors have wisely refrained from incorporating recent decisions unless they are of significance. (Would not *L'Estrange* v. *Graucob, Ltd.* [1934] 2 K. B. 394 be a useful addition to Art. 18 ?) One or two small criticisms might be made in connection with the treatment of certain well-known cases. The proposition derived from *Stocks* v. *Wilson* and embodied in the last part of the first sentence on p. 71 is surely suspect, and appears to have been treated as such in *Leslie* v. *Sheill*; and it may also be doubted whether the reference to the equitable principle of restitution, there the subject of discussion, is not too brief to be illuminating. The complicated facts of *Scriven* v. *Hindley* are possibly over simplified (pp. 130, 131). The last sentence in the account of *Harse* v. *Pearl Life Assurance Co.* is ambiguously framed and might well be misleading.

In this edition (as in the last) the learned authors have chosen to base much of the opening of the chapter on mistake upon passages of Lord Atkin's speech in *Bell* v. *Lever Bros., Ltd.* It is open to question whether this is particularly successful, though it is obviously a matter of great difficulty to deal with the subject in an elementary work of this kind. In connection with mistake of identity of the other party a hypothetical illustration is used which, with respect, might well find a contrary solution if due weight were given to a more objective interpretation of problems of offer and acceptance. If I make an offer to John Smith, erroneously thinking that he is the distinguished artist of that name, am I not bound if he accepts, I having so expressed myself that he could reasonably understand my offer as intended for him?

The rewriting of the chapter on discharge under condition is carefully and fully done. Again, it is plainly difficult to treat such a matter within a small compass, and here, at times, the detail seems to be at variance with the simplicity of the earlier part of the book. For instance, the facts of *Tamplin* v. *Anglo-American Petroleum Co., Ltd.* and *Bank Line, Ltd.* v. *Capel* are set out in the statement of principles (pp. 258, 259) in order to show how judges have differed in applying those principles to particular facts. Two points may here be mentioned. In the earlier part of the same chapter (not rewritten) it is perhaps misleading to set out the facts of *Appleby* v. *Myers* (p. 238) without

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a qualifying cross-reference to the possible effect of the Frustrated Contracts Act, 1943, on such a situation. Also in the same chapter (Art. 118), under impossibility in regard to contracts which require personal performance, the learned authors have chosen to combine as illustrations cases of the *Robinson* v. *Davison* type where a promisor is prevented by illness or death from performing his part of the contract with cases such as *Unger* v. *Preston Corporation*, where the promisor was so prevented by internment. In fact the learned judge in the latter case found himself unable to distinguish the circumstances from those of *Horlock* v. *Beal*, which case, as may be expected, is discussed in another article in the same chapter. It is true that modern judges, as for example Viscount Simon L.C. and Lord Wright in *Constantine Steamship Line* v. *Imperial Smelting Corporation, Ltd.*, seem to be moving towards a unified treatment of the varied cases where impossibility or frustration may be held to excuse, but if there is any merit in the segregation of such cases it is presumably desirable to proceed with an eye upon their different ancestry; and it may be thought to be a little dangerous, in the absence of express authority, to treat Mrs. Robinson and Mr. Unger as of common legal stock, when other well-known figures still emerge from adjacent pages wearing their rue with a difference.

R. P. F. Roberts.

Ancient Hebrew Marriage Laws. **With special reference to General Semitic Laws and Customs. By E. Neufeld, Ph.D., D.Litt. London : Longmans, Green & Co., Ltd. 1944. xix and 304 pp. (21s. net.)**

To the majority of the readers of *The Law Quarterly Review* the Jewish *Corpus Iuris*, it may be safely assumed, is *terra incognita*. This may be due partly to the fact that the only readily available English text is that of the Jewish *lex scripta*, the Pentateuch—the Talmud as a whole, the great repository of the Jewish *lex non scripta*, is in process of translation into English, several volumes have already been published—but while the Bible is in everybody's possession, the Talmud in English remains a specialized reader's choice or that of a public or institutional library. Only the specialized, outside the ranks of Jewry, are likely to take the trouble to learn the amount of Hebrew and its kindred tongue of the Gemara (or super-commentary upon the *lex scripta*, being the superstructure of the Talmudical edifice) necessary to read the texts of the writings in the original. Furthermore the attitude towards the Jewish *Corpus Iuris* is inevitably and inextricably interwoven with theology and the approach to the subject will vary according as one holds a ' fundamentalist' standpoint in relation to the Scriptures (such as generally characterizes many, if not most, of the profoundest Jewish exponents of Rabbinical writings) or one adopts in varying degrees a ' critical ' attitude in relation to the age, order and authorship of the texts and perhaps also the source of their revelation or inspiration. Dr. Neufeld, whose work shows the signs of that intensive Rabbinical training which characterizes the East European schools of learning with at the same time indoctrination into the comparative and ' scientific ' methods redolent of the Central European schools, appears to have anticipated the first difficulty by including in his Introduction a brief, and it must be admitted all too brief, explanation of the Jewish legal system (he appears to favour the term ' Hebrew '—but as by the time the system reached its developed exposition ' Jews ' and ' Jewish ' are a more familiar designation there seems no point in using a description attributable to the earlier ages, notwithstanding the qualifying word ' ancient ' in the title of his book). It is unfortunate that there is not a standardized transliteration in English of Hebrew or Aramaic words—in the Introduction we read of ' Miš̈nāh ', which the general reader will not immediately recognize as the equivalent of the better known spelling ' Mishna ', and ' Hălākhāh ' appears instead of the more usual ' Halacha ', and ' Midrâš ' appears instead of ' Midrash '. ' Sabath ' is surely pendantic, considering that ' Sabbath ' has long ago passed into English. The whole Introduction presupposes an acquaintance with the comparative ' Jurisprudence ' of the near East, and, what is more, an acceptance of the critical theories as to the Bible. The standpoint taken up by the author can be revealed by a characteristic sentence: ' Biblical laws . . . were a product of Hebrew genius, ideas, necessity and psychology '. Such an attitude would not be acceptable to traditional Jewish teaching and readers of the writings of that eminent Christian scholar of the Old Testament, Cardinal Faulhaber, will recall that such a viewpoint received

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from him the critical scrutiny which it would meet on the part of Jewish orthodoxy. Thus forewarned one can delve with interest into the pages packed with a mass of learning in the comparative law and lore of the part of the Orient concerned.

The chapter headings describe the scope of the work and a valued feature of each chapter is the 'review' ('which for the sake of brevity is called "Comparison"') of the systems of Hammurabi, the Assyrian Laws, the Hittite Code, and some Nuzi and ancient Arab customs. Part I deals with Forms of Marriage, Part II with the Constitution and Dissolution of Marriage, Part III with Impediments to Marriage, and Part IV the Status of Parent and Children. The range is so wide that it is impossible here to do more than to take as an illustration the opening thesis on Levirate Marriage, the Scriptural law as to which 'is laid down in fairly adequate form in Deut. 25, 5–10' (p. 23). The author here appears to have dipped into every lucky bag of writings upon the subject and picked mainly non-Jewish contributors of varying standards of equipment for the heavy task of expounding this intricate branch of Jewish Family Law, but all that glitters is not gold. It is a little difficult to appreciate why Dr. Neufeld regards 'adequate protection for, and maintenance of, a widow' as 'the primary and most important intention of the legislator in defining this Law' (p. 47). Much nearer the mark is the statement that 'one of the avowed objects of the Levirate marriage being to create an heir who would carry on the deceased's name and estate' (p. 48) and that (*ibid.*) 'the Levirate obligation as a whole is inextricably bound up with the Law of Inheritance'. Dr. Neufeld presents a more limited range of authorities when he refers to the sphere of the Civilian and the Common Lawyer and not unnaturally in these places seems less sure-footed. He might have noted that Pollock in his *First Book of Jurisprudence* (ch. v) observed that 'Coke in the Preface to the sixth part of his Reports suggests that Moses was the first reporter. The case of the daughters of Zelophehad, narrated at the beginning of the twenty-seventh chapter of The Book of Numbers, is not cited by him in this connection but he cites it elsewhere', and Pollock proceeds to show that the case was still living law when the Jews of Aden petitioned the Government of India to be excluded from the Indian Succession Act, citing hereon Courtenay Ilbert's *Government of India*, p. 333, 2nd ed. Muirhead's *Historical Introduction to the Private Law of Rome* is, in both the literal and metaphorical senses, by no means the last word on the subject, but it is the only text-book on the Civil Law listed in his Bibliography. 'Maine H. S. Ancient Law, 1906', a citation thus appearing therein, would hardly suggest recognition of a classic ever so much older and an author who, like Shakespeare, is better recognized without his initials. The author observes (p. 226) that 'in English usage a bastard means a child born out of wedlock but by English law he may be legitimized per subsequens matrimonium'. This is correct, but he omits to mention that the possibility of such legitimation is of comparative recency (see the Legitimacy Act, 1926, s. 1 (1)). Dr. Herzog's *magnum opus* suffers a somewhat disconcerting misprint as it is referred to (p. 275) as 'the Main Institution of Jewish Law'. In case the reader unfamiliar with the subject might be set wondering what that was, he can be reassured that with the addition of the plural s to the word 'Institution' the matter is put right. 'Pre-Masonetic' (p. 9) seems to be a misprint for 'Pre-Masoretic'. Sometimes it is difficult to see the wood for the trees because of the mass of exuberant foliage, but one has compensation with some fine flowering of spiritual appreciation where, for instance (at p. 174), the author observes that 'the Divine origin of the Code . . . in the Biblical Law . . . is the élan vital'. One may perhaps hazard the view that the author's presentation of typical 'Higher Criticism' axioms in the Introduction and elsewhere in the work is more pragmatic than dogmatic. As a repertory of the comparative learning upon the subject there can be no gainsaying the evident fact that Dr. Neufeld's thesis is a notable contribution.

Bertram B. Benas.

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Books also received:—

Bowstead on Agency. Tenth edition. By His Honour Judge Arthur H. Forbes. London: Sweet & Maxwell, Ltd. 1944. xc and 289 and (index) 47 pp. (35*s.* net.)—The full title of this book is 'A Digest of the Law of Agency', and the special character suggested by this title is fully maintained in this new edition; the cases mentioned in a table of cases eighty-six pages long are dealt with in under three hundred pages of text. Such books are invaluable to the practitioner as a ready means of finding the authorities in point, but lack the full consideration of the principles, with their attendant difficulties, which even practitioners need when no case on all fours with the point in issue can be found. Judge Forbes refers in his preface to war-time difficulties which make it impossible to take account of extra-judicial writings. Let it be hoped that the piping days of peace will leave him the time and the inclination to carry out the expansion and partial rewriting that is needed to double the value of the book. For the present it must suffice that the new law since the last edition in 1938 has been carefully incorporated into the existing adequate but uninspiring framework.

The Liabilities (War-Time Adjustment) Acts, 1941 and 1944. Second edition. By G. Granville Slack, B.A., LL.M., of Gray's Inn, Barrister-at-Law. London: Butterworth & Co. (Publishers), Ltd. 1945. iv and 148 and (index) 11 pp. (10*s.* 6*d.* net.)—This annotated copy of the Acts and Rules has been done with Mr. Slack's customary skill. In view of the very reasonable price, it is perhaps churlish to regret the absence of tables of cases and statutes, and wish that the name of the book had appeared on the spine. Those who do not own Butterworth's Emergency Legislation Service may be a little puzzled by unexplained references to 'Digest of Cases' (*e.g.* on p. 98); and references to the Law Reports should be given (*e.g. Re Kirby* [1944] K. B. 213 on p. 3 and *Re Evans* [1944] K. B. 373 on p. 98). But minor blemishes such as these do little to detract from the value of Mr. Slack's patient and thorough work.

Learning the Law. By Glanville Williams, M.A., LL.B., Ph.D., of the Middle Temple, Barrister-at-Law. Second edition. London: Stevens & Sons, Ltd. 1945. xii and 161 pp. (7*s.* 6*d.* net.)—The second edition of this excellent little book differs little from the first edition reviewed *ante*, p. 304. A few slips have been corrected and there are a number of small revisions and additions to the text.

The Principles of Mercantile Law. By J. Charlesworth, LL.D., of Lincoln's Inn, Barrister-at-Law. Sixth edition. London: Stevens & Sons, Ltd., and Sweet & Maxwell, Ltd. 1945. xxxv and 365 and (index) 10 pp. (12*s.* 6*d.* net.)—No changes of any great substance have been made to this useful and reasonably priced book.

Palmer's Private Companies. Thirty-ninth edition. By J. Charlesworth, LL.D., of Lincoln's Inn, Barrister-at-Law. London: Stevens & Sons, Ltd. 1945. vii and 96 and (index) 4 pp. (2*s.* 6*d.* net.)

The Essential Work Order. By H. Samuels, M.A., Barrister-at-Law, of the Middle Temple and Northern Circuit. London: Stevens & Sons, Ltd. 1945. viii and 30 pp. (2*s.* 6*d.* net.)

This and the preceding booklet inaugurate a series called 'This is the Law', which has the laudable object of making available to the public accurate yet simple explanations of various branches of law at a low price. *Palmer's Private Companies* is well known; Mr. Samuels' essay seems an unimpeachable combination of accuracy with lucidity.

The Atlantic Charter. By Julius Stone, D.C.L., S.J.D., Challis Professor of International Law and Jurisprudence in the University of Sydney. Sydney: Current Book Distributors. 1945. 96 pp. (No price stated.)—This is an abridged edition of the book published in 1943.

Alexander James Carlyle. By F. M. P. London: Humphrey Milford. 1945. 15 pp. (2*s.* net.)—This is reprinted from the Proceedings of the British Academy, Vol. 29.

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Professional Conduct and Advocacy. Second edition. By K. V. KRISHNASWAMI AIYAR, Advocate, High Court, Madras. With Forewords by Sir MAURICE GWYER, formerly Chief Justice of India, and Sir LIONEL LEACH, Chief Justice, High Court, Madras. Madras: Oxford University Press. 1945. xx and 212 and (index) 30 pp. (*Rs.*7.8.)

Notes to the Rules of Criminal Procedure for the District Courts of the United States. Washington: United States Government Printing Office. 1945. xii and 58 pp. (No price stated.)

Supplement to A Guide to Juvenile Court Law. By GILBERT H. F. MUMFORD, Solicitor. London: Jordan & Sons, Ltd. 1945. 15 pp. (1*s.* net.)

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THE LAW QUARTERLY REVIEW

VOLUME 61

MEIGHEN PAPERS, Series 6 (M.G. 26, I, Volume 222)

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THE

LAW QUARTERLY REVIEW

EDITED BY

A. L. GOODHART, K.C., D.C.L., LL.D.
Professor of Jurisprudence in the University of Oxford

VOLUME 61

LONDON — 1945
STEVENS & SONS, LIMITED
119 & 120 CHANCERY LANE
CANADA AND THE UNITED STATES OF AMERICA:
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3 Lakeview Terrace,
Ottawa, Ontario.

October 1st, 1945.

Rt. Hon. Arthur Meighen, P.C., K.C.,
320 Bay Street,
Toronto, Ontario.

Dear Mr. Meighen:

Thank you very much for your letter of the 27th. Please do not take any further trouble about Mr. Mitchell's statement. I had never thought of putting you to such inconvenience; was merely anxious to know whether from your own recollection you would say that his statement was well founded.

I discovered a curious thing the other day. Looking through a Sessional Paper No. 442 of 1943-1944, I found a record of the disallowance of a fourth Alberta Act in 1942. Apparently P.C. 2350, containing the Minister's recommendation of disallowances, with reasons, dealt with four Alberta Acts. P.C. 2351, embodying the actual disallowance as published in the Canada Gazette, deals with only three; another superb example of the efficiency of the Department of Justice. It is, of course, possible that Council rejected the Minister's recommendation as to the fourth Act; but in that case the Department has misinformed the House of Commons in the Sessional Paper. Whichever way you look at it, it is a sloppy piece of work.

Hardy, of the Parliamentary Library, called my attention some time ago to a most curious passage in the Parliamentary Guide. I have been meaning to mention it to you and have kept forgetting. In the introductory matter (p. 6 of the 1943 edition) under the heading "The Government of Canada", there appears the following: "It is not necessary that all the members of the Cabinet be members of the Senate or the House of Commons as long as the Cabinet, as a whole, has the confidence of the popular branch of Parliament." Hardy checked and to his utter astonishment found that this passage dated back at least to 1915 when old Colonel Chambers was editing the thing. It would be interesting to know where it came from. I think the error should be drawn to the attention of the new editor, whoever he may be. Normandin is dead and I do not know who is taking it on.

I expect to be in Toronto on October 16th, and hope to see you.

Yours sincerely,
Eugene Forsey
Eugene Forsey.

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October 2, 1945.

Dr. Eugene Forsey,
3 Lakeview Terrace,
Ottawa, Ontario.

My dear Eugene:

Those are indeed two interesting matters to which you call attention in yours of first. I would very much like to have the enjoyment of razzing the Government over the negligence clearly disclosed in the reports on disallowances. On this subject I am sure a study of Hansard will show that in the early years of the King Administration his Minister of Justice made quite a virtue of having adopted a new doctrine and practice with respect to disallowances. I can remember definitely hearing pronouncements delivered somewhat boastfully that the old practice of disallowance had fallen into desuetude or worse and was abandoned by the King Administration. If Provincial Statutes were intra vires, the Dominion should not interfere; it should let them take their course. If they were ultra vires then the Courts should be resorted to to have them so declared. This much-heralded reform of the older practice seems to have proven not so good.

Col. Chambers was, of course, wrong in the second matter. He was a fine old man, but I never regarded him as an authority.

Yours very truly,

AW/E.

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3 Lakeview Terrace,
Ottawa, Ontario.

October 10, 1945.

Rt. Hon. Arthur Meighen, P.C., K.C.,
320 Bay Street,
Toronto, Ontario.

Dear Mr. Meighen:

I am much interested by your comments in your letter of October 2nd. I recall Lapointe in March, 1937, saying that he "did not see how the power of disallowance could be exercised in a federation such as this." I am certain this is how it appeared in unrevised Hansard. The revised version has the word "easily" inserted before "be exercised", the explanation being, I have no doubt, that Master Lapointe had meanwhile disallowed three Alberta Acts himself, August 1937. Seldom has a public man been compelled to eat his words so publicly so soon after they were uttered. On the other hand, our old friend R.B. on April 16, 1931, told Mr. Boulanger in the House of Commons that the power of disallowance had been "in abeyance for half a century"! (Boulanger had been trying to get some statements on the disallowance of some Saskatchewan education Act or Acts.) So even Conservative Homers nod occasionally.

It turns out that I was correct in thinking the Department of Justice had garbled its Return to the House in 1943 and 1944. There were only three Acts disallowed in 1942, not four as the Return stated.

Some time I must tell you of my experience with a rather well known Toronto lawyer on this question of disallowance. It has left me with a somewhat jaundiced view of your profession, but I suppose, as I once wrote you, that the legal profession like others has all kinds of people in it. The temerity with which this particular gentleman was ready to undertake a case without even the rudiments of knowledge of the subject, simply staggered me. He had apparently never even heard of the two volumes of Provincial Legislation. He also appeared to think that the Letters Patent, constituting the office of Governor-General, had something to do with the matter!

There is a curious passage in Hansard for October 4th last, pp. 764-69, on the right to appeal from a ruling by the Speaker refusing leave to adjourn to discuss a matter of urgent public

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Rt. Hon. Arthur Meighen, P.C., K.C.,
Toronto, Ontario.

October 10, 1945.

importance. I must look up the English practice. It is quite possible that the Speaker was right, especially as he is supported by two ex-Speakers; but the implications of some of the language used seemed to suggest a pretty serious limitation of the right to appeal Speakers' decisions generally.

Yours sincerely,

Eugene Forsey

Eugene Forsey.

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October 11, 1945.

Dr. Eugene Forsey,
3 Lakeview Terrace,
Ottawa, Ontario.

My dear Eugene:

On receipt of yours of 10th, I looked up Hansard for the first time and now think I understand the position re Speaker's ruling. There is no doubt that Speaker Black's conduct on Feb. 19, 1932, is a definite precedent for Speaker Fauteaux' conduct on October 4th. Further, though I have not the Hansard of '32 here, I cannot believe that Black made his decision without earlier precedents to support him. The situation that results, however, is to my mind intolerable. The House should have the right to discuss a subject proposed by a Member as a subject of urgency, if the House itself decides that it desires to do so. A Speaker's interpretation of the rules, if supported by the House, stands until changed, but the change cannot come too soon. The rules should be amended so as to give an appeal against any decision of the Speaker that a matter proposed for discussion under the urgency clause is not, in fact, urgent.

I note with very great interest what you say as to disallowance. Had not known that Mr. Bennett had gone as far as he did go; still, he did not go as far as Lapointe. Very probably Conservative Homers sometimes nod, but Mr. Bennett, though a very able man, was not a Homer. He was too much in the habit of speaking in haste.

What you recite in your third paragraph about the Toronto lawyer is really appalling.

Yours very truly,

AM/E.

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3 Lakeview Terrace,
Ottawa, Ontario,
October 19, 1945.

Rt. Hon. Arthur Meighen, P.C., K.C.,
320 Bay Street,
Toronto, Ontario.

Dear Mr. Meighen:

As things turned out, I had not a moment free the rest of the day till 11 o'clock. I was talking to Army Councillors from 4:30 to 10:00 (speech, questions, dinner, conversation), and then had another hour in the Congress office with our Regional Director.

I was very much interested in your comments on the Speaker's ruling, and should like to be able to show them confidentially to one or two of my political friends.

My recent digging around questions of disallowance has caused me to make up my mind to do some further articles or even a book on it at the earliest possible moment. When this will be, heaven alone knows.

Kindest regards,

Yours sincerely,

Eugene Forsey

Eugene Forsey.

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144896

October 20, 1945.

Dr. Eugene Forsey,
5 Lakeview Terrace,
Ottawa, Ontario.

My dear Eugene:

I have yours of 19th. Referring first to the second paragraph asking that you be allowed to use confidentially my comments on the Speaker's ruling, I am quite willing that you should do this if you desire. I may add I have not been in communication with any Members of the Progressive-Conservative Party in the House as to what their views may be.

Certainly a book by you on disallowance would be of very real value, and permanent value. My other thought is that I have some fear you are over-working. You owe it to yourself and to all of us that you do not do this. Look after your health, for without it nothing is worthwhile.

Yours very truly,

AM/E.

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144897

3 Lakeview Terrace,
Ottawa, December 26, 1945.

Dear Mr. Meighen,

I hope you had a good Christmas and will have a Happy New Year. I fancy having the boys back again will be sufficient guarantee of that,

The Law Quarterly Review for October 1945 has a longish review of my book by K.C. Wheare, of Oxford, the author of that work on the Statute of Westminster. It is, to my mind, the most interesting and entertaining review I have had, and, I think, very fair. I think you will find it at least interesting, though you will no doubt disagree with parts of it. My only quarrel with anything Wheare says is that I think he underestimates the size of the job of intellectual slum clearance which had to be done, especially in this country.

King will be intensely annoyed (a) by the fact that he is hardly mentioned, and (b) by the comments on the temporary Gegernment. I only hope he will see the review. If I knew of any way of making sure that it was brought to his attention, I'd act. But I don't. However, that corps of secretaries ought to be able to spot it for him anyway.

I shall be much interested to know what you think of the thing. I have no copy (one of the staff at the Parliamentary Library drew it to my attention in the first place, and I got it from there), so I can't send you one; and it is too long to ask my secretary to copy out. However, you should easily be able to get one in Toronto.

I mean to write Wheare briefly and cordially, mentioning one or two things I have found out since I wrote the book, which confirm some of the things I said.

Yours sincerely,

Eugene Forsey

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144898

December 31, 1945.

Dr. Eugene Forsey,
5 Lakeview Terrace,
Ottawa, Ontario.

My dear Eugene:

I was truly pleased to receive your letter of 26th December. Miss Edmondson is trying to get a copy of the Law Quarterly Review for October '45, and I shall be most interested to read Mr. Wheare's article. I am disposed to think I won't like it any too well just from the hint you give, but will write you as soon as I have read it.

I have been wondering for some weeks now whether you have read Alexander Barmine's book, "One Who Survived." In all probability you have seen this book, but if by any chance you have not, I do think you owe it to yourself to read it. The best part is at the close, but the whole is a truly terrible revelation. I have read a considerable number on the same subject, mostly by Communists or former Communists, and probably you have also, but whether you have or not, read this one anyway.

Yours sincerely,

AM/E.

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144899

January 5, 1948.

Dr. Eugene Forsey,
3 Lakeview Terrace,
Ottawa, Ontario.

My dear Eugene:

I have just obtained and read the article by Wheare in the Law Quarterly Review, and must say I am not particularly impressed by it.

He differs from you on two points--firstly, he says that on my request for Dissolution Lord Byng had two courses that he might follow, either one of which would have been Constitutional--to grant my request or to refuse it. For a writer to say that either one of two opposing courses is Constitutional is to reveal an absence of appreciation of the meaning of the word. The right course can be deduced only from principles, precedents and authorities. That course which has the most in the wayof principle, precedent and authority behind it is the Constitutional course; any other is not. In your book you gave the most powerful reasons for your contention that the course Lord Byng pursued had the major, indeed, the overwhelming, weight of principle, precedent and authority behind it. Wheare says the other course would have been Constitutional, but gives not the slightest reason for his belief that it had either principle, precedent or authority to support it.

Secondly, he objects to your use of the word "status" in a sentence pertaining to the Imperial Conference Resolution of 1926, and thinks the word should have been "structure." I think your word is the better of the two, but what value in any event his point has is beyond me. His conclusion as to the meaning of the Resolution is plainly the same as your own.

Will be exceedingly anxious to see your letter to Mr. Wheare.

Yours sincerely,

AM/E.

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144900

3 Lakeview Terrace,
Ottawa, Ontario,
January 11, 1946.

Rt. Hon. Arthur Meighen, P.C., K.C.,
320 Bay Street,
Toronto, Ontario.

Dear Mr. Meighen:

Thank you very much for your letters of December 31st and January 3rd, which I should have answered sooner had I not been pretty thoroughly worn out with sundry domestic duties and a heavy cold. This has now cleared up, but our older child has had a rather heavy cold, so I am not out of the woods yet.

I have not seen Mr. Barmine's book, but frankly I doubt whether it would tell me much I don't already know, except for corroborative detail. A dozen years' experience of the domestic variety of Communist has left me with no illusions about them. They are the bitterest and the most unscrupulous enemies the C.C.F. has, and I should think I might surprise even you by what I could tell you about my personal experiences with them. There are, of course, people who are well aware of the shortcomings of Canadian Communists, but cherish the peculiar delusion that foreign Communists are altogether different. This is a view which I see no reason to share.

I am sorry you had such a poor opinion of Mr. Wheare's review. I think, on the whole, it is good, though I should be prepared to take issue with him on some minor points. I enclose a copy of my letter to him, which I am afraid will not please you much better than the review.

I suppose you have seen the editorial in the Journal last week about your speech in Washington in 1930; if not, I must send it to you. I heard only this morning that there was a long article on you in last Saturday's Citizen. I must look it up.

I notice the recent Time article on Mackenzie King contains some fresh additions to the fables surrounding his career, perhaps the most notable being that when he first took office, he was the youngest Prime Minister Canada had ever had. I have written the local correspondent of Time, pointing out the inaccuracies. But as the correspondent in question is a friend of mine, I have foreborne writing to Time itself, especially as the inaccuracies in question are only matters of detail, and the real outrages in the article would require far more space and time than I can give.

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144901

Rt. Hon. Arthur Meighen, P.C., K.C.,
Toronto, Ontario.

Jan. 11, 1946.

I have been too busy to do anything about that famous Reader's Digest production of last September, the chief snag being that business about the French-Canadians in the last war and this. I hope, however, soon to send the Reader's Digest a belated and detailed protest.

I shall be in Toronto on January 24th and hope to drop in on you for a moment or so.

Yours sincerely,

Eugene Forsey

Eugene Forsey.

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144902

3 Lakeview Terrace,
Ottawa, Ontario,
January 11th, 1946.

K. C. Wheare, Esq.,
The Law Quarterly Review,
c/o Stevens and Sons, Limited,
119 & 120 Chancery Lane,
London, W. C. 2.

Dear Mr. Wheare:

I have just read with the greatest interest your long and careful review of my book in the Law Quarterly Review for October. I think it is easily the most interesting and entertaining review I have had, and also the one from which I may profit most. I appreciate very warmly the kind things you have said; and I think I can learn a good deal from the others.

I need hardly say I am highly flattered to be mentioned in the same breath with Locke, even though in a not very flattering context. I think my only comment on this paragraph of your review is that both Locke and I had a job of intellectual slum clearance to do. How necessary it was in this country I think no one in Britain can have any conception. The amount of nonsense that had been talked and written on the subject here (on both sides) would fill half the dust bins in the country. If you could see the long series of violent articles with which the late J.W. Dafoe, of the Winnipeg Free Press (whose influence was very considerable), greeted my book, you would get some idea of how much trash had to be cleared out of the way before anyone could do the "lucid, impartial and constructive" exposition for which you call. The old man hammered me for weeks on end, column after column, accusing me of half the intellectual crimes in the calendar, and even going to the length of berating me for failing to quote a speech of Pitt's which Pitt never made!

I think you exaggerate in saying that "there is seldom a page where Keith's name is not mentioned more than once." But it is certainly mentioned very often. Again, my excuse must be that, in this country at least, Keith's numerous slap-dash, pontifical and inconsistent statements had acquired enormous prestige, which not even Dr. Evatt's work had done much to lessen.

Of course the space I devoted to the 1926 business must appear disproportionate, especially to you in Britain. But: (1) that particular case had been so bedevilled by careless, unfounded and sometimes deliberately mendacious discussion (which the South African

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K.C. Wheare, Esq.,
London, England.

Jan. 11, 1946.

case, incidentally, had not, at least to the best of my knowledge; (2) the publishers, very naturally, objected to the length of my original ms., which contained a reasonably careful review of all the cases now relegated to the Appendix, and insisted that I cut the book to half its length.

I was particularly pleased with what you were kind enough to say about my discussion of Mr. Meighen's temporary Government. You may perhaps be interested to know that I have since discovered: (1) that there is probably no legal quorum of the Canadian Privy Council; (2) that the Order-in-Council of July 11, 1896, appointing Laurier President of the Privy Council, was passed by a "Committee" consisting of Laurier himself; (3) that ministerial by-elections were abolished in Ontario in 1941; (4) that in 1918 under a special temporary wartime Act, the two Dominion Ministers without Portfolio did receive salaries, the Act providing that their seats should not thereby be vacated; (5) that since the formation of the Bennett Government, August 1930 Ministers without Portfolio do take an oath as such, though Acting Ministers of Departments do not.

My statement about equality of status to which you take exception is I think really a paraphrase of some remarks by Professor W.P.M. Kennedy. There is undoubtedly force in what you say; on the other hand, the provisions of the Irish Free State Constitution of 1922, established by Statute, rules on this subject, which certainly were quite different from British usage, and certainly, I should say, were not overthrown by the 1926 Report.

In the unlikely event of my book running into a second edition, I shall certainly consider carefully the points you raise, and also shall refer to your own comments on this matter of statuses in your book on the Statute of Westminster, comments which I unfortunately overlooked.

I want also to say more about the relationship of grant and refusal of dissolution to the voting of Supply, a matter which came up here in Ontario last spring. That Ontario case and an earlier one of 1904 both deserve discussion. In both instances, dissolution was granted. In 1904, the Government's majority was so small that it was almost totally unable to proceed with legislation. In 1945, a minority Government, which took office after the election of 1943, was defeated on the Address at the beginning of its second session. Supply had not been voted, and some important and essentially non-contentious legislation had reached an advanced stage. A new

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144904

Active Service Voters' Act had been passed under which the Service vote was to be conducted under Regulations drawn up by "the Chief Election Officer appointed under the Election Act, 1945". But the Election Act, 1945, had not been passed; it was still in Committee. The Opposition Parties publicly stated their willingness to facilitate passing of Supply. Nonetheless, dissolution was granted forthwith, without the House meeting again after the Government's defeat. The Government won the election by an handsome majority. I enclose an article of mine on this case which, though obviously a popular presentation, may amuse you.

I wonder if you have seen the book on British Dissolutions from 1832-1931 by Dr. C.K. Wang? It is apparently a Columbia Ph.D. thesis, and was published about 1934. Unluckily, I had not seen it until a month or so ago. It seems to be exceedingly well done, and I should certainly make much use of it in any second edition.

Please do not feel obliged to take any notice of this letter. I write, not to bother you, but merely to express my appreciation for a most interesting and stimulating review.

Yours sincerely,

Eugene Forsey,

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144905

January 14, 1946.

Dr. Eugene Forsey,
5 Lakeview Terrace,
Ottawa, Ontario.

My dear Eugene:

I just received yours of 11th. I like your answer to Mr. Wheare very well, although I think you over-estimate the merits of his article.

I have not seen the "Time" article on Mackenzie King. It is a long time since I have been able to read fiction even of the best quality and I have no desire to read this kind of stuff.

I ran over hastily the article by Senator Charles Bishop, to which you refer. He has managed to get practically all his facts wrong--indeed, his record is near 100%. Apparently he has not even read Sir Robert Borden's "Memoirs".

Now, as to Barmine's book--"One Who Survived." It is true Russia is Communist--that is to say, in the sense that a Communist Party through its leaders is in complete control of the country and has established and operated for very many years a thoroughgoing dictatorship. It is also true that our Socialists are not Communists, and that the two in this country are indeed bitter enemies. The same is also true in the United States. Nevertheless, the Russian economic system is Socialism and is so described by Socialist writers. Aside, however, from how it may be described by anybody, it is thoroughgoing Socialism. Barmine's book is a record by one on the ground for a great many years (1917-38), thoroughly sympathetic with Socialism, of the workings of that system in Russia--of its political and economic results. There are many other books of the same kind--all or nearly all of which I have read. Barmine's is not lengthy and in my judgment it is authoritative and it is the latest. I say most earnestly that it deserves and rewards perusal.

(over)

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I was quite disappointed to find in conversation with the Rt. Hon. Herbert Morrison, whom I sat close to at a dinner here, that he had not read any of these works, and, indeed, that he did not know of their existence. The chief protagonist of Socialism in the political field of England should have made a study of the operation of Socialism in the only great country in which it has been put into effect. He has had access to many books written by keen Socialist sympathizers who have spent years in Soviet Russia--in fact, so far as I know he could get access to no other works on the subject because other people have not been permitted to spend many years in that country, and for the most part have not been permitted to enter.

I should say that I liked Morrison personally very much and consider him somewhat of an artist in saying the right thing fairly well. He made himself quite acceptable generally but his language here would not impress one as that of a crusader who for fifteen years had sounded the slogan "Socialism in our time."

Will be very pleased indeed to see you on 24th January and hope you will come in in time and have lunch with me.

Yours sincerely,

AM/E.

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144907

January 28, 1946.

Dr. Eugene Forsey,
5 Lakeview Terrace,
Ottawa, Ontario.

My dear Eugene:

I have had a swift run-in with John Bartlet Brebner and his book "North American Triangle." In his reply to me he gives as authority for certain outrageous statements one, Elizabeth H. Armstrong, whom he describes as "a distinguished American scholar." He also gives as his authority Colonel C. P. Stacey whom he describes as "Canada's leading military historian--who now heads the Historical Section at Canadian Military Headquarters in Great Britain."

Whoever either of these people are, I have not been up to the present aware of their existence. If, however, Col. Stacey were of the right predisposition and pliability, he is probably the man who would be the present head of the Historical Section. He appears tohave written a book "The Military Problems of Canada" published at Toronto in 1940.

Have you read either his book or Miss Armstrong's (The Crisis of Quebec, 1914-18), or can you let me know anything about them, and especially about who these authors are.

Yours very truly,

AM/E.

Later:--I find Max knows Stacey. He is a young fellow from my home town, St. Marys, though I never heard of his family there. Max laughed heartily when I read to him the status assigned to him by Brebner.

A. M.

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144908

3 Lakeview Terrace,
Ottawa, February 2, 1946.

Dear Mr. Meighen,

Your letter arrived just before I had to leave for Montreal, and I got back only late last night. Hence my delay in answering.

I have not seen Brebner's book, and am all agog to know the subject of your "swift run-in" with him. But I am afraid I cannot add much to what you already know about his two "authorities". I am sending Miss Armstrong's book under separate cover. I read it some years ago, and indeed reviewed it for the Canadian Forum. I do not now recall anything much about it, though my review was favourable. But I am inclined to think I was then a good deal more innocent than I am now, and think it therefore perhaps as well for my own reputation (if any) that by an error of the editorial staff the review appeared over Underhill's initials instead of mine! I note that, even then, I drew attention to several errors of fact; and later, having occasion to look the thing up again I noted with horror that Miss Armstrong's sole references to you (two in number) were what purported to be quotations based on, of all things, articles by Bourassa in Le Devoir! This last certainly suggests a lack of critical acumen, if nothing worse, in Miss Armstrong.

Charlie Stacey was at Oxford when I was. He was on some sort of scholarship, Massey, I think. I always regarded him then as a very strong and belligerent Conservative. I lost track of him completely after we left Oxford, and the next thing I heard of him was when a young American student from Princeton turned up looking for information on the C.C.F., and said that his theme, or whatever it was, was being directed by Professor C.P. Stacey, who had told him that the C.C.F. had "ants in their pants", but that if he was determined to write on such a subject he had better see me, among other people. I have also occasionally seen articles by Stacey in the Canadian Historical Review, always on military history, and, I think, rather obscure parts of it in the last century. As I had no particular interest in the subjects of the articles, I never read them. Like you, I had never heard of his book.

In short you have pretty well drawn a blank. Stacey may be an "authority" on military history, or parts of it; I don't know, and am not qualified to say. Miss Armstrong certainly knows a lot about Quebec, but whether it has been drawn from a sufficiently wide list of sources, or sufficiently reliable ones, or how good her judgement is, I can't say, at any rate without reading her book over again, which at the moment I don't feel I have time to do. I am afraid I must add that my own experience in writing my book has given me a rather jaundiced view of "authorities". Too often they seem to be people with considerable self-assurance and wide gullets, and very little discrimination. They can and do swallow almost anything, without taking the trouble to find out whether it is based on anything more solid than some previous "authority's" ipse dixit; and the result is a merry game in which errors acquire the prestige of truth because so many successive writers have put them on paper. Of course there are exceptions, I hope many; but there is a terrible lot of shoddy work done.

Incidentally, you will be pleased to know that I have just had a letter from Professor Brown assuring me that he has incorporated in a new printing of his booklet on Canadian Democracy in Action as many of my suggestions as he could manage to work in to the space available. As I understand the booklet is used in Ontario schools, I am much relieved and pleased.

Yours sincerely,
Eugene Forsey

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144909

February 19, 1946.

My dear Eugene:

Thanks very much for sending me up C. P. Stacey's article on "Canada's Defence Policy." He has set out to erect Ian Mackenzie into a great Minister of Defence—which is some job. I admit, though, King did not kick him downstairs because he was not efficient, but because he thought it would give the P. M. a reputation for efficiency. Any attempt to show that Canada had a virile defence policy from '35 to the war is, of course, grotesque. Our whole record in this respect had not been creditable for many years.

Yours very truly,

Dr. Eugene Forsey,
5 Lakeview Terrace,
Ottawa, Ontario.

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144910

520 Bay Street, Toronto,
February 19, 1946.

My dear Eugene:

I am exceedingly delinquent in not having written you sooner to express sympathy over the death of your mother. I remember her, but only very slightly.

I know that she and you were very much together and owing to your father's early death she meant even more to you than most mothers mean to their sons. I know, myself, there is no one a man misses so much.

I sincerely hope her last days were days of peace and not of anguish.

With deepest sympathy and the best of good wishes for yourself.

Very truly yours,

Dr. Eugene Forsey,
Ottawa, Ontario.

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144911

3 Lakeview Terrace,
Ottawa, Ontario,
February 22, 1946.

Rt. Hon. Arthur Meighen, P.C., K.C.,
320 Bay Street,
Toronto, Ontario.

Dear Mr. Meighen:

It was more than kind of you to send me such a beautiful letter of sympathy, but I know you will be glad to hear that it was a case of mistaken identity! The Eugene Forsey whose mother has just died is a second cousin of mine[x] whom I have never seen. Father's uncle, who came to Toronto from Newfoundland many years ago, had seven children, most of whom had good-sized families; one cousin named his son after father. I should have been altogether mystified by your letter if my assistant had not happened to notice the item in the Toronto paper and called it to my attention. I got a very beautiful card of sympathy from another friend a day or two ago. My own mother, I am glad to say, is in excellent health, has far more energy than I have, and, I hope, and confidently expect, will be with me for many years yet.

I was very glad indeed to have your other letter, saying that the Canadian Journal of Economics and Political Science had arrived safely. I was beginning to be afraid that you were ill. After I got your letter about Brebner's book, I wrote you and also sent a copy of Miss Armstrong's book, and you are always so prompt about replying that I thought you must certainly have fallen a victim to 'flu or some other malady. I now wonder whether the letter and the book went astray. If you did not receive them, perhaps you will let me know and I shall try to trace the book.

I did not read Stacey's article, but after what you say about it am just as glad, as it would probably have sent my blood pressure up. I have less than no use for Ian Mackenzie, a most unpleasant specimen, demagogue and buffoon and bully, who is, in my judgment, doing as much as any other one man to lower the whole tone of the House of Commons.

When you have finished with Stacey's article, I should like to have it back; also, Miss Armstrong's book, assuming it eventually reaches you.

I had an enquiry from the Privy Council Office about the use of the terms "Cabinet" and "Ministry" in Great Britain and more particularly in Canada. I gave them a string of references. As far as Britain is concerned, the answer is pretty easy, though according to

[x] This cousin got married a few days before I did, and I got a nice letter of congratulation about it! I wonder how often he has received abusive letters about my political and other aberrations. I hope, at least, that he is not a fervent admirer of King's!

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144912

Rt. Hon. Arthur Meighen,
Toronto, Ontario.

Feb. 22, 1946.

this man in the Privy Council Office there is now emerging there an intermediate group of Ministers, not in the Cabinet, but described as "of Cabinet rank". I have not verified this, but must remember to do so next time I am up at the Parliamentary Library. As to Canada, my impression is that down to the appointment of the first Solicitor General and Controllers of Customs and Inland Revenue, the terms "Cabinet, "Ministry", "Government" and "Administration" were used interchangeably here, but that when there was a Solicitor General outside the Cabinet, or when there were Controllers outside the Cabinet, or when there were Parliamentary Secretaries and Under Secretaries during and immediately after the last war, the Ministry included these people, but the Cabinet of course did not. I should be interested to know your opinion. Whether the present Parliamentary Assistants should be called members of the Ministry, though not, of course, of the Cabinet, is apparently a rather difficult point. Common sense and British precedent, I think, say yes. But when the offices were created, King delivered himself of a characteristically muddled and ambiguous statement on the subject, which, as usual, is open to several interpretations. I must look this up again, but I should be much interested to have your opinion on this point also.

I expect to be in Toronto a week from tomorrow, March 2nd, but am to be tied up all morning and all afternoon, so I fear I shall not see you. Gilbert Jackson is inviting a group of economists of the University and, "it is hoped", two officials of the trade union movement, to meet him and his associates to discuss the work he has been doing on economic reconstruction. I am apparently one of the union officials; who the other is, I do not know.

I am hoping to finish tomorrow an article on the appointment of extra Senators under Section 26 of the British North America Act. I have dug up some confidential memoranda by Alexander Mackenzie on his attempt to use Section 26 in 1873, and I propose to consider this attempt and the question of possible future use of the Section. If the Liberals hold office much longer, by the time the next change of Government occurs, there will be nothing but Liberals in the Senate, and the new Government will simply have to invoke Section 26. So at least it seems to me. I shall probably send you a draft of the article for your criticism before I submit it to the Canadian Journal of Economics and Political Science. I enclose a copy of the note I have sent to the Canadian Historical Review on Mackenzie's memoranda, which you need not bother to return.

Yours sincerely,

Eugene Forsey

Eugene Forsey.

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144913

Alexander Mackenzie's Memorandum on the Appointment of Extra Senators, 1873-74.

The Mackenzie Government took office November 7, 1873. It prorogued Parliament the same day and dissolved it January 2, 1874. Meanwhile, on December 22, Mackenzie had submitted to the Cabinet a "report" that it was "desirable in the Public Interests" that six extra Senators be appointed under the provisions of Section 26 of the British North American Act. Next day the Cabinet passed, and the Governor-General approved, P.C. 1711, advising his Excellency to make the necessary recommendation to the Queen. P.C. 1711 refers to a "memorandum" by Mackenzie, dated December 22, presumably containing his reasons for tendering such advice. Sessional Paper No. 68 of 1877 gives the text of the Order and the report (which says nothing of reasons, beyond the single phrase about the "Public Interests"), but not a word of the memorandum. Neither the Governor-General's Office nor the Privy Council Office has any copy of the memorandum, nor is there any trace of it in the official despatches in the Public Archives of Canada or the Public Record Office in London. But the Mackenzie Letter Books, volume 2, pp. 104-107, contain an incomplete version of a memorandum on the subject, undated, and marked "Confidential"; and the Public Record Office has a similar memorandum, also "Confidential", dated "Council Chambers, January 2nd., 1874", and signed by Mackenzie. Of this second memorandum there appears to be no copy at all in Canada, certainly none in the Archives, the Privy Council Office or the Governor-General's Office. The copy reprinted here has been made available through the kindness of Sir Shuldham Redfern, late Secretary to the Governor-General, and Sir Eric Machtig of the Dominions Office. Comparison of the two memoranda suggests that the one in the Letter Book is what remains of the original document of December 22, 1873.

The probability is that the revised version was drawn up at Lord Dufferin's request. His position when the advice was originally tendered was not free from difficulty. It was by no means certain that the Government could command

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a majority in the existing Parliament. Nor could it be certain that a dissolution would give it a majority in a new Parliament. In these circumstances, Lord Dufferin might well have demurred when asked to invoke this extraordinary power, might have provoked a crisis by declining to assent till the Government had proved that it had the support of the House of Commons. Instead, he approved the Order-in-Council at once, and then, apparently, put it in his pocket, knowing that if the Government were defeated, either in the House or at the polls, P.C. 1711 would be a dead letter. It can hardly be mere coincidence that Mackenzie's second memorandum is dated on the very day on which Parliament was dissolved, still less that P.C. 1711, with the memorandum of January 2, was not forwarded to London till January 26, and so could not possibly come before the British Government before the results of the election were known.

The two memoranda are as follows:

Confidential Memorandum

on

Senate Appointments

The 26th Section of the British North AmericaAct provides as follows:-

"If at any time, on the recommendation of the Governor-General, the Queen thinks fit to direct that three or six members be added to the Senate, the Governor-General may, by summons to three or six qualified persons (as the case may be) representing equally the three divisions of Canada, add to the Senate accordingly."

Confidential Memorandum

on

Appointments to the Senate

Same

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This provision was obviously intended to give relief from the rigidity consequent on having a fixed number of appointed Senators holding their positions for life, and find a way to avoid possible complications or inconveniences by giving some elasticity to the system. The only question that can arise at present is whether the existing circumstances are such as may fairly justify the administration in asking the Assent of Her Majesty to the proposal to make the additional appointments.

Without venturing to enumerate or anticipate all the cases which might arise justifying the exercise of the authority vested in the Crown by the Act, I wish to point out the existing circumstances which, in my opinion, seem to be a sufficient justification for asking for the authority.

The Government of Canada is carried on, as are all the Governments of the Empire, by the means of active political organisations of a party character. The Senate must be composed of gentlemen holding the political views of one or both of the two great political parties

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Without venturing to enumerate or anticipate all the cases which might arise justifying the exercise of the authority vested in the Crown by the Act, I wish to point out the reasons which seem to be sufficient, in my opinion, to justify the Government in asking the Assent of the Crown for making additional appointments. The Government of Canada is carried on, as are all the Governments of the Empire, by means of active political organisations of a party character. The Senate must necessarily be composed of gentlemen holding the political views of one or the other of the two great parties

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into which political society is divided. Regard must therefore be had to the political complexion of the Senate by every government, as its existence may be to some extent affected by an extremely hostile majority therein.

During the time when the terms of confederation were discussed in the old Provincial Parliaments the Legislative Councils of the then Provinces were nearly equally divided between the two parties. A tacit agreement was made that illegible of the two parties should nominate respectively one half of the members of the Senate. It might be said to be "so nominated in the bond". Without such a stipulation the negotiation could not be carried on successfully for although the conservative element was the strongest in the Government the liberal element was strongest in the legislature.

into which political society is divided.

The political complexion of this body cannot therefore be regarded with indifference by any Government, as a large and hostile majority in the Senate may affect the Government very seriously, acting in conjunction with a powerful minority in the Commons.

When the terms of Union were under discussion in the old Provincial Parliaments, the Legislative Councils of the then separate Provinces were nearly equally divided between the two parties. An agreement was then entered into by the leaders of the respective parties that the members of the Senate should be nominated by them in equal numbers, that is that each party should nominate one half. This was not, for obvious reasons, provided for in the Act, but nevertheless it might be said to be "so nominated in the bond", as the 14th Resolution of the Quebec Conference states that "due regard shall be had to the claims .....of the Opposition in each Province so that all political parties may as nearly as possible be fairly represented." Without such a stipulation, the negotiations could not have been carried on with success; for,

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Although there was a partial disruption in the Coalition Cabinet in December 1865 which prevented the cordial working of the two parties in the Session of 1866 on general subjects, the Confederate policy was supported as cordially as ever, and the arrangement concerning the Senate was carried out in this particular with reasonable fairness. The classification of some so called independents was objectionable doubtless, and, therefore, some nominations were made apparently in the liberal interest which that party could hardly recognise. Still the "bond" was professedly kept and the principle acknowledged.

The Senate met therefore in 1867 for the first time, so constituted, with a fair opportunity to vindicate the reputation of its Creators for political knowledge and foresight. I will not here discuss the question whether the new body justified the hopes held out, as we are not proposing a change in its constitution in the Coalition Cabinet in

although the conservative element was strongest in the Cabinet of the old Provinces of Canada, the liberal element was strongest in Parliament.

There was a partial disruption of the Coalition Cabinet during the period of political incubation which prevented the cordial working of the two parties in the Session of 1866 on general subjects, but the policy of confederation was sustained as cordially as ever, and the arrangement concerning the Senate was carried out in this respect with reasonable fairness. The classification of some members was objectionable and, therefore, some nominations were made apparently in the liberal interest which that party hardly recognised. Still the "bond" was professedly kept and the principle acknowledged.

The Senate met in 1867 for the first time so constituted with a fair opportunity to vindicate the reputation of its creators for political knowledge and foresight. A brief statement of facts will shew whether the principle adopted in its creation [sic] have been adhered to, viz., an equitable distribution of

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tution, although I hold very decided views on that point, but it is right we should consider whether the principle observed in its creation have [sic] been adhered to viz., an equitable distribution of its political power between the two parties.

Since 1867 thirty one (31) appointments have been made to the Senate. Of these nine were from the three new Provinces. In one only of these Provinces was there any attempt to consult the political divisions which had previously prevailed in the Province.viz. in Prince Edward Island where two were selected from each party. All the other Senators were selected from the ranks of the ministerial party, the net result being that twenty-nine (29) were chosen because they were allies of the governing party and two of their opponents by agreement with the Islanders. The result on the whole being that the Opposition to the present administration controul the Senate by a very large majority.

Another provision of the illegible in connection with the death of two of the members aggravates this disparity of members. Under the impression that P.E. Island would enter the Union in 1867 it was grouped with N Scotia and N Brunswick, the group to have its political power between the two political parties. Since 1867, thirty-one appointments have been made. Of these nine (9) were made to give representation to the three new Provinces of Manitoba, Columbia and Prince Edward Island. In one only of these Provinces was there any attempt made to consult the political divisions which had previously prevailed, viz., in Prince Edward Island, where two were selected from each side.

All the others were selected from the ranks of the then ministerial party; the net result being that twenty-nine (29) of the new Senators were on one side and two (2) on the other. The result on the whole being that the Opposition to the present Administration controll the Senate by a very large majority.

Another provision of the British North American Act taken in connection with the death of two of the members aggravates this disparity of members.

Nova Scotia, New Brunswick and Prince Edward Island were formed into

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twenty-four (24) Senators. The 147th Section provides that "after the admission of Prince Edward Island the representation of N Scotia and N Brunswick in the Senate shall, as vacancies occur, be reduced from twelve to ten members respectively. Within the last few weeks one Senator has died in each of these Provinces, viz. Senators Locke and Steves, both these members were supporters of the present Government.

a group, one of three, with a representation of twenty-four members in the Senate. Prince Edward Island not having come into the confederacy, Nova Scotia and New Brunswick received each two members more than their own allotment as portions of the group. The 147th Section of the British North American Act provides that "after the admission of Prince Edward Island ..... the representation of Nova Scotia and New Brunswick in the Senate shall be reduced as vacancies occur from twelve to ten members respectively. Senators Locke and Steves from these Provinces died very recently, both these members were supporters of the present Government but they cannot be replaced, and the result is that the Government is further weakened in the Senate.

I do not mean to lay down the doctrine that the Senate must be filled by the appointment of an exactly equal number from each political party. Such an arrangement would be scarcely possible; nor do I pretend to say that, even if possible, it would be advisable for each successive Administration to obtain a majority in the Senate. The body as it exists is the result of a system of compromise which it was hoped would be reasonably

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satisfactory to the country. It is, however, evident that much care and delicacy is necessary in making appointments to give the body the weight it should have in the country and prevent the impression gaining ground that it is too much the creation of the Administration of the day. The fair equilibrium which should exist has been seriously disturbed, and a sufficiently clear case has been established to justify the application of the counterpoise provided by the Constitution.

The new Administration should have an opportunity of seating some of the prominent supporters of its policy before the commencement of the coming Session not merely to remove to the limited extent possible the disparity in numbers, but for the purpose of having able advocates of the Government measures in the House.

It should be noted that the addition of six members will really be only an actual addition of four to the present number, as the vacancies in the Maritime Provinces cannot be filled for the reasons stated and further vacancies may occur at any moment to reduce the number still further.

Respectfully submitted,

(Sgd.) A. Mackenzie.

Council Chambers.

January 2nd, 1874.

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February 26, 1946.

Dr. Eugene Forsey,
3 Lakeview Terrace,
Ottawa, Ontario.

Dear Eugene:

Just received your letter of 22nd on my return from New Brunswick this forenoon. I am very much relieved to know that I was mistaken as to the identity of the Mrs. Forsey who passed away. Could hardly conceive that there was any other Eugene Forsey in this country.

Yes, I received the Canadian Journal of Economics and Political Science with the article by Stacey, and am returning the issue under separate cover. Also I received Miss Armstrong's book but have not yet been able to read more than a part of it. So far as I have read, it is not a book in which she undertakes to express opinions on Canadian affairs at all. It is a narrative reciting the development of a certain issue and the phases of opinion thereon. Perhaps I shall find something else in it later, but so far as I have gone, Prof. Brebner of Columbia has no right whatever to say that he has authority there for the statements made in his book. The fact, for example, that Miss Armstrong says Bourassa argued as follows does not mean that she makes herself responsible for the truth of his statements or the validity of his argument.

I definitely, warmly and irrevocably agree with all you say about Ian Mackenzie.

My understanding has always been that no man becomes a member of the Cabinet until he is sworn of the Privy Council and is placed among those called to its meetings by the Prime Minister. When I became Solicitor-General in June of 1913, I became a member of the Government but not a member of the Cabinet. I was sworn of the Privy Council and invited to the Cabinet meetings by the Prime Minister about two years later, though I was still merely Solicitor-General.

In our day we had Parliamentary Secretaries--I think three or four. These were not considered even members of the Government or of the Administration or of the Ministry. I think it unlikely that King would commit himself to say that

(over)

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he regards his Parliamentary Secretaries as members of the Government. I regard the words "Administration" and "Government" as synonymous. I would think the word "Ministry" was synonymous with "Cabinet."

I have read the copy of the note you sent to the Canadian Historical Review on Mackenzie's Memoranda, and thank you for allowing me to keep this. The note seems to me to do credit to Mackenzie--especially the second writing of it.

My own view would be that a new Ministry finding itself ~~not~~ without a large majority in the Commons would be wise at least to delay the invocation of Section 26 of the B. N. A. Act. Little is to be gained by its invocation except to add somewhat to the number of Senators. There would need to be something approaching a balance before Section 26 could bring about a Government majority. As it is, the historic usage of the Senate would impel it to be very cautious in defeating an important Government Bill, especially if the Government were in a position to claim a popular mandate for the measure. If such a Bill, under such circumstances, were defeated, the subject of invoking Section 26 could be considered thereafter.

Yours very truly,

AM/E.

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3 Lakeview Terrace,
Ottawa, Ontario,
February 27, 1946.

Rt. Hon. Arthur Meighen, P.C., K.C.,
320 Bay Street,
Toronto, Ontario.

Dear Mr. Meighen:

I enclose a draft copy of my article on extra Senators under Section 26 of the British North America Act, on which I shall welcome any criticisms you have time and inclination to make. The footnote reference to the Canadian Historical Review is incomplete because I do not yet know whether they are taking my Note on Mackenzie's Memoranda, let alone when it will be published if they do take it.

Yours sincerely,

Eugene Forsey

Eugene Forsey

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Appointment of Extra Senators under Section 26 of the British North America Act

Eugene Forsey

Before the election of last June, the possibility of a C.C.F. Government at Ottawa in the near future had caused a sudden revival of interest in the Senate. Articles on the Upper House, its powers, its functions and its value as a bulwark against Socialism blossomed all over the place. But in all the discussion, one point seems to have been completely overlooked. If, as and when the C.C.F. takes office, it will not have a single supporter in the Senate. Moreover, if the Liberals hold office for a few years more, it is not beyond the bounds of possibility that if, as and when the Progressive Conservatives take office they will be in the same position. Clearly, any Government must have some supporters in the Upper House, if only to move and second its legislation. Would there be any way out of the difficulty short of an amendment to the British North America Act?

The answer would seem to be yes. Normally the Senate is limited to 96. But Section 26 of the British North America Act provides that "If, at any Time, on the Recommendation of the Governor-General, the King thinks fit to direct that four or eight Members be added to the Senate, the Governor-General may by Summons to four or eight qualified Persons (as the case may be), representing equally the four Divisions of Canada, add to the Senate accordingly." Sections 27 and 28 add: "27. In case of such Addition being at any Time made the Governor-General . . . shall not summon any Person to the Senate, except on a further like Direction by the King on the like Recommendation to represent one of the four Divisions until such Division is represented by Twenty-four Senators and no more. 28. The Number of Senators shall not at any Time exceed one hundred and four." There can be little doubt that a Government in the position just described would advise appointment of at least four extra Senators; and there can be equally little doubt that the advice would be accepted.

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Unfortunately it is impossible to be more positive, for there have never been any appointments under Section 26; only once has there been even an attempt to take advantage of its provisions, and on that occasion, the circumstances were very different from those which may arise at the next change of Government. None the less, the case is worth examining.

On November 7, 1873, the Mackenzie Government took office. It prorogued Parliament the same day. Dissolution followed, January 2, 1874. Meanwhile, on December 22, 1873, Mr. Mackenzie had drawn up a confidential Memorandum [1] recommending the appointment of six extra Senators (the maximum possible under the Act as it then stood), and on December 23 this recommendation was adopted by the Cabinet, in P.C. 1711. It was at once approved by the Governor-General but not forwarded to London till January 26, 1874. With it went a second confidential Memorandum from Mackenzie, dated January 2, setting forth the reasons for the recommendation.

The constitutional practice of that time was that the Canadian Cabinet advised the Governor-General to make the "recommendation" to the Queen; that the Governor-General, if he accepted the advice, made the recommendation; and that the British Cabinet advised the Queen whether or not to "direct" the appointment of the extra Senators. On this occasion, the Governor-General accepted the advice of his Ministers, but the British Government declined to advise the Queen to direct the appointments, the refusal being dated February 18, a month and eight days before the opening of the new Parliament.

Since the Balfour Report of 1926, the constitutional procedure would of course be different. The British Cabinet would not come into the picture at all.

[1] An incomplete version of this Memorandum appears in the Mackenzie Letter Books, II, 104-107. It is practically identical with the first eleven paragraphs of the Memorandum of January 2, 1874 (see below). No complete copy can be found in the Privy Council Office, the Public Archives, the Governor-General's Office, or the Public Records Office in London. For the texts of both Memoranda, see Canadian Historical Review,

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The Governor-General's "recommendation" would settle the matter. If a Cabinet advised the appointments, the only thing that could prevent them would be a possible "reserve power" in the Governor-General to refuse, a power which he could exercise only if the Cabinet gave way or if he could find other Ministers prepared to take responsibility for the refusal. Clearly the chance that any such power would be exercised is very small, but it cannot be altogether excluded; and the behaviour of the Governor-General in 1873-4, and the reasons given by the British Government for refusing the request then, may give some indication of the principles which might guide a Governor-General in dealing with any future request.

The circumstances of December 23, 1873, were peculiar. The late Government had not been defeated in the House, though if it had waited for the vote on Mr. Mackenzie's motion of censure it almost certainly would have been. The same House was still in existence, and it unquestionably contained a majority normally hostile to a Liberal Government. It was more than doubtful whether the new Government could carry on without a dissolution, and the results of a dissolution were by no means certain. Even if an election took place, and the Government won it, it could not be taken for granted that the Senate would necessarily be seriously hostile. In view of these facts, the Governor-General might well have balked at accepting advice to invoke an extraordinary power provided by the Constitution presumably only for use in cases where nothing else would serve. But with his customary tact, Lord Dufferin accepted the advice and put the Order-in-Council in his pocket till the eve of the election, forwarding it to London only when it was certain to reach the British Government after the election results were known.

A modern Governor-General could not adopt either of the expedients Dufferin resorted to. His Ministers would insist on an immediate answer and there could be no appeal to the British Government. Faced with a request like Mackenzie's, in similar circumstances, what would a modern Governor-General do? He might urge

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delay till the existing Parliament had shown whether it was prepared to support the new Government, or until elections had been held. He might urge delay till the Senate had shown that it was not prepared to deal fairly with the new Government. But if his Ministers insisted on immediate compliance with their request, what then? Would he give way or would he seek other advisers? If he sought them could he find them?

To these questions, Mackenzie's Memorandum of January 2, 1874,[1] the British Government's reply of February 18, 1874, and the debate in the Senate, March 19-20, 1877, offer partial answers.

Mackenzie at the outset lays down the general principle that Section 26 "was obviously intended to give relief from the rigidity consequent on having a fixed number of Senators holding their seats for life and thus find a way to avoid possible complications or inconveniences by giving some elasticity to the system." He deliberately refrains, however, from any attempt to "enumerate or anticipate all the cases which might arise justifying the exercise" of this special power, confining himself to the two reasons which in his view warrant its exercise in this particular case.

The first is the pre-Confederation agreement that the original appointments to the Senate should be divided equally between the two political parties, an agreement which, with some qualifications, Mackenzie seeks to erect into a permanent principle of the Canadian Constitution. The earlier Memorandum simply asserts the existence of such an agreement, adding that without it the Confederation negotiations could not have been carried through at all, because, though the Conservatives had a majority in the Cabinet of the old Province of Canada, the Liberals had a majority in the House. The later Memorandum, perhaps at Lord Dufferin's

[1] There seems to be no copy of this document in Canada. It has been made available from the Public Records Office in London through the kindness of Sir Shuldham Redfern and Sir Eric Machtig.

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suggestion, offers, as proof of the agreement, the fourteenth of the Quebec Resolutions: that in the first appointments to the Upper House, "due regard shall be had to the claims . . . of the Opposition in each Province so that all political parties may as nearly as possible be fairly represented." Mackenzie admits that, broadly speaking, the agreement was carried out in the original appointments. But "the principle adopted in its creation . . . an equitable distribution of its political power between the two political parties" had not "been adhered to" in subsequent appointments. Of thirty-one new Senators, nine were appointed "to give representation to the three new Provinces of Manitoba, Columbia and Prince Edward Island", and only in Prince Edward Island "was there any attempt made to consult the political divisions which had previously prevailed." The result was twenty-nine new Conservative Senators and two Liberals, and a "very large" Opposition majority in the Upper House. The situation had been aggravated by the fact that, with the admission of Prince Edward Island, vacancies from Nova Scotia and New Brunswick could not be filled till their representation had fallen from the original twelve to ten, and so the Government was unable to replace two Liberal Senators from these provinces who had recently died.

Mackenzie was, of course, well aware that to suggest rigid application of the principle which had governed the original appointments would be a counsel of perfection. "I do not mean", he said, "to lay down the doctrine that the Senate must be filled by the appointment of an exactly equal number from each political party. Such an arrangement would be scarcely possible; nor do I pretend to say that, even if possible, it would be advisable for each successive Administration to obtain a majority in the Senate. . . It is, however, evident that much care and delicacy is necessary in making appointments to give the body the weight it should have in the country and prevent the impression gaining ground that it is too much the creation of the Administration of the day. The fair equilibrium which should exist has been seriously disturbed, and a sufficiently clear case has been established to justify

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the application of the counterpoise provided by the Constitution."

The second reason for advising the appointments is that "The new Administration should have an opportunity of seating some of the prominent supporters of its policy . . . for the purpose of having able advocates of the Government measures in the House."

The British Government's reply was a frigid and uncompromising refusal. It totally ignored both Mackenzie's reasons for advising the appointments, laying down instead the principle that the Queen could be advised to exercise the power only "in the event of an actual collision of opinion between the two Houses when it was made apparent that a difference had arisen of so serious and permanent a character that the Government could not be carried on without Her intervention, and when it could be shown that the limited creation of Senators allowed by the Act would supply an adequate remedy." In this case nothing of the sort had been shown.

Neither the Canadian Government's request nor the British Government's reply was communicated to either House until 1877, and even then Mackenzie's memorandum was not brought down. After the production of the papers, Senator Campbell, Conservative leader in the Senate, moved a motion approving the British Government's decision and the reasons for it, and a most interesting debate followed. Senator Wilmot, the only Senator who had been present at the London Conference where the British North America Act was drawn up, confirmed the contention that Section 26 had been intended only to break a deadlock between the two Houses.[1] Senator Scott, for the Government, contended that the number of appointments provided for was too small to break a deadlock. The power could therefore not have been given for that purpose. The Government had sought only to anticipate vacancies and strengthen

[1] Senate Debates, 1877, p. 203. Pope's Confederation Documents, p. 118, and Lord Carnarvon's speech in the House of Lords on the second reading of the British North America Bill, quoted by Senator Macpherson, Senate Debates, 1877, pp. 215-16, show that this is correct.

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itself in the Senate, and this would have been a perfectly proper use of the power.[1] Senator Dickey denied that the number was too small to break a deadlock; the Esquimalt and Nanaimo Railway Bill had been defeated by only one vote, with two Government supporters voting against it.[2] George Brown thought the power given by Section 26 should be used with "great caution", but could properly be used in any "fitting exigency", any case of "imperious necessity". Such necessity, he contended, had plainly existed in December 1873. He repeated Scott's argument; but where Scott had admitted that appointments to the Senate were part of Government "patronage" and that it was "only natural" for the Macdonald Government to have appointed its own supporters, Brown, like Mackenzie, asserted the principle that the numbers of the two parties in the Senate should be kept roughly equal. He repeated the substance of Mackenzie's argument on this point, bolstering his case by claiming that six of the late Government's appointments had been made when it was in its "last throes", and ought to have been held over for the new Administration.[3] Senator Kaulbach said that the terms of Sections 26 and 27 made it clear that the power to make extra appointments was an emergency power: "Had the Government measures not been treated in a fair spirit; had not the action of honourable members been generally approved by the people; had the Government appealed to the people upon any measure refused here, and then on being returned and again presenting it here, this House had again refused it, a case of deadlock might have been made out such as to justify the Government."[4] Senator Vidal insisted that the power could be properly invoked only when a "permanent" difficulty had arisen. If the Government had asked for the appointments after the defeat of the Esquimalt and Nanaimo Railway Bill, it would have had a case, though even then the permanency of the difference between the two Houses would not have been established, as the bill had not been reintroduced.[5] Senator Wark

[1] Senate Debates, 1877, pp. 204-5.
[2] Ibid., p. 206.
[3] Ibid., pp. 207-9.
[4] Ibid., p. 217.
[5] Ibid., p. 218.

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made the original and significant suggestion that the special power might be needed, on occasion, to find a Speaker, or a "legal gentleman" to take charge of legal business, or a Cabinet Minister.[1]

In this whole controversy, the British Government, and the Canadian Conservative party, stood firmly on the history of Section 26 itself and on British precedent. Section 26 had been inserted in the Act not by the Fathers of Confederation but by the British Government, and inserted solely for the purpose of breaking a deadlock which could not be broken by any other means. Mackenzie and the Liberals, on the other hand, arguing that the Act itself conferred an unrestricted and unconditional power, fought for a wider interpretation based at least partly on purely Canadian history and circumstances. Subsequent developments have made most of the arguments on both sides obsolete. On the one hand, Mackenzie's main contention has been shown to be altogether Utopian; no Government ever appoints anybody except its own supporters to the Senate. On the other hand, the long tenure of most Canadian Governments (the very reverse of what British, Canadian, Australian and New Zealand experience down to 1867 had led everyone to expect) has rendered Section 26 perfectly useless for the purpose for which it was intended. It will probably never be used except for purposes which its creators never contemplated.

Viewed retrospectively, therefore, the only really important part of Mackenzie's argument is the second to last paragraph of his Memorandum of January 2, 1874: that the Government needed the appointments to give it "able advocates" in the Senate. Similarly, the only important contribution to the debate of 1877 is Senator Wark's: that a new Government might need extra appointments to give it Senators with the particular qualifications necessary for the Speakership, Cabinet office or the conduct of legal business. Unfortunately for Mackenzie, his second to last paragraph is introduced almost as an afterthought, without any supporting evidence; there was already a considerable number of Liberals in the Senate; on December 16, 1873, a

[1] Ibid., p. 221.

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vacancy had allowed him to appoint George Brown, certainly a highly "able advocate"; and, as the event proved, further vacancies might well occur before the opening of the new session.[1]

It is worth noting that even if Mackenzie had got his six Senators, he would still have been in a minority in the Senate; so that if the elections had gone against him, a new Conservative Government would not have been seriously embarrassed by the fact that the appointments had been made. This might have been considered an additional reason for assenting to his request. On the other hand, if the six had been enough to give him a majority, that might have been an additional reason for declining until he had proved that he had the confidence of the existing or a new House of Commons. It would have been intolerable to allow a Government which had never had the confidence of the Commons to hamstring its successor. By the same token, if six appointments would have given Mackenzie a majority but three would not, the Governor might properly have agreed to recommend three but not six, always assuming, of course, that he could find an alternative Government to accept responsibility for his action.

It cannot be said that the 1873 case throws much light on the problems which would arise if a Government found itself without a single supporter in the Senate. On the contrary, both the Cabinet and the Governor-General would have to be guided almost entirely by the light of reason, the spirit of the Constitution and the particular circumstances of the case.

If the new Government took office, as in 1873, because its predecessor had resigned without being defeated in the House or at the polls, and asked for the appointment of four or eight extra Senators before meeting either the existing House or a new one, would the Governor-General be bound to assent? He certainly could not refuse unless he could either persuade the late Government to resume office or could find another alternative Government. But could he have any solid ground for refusing? Suppose that on the present Liberal Government's resignation

[1] R.W. Scott and E.G. Penny were appointed shortly before the opening.

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the Progressive Conservatives took office. They would, ex hypothesi, have no majority in the existing House of Commons and no certainty of winning an election. If they got the full eight extra Senators, met the existing Parliament, were at once defeated, either did not ask or were refused a dissolution, and made way for a C.C.F. Government, the new C.C.F. Government would find itself not only without supporters in the Senate but with no means of getting any. A Governor-General who agreed to the full eight appointments before the House met would be making himself an accomplice in a scandalous abuse of power; a Governor-General who declined would merely be safeguarding the rights of the people. If, however, the Progressive Conservatives asked for only four appointments before the House met, the Governor could scarcely refuse; for even if the Progressive Conservative Government were at once defeated in the House, and a C.C.F. Government took office, the new C.C.F. Government would still be able to make four appointments. The essential constitutional right would have been preserved. Similarly, if the Progressive Conservatives secured a dissolution, either without meeting the existing House or after defeat there, the Governor could hardly refuse a request for the appointment of four extra Senators before the new House met, but might properly refuse a request for eight until the Government had either won a clear majority in the election or secured the support of the new House.

If a new Government without a single supporter in the Senate took office after winning a clear majority in an election, its right to the full eight appointments would seem to be unquestionable, its power to get them equally so. An alternative Government in the existing Parliament and a fresh dissolution would be alike impossible.

But if the Liberal Government resigned as the result of an election which gave no party a clear majority, the case would be different. Suppose, in this instance, that a C.C.F. Government took office. It would certainly have a right to four appointments forthwith, to enable it to meet Parliament. But if the Progressive

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Conservatives were numerous enough to have any chance of forming a Government if the C.C.F. Government were defeated when it met the House, then, for reasons already indicated, the Governor-General would be entitled to insist on deferring the other four till the C.C.F. had shown that it could command a majority; and he would presumably have no difficulty in finding an alternative Government to take responsibility for his action. If, however, the Progressive Conservatives were so few as to have no chance of forming a Government, then, again, the Governor could hardly refuse to make the full eight appointments, as the alternative to a C.C.F. Government would be the return of the Liberals who already had the whole normal membership of the Senate.

This does not, of course, by any means exhaust the possibilities of the subject. There are times when a Government is not entitled even to fill vacancies in the Senate, let alone make use of Section 26, and when the Governor-General would be entitled to refuse his consent if it tried. The crisis of June-July 1896, when Sir Charles Tupper, after his defeat at the polls, tried to fill two vacancies and Lord Aberdeen refused, and was upheld by Sir Wilfrid Laurier, by the Colonial Secretary (Joseph Chamberlain), and, many years later, by Mr. Meighen, provides one illustration. The events of November 1925-July 1926 provide two others. If Mr. King's Government, after the election of 1925 (from which it emerged with 101 seats to the Conservatives' 116) and before it received the support of the new House of Commons, had tried to fill the two vacancies which existed, Lord Byng could properly have refused. If Mr. Meighen's Government, after its defeat in the House and while it was awaiting the verdict of the electorate, had tried to fill the three vacancies which then existed, again Lord Byng could properly have refused. Lord Aberdeen easily found an alternative Government to take responsibility for his refusal, and it is altogether probable that Lord Byng would have also. Actually, both Mr. King and Mr. Meighen behaved with perfect propriety:

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Mr. King filled no vacancies till June 25, and Mr. Meighen filled none at all. In all three cases, an attempt to appoint extra Senators under Section 26 would, of course, have been even more improper than an attempt to fill vacancies, and there can be little doubt that the Governor would have refused. If in any one of the three cases the state of parties in the Senate had been such that the appointment of the full number of extra Senators would have converted a minority into a majority, the Governor would have been almost bound to refuse, as compliance with the request would have seriously embarrassed an incoming Government. But both Sir Charles Tupper and Mr. Meighen already had majorities in the Senate, and the majority against Mr. King was so large that even if he had filled both vacancies and added the full eight extra members, he would still have been in a minority. In none of the three cases, therefore, was the Government under any temptation to make improper use of Section 26. But situations in which it might be are easily conceivable.

There is also the possibility that a new Government might find itself with some supporters in a full Senate of 96 members, but none of an age or capacity to bear even the relatively slight burdens of a Minister without portfolio and Leader of the Senate; it would seem to have a clear right to four appointments, though not to eight unless it had already shown that it possessed the confidence of the Commons.

It is not hard to imagine various permutations and combinations of these circumstances. But three principles are clear: (1) any Government is entitled to meet Parliament with some supporters in the Senate; (2) no Government without the confidence of the House of Commons is entitled to make it impossible for its successor to do so; (3) no Government without the confidence of the House

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of Commons is entitled to make use of Section 26 to give itself a Senate majority which could not be overcome by an immediate further use of the Section by its successor.

These are some of the principles which, it is submitted, ought to guide Governments and Governors-General in the use of Section 26. But the conventions governing such use have still to be worked out, and they will have to be worked out without much help either from our own or British history. British precedent in regard to the creation of peers will be almost totally useless. For one thing, it is concerned almost entirely with the question of "swamping" the Upper House, something for which Section 26, as we have seen, is never likely to be of any use. For another, Britain has a Parliament Act; Canada has not. For a third, the House of Lords is not limited in number; the Senate is. The power of the Senate is much greater than that of the Lords, and the power of the Canadian Government and House of Commons to overcome obstruction by the Upper House is much less, indeed almost nil. Moreover, if a British Government created a thousand extra peers, this would not prevent its successor from creating another thousand; if a Canadian Government secured the appointment of eight extra Senators under Section 26, it might prevent its successor from making any appointments at all for several years. Because of the provisions of Section 27, it could make no ordinary appointments till at least two Senators from some <u>one</u> Senatorial division of Canada had died, resigned or become disqualified, and could make no further use of Section 26 till at least one Senator from <u>each</u> division had died, resigned or become disqualified.

The need for a reserve power in the Governor-General to prevent abuse of Section 26 is therefore much greater than the need for a reserve power in the King to prevent abuse of the power to create peers. That the King has such a

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reserve power is abundantly clear from the events of November 1910. On that occasion, he was willing to create enough peers to carry the Parliament Bill, but only after all other means had been exhausted. The first step was to try to get the Lords to pass the bill in the existing Parliament. If that failed, the next step was to dissolve Parliament, to see whether the electorate really favoured the bill. If the electorate said yes, the next step was to see whether the Lords would give way, as they had after the election on the Lloyd George Budget. Only if all these steps had been taken without result was the King prepared to create enough peers to swamp the opposition. It is arguable that the Parliament Act, by providing an alternative method of overcoming obstruction by the Lords, has strengthened the King's reserve power in the creation of peers; certainly it can hardly be argued that it has taken it away. If the King has a reserve power in the creation of peers, a fortiori the Canadian Governor-General ought to have a reserve power in the use of Section 26 of the British North America Act. It should hardly be necessary to add that "reserve power" means what it says: a power held in reserve, to be used only on extraordinary occasions to prevent a flagrant breach of constitutional right. As long as Cabinets observe ordinary constitutional decency, restraint and decorum in the advice they tender, reserve powers remain in reserve; it is only on the occasions, fortunately rare, when Cabinets forget themselves, that the reserve powers come into play.

Ottawa, Ontario,
February 26, 1946.

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144938

3 Lakeview Terrace,
Ottawa, Ontario,
February 28, 1946.

Rt. Hon. Arthur Meighen, P.C., K.C.,
320 Bay Street,
Toronto, Ontario.

Dear Mr. Meighen:

As a result of a conversation with my assistant and my secretary yesterday afternoon, and some further reflection last night while I was finishing the supper dishes, I have made some changes in the article on extra appointments to the Senate.

I enclose revised pages 12 and 13. The only other changes are on page 10, where lines 16 and 17 now read: "hardly refuse a request for the appointment of four extra Senators, after the election but before the new House met (unless, of course, another party had won a clear majority), but might properly refuse a request for eight until the Government had . . ."; and page 11, where I have added a footnote as follows: "It is worth noting that Section 26 might provide the only means by which a Progressive Conservative or C.C.F. minority Government could give French Canada representation in the Cabinet", referring to the end of the first paragraph.

Yours sincerely,

Eugene Forsey

Eugene Forsey.

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144939

February 28, 1946.

Dr. Eugene Forsey,
5 Lakeview Terrace,
Ottawa, Ontario.

My dear Eugene:

I just received today your letter of 27th and immediately read with care your article on "Appointment of Extra Senators under Section 26 of the B. N. A. Act. This is really an admirable, and not unlikely will prove to be a very useful, discussion of the exercise of Cabinet and Governor-General's powers under this Section. I follow your reasoning throughout without difference of any kind. You very clearly establish that this is another case where the reserve power of the Governor-General is absolutely essential and may quite conceivably come into operation. It casts another sad reflection on the intelligence of the Dafoe and Ewart contentions of 1926. To Dafoe and Ewart might be added Mackenzie King himself.

Your study of the subject is much greater than mine has been, but I still think the suggestion made by me in my letter of Tuesday is sound. There could conceivably, of course, arise a situation where men could not be found to take charge of a new Government's programme in the Upper House. This is unlikely, but possible. The country, it seems to me, has a right to expect that the Government make an honest attempt to get on without altering the numerical composition of one of the branches of Parliament. The question of such an alteration is rather on a different level from other questions of policy.

I would be inclined to suggest that you modify the words "frigid and uncompromising" on page 6, as descriptive of the terms of the British Government's refusal. It would not be the usual course for the British Government in these circumstances to take up in detail Mr. Mackenzie's memorandum and give an answer thereto. The proper procedure for such a Government was merely to set out the principle which they thought applied. This they did in terms which were very clear, and, I think, not lacking in courtesy. Quite apparently that Government had in mind an analogy to the position of the King in respect of an obligation for an unusual creation of Peers.

(over)

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The conduct of His Majesty, indeed, in 1910, as set out in subsequent pages of your article, indicates plainly that a British Government might well feel that such an analogy existed and applied in a disposition of the Mackenzie Cabinet's recommendation.

You do not ask for return o' the copy you so kindly sent me. If you do not need it, I would much like to keep it.

Yours very truly,

AM/E.

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144941

March 1, 1946.

Dr. Eugene Forsey,
3 Lakeview Terrace,
Ottawa, Ontario.

My dear Eugene:

I received yours of 28th and have checked over the additions and corrections. You have improved the article, and that is saying a good deal. I like its clear, lucid style, but still more, the thoroughness of examination of the available records.

Yours very truly,

AM/E.

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144942

3 Lakeview Terrace,
Ottawa, Ontario,
March 1, 1946.

Rt. Hon. Arthur Meighen, P.C., K.C.,
320 Bay Street,
Toronto, Ontario.

Dear Mr. Meighen:

Thank you very much for your letter of the 26th. I am glad the book arrived safely. There is not the least hurry about returning either it or the Canadian Journal of Economics and Political Science. I hope some day to hear what it was you had your dispute with Brebner about.

I am very much indebted to you for your observations on the Cabinet, the Ministry, etc. I hope shortly to do a short memorandum on this subject. One of the officials of the Privy Council Office and I have been engaged in a process of mutual aid in regard to this and other matters connected with the subject of Cabinet Government in Canada, and I have collected a certain amount of information which I hope to supplement soon. I shall be interested in your comments on the results.

I expect also within the next few weeks to do a note on Mr. Ilsley's famous remarks about the responsibility of the Cabinet to the Crown, and an article on the Tupper-Aberdeen crisis of 1896, as to which I have at last got some information I was seeking about the New South Wales precedent of 1894. I shall be much interested in your comments on these also. I make no apology for threatening to inflict these things upon you; for quite apart from your unvarying kindness, I think you will agree that it is important that anything that is published on such matters should be as accurate and as carefully considered as possible.

In running over my notes on some of these matters, I find a reference to a decision by Mr. Speaker Ouimet, May 9, 1887, recorded in Hansard at page 358, that a member who has paired and voted inadvertently may "withdraw" his vote. It would have been interesting if some one had mentioned this on July 1, 1926.

Yours sincerely,

Eugene Forsey

Eugene Forsey.

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144943

March 4, 1946.

Dr. Eugene Forsey,
3 Lakeview Terrace,
Ottawa, Ontario.

My dear Eugene:

I am indeed interested to learn from yours of 1st that you propose preparing an article on Mr. Ilsley's famous remark about the responsibility of the Cabinet to the Crown. I shall be very interested in it and as well in anything further you have to say on the Tupper-Aberdeen crisis.

Truly I never heard before of Mr. Speaker Ouimet's decision of May 8, 1887. Even had I known him, I was not in the House and, of course, could not have done anything about it.

You ask about my controversy with Brebner. I cannot do better than send you copy of the corresponce to date. I shall not carry on this correspondence further until I have carefully studied the Armstrong book at least, and probably the Stacey book as well. I am certainly not much interested in Stacey, however, after his eulogy of Ian Mackenzie.

Yours sincerely,

AM/E.
Encl.

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144944

3 Lakeview Terrace,
Ottawa, Ontario,
March 4, 1946.

Rt. Hon. Arthur Meighen, P.C., K.C.,
320 Bay Street,
Toronto, Ontario.

Dear Mr. Meighen:

Thank you very much indeed for your two very kind letters about my article. I have tried to think of some other phrase than "frigid and uncompromising" which would say what I had in mind without being open to the objection you note, but I have not succeeded. So I am sending the thing off as it stands. What its fate will be at the hands of the editors of the Canadian Journal of Economics and Political Science remains to be seen.

Yours sincerely,

Eugene Forsey

Eugene Forsey.

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144945

3 Lakeview Terrace,
Ottawa, Ontario,
April 8th, 1946.

Rt. Hon. Arthur Meighen, P.C., K.C.,
320 Bay Street,
Toronto, Ontario.

Dear Mr. Meighen:

I have just heard a choice bit on King's remarks to our Congress delegation the other day. Apropos of Conroy's demand for "order" rather than "a new social order", King, who apparently regards the latter phrase as his personal property, hardly less cherished than the memory of his grandfather, proceeded to deliver a twenty-minute dissertation on the sun dial in his father's garden: where and what it was, what it did, how, when properly set, it told him the time, the latitude, the longitude, etc., etc., in infinite variety; how it had produced upon his mind the conviction that there was a natural law in the universe, a natural order; how this in turn had inspired him to search for a natural order in human relations; how he had devoted his life to that search, and (I gather) had found the object of his quest.

This might be something for John Stevenson. If he is interested, I have no doubt he can get details from our Executive Secretary, Norman Dowd.

Have you seen Humphrey Mitchell's masterly contribution to the "Canada Day" debate: "The British people hold an umbrella of freedom. Yes, always remember that they hold that umbrella of freedom." No wonder he thinks King is the greatest statesman Canada has ever produced; deep calling unto deep.

Yours sincerely,

Eugene Forsey

Eugene Forsey.

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144946

April 9, 1946.

Dr. Eugene Forsey,
8 Lakeview Terrace,
Ottawa, Ontario.

My dear Eugene:

What a wholly typical performance that was of King's at the Labour conference! The head grows and grows---it always was too big.

John, I think, is in Ottawa but he will certainly get this at the first opportunity.

The stuff I referred to when you were in the other day as just received from Ottawa is intensely interesting and revealing. There is nothing very much new about it, but on the whole Murphy got the facts right from the Governor-General. Any little discrepancy is plainly due to the impossibility of having every detail in Murphy's mind as it was related to him. Later I will send you this material but will want it back. Strange to say, I never saw it before.

Meantime, I am sending you copy of a letter I have written today to Mr. Dickson.

Yours sincerely,

AM/E.
Encl.

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144947

3 Lakeview Terrace,
Ottawa, April 10, 1946.

Dear Mr. Meighen,

When you have finished with that article of Senator Bishop's, dealing with the 1926 business, I should be very glad if you would lend it to me for a few days. I have tried to find it here, but without success. Come to think of it, the date would do me just as well, as I could then locate it in the Reading Room without difficulty. It occurs to me that it might require some answer from me.

Golden's article on the Communists in the last News is very good.

I see the Globe and Mail printed my letter about Dr. Bruce's resignation. I hope King will see it. I sent the same letter to both papers here. Doubtless one of the army of secretaries will draw it to his attention. I hope also that someone will draw it to Mr. Bracken's attention, so that he will not let King get away with nonsense of this sort again. The brazen, pompous impudence of the man is almost past belief.

Yours sincerely,

Eugene Forsey

Rt. Hon. Arthur Meighen, P.C., K.C.
320 Bay Street,
Toronto, Ontario

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144948

April 11, 1946.

Dr. Eugene Forsey,
5 Lakeview Terrace,
Ottawa, Ontario.

My dear Eugene:

I have your letter of 10th. Strange to report, I had not seen your letter in the Globe and Mail. Miss Edmondson assumed I had seen it and filed the letter away. It was a great pleasure for me to read it today. You certainly have put King in the doghouse. If the case of Lapointe had been recalled at the time and flung back at him under heavy power, it would have been deadly. I am going to ask Mr. Bracken to read your letter.

I am sending you herewith the material to which you refer. To tell the truth I have not read Bishop's stuff as I do not think anything he writes is worth the time. The other material, though, will be quite gripping. Please preserve it most carefully. You may have a copy made if you wish, because I have not been asked to preserve it as confidential in any way--after which, please return.

Yours very truly,

AM/E.
Encl.

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144949

3 Lakeview Terrace,
Ottawa, Ontario,
April 12, 1946.

Rt. Hon. Arthur Meighen, P.C., K.C.,
320 Bay Street,
Toronto, Ontario.

Dear Mr. Meighen:

Thanks very much for your letter of the 9th and the enclosure, which is especially interesting.

There is an old boy here whom I have run into several times at a local restaurant who seems to have known Murphy rather well, and who declares that King did his level best to keep Murphy, Lemieux and all other ex-Ministers of Laurier's Cabinet out of his own first Cabinet in 1921. Have you ever heard this? If you would like details, I can probably get them from this gentleman.

Had a call from John Stevenson the other night. He had seen a truncated version of my letter about Bruce's resignation in the Ottawa Journal, and was highly pleased even with this. He said it would make King "frightfully angry". I did not at the moment have time to tell him the sun dial story, but hope to see him shortly and shall certainly tell it then.

Your letter to Mr. Dickson is intensely interesting. It raises two points on which I should like to have your comments:

(1) Apparently, I was in error at pages 133-134 of my book where, as you will see, I quoted the Montreal Gazette to the effect that immediately after King's announcement of his resignation, June 28, the Governor sent for you and asked if you could command a majority to get the work of the session concluded; that you replied you could; and that in the evening you undertook to form a Government. According to the Gazette, it was only after this that Lord Byng sent for Mr. Fork. Evidently, this account should be corrected in any later edition, and I should like to have from you the precise statement which I could use for that purpose.

(2) I am a little perplexed about what you actually said to Lord Byng. According to the Gazette version, you said you could command a majority to finish the work of the session. But you say to Mr. Dickson, and you have said to others, that no man can command a majority when he is out of the House himself. What puzzles me is that when Lord Byng asked you to take office, you knew you would not be able to be in the House for the remaining few days of

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the session, but presumably you must have given him ground to think that even so your temporary ministry would be able to finish the session in your absence. My assumption would be that you must have given an assurance of this sort, though not of course a guarantee, to Lord Byng, with a further assurance that once you were back in the House yourself, you would in all reasonable probability be able to carry on for some considerable length of time. I should like to have your comments on this.

I note what you say in the last paragraph of your letter to Mr. Dickson. I hope that you have put down on paper for use when such use would be proper the request which Lord Byng actually did make to you. I have not the slightest wish to know what it was, but I think it should be on record, if only for use after both you and I are dead and gone.

I shall be very greatly interested in seeing Murphy's stuff, and shall return it promptly.

Yours sincerely,

Eugene Forsey

Eugene Forsey.

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144951

April 15, 1946.

Dr. Eugene Forsey,
5 Lakeview Terrace,
Ottawa, Ontario.

My dear Eugene:

I have just read yours of 12th, and hasten to reply at once.

As to paragraph (1), after very careful reflection and digging up the past, I am inclined to think you are not in error in saying that I accepted on the night of King's resignation. The Governor-General asked to see me at noon of that day and doubtless I went out at once. I very definitely declined to accept at that time and told him I wanted to have sufficient leisure for consideration and consultation. The reason I was under the impression, when I wrote Mr. Dickson, that it was the following night that I accepted, was that I recall very well the Governor-General telling me about his conversation with Mr. Forke. It is possible, and now I think, likely, that he told me this afterwards. The Gazette, of course, is entirely wrong in saying that I accepted at once, and even yet I do not feel quite sure that my statement of acceptance was made until the following day.

As regards No. (2), I certainly did not know when Lord Byng asked me to take office that I could not command a majority temporarily even in my own absence. In fact, I thought it quite certain that I could--that is, for the purpose merely of completing the passage of legislation already fully, or nearly fully, considered, and proroguing the Session. There was no reason in the world why I should think otherwise, and similarly there was no reason why an attempt should have been made on the part of those who acknowledged they could not command a majority to bring about the defeat of an Administration that was merely meeting the necessities of the situation, which all agreed upon, I thoroughly knew the desires of the Members to have this done that they might return to their other duties. Indeed, I spoke to a number of the Progressives. What I was urging in my letter to Mr. Dickson and what I have urged to you is that no man should be expected to carry on against aggressive attack while he is not there to meet the aggression himself, and that in the British House or any other House where the rules

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of gentlemen prevail, no attempt would be made to defeat him in his absence. If he endeavoured to carry on, of course, and formulate important new legislation or policy, the situation would be quite different. No leader in his senses, though, would try to do this while absent from the House himself.

When you are next here I will tell you the exact circumstances referred to in the latter part of your letter.

I think I did hear of the effort to keep Lemieux and Murphy out. I am not certain of hearing about Murphy, but I certainly heard about Lemieux.

Yours sincerely,

AM/E.

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144953

3 Lakeview Terrace,
Ottawa, Ontario,
April 15th, 1946.

Rt. Hon. Arthur Meighen, P.C., K.C.,
320 Bay Street,
Toronto, Ontario.

Dear Mr. Meighen:

Thanks very much for your letter of the 11th and its enclosures.

Bishop's stuff is certainly not worth reading. He refrains from outright mendacity, but is rather skillful in his omissions. I am returning this production herewith.

I shall send back Senator Murphy's documents as soon as I have had a copy of the principal memorandum made. It certainly is an amusing story. I notice, incidentally, that King has recently been putting about again the tale that Laurier House is his personal property.

I am inclined to agree with Murphy that Byng had no right to make any such agreement with King, and that King ought to have refused at the outset. In my judgment, no Prime Minister is ever justified in binding himself to give any advice in hypothetical circumstances, except such advice as the public interest in such circumstances may seem to him to require. Peel, you will recall, in 1835, was asked in the House to give an undertaking that he would not ask for a second dissolution, and he took his stand firmly on the principle I have just mentioned (see my book, p. 74), though I think he would have had absolutely no case for a second dissolution until an absolute deadlock had arisen or some great new question of public policy had presented itself. You will recall also that in the Tasmanian case of 1914, the Governor summoned Mr. Earle to office on condition that he advise an immediate dissolution; Earle took office and declined to advise dissolution; and the constitutional propriety of his conduct and the impropriety of the Governor's were strongly set forth by the late Lord Harcourt. You will find the precise reference in a footnote at p. 34 of my book. In any event, quite apart from precedents or authorities, it seems to me clear that conditions of this sort are inadmissible.

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144954

I am enclosing copy of a Note on Ilsley's statement, which I am sending to the Canadian Journal of Economics and Political Science.

Yours sincerely,

Eugene Forsey

Eugene Forsey.

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144955

The Crown and the Cabinet: a Note on Mr. Ilsley's Statement

On November 12, 1945, Mr. Ilsley, then acting Prime Minister, told the House of Commons that "The authority of the government is not delegated by the House of Commons; the authority of the Government is received from the Crown. . . . His Majesty's advisers are sworn in as advisers to the crown. The government is responsible to parliament, . . . but that is a different thing from the doctrine that the government is a committee of the House of Commons or that it exercises authority delegated by the House of Commons. That is not so." (Commons Debates, unrevised edition, pp. 2041, 2043.)

The Opposition parties fiercely attacked this position, quoting freely from speeches by Mr. King, notably one of January 29, 1934, in which he described the Cabinet as "an executive which derives its powers from and is responsible to the House of Commons." (Quoted in Commons Debates, unrevised edition, November 15, 1945, p. 2098.) Curiously enough, no one quoted Mr. King's attack, in the autumn of 1926, on Mr. Meighen's Government of that year, when he asked: "When was there a ministry in British history that undertook to carry on the government of the nation having no authority from parliament and no authority from the country?" (Commons Debates, 1926-27, p. 47.)

Mr. Ilsley stoutly maintained that he was not only "technically correct" (i.e., as a matter of strict law), which no one seems to have questioned, but also "constitutionally correct . . . and correct in spirit." (Commons Debates, November 15, pp. 2100-01.) It was on this point that he was challenged, and the challenge was on the face of it impressive. But those who uphold the opposite doctrine, that the authority of the Government is delegated by the House of Commons or the electorate, appear to have overlooked certain highly important facts.

(1) Between the dissolution of one Parliament and the election of another, a period which in Canada may last for several months, the Government

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continues to hold office and exercise its functions. It may have to make vitally important decisions, both in domestic and external affairs. It might have to decide the question of peace or war. Where does it get its authority? Not from the House of Commons, for there is no House of Commons; the old one is gone and the new one has not yet been elected. Nor from the electorate, for the electorate has yet to pronounce. The case is particularly clear if, as not infrequently happens, the old House was dissolved because the Government had been defeated in it. This was the position of Mr. Meighen's Government in the summer of 1926, after its defeat in the House on July 1.

(2) If, as in Britain in 1834, December 1905, and October 1922, or in Canada in November 1873, a Government resigns without having been defeated in the House or at the polls, the new Government takes office without any authority from either the House or the country, and can claim no authority from either till it has been upheld in the House or at a general election.

(3) If a Government has secured a dissolution and comes back in a minority, it may decide to retain office till the new Parliament can meet and pronounce judgment. During that period it can certainly claim no authority from either the House or the electorate. This was the position of Peel's Government in 1835, Melbourne's in 1841, Derby's in 1852 and 1859, Palmerston's in 1857, Salisbury's in 1886, Mr. Baldwin's in 1924 and Mr. King's from the end of October 1925 till January 1926.

(4) If, as in Britain in 1783 and 1807, in Quebec in 1878 and 1891, and in British Columbia in 1898, a Government undefeated in the House is dismissed, the new Government takes office without any authority from the House or the country, and can claim no such authority till it has been upheld in the House or at a general election. This case is unlikely to arise under modern conditions, but cannot be

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entirely ruled out.

It is therefore evident that repeatedly in British history Ministries have undertaken to carry on the government "having no authority from parliament and no authority from the country"; that this is bound to continue to happen; that in the circumstances indicated above and possibly others as well, Governments, under the British system, derive their authority, not only in law but in constitutional fact, solely from the Crown, and could derive it from no other source; and that Mr. Ilsley was absolutely right in claiming that his statement was "constitutionally correct and . . . correct in spirit."

All the criticism of his position, in fact, appears to have arisen from the mistaken notion that there is some conflict between the principle that the Government's authority is derived from the Crown and the principle that the Government is responsible to the House of Commons and the electorate. As Mr. Ilsley himself pointed out, there is no such conflict. The Government derives its authority from the Crown and is responsible to the House and the electorate. Any Government can be removed from office by the House or the electorate; no Government can retain office without the support and confidence of the House which represents the electorate.

Ottawa, April 15, 1946.

Eugene Forsey

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April 17, 1946.

Dr. Eugene Forsey,
3 Lakeview Terrace,
Ottawa, Ontario.

My dear Eugene:

I received your letter of 15th.

Yes, I think you are quite right, and have been from the beginning, that the agreement reached between King and Lord Byng should not have been entered into. This, of course, does not alter the fact that it was entered into, and the obligations that flowed from that fact.

I am also in entire agreement with you with respect to the Constitutional source of the powers of Government. I have said so on different occasions since the question arose, but did not feel that I was called upon to make any public statement.

With kindest regards,

Yours sincerely,

AM/E.

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3 Lakeview Terrace,
Ottawa, Ontario,
April 23rd, 1946.

Rt. Hon. Arthur Meighen, P.C., K.C.,
320 Bay Street,
Toronto, Ontario.

Dear Mr. Meighen:

Thanks very much for your letter of the 17th. I am very greatly pleased to find that you agree with me on both points.

By the way, what in the world does Murphy mean by saying that if King did not go to Byng at once after the election of 1925, he would find that "the Tories had forestalled him"? I can conceive of no way in which you could have approached the Governor-General, unless he sent for you. If Murphy means merely that you might have issued a statement before King could see the Governor, that is doubtless true; but I do not see how any such statement could affect King's or Byng's freedom of action in the matter, except to the very limited degree that it might influence public opinion, and thus make King's position more difficult. But the results of the election were already so damning to King, that I find it hard to understand how any statement by you at that moment could have added much; and a statement issued in advance of King's consultations with the Governor-General would probably have struck most people as neither fair nor proper, and would, I am sure, never have entered your head as a possibility. So I am completely mystified by what Murphy means.

It is quite evident that even before the crisis of 1926, or indeed before the election of 1925, Murphy had a wretched opinion of King. What a lovely, happy family they must have been!

Yours sincerely,

Eugene Forsey

EF:RM

Eugene Forsey,
Director of Research.

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April 26, 1946.

Dr. Eugene Forsey,
3 Lakeview Terrace,
Ottawa, Ontario.

My dear Eugene:

I have yours of 25rd. Senator Murphy's statement puzzled me in much the same way as it puzzled you--that is in respect of his expressed fear that the Tories would forestall Mr. King in seeing the Governor-General. I would never think of approaching the Governor-General on any subject affecting his duties, save at his own request.

You are right about the early unfavourable estimate Senator Murphy made of King. By the way, did you note in the morning press Paul Martin's statement about something Mr. Atlee said to him in private conversation, on the gigantic stature and world service of the two giants Smuts and King! The ethics of repeating publicly a statement so made, to affect the politics of another country, is not only questionable but definitely bad.

You probably have a different view, but I would say that even if Atlee made the statement, it leaves the score on his record just where it was--neither up nor down. So far as I have been able to trace Atlee's decisions, he has never yet been right on anything.

Yours very truly,

AM/E.

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APPOINTMENT OF EXTRA SENATORS UNDER SECTION 26 OF THE BRITISH NORTH AMERICA ACT

BY

EUGENE FORSEY

Reprinted from the Canadian Journal of Economics and Political Science,
Vol. 12, No. 2, May, 1946.

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APPOINTMENT OF EXTRA SENATORS UNDER SECTION 26 OF THE BRITISH NORTH AMERICA ACT.

The present party standing in the Senate is sixty-five Liberals and twenty-six Progressive Conservatives, with five seats vacant. Since the Bennett government left office, thirty-seven Conservative Senators have died or resigned, eleven of them in the last three years alone. As the Progressive Conservatives are, for the most part, among the oldest Senators, it is by no means impossible that, if the Liberals retain office a few years longer, a succeeding Progressive Conservative government may find itself without a single supporter in the Senate. A C.C.F. government would, of course, inevitably be in the same position.

Clearly, any government must have some supporters in the Upper House, if only to move and second its legislation. Would there be any way out of the difficulty short of an amendment to the British North America Act?

The answer would seem to be yes. Normally the Senate is limited to ninety-six. But Section 26 of the British North America Act provides that "If, at any Time, on the Recommendation of the Governor-General, the King thinks fit to direct that four or eight Members be added to the Senate, the Governor-General may by Summons to four or eight qualified Persons (as the case may be), representing equally the four Divisions of Canada, add to the Senate accordingly." Sections 27 and 28 add: "27. In case of such Addition being at any Time made the Governor-General . . . shall not summon any Person to the Senate, except on a further like Direction by the King on the like Recommendation, to represent one of the four Divisions until such Division is represented by Twenty-four Senators and no more. 28. The Number of Senators shall not at any Time exceed one hundred and four." There can be little doubt that a government in the position just described would advise appointment of at least four extra Senators; and there can be equally little doubt that the advice would be accepted.

Unfortunately it is impossible to be more positive, for there have never been any appointments under Section 26; only once has there been even an attempt to take advantage of its provisions, and on that occasion, the circumstances were very different from those which may arise at the next change of government. None the less, the case is worth examining.

On November 7, 1873, the Mackenzie government took office. It prorogued Parliament the same day. Dissolution followed, January 2, 1874. Meanwhile, on December 22, 1873, Mr. Mackenzie had drawn up a confidential memorandum[1] recommending the appointment of six extra Senators (the maximum possible under the Act as it then stood), and on December 23 this recommendation was adopted by the Cabinet, in P.C. 1711. It was at once approved by the Governor-General but not forwarded to London till January 26, 1874. With it

[1]An incomplete version of this Memorandum appears in the Mackenzie Letter Books, II, 104-17. It is practically identical with the first eleven paragraphs of the Memorandum of January 2, 1874 (see below). No complete copy can be found in the Privy Council Office, the Public Archives, the Governor-General's Office, or the Public Records Office in London. For the texts of both Memoranda, see *Canadian Historical Review*, June, 1946.

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went a second confidential memorandum from Mackenzie, dated January 2, setting forth the reasons for the recommendation.

The constitutional practice of that time was that the Canadian Cabinet advised the Governor-General to make the "recommendation" to the Queen; that the Governor-General, if he accepted the advice, made the recommendation; and that the British Cabinet advised the Queen whether or not to "direct" the appointment of the extra Senators. On this occasion, the Governor-General accepted the advice of his ministers, but the British government declined to advise the Queen to direct the appointments, the refusal being dated February 18, a month and eight days before the opening of the new Parliament.

Since the Balfour Report of 1926, the constitutional procedure would of course be different. The British Cabinet would not come into the picture at all. The Governor-General's "recommendation" would settle the matter. If a Cabinet advised the appointments, the only thing that could prevent them would be a possible "reserve power" in the Governor-General to refuse, a power which he could exercise only if the Cabinet gave way or if he could find other ministers prepared to take responsibility for the refusal. Clearly the chance that any such power would be exercised is very small, but it cannot be altogether excluded; and the behaviour of the Governor-General in 1873-4, and the reasons given by the British government for refusing the request then, may give some indication of the principles which might guide a Governor-General in dealing with any future request.

The circumstances of December 23, 1873, were peculiar. The late government had not been defeated in the House, though if it had waited for the vote on Mr. Mackenzie's motion of censure it almost certainly would have been. The same House was still in existence, and it unquestionably contained a majority normally hostile to a Liberal government. It was more than doubtful whether the new government could carry on without a dissolution, and the results of a dissolution were by no means certain. Even if an election took place, and the government won it, it could not be taken for granted that the Senate would necessarily be seriously hostile. In view of these facts, the Governor-General might well have balked at accepting advice to invoke an extraordinary power provided by the constitution presumably only for use in cases where nothing else would serve. But with his customary tact, Lord Dufferin accepted the advice and put the order-in-council in his pocket till the eve of the election, forwarding it to London only when it was certain to reach the British government after the election results were known.

A modern Governor-General could not adopt either of the expedients Dufferin resorted to. His ministers would insist on an immediate answer and there could be no appeal to the British government. Faced with a request like Mackenzie's in similar circumstances, what would a modern Governor-General do? He might urge delay till the existing Parliament had shown whether it was prepared to support the new government, or until elections had been held. He might urge delay till the Senate had shown that it was not prepared to deal fairly with the new government. But if his ministers insisted on immediate

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compliance with their request, what then? Would he give way or would he seek other advisers? If he sought them could he find them?

To these questions, Mackenzie's memorandum of January 2, 1874,[2] the British government's reply of February 18, 1874, and the debate in the Senate, March 19-20, 1877, offer partial answers.

Mackenzie at the outset lays down the general principle that Section 26 "was obviously intended to give relief from the rigidity consequent on having a fixed number of Senators holding their seats for life and thus find a way to avoid possible complications or inconveniences by giving some elasticity to the system." He deliberately refrains, however, from any attempt to "enumerate or anticipate all the cases which might arise justifying the exercise" of this special power, confining himself to the two reasons which in his view warrant its exercise in this particular case.

The first is the pre-Confederation agreement that the original appointments to the Senate should be divided equally between the two political parties, an agreement which, with some qualifications, Mackenzie seeks to erect into a permanent principle of the Canadian constitution. The earlier memorandum simply asserts the existence of such an agreement, adding that without it the Confederation negotiations could not have been carried through at all, because, though the Conservatives had a majority in the Cabinet of the old Province of Canada, the Liberals had a majority in the House. The later memorandum, perhaps at Lord Dufferin's suggestion, offers, as proof of the agreement, the fourteenth of the Quebec Resolutions: that in the first appointments to the Upper House, "due regard shall be had to the claims . . . of the Opposition in each Province so that all political parties may as nearly as possible be fairly represented." Mackenzie admits that, broadly speaking, the agreement was carried out in the original appointments. But "the principle adopted in its creation . . . an equitable distribution of its political power between the two political parties" had not "been adhered to" in subsequent appointments. Of thirty-one new Senators, nine were appointed "to give representation to the three new Provinces of Manitoba, Columbia and Prince Edward Island," and only in Prince Edward Island "was there any attempt made to consult the political divisions which had previously prevailed." The result was twenty-nine new Conservative Senators and two Liberals, and a "very large" Opposition majority in the Upper House. The situation had been aggravated by the fact that, with the admission of Prince Edward Island, vacancies from Nova Scotia and New Brunswick could not be filled till their representation had fallen from the original twelve to ten, and so the government was unable to replace two Liberal Senators from these provinces who had recently died.

Mackenzie was, of course, well aware that to suggest rigid application of the principle which had governed the original appointments would be a counsel of perfection.

[2]There seems to be no copy of this document in Canada. It has been made available from the Public Records Office in London through the kindness of Sir Shuldham Redfern and Sir Eric Machtig.

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I do not mean [he said], to lay down the doctrine that the Senate must be filled by the appointment of an exactly equal number from each political party. Such an arrangement would be scarcely possible; nor do I pretend to say that, even if possible, it would be advisable for each successive Administration to obtain a majority in the Senate.... It is, however, evident that much care and delicacy is necessary in making appointments to give the body the weight it should have in the country and prevent the impression gaining ground that it is too much the creation of the Administration of the day. The fair equilibrium which should exist has been seriously disturbed, and a sufficiently clear case has been established to justify the application of the counterpoise provided by the Constitution.

The second reason for advising the appointments is that "The new Administration should have an opportunity of seating some of the prominent supporters of its policy . . . for the purpose of having able advocates of the Government measures in the House."

The British government's reply was a frigid and uncompromising refusal. It totally ignored both Mackenzie's reasons for advising the appointments, laying down instead the principle that the Queen could be advised to exercise the power only "in the event of an actual collision of opinion between the two Houses when it was made apparent that a difference had arisen of so serious and permanent a character that the Government could not be carried on without Her intervention, and when it could be shown that the limited creation of Senators allowed by the Act would supply an adequate remedy." In this case nothing of the sort had been shown.

Neither the Canadian government's request nor the British government's reply was communicated to either House until 1877, and even then Mackenzie's memorandum was not brought down. After the production of the papers, Senator Campbell, Conservative leader in the Senate, moved a motion approving the British government's decision and the reason for it, and a most interesting debate followed. Senator Wilmot, the only Senator who had been present at the London Conference where the British North America Act was drawn up, confirmed the contention that Section 26 had been intended only to break a deadlock between the two Houses.[3] Senator Scott, for the government, contended that the number of appointments provided for was too small to break a deadlock. The power could therefore not have been given for that purpose. The government had sought only to anticipate vacancies and strengthen itself in the Senate, and this would have been a perfectly proper use of the power.[4] Senator Dickey denied that the number was too small to break a deadlock: the Esquimalt and Nanaimo Railway Bill had been defeated by only one vote, with two government supporters voting against it.[5] George Brown thought the power given by Section 26 should be used with "great caution," but could properly be used in any "fitting exigency," any case of "imperious necessity." Such necessity, he contended, had plainly existed in December, 1873. He repeated Scott's argument;

[3] *Senate Debates,* 1877, p. 203. Sir Joseph Pope's *Confederation Documents,* (Toronto, 1895), p. 118, and Lord Carnarvon's speech in the House of Lords on the second reading of the British North America Bill, quoted by Senator Macpherson, *Senate Debates,* 1877, pp. 215-16, show that this is correct.

[4] *Senate Debates,* 1877, pp. 204-5.

[5] *Ibid.,* p. 206.

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but where Scott had admitted that appointments to the Senate were part of government "patronage" and that it was "only natural" for the Macdonald government to have appointed its own supporters, Brown, like Mackenzie, asserted the principle that the numbers of the two parties in the Senate should be kept roughly equal. He repeated the substance of Mackenzie's argument on this point, bolstering his case by claiming that six of the late government's appointments had been made when it was in its "last throes," and ought to have been held over for the new administration.[6] Senator Kaulbach said that the terms of Sections 26 and 27 made it clear that the power to make extra appointments was an emergency power: "Had the Government measures not been treated in a fair spirit; had not the action of honourable members been generally approved by the people; had the Government appealed to the people upon any measure refused here, and then on being returned and again presenting it here, this House had again refused it, a case of deadlock might have been made out such as to justify the Government."[7] Senator Vidal insisted that the power could be properly invoked only when a "permanent" difficulty had arisen. If the government had asked for the appointments after the defeat of the Esquimalt and Nanaimo Railway Bill, it would have had a case, though even then the permanency of the difference between the two Houses would not have been established, as the bill had not been reintroduced.[8] Senator Wark made the original and significant suggestion that the special power might be needed, on occasion, to find a speaker, or a "legal gentleman" to take charge of legal business, or a cabinet minister.[9]

In this whole controversy, the British government, and the Canadian Conservative party, stood firmly on the history of Section 26 itself and on British precedent. Section 26 had been inserted in the Act not by the Fathers of Confederation but by the British government, and inserted solely for the purpose of breaking a deadlock which could not be broken by any other means. Mackenzie and the Liberals, on the other hand, arguing that the Act itself conferred an unrestricted and unconditional power, fought for a wider interpretation based at least partly on purely Canadian history and circumstances. Subsequent developments have made most of the arguments on both sides obsolete. On the one hand, Mackenzie's main contention has been shown to be altogether Utopian: no government ever appoints anybody except its own supporters to the Senate. On the other hand, the long tenure of most Canadian governments (the very reverse of what British, Canadian, Australian, and New Zealand experience down to 1867 had led everyone to expect) has rendered Section 26 perfectly useless for the purpose for which it was intended. It will probably never be used except for purposes which its creators never contemplated.

Viewed retrospectively, therefore, the only really important part of Mackenzie's argument is the second to last paragraph of his memorandum of January

[6] *Ibid.,* pp. 207-9.

[7] *Ibid.,* p. 217.

[8] *Ibid.,* p. 218.

[9] *Ibid.,* p. 221.

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2, 1874: that the government needed the appointments to give it "able advocates" in the Senate. Similarly, the only important contribution to the debate of 1877 is Senator Wark's: that a new government might need extra appointments to give it Senators with the particular qualifications necessary for the speakership, cabinet office, or the conduct of legal business. Unfortunately for Mackenzie, his second to last paragraph is introduced almost as an afterthought, without any supporting evidence; there was already a considerable number of Liberals in the Senate; on December 16, 1873, a vacancy had allowed him to appoint George Brown, certainly a highly "able advocate"; and, as the event proved, further vacancies might well occur before the opening of the new session.[10]

It is worth noting that even if Mackenzie had got his six Senators, he would still have been in a minority in the Senate, so that if the elections had gone against him, a new Conservative government would not have been seriously embarrassed by the fact that the appointments had been made. This might have been considered an additional reason for assenting to his request. On the other hand, if the six had been enough to give him a majority, that might have been an additional reason for declining until he had proved that he had the confidence of the existing or of a new House of Commons. It would have been intolerable to allow a government which had never had the confidence of the Commons to hamstring its successor. By the same token, if six appointments would have given Mackenzie a majority but three would not, the Governor might properly have agreed to recommend three but not six, always assuming, of course, that he could find an alternative government to accept responsibility for his action.

It cannot be said that the 1873 case throws much light on the problems which would arise if a government today found itself without a single supporter in the Senate. On the contrary, both the Cabinet and the Governor-General would have to be guided almost entirely by the light of reason, the spirit of the constitution and the particular circumstances of the case.

If the new government took office, as in 1873, because its predecessor had resigned without being defeated in the House or at the polls, and asked for the appointment of four or eight extra Senators before meeting either the existing House or a new one, would the Governor-General be bound to assent? He certainly could not refuse unless he could either persuade the late government to resume office or could find another alternative government. But could he have any solid ground for refusing? Suppose that on the present Liberal government's resignation the Progressive Conservatives took office. They would, *ex hypothesi,* have no majority in the existing House of Commons and no certainty of winning an election. If they got the full eight extra Senators, met the existing Parliament, were at once defeated, either did not ask or were refused a dissolution, and made way for a C.C.F. government, the new C.C.F. government would find itself not only without supporters in the Senate but with no means of getting any. A Governor-General who agreed to the full eight appointments before the House met would be making himself an accomplice in a scandalous abuse of power; a Governor-General who declined would merely be safeguarding

[10] R. W. Scott and E. G. Penny were appointed shortly before the opening.

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the rights of the people. If, however, the Progressive Conservatives asked for only four appointments before the House met, the Governor could scarcely refuse; for even if the Progressive Conservative government were at once defeated in the House, and a C.C.F. government took office, the new C.C.F. government would still be able to make four appointments. The essential constitutional right would have been preserved. Similarly, if the Progressive Conservatives secured a dissolution, either without meeting the existing House or after defeat there, the Governor could hardly refuse a request for the appointment of four extra Senators after the election but before the new House met (unless, of course, another party had won a clear majority), but might properly refuse a request for eight until the government had either won a clear majority in the election or secured the support of the new House.

If a new government without a single supporter in the Senate took office after winning a clear majority in an election, its right to the full eight appointments would seem to be unquestionable, its power to get them equally so. An alternative government in the existing Parliament and a fresh dissolution would be alike impossible.

But if the Liberal government resigned as the result of an election which gave no party a clear majority, the case would be different. Suppose, in this instance, that a C.C.F. government took office. It would certainly have a right to four appointments forthwith, to enable it to meet Parliament. But if the Progressive Conservatives were numerous enough to have any chance of forming a government if the C.C.F. government were defeated when it met the House, then, for reasons already indicated, the Governor-General would be entitled to insist on deferring the other four till the C.C.F. had shown that it could command a majority; and he would presumably have no difficulty in finding an alternative government to take responsibility for his action. If, however, the Progressive Conservatives were so few as to have no chance of forming a government, then, again, the Governor could hardly refuse to make the full eight appointments, as the alternative to a C.C.F. government would be the return of the Liberals who already had the whole normal membership of the senate.[11]

This does not, of course, by any means exhaust the possibilities of the subject. There are times when a government is not entitled even to fill vacancies in the Senate, let alone make use of Section 26, and when the Governor-General would be entitled to refuse his consent if it tried. The crisis of June-July, 1896, when Sir Charles Tupper, after his defeat at the polls, tried to fill two vacancies and Lord Aberdeen refused, and was upheld by Sir Wilfrid Laurier, by the Colonial Secretary (Joseph Chamberlain), and, many years later, by Mr. Meighen, provides one illustration. The events of November, 1925-July, 1926, provide two others. If Mr. King's government, after the election of 1925 (from which it emerged with 101 seats to the Conservatives' 116) and before it received the support of the new House of Commons, had tried to fill the two vacancies which

[11] It is worth noting that Section 26 might provide the only means by which a Progressive Conservative or C.C.F. minority government could give French Canada representation in the Cabinet.

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existed, Lord Byng could properly have refused. If Mr. Meighen's government, after its defeat in the House and while it was awaiting the verdict of the electorate, had tried to fill the three vacancies which then existed, again Lord Byng could properly have refused. Lord Aberdeen easily found an alternative government to take responsibility for his refusal, and it is altogether probable that Lord Byng would have also. Actually, both Mr. King and Mr. Meighen behaved with perfect propriety: Mr. King filled no vacancies till June 25, and Mr. Meighen none at all. In all three cases, an attempt to appoint extra Senators under Section 26 would, of course, have been even more improper than an attempt to fill vacancies, and there can be little doubt that the Governor would have refused. If in any one of the three cases the state of parties in the Senate had been such that the appointment of the full number of extra Senators would have converted a minority into a majority, the Governor would have been almost bound to refuse, as compliance with the request would have seriously embarrassed an incoming government. But both Sir Charles Tupper and Mr. Meighen already had majorities in the Senate, and the majority against Mr. King was so large that even if he had filled both vacancies and added the full eight extra members, he would still have been in a minority. In none of the three cases, therefore, was the government under any temptation to make improper use of Section 26. But situations in which it might be are easily conceivable.

There is also the possibility that a new government might find itself with some supporters in a full Senate of ninety-six members, but none of an age or capacity to bear even the relatively slight burdens of a minister without portfolio and leader of the Senate; it would seem to have a clear right to four appointments, though not to eight unless it had already shown that it possessed the confidence of the Commons.

It is not hard to imagine various permutations and combinations of these circumstances. But three principles are clear: (1) any government is entitled to meet Parliament with some supporters in the Senate; (2) no government without the confidence of the House of Commons is entitled to make it impossible for its successor to do so; (3) no government without the confidence of the House of Commons is entitled to make use of Section 26 to give itself a Senate majority which could not be overcome by an immediate further use of the Section by its successor.

These are some of the principles which, it is submitted, ought to guide governments and governors-general in the use of Section 26. But the conventions governing such use have still to be worked out, and they will have to be worked out without much help either from our own or British history. British precedent in regard to the creation of peers will be almost totally useless. For one thing, it is concerned almost entirely with the question of "swamping" the Upper House, something for which Section 26, as we have seen, is never likely to be of any use. For another, Britain has a Parliament Act; Canada has not. For a third, the House of Lords is not limited in number; the Senate is. The power of the Senate is much greater than that of the Lords, and the power of the Canadian government and House of Commons to overcome obstruction by the Upper

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House is much less, indeed almost nil. Moreover, if a British government created a thousand extra peers, this would not prevent its successor from creating another thousand; if a Canadian government secured the appointment of eight extra Senators under Section 26, it might prevent its successor from making any appointments at all for several years. Because of the provisions of Section 27, it could make no ordinary appointments till at least two Senators from some *one* senatorial division of Canada had died, resigned, or become disqualified, and could make no further use of Section 26 till at least one Senator from *each* division had died, resigned, or become disqualified.

The need for a reserve power in the Governor-General to prevent abuse of Section 26 is therefore much greater than the need for a reserve power in the King to prevent abuse of the power to create peers. That the King has such a reserve power is abundantly clear from the events of November, 1910. On that occasion, he was willing to create enough peers to carry the Parliament Bill, but only after all other means had been exhausted. The first step was to try to get the Lords to pass the bill in the existing Parliament. If that failed, the next step was to dissolve Parliament, to see whether the electorate really favoured the bill. If the electorate said yes, the next step was to see whether the Lords would give way, as they had after the election on the Lloyd George budget. Only if all these steps had been taken without result was the King prepared to create enough peers to swamp the opposition. It is arguable that the Parliament Act, by providing an alternative method of overcoming obstruction by the Lords, has strengthened the King's reserve power in the creation of peers; certainly it can hardly be argued that it has taken it away. If the King has a reserve power in the creation of peers, *a fortiori* the Canadian Governor-General ought to have a reserve power in the use of Section 26 of the British North America Act. It should hardly be necessary to add that "reserve power" means what it says: a power held in reserve, to be used only on extraordinary occasions to prevent a flagrant breach of constitutional right. As long as Cabinets observe ordinary constitutional decency, restraint and decorum in the advice they tender, reserve powers remain in reserve; it is only on the occasions, fortunately rare, when Cabinets forget themselves, that the reserve powers come into play.

EUGENE FORSEY

Ottawa.

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THE CANADIAN JOURNAL OF ECONOMICS AND POLITICAL SCIENCE

May, 1946

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PRINTED IN CANADA

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3 Lakeview Terrace,
Ottawa, May 14, 1946.

Dear Mr. Meighen,

This letter requires no answer. It is written really to enable me to satisfy my daughter when I go home to-night! Two days ago she received a letter from one of my aunts in Newfoundland. Within a few hours she had, with much effort, got it into an envelope and sealed it, and had then informed me that it was "a letter to Mr. Meighen", which I was to post forthwith. Yesterday morning I came out without it; result, tears at supper time, and assurances from me that I would faithfully undertake to post "the letter to Mr. Meighen" to-day. She added that some day she was coming to Toronto with me and wanted to be taken to see Mr. Meighen! I assured her that when she was old enough to go to Toronto with me, I should certainly try to take her to see you, and that you would be very pleased, as you were very fond of little girls, and had had one of your own.

You will be amused to know that the letter to you was coupled with a gift of two dandelions to Mr. Mosher, also forgotten yesterday, with similar tearful consequences! This presentation has now been made, so all should be well this evening.

While I am writing, I cannot resist saying that I hope you noticed King's statement on the aim and object of a Prime Minister's existence: to keep out of trouble. This, of course, is perfectly in character, and nothing new. It accords precisely with his statement to Smith, of the Ottawa Journal, at the time of the famous twenty-fifth anniversary, that the secret of health was "no excess; no excess in thought, no excess in action", and that the most important achievements in statesmanship were not what one did but what one prevented. But this latest version of his credo takes the cake.

Yours sincerely,

Eugene Forsey

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May 16, 1946.

Dr. Eugene Forsey,
5 Lakeview Terrace,
Ottawa, Ontario.

My dear Eugene:

Thanks for your letter of 14th. Tell your little girl I value highly her desire to write me. At the same time I note that she holds in equal regard Mr. Mosher. Please ask her to be careful not to get us mixed. I think your daughter must be farther advanced for her age than my grandchildren. My recollection is she cannot be over three.

I am told the P. M. is principally concerned now in dodging all work possible. Without any doubt he believes in the doctrine, "Aprés moi le déluge" and will probably be quite disappointed if "le déluge" does not quickly follow the "moi". When he sees it coming he will find his health not to be at all good, but until he sees it coming, he will stay.

Yours sincerely,

AW/E.

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3 Lakeview Terrace,
Ottawa, Ontario,
May 22nd, 1946.

Rt. Hon. Arthur Meighen, P.C., K.C.,
320 Bay Street,
Toronto, Ontario.

Dear Mr. Meighen:

It occurred to me last night that there is one paper at the Political Science Association meetings in Toronto this week which might be of special interest to you, and in the discussion of which I think it would be very valuable to have you take part. The paper in question is by Arnold Heeney, Clerk of the Privy Council and Secretary of the Cabinet, on "The Working of the Cabinet and the Privy Council". It is to be delivered in Hart House at 2:30 on Friday. I know Heeney has been working on it rather carefully for some time; indeed, one of his assistants has called on me from time to time for information which I suspect may have been for this purpose. Heeney is, I think, exceedingly thorough and conscientious, but there may well be historical aspects of the subject about which he knows relatively little and on which you could throw a flood of light. I shall be there myself and very much hope you may find it possible to be on hand also.

Charles Woodsworth conveyed your good wishes. He was apparently much impressed by you.

It will be news to know that I heard recently that one local Communist has been putting it about that I am a ghost writer of editorials for the Globe and Mail. How pleased the Globe and Mail would be! Old Dafoe, in the Elysian fields or elsewhere, if he has heard this tale, doubtless considers it final proof that I am a Tory plotter, just as he said.

My article on the "Extra Senators" has now appeared, and I shall be sending you an offprint soon.

Kindest regards to Mrs. Meighen and Max.

Yours sincerely,
Eugene Forsey
Eugene Forsey.

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May 23, 1946.

Dr. E. A. Forsey,
5 Lakeview Terrace,
Ottawa, Ontario.

My dear Eugene

I received yours of 22nd. I have always heard Mr. Heeney well spoken of and have not the least doubt he is a thorough and painstaking student. In fact, I think he would probably know considerably more about the working of the Cabinet and the Privy Council than I would myself.

As to attending the address tomorrow, I really think I would prefer not to. You will hardly believe how sedulously I avoid attending meetings of any kind, and especially those where discussions may occur in which I would be expected to take part.

Nonetheless I would certainly like, and will expect, to see you when you arrive. Will also look forward to reading your article on the extra Senators, with the keenest anticipation.

With highest regards always,

Yours sincerely,

AM/E.

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