THE ROYAL POWER OF DISSOLUTION OF PARLIAMENT IN THE BRITISH COMMONWEALTH

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Statement of Claim to Original Work, or Contribution to Knowledge

In the first place, the thesis has collected, summarized and examined a large number of cases of grant and refusal of dissolution, especially in the overseas Empire, which seem never to have been recorded before except in the original official documents. Second, it has done the same for a considerable number of discussions of hypothetical cases of dissolution in the United Kingdom. Third, it presents the first complete and accurate record, and the most thorough critical analysis which has yet appeared, of the highly important Canadian crisis of 1926 (including the very interesting, though by no means unprecedented, temporary Government of Ministers without portfolio). Fourth, it subjects the pronouncements of statesmen and text-writers on the subject of dissolution of Parliament to rigorous criticism, in the light of the basic principles of the British parliamentary system. Fifth, it argues that a proper and resolute exercise of the Crown's reserve power in regard to dissolution of Parliament is an essential safeguard of constitutional liberty.

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CHAPTER I

The Nature, Scope and Importance of the Subject

Most writers on the British Constitution have devoted comparatively little space to the question of the rules governing the exercise of the royal power of dissolution of Parliament. A few, especially those who have made a careful study of Dominion Constitutions, have treated the subject at considerable length and with much scholarly detail. But even these few are by no means in full agreement; their works do not cover by any means all the cases; and none of them has given an adequate account of the highly important Canadian crisis of 1926. Broadly speaking, therefore, it is still true that, as Professor K. H. Bailey said in 1936, "The most striking conclusion that emerges from a survey of past practice is the immense amount of sheer uncertainty and confusion in which the whole subject is involved".(1) Or, as Dr. Evatt put it, "It is often impossible to tell whether the conventions are being obeyed, because no one can say with sufficient certainty what the conventions are. . . . Amongst the text-writers on the subject of constitutional conventions those interested will usually be able to find support for (or against) almost any proposition. . . . The student engaged in such research is almost overwhelmed by the assertions and deductions of those who are more inclined to make a general statement than to support it by careful reasoning or a close investigation of the facts. And even those who have devoted considerable labour and skill to the effort of explaining the mysteries of these reserve prerogatives become dogmatic upon the questions, and either fail to take account of the special character of the individual precedent, or refuse to face modern developments because of some particular

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(1) In his introduction to "The King and His Dominion Governors", by H. V. Evatt, (Oxford, 1936), pp. xiv-xv.

preconception."(1) Evatt also calls attention to the "very curious growth of 'authority'" in connection with such "grave constitutional problems": "The helpful precedent is selected and the general statement advanced until, as time goes on, the loose generalization is itself treated as the true and only gospel." He suggests that "It is important that many of the supposed rules and maxims affecting the reserve powers of the Crown should be investigated anew",(2) and he has himself made a distinguished contribution to such investigation.

Of the legal power of the Crown there is of course no question. Throughout the British Commonwealth(3) the King or his representative may, in law, grant, refuse or force dissolution of the Lower House of the Legislature. In the Commonwealth of Australia and the Union of South Africa he may, in certain defined circumstances, dissolve both Houses.(4) In legal theory the discretion of the Crown is absolute (though of course any action requires the consent of some Minister), but the actual exercise of the prerogative or statutory power is everywhere regulated by conventions.

The problem is, what are those conventions?

In any attempt to answer that question, the first step obviously is to examine the precedents. But what precedents? Even before the Report of the Imperial Conference of 1926, it was everywhere admitted that United Kingdom precedents at least were relevant for the whole Commonwealth; and if there had been any doubt, the statement of the Report that in all essential respects the relations between a Dominion Governor or Governor-General and his Ministers are the same as between the King and his Ministers would have resolved it. It does not follow, of course, that Dominion usage may not

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(1) Op. cit., pp. xiv-xv, 2-3, 268.
(2) Ibid., pp. 2-3.
(3) In this context, Eire is clearly outside the Commonwealth, as there is no longer any representative of the Crown there.
(4) Commonwealth Constitution, section 57; South Africa Act, section 20, and Senate Act (South Africa) of 1926.

vary from British in some degree.(1) An interpretation of the Report which would mean that thenceforth the Dominions would not be able to develop any special usage of their own, but would be bound simply to abide by what has developed or may develop in the United Kingdom, would be manifestly inconsistent with the Report's cardinal principle of equality of status.(2) Whether the Report means that Dominion precedents, at least subsequent to the date of the Report, are now to be considered relevant to a discussion of United Kingdom usage is not clear.

When we come to consider precedents from the overseas Empire, what may seem to be difficult problems arise. What precedents are admissible? If any of the Dominion precedents prior to the Report of 1926 are admissible, where do we start and what parts of the Empire do we include? Does "Dominion status", for this purpose, begin with the creation of the Dominion of Canada in 1867; or with the first Imperial (as distinct from Colonial) Conference in 1907; or with 1911, when, according to Professor Keith, the Dominions first appeared "on equal terms with the United Kingdom";(3) or with the recognition of the international position of the Dominions in 1919; or at some date between 1919 and 1926, and if so, what date? Do the Australian colonies for any period before the creation of the Commonwealth count as Dominions or not? What about the British North American provinces before Confederation? Is Newfoundland during its period of responsible government, or some part of that period, to be considered a Dominion or not? The 1926 Report classifies it among the Dominions; but, on the other hand, Newfoundland never enjoyed any separate international position, though it did have, as Canada has not, the power to amend its own Constitution. What about precedents in the self-governing colonies between the grant of responsible govern-

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(1) See below, pp. 162, 391-392.
(2) See below, pp. 391-392.
(3) Manchester Guardian, July 8, 1926.

ment and the arrival of Dominion status? To what extent, and for how long, did Governors-General, Governors and Lieutenant-Governors act as Imperial officers? To what extent are any differences between their behaviour and that of the Crown in Britain attributable to this factor, and to what extent to the existence of a parliamentary situation different from any that arose in Britain? In other words, how far did they act otherwise than as the Crown would have acted in Britain in similar circumstances? To what extent are precedents from the Australian States or Canadian provinces admissible?

All these questions are fortunately comparatively easy to answer.

In most cases, Governors-General, Governors and Lieutenant-Governors throughout the period of responsible government appear to have based their exercise of the power of dissolution on United Kingdom practice. In only a very few cases is there any evidence to the contrary.(1) The apparent differences between their behaviour and that of the Crown in Britain are explicable almost wholly in terms of a different parliamentary situation (notably, the existence of a multiple-party system), and, in some jurisdictions at some times, a shorter maximum term of Parliament than in the Mother Country.(2)

As to the Australian States and Canadian provinces: The Imperial Conference Report of 1926 included neither in its declaration on the relations between a Governor or Governor-General and his Ministers, and Keith, in his more recent works,(3) draws a sharp distinction between the local and the central Governments. Evatt, on the other hand, thinks both States and provinces "as much entitled to inclusion in the general declaration of 1926 . . . as . . . the central authorities", maintaining that "there is really no valid ground for denying to the Australian States and the Dominion

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(1) For the evidence, see below, Chapter II.
(2) Ibid.
(3) E.g. "Constitutional Law of the British Dominions" (Macmillan, 1933), p. 150.

Provinces a constitutional status in respect of internal affairs completely co-equal with the status of the central Governmental authorities. It follows, of course, that no valid distinction can, or should, be drawn between the position of the Governor-General in relation to Ministers . . . and the position of the Governors and Lieutenant-Governors of the States and Provinces in relation to Ministers".(1)

In respect to the Australian States there seems no reason whatever to dissent from Evatt's view, which is, after all, the considered opinion of a former judge of the Australian High Court. In respect to the Canadian provinces his statements are a good deal too sweeping. On the general proposition that the provinces are, within their sphere, "completely co-equal with" the Dominion, Evatt seems to be clearly wrong, and Keith, who takes the opposite view, clearly right. In support of his thesis, Evatt quotes extensively from the well known judgments of the Judicial Committee of the Privy Council which assert that the provinces are "sovereign" within their sphere and that Lieutenant-Governors are as much the representatives of the Crown for provincial purposes as the Governor-General for Dominion purposes. But it is questionable whether these judgments really mean all that Evatt takes them to mean. They have to be construed with the perfectly clear and precise language of the British North America Act itself. The Lieutenant-Governors are appointed by the Governor-General, are subject to his instructions, and are removable by him. They give or withhold assent to provincial bills "in the Governor-General's name". They may reserve any provincial bill for the signification of the Governor-General's pleasure, and any such reserved bill becomes law only if the Governor-General's assent is signified within one year. Even when the Lieutenant-Governor assents to a bill, the Act may be disallowed by the Governor-General within one year of its receipt at Ottawa.

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(1) Evatt, op. cit., pp. 208, 216. For his supporting arguments, see pp. 203-216.

There are also the Dominion powers in relation to education, under section 93 of the British North America Act and the corresponding sections of the Manitoba, Saskatchewan and Alberta Acts.(1) In exercising all these powers the Governor-General of course acts on the advice of the Dominion Cabinet. The Lieutenant-Governor of a province is therefore unquestionably for some purposes and in some aspects "a Dominion officer". But for other purposes and

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(1) British North America Act, sections 55-59, 90. See also the judgment of the Supreme Court of Canada in reference to the powers of reservation and disallowance, 1938 S.C.R., pp. 71-79, which expressly repudiates the view that the declarations of the 1929 Conference on Dominion Legislation are applicable to the provinces. This judgment was of course not handed down till after Evatt wrote, and is in any case subject to reversal by the Judicial Committee. Two Lieutenant-Governors have actually been removed by the Dominion: Mr. Letellier de St. Just in Quebec in 1879, and Mr. T.R. McInnes in British Columbia in 1900. All Lieutenant-Governors receive general instructions from the Governor-General, and may also receive particular instructions in particular cases. Mr. McInnes received several such instructions in regard to his actions in British Columbia in 1898-1900; the Lieutenant-Governor of Nova Scotia, in 1926, was instructed to refuse assent to an Order-in-Council appointing extra Legislative Councillors; Lieutenant-Governors in general received special instructions in 1882 in regard to refusal of assent to bills and reservation; and these last instructions were repeated in a special despatch of 1924 to the Lieutenant-Governor of Prince Edward Island. (See "Memorandum on the Office of Lieutenant-Governor of a Province"(Department of Justice, Ottawa, 1937), in which, however, there is a considerable number of errors of detail; Sessional Paper of the House of Commons (Canada), 1900, no. 174; Canadian Annual Review, 1925-1926, p. 408; Minute of Council of November 29, 1882, in "Dominion-Provincial Legislation", vol. I, pp. 77-78; Sessional Paper of the House of Commons (Canada), 1924, no. 276.)

The power of disallowance has been exercised 107 times, on a great variety of Acts and for a great variety of reasons. Lieutenant-Governors have withheld assent to bills 25 times, and have reserved 65 bills for the Governor-General's pleasure. Of the reserved bills, only 14 have received the Governor-General's assent. The variety of bills reserved and of reasons for not giving assent is almost, if not quite, as considerable as in the cases of disallowance. (See "Dominion-Provincial Legislation"; "Memorandum on the Office of Lieutenant-Governor of a Province"; "Memorandum on the Dominion Power of Disallowance of Provincial Legislation" (Department of Justice, Ottawa, 1937); and E. A. Forsey, "Disallowance of Provincial Acts, Reservation of Provincial Bills, and Refusal of Assent by Lieutenant-Governors since 1867", in Canadian Journal of Economics and Political Science, vol. IV, no. 1, and "Canada and Alberta: the Revival of Dominion Control over the Provinces", in Politica, vol. IV, no. 16. Most of the errors and omissions in the former article are repaired in the latter; but the total number of reserved bills is 65, not 64 (Manitoba having one more than the article states); and there has been one more disallowance since the article was written.)

in other aspects he is, equally unquestionably, a representative of the Crown, and has ordinarily been regarded as bound by the same conventions as the Crown itself and its representatives elsewhere.(1) Accordingly, it would seem that in respect to dissolution of the provincial Legislature the Lieutenant-Governor, except when acting as a Dominion officer under Dominion instructions applying directly to the particular case concerned, exercises his powers according to the same constitutional rules as any other representative of the Crown. Evatt's statement that "no valid distinction can, or should, be drawn between the position of the Governor-General in relation to Ministers . . . and the position of the . . . Lieutenant-Governors of the . . . Provinces in relation to Ministers" is therefore, in the context, and subject to the exception noted, correct. Certainly the principle it affirms seems to have been taken for granted in the debates in the Ontario Legislature in December 1871,(2) and in the documents on the refusal of dissolution in Quebec in 1879.(3) Hence, precedents of grant and refusal of dissolution drawn from the history of the Canadian provinces since Confederation would seem to be perfectly relevant, unless it can be shown, in any given case, that the Lieutenant-Governor was acting as a Dominion officer

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(1) See the Minute of Council of November 29, 1882. It is true that this Minute lays down, inter alia, that the power of withholding assent is obsolete, and that Lieutenant-Governors have nevertheless vetoed an appreciable number of bills since 1882. But assent appears in most, if not all, cases, to have been withheld for reasons which would probably be considered sufficient in any jurisdiction; certainly, in every case, the Lieutenant-Covernor appears to have acted on the advice of his Ministers, who assumed full responsibility and were not censured by the Legislature. (See Forsey, in Canadian Journal of Economics and Political Science, loc. cit.)

(2) Ontario Parliamentary Debates, 1871, pp. 18-27. The assumption here seems to have been that the Lieutenant-Governor was bound by the same conventions as the Queen.

(3) See below, pp.

and not simply as a representative of the Crown.(1)

It is necessary, however, to consider not only the precedents,(2) but also the opinions of recognized authorities on the Constitutions, British and Dominion, whether statesmen or text-writers.(3) Only when both precedents and opinions have been carefully and critically examined will it be possible to formulate with some degree of precision the conventions which appear at present to govern the use of the power of dissolution, and to suggest in what directions further development of the conventions might usefully take place.

That the questions involved are of first-rate importance the refusal of dissolution in South Africa in 1939 is proof enough. But their importance goes far beyond any special or local or merely temporary circumstances such as may have been involved in that case. If a multiple-party system proves to be relatively permanent in both Britain and the Dominions, as seems not unlikely, then, as Mr. C. S. Emden has suggested, it may be necessary to

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(1) In regard to the legislative powers of the provinces Evatt seems to have fallen into a curious error. At pp. 214-215 of "The King and His Dominion Governors" he observes: "If, by virtue of section 7 (2) of the Statute of Westminster, the Colonial Laws Validity Act has no further application to the laws of Canadian provinces, . . .upon what basis will the future constitutional settlement of the provinces rest? Will it be competent to the Legislature for the time being to amend its constitution without any observance of prior laws passed by itself? Will the Legislature be rendered unable to bind its successors? The question is of importance in Canada . . . becasue the removal of the operation of the Colonial Laws Validity Act may possibly be invoked to restore to the Legislature for the time being its power of ignoring existing restrictions upon its constitutional power." So far from being "of importance", the question does not even arise. The matter is fully covered by the explicit terms of the British North America Act, section 92, head 1, "The Amendment from Time to Time, notwithstanding anything in this Act, of the Constitution of the Province, except as regards the Office of Lieutenant-Governor", terms which are left intact by the Statute of Westminster. There are not, and never have been, any "restrictions on the constitutional power" of provincial legislatures except the one in regard to the office of Lieutenant-Governor, and this remains in full vigour.

(2) These, except for the highly important and controversial cases in Canada in 1926 and South Africa in 1939, are dealt with in Chapters II and III. The Canadian case of 1926 is dealt with in Chapters V and VI, the South

discover in past practice, or work out de novo, "rules governing the times when it is appropriate to make appeals to the people"; perhaps "the sovereign will have to exercise a real power of refusing dissolution, or it will have to be laid down that a dissolution can be claimed only in certain recognized circumstances".(1) The problem is made more urgent by "the rise of parties and groups which question many of the foundations, which both the other parties took for granted". This development "leads", says Evatt, "to a demand for the understanding of these vague doctrines of the prerogative. If Parliamentary government is to endure, it is essential that the terrain of this constitutional no-man's-land should be finally explored."(2) The constitutional disputes of 1912-1914 and 1931 in the United Kingdom, Evatt thinks, show that it is "dangerous to allow uncontrolled discretion, and the absence of any binding rule".(3) Professor Laski and Mr. Woolf consider it "not impossible that 'theories of constitutional form will be adjusted overnight to suit the interests of Conservatism'"(4) It might be added that the absence of any clear rule, or the misunderstanding of whatever rules do exist, combined with the obscurity of the subject and the ignorance of the democratic electorate on such matters, is a positive invitation to unscrupulous demagogues to play fast and loose with the Constitution.

Nor is this all. The enormous increase in the power of the Cabinet, and especially of the Prime Minister, raises the question whether the reserve power of the Crown to force or refuse dissolution may not be one of the few

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African case of 1939 in Chapter VII.

(3) The opinions of the authorities, except in regard to the Canadian case of 1926 and the South African case of 1939, are dealt with in Chapters III and IV. The opinions of the authorities on these latter cases are dealt with in Chapters V-VII.

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(1) "The People and the Constitution", p. 280, quoted in Evatt, op. cit., pp. 68-69.
(2) Evatt, op. cit., pp. 119-120.
(3) Ibid., pp. 10-11.
(4) Quoted in Evatt, loc. cit.

safeguards against dictatorship by "the leader of the junta wielding for the moment the power of office".(1) If, for example, a Cabinet with a majority in both Houses tried to use that majority to prolong the life of Parliament indefinitely, a forced dissolution would be the only constitutional means of preserving the rights of the people. On the other hand, there may be times when, for the preservation of the Constitution and the rights of the people, it will be essential for the Crown to refuse dissolution.

The British constitutional system was never intended to be a plebiscitary democracy, in which Parliament exists and debates only on sufferance, under threat of dissolution at any moment by the Government in office, whether or not that Government has a majority in the House of Commons. A system of that kind has certainly no right to the title "parliamentary government", and it may at least be questioned whether it has any right to be called democratic. "Of course", as Evatt says, "in one sense, every appeal to the people, whatever circumstances exist when it takes place, represents an attempt to get a decision from the political sovereign. In this sense a series of repeated dissolutions of the Parliament may be said to represent the 'triumph' of the people as political sovereign. In actual fact, however, by means of defamation and intimidation and the deliberate inculcation of disillusion and disgust, a series of repeated dissolutions would probably be the very means of first delaying and ultimately defeating the true popular will, and so represent a triumph over, and not a triumph of, the electorate."(2) It might be added that even without defamation, intimidation and so forth, the same result might follow if the people were obliged to vote in ignorance of the essential facts which might have been uncovered by prior parliamentary debate.(3) In other words, an "appeal to the people" is not necessar-

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(1) Leif Egeland, M.P., in "The Forum" (Johannesburg), March 9, 1940.
(2) Evatt, op. cit., p. 109.
(3) For further discussion of this point, see below, pp.292-293.

ily democratic; it may be merely demagogic, pseudo-democratic, even anti-democratic.

The question of the exercise of the power of dissolution involves, indeed, among other things, the whole question of the position of Parliament in the British system, a question on which there appears to have grown up a good deal of misapprehension. The classic statement of the true doctrine on this point is of course Burke's. In his speech to the electors of Bristol, November 3, 1774, Burke defined the position of a member of Parliament, and incidentally, in part at least, of Parliament itself. It is a member's "duty to sacrifice his repose, his pleasure, his satisfactions" to those of his constituents, "and above all, ever, and in all cases, to prefer their interest to his own. But his unbiased opinion, his mature judgment, his enlightened conscience, he ought not to sacrifice to you, to any man, or to any set of men living. These he does not derive from your pleasure, -- no, nor from the law and the Constitution. They are a trust from Providence, for the abuse of which he is deeply answerable. Your representative owes you, not his industry only, but his judgment; and he betrays, instead of serving you, if he sacrifices it to your opinion. . . . To deliver an opinion is the right of all men; that of constituents is a weighty and respectable opinion, which a representative ought always to rejoice to hear, and which he ought always most seriously to consider. But <u>authoritative</u> instructions, <u>mandates</u> issued, which the member is bound blindly and implicitly to obey, to vote and to argue for, though contrary to the clearest conviction of his judgment and conscience, -- these are things utterly unknown to the laws of this land, and which arise from a fundamental mistake of the whole order and tenor of our Constitution."(1) What happens to the "judgment and conscience" of members of Parliament who

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(1) "Works" (Little, Brown and Company, 1901), vol. II, pp. 95-96.

deliberate under the shadow of dissolution at the whim of the Cabinet?

In his speech on a motion relative to the Speech from the Throne, June 14, 1784, Burke was even more explicit in regard to the dangers which would result from conceding to the Cabinet a right to dissolve Parliament at any moment it pleased: "It is a contrivance full of danger for ministers to set up the representative and constituent bodies of the Commons of this kingdom as two separate and distinct powers, formed to counterpoise each other, leaving the preference in the hands of secret advisers of the crown. In such a situation of things, these advisers, taking advantage of the differences which may accidentally arise or may purposely be fomented between them, will have it in their choice to resort to the one or the other, as may best suit the purposes of their sinister ambition. By exciting an emulation and contest between the representative and the constituent bodies, as parties contending for credit and influence at the throne, sacrifices will be made by both; and the whole can end in nothing else than the destruction of the dearest rights and liberties of the nation. If there must be another mode of conveying the collective sense of the people to the throne than that by the House of Commons, it ought to be fixed and defined, and its authority ought to be settled: it ought not to exist in so precarious and dependent a state as that ministers should have it in their power, at their own mere pleasure, to acknowledge it with respect or to reject it with scorn. It is the undoubted prerogative of the crown to dissolve Parliament; but we beg leave to lay before his Majesty, that it is, of all the trusts vested in his Majesty, the most critical and delicate, and that in which this House has the most reason to require, not only the good faith, but the favour of the crown. His Commons are not always upon a par with his ministers in an application to popular judgment; it is not in the power of the members of this House to go to their election at the moment most favourable to them.

It is in the power of the crown to choose a time for their dissolution whilst great and arduous matters of state and legislation are depending, which may be easily misunderstood, and which cannot be fully explained before that misunderstanding may prove fatal to the honour that belongs and to the consideration that is due to members of Parliament. . . . We are to offer salutary, which is not always pleasing counsel: we are to inquire and to accuse; and the objects of our inquiry and charge will be for the most part persons of wealth, power and extensive connections: we are to make rigid laws for the preservation of the revenue, which of necessity more or less confine some action or restrain some function which before was free: what is the most critical and invidious of all, the whole body of the public impositions originate from us, and the hand of the House of Commons is felt in every burden which presses on the people. Whilst ultimately we are serving them, and in the first instance whilst we are serving his Majesty, it will be hard indeed, if we should see a House of Commons the victim of its zeal and fidelity, sacrificed by his ministers to those very popular discontents which shall be excited by our dutiful endeavours for the security and greatness of his throne. No other consequence can result from such an example, but, in future, the House of Commons, consulting its safety at the expense of its duties, and suffering the whole energy of the state to be relaxed, will shrink from every service which, however necessary, is of a great and arduous nature, -- or that, willing to provide for the public necessities, and at the same time to secure the means of performing that task, they will exchange independence for protection, and will court a subservient existence through the favour of those ministers of state or those secret advisers who ought themselves to stand in awe of the Commons of this realm. A House of Commons respected by his ministers is essential to his Majesty's service: it is fit that they should yield to Parliament,

and not that Parliament should be new-modelled until it is fitted to their purposes. If our authority is to be held up when we coincide in opinion with his Majesty's advisers, but is to be set at nought the moment it differs from them, the House of Commons will shrink into a mere appendage of administration, and will lose that independent character which, inseparably connecting the honour and reputation with the acts of this House, enables us to afford a real, effective and substantial support to his government."(1)

These are the words of one who has been called "the greatest master of civic wisdom in our language". In certain respects the precise wording may have been rendered obsolete by subsequent developments. But the essential point Burke was making is as relevant to-day as it was when he spoke; and there can be little doubt that we have seen, within this generation, in various parts of the British Commonwealth, examples of the very danger of which Burke gave warning.

Evatt goes so far as to say: "The present constitutional position" (i.e., the state of uncertainty which he has been discussing) "is so unsatisfactory that in Australia it has led to some grave abuses. Cases have occurred where, owing to the existence of three or four political parties in the popular House, or of a revolt within a Ministerial party, Ministers brought face to face with a critical vote of the House assert that they possess an unconditional right to dissolve the House, and, in the event of an adverse vote, will assert such right. In New South Wales, for instance, such a crisis arose quite recently. After a defeat in the House upon a vital issue, the Premier of the State ultimately resigned and was replaced by another Premier. In the meantime, the State Governor had stayed his hand for several days to permit of the election of a new leader by one of the government parties, and took no steps whatever to consult other leaders in

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(1) Ibid., pp. 553-555.

the popular House. . . . The most serious feature of the position was that the newspapers and, it has been asserted, one or more members of the Ministry, intimated to supporters whose vote was regarded as doubtful that if they voted against Ministers, they would recommend a dissolution, and the State Governor was compelled to act upon the advice of the Premier for the time being, even after his defeat by a vote of the House. Many similar 'intimations' have been published by the press in relation to the Commonwealth House of Representatives where, as has often been the case, it happens that Ministers for the time being represent one party only out of three and possess no working majority. The newspapers supporting Ministers assert that, under modern constitutional practice, the Prime Minister for the time being 'always has a dissolution in his pocket'. These matters are of general importance. In my opinion, similar 'intimations' are a very serious interference with the regular process of parliamentary government. . . . They are designed to put pressure upon members of parliament who are thus hindered in the free exercise of their duty to vote in accordance with the interests of the electors."

Evatt adds, however, that "the mere fact that some sort of alternative Ministry is possible does not, and should not, prevent the grant of a dissolution by the King's representative. Presumably the Governor would never lose sight of the popular 'mandate' possessed by the existing Assembly. Again, it might be disastrous to democratic feeling to permit the continuance of an Assembly if (say) the alternative Ministry would have little or no popular backing or if it proposed to act, or was dependent upon the support of members who were proposing to act, in flagrant disregard of pledges to the electors."(1)

Such are the questions to the investigation of which the following chapters are devoted.

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(1) 18 Canadian Bar Review, no. 1, pp. 8-9.

CHAPTER II

Precedents of Grant and Refusal of Dissolution

(a) The United Kingdom

The first grant of dissolution in Britain in special circumstances was of course that to Pitt the Younger in 1784. Pitt had been called to office, December 19, 1783, on the dismissal of the Fox-North Coalition. On December 24 the House adjourned till January 12, 1784. On January 16 the Opposition carried by a majority of 21 a motion asserting that the appointments of Ministers had been "such as do not conciliate or engage the confidence of this House" and "contrary to constitutional principles and injurious to the interests of His Majesty and his people". On January 23 the Commons followed up this motion for the removal of Ministers by rejecting the Government's East India Bill by a majority of 8. On January 29, without a division, it voted the charges against the late Ministry groundless. On February 2 it voted want of confidence by a majority of 19. Next day it voted by a majority of 24 to lay the resolutions of February 2 before the King. On February 20 it carried by a majority of 20 a motion "for a United and Efficient Administration". On February 27 the Government was defeated on the adjournment by a majority of 7. On March 1 an Address to the Crown for the removal of Ministers on the ground of want of confidence was carried by a majority of 12. On March 5 the Mutiny Bill was postponed by a majority of 9. On March 8 a fresh vote of want of confidence was carried by a majority of 1.(1) Pitt then asked and got dissolution. The previous dissolution had been granted to Lord North, September 1, 1780. North's Government had given way to Lord Rockingham's, March 27, 1782;

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(1) Cobbett's Parliamentary History, vol. XXIV, pp. 361, 380, 412, 449, 484, 494, 667, 686-687, 713, 733, 744.

Rockingham's to Lord Shelburne's, July 13, 1782; Shelburne's to the Fox-North Coalition, April 5, 1783.

The dissolutions of 1790, 1796 and 1802 present no special features. In July 1806 the King granted a dissolution to Lord Grenville. The new Parliament met December 15. On March 20, 1807, the King having required of Ministers a pledge that there should be no further proposals for concessions to the Catholics, a pledge which the Cabinet felt unable to give, the Cabinet was dismissed, and the Duke of Portland took office. The new Government met the House and survived two votes, but on April 27 dissolved Parliament.(1)

Dissolutions followed in the normal course of events in 1812, 1818, 1820 (on the demise of the Crown), 1826 and on July 24, 1830 (again following the demise of the Crown). On November 15, 1830, the Duke of Wellington's Government was defeated on the Civil list, 233-204, and resigned. Lord Grey took office. On April 19, 1831, he was defeated in committee on an amendment to the Reform Bill, 299-291, and two days later on the adjournment, 164-142. This latter vote had the effect of stopping the Supplies. Grey then secured a dissolution, April 23.(2) The previous dissolution had taken place under Wellington's auspices.

On December 3, 1832, after the passing of the Reform Bill, Grey dissolved again, to enable the new electors and constituencies to vote.

On November 15, 1834, Lord Melbourne, Grey's successor as Whig Prime Minister, resigned, or suffered a quasi-dismissal. Sir Robert Peel took office and dissolved, making no attempt to carry on with the existing Parliament. He was defeated in the new Parliament and resigned, Melbourne resuming office.

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(1) Parliamentary Debates, First Series, vol. 9, pp. 246, 277, 348-349, 475.
(2) Parliamentary Debates, Third Series, vol. 1, pp. 549-552; vol. 3, pp. 1688-1700, 1805, 1807, 1812.

On July 17, 1837, Parliament was dissolved, following upon the demise of the Crown. On May 18, 1841, Melbourne's Government was defeated, 317-281, on the sugar duties, and on June 4, a motion of want of confidence carried by a vote of 312-311.(1) The Government then asked for dissolution, which took place June 23.

On March 19, 1852, the first Derby Government being then in office and as yet undefeated in the Commons, Disraeli announced the Cabinet's intention to dissolve as soon as "necessary measures" had been passed.(2) On May 10 the Government was defeated, 234-148, on an Order of the day carried against Government notice of a bill to transfer the seats of two disfranchised constituencies to Yorkshire and Lancashire.(3) It secured a dissolution, which took place July 1. The previous dissolution had been granted to Lord John Russell, July 23, 1847. Russell's Government had meanwhile been defeated, in 1851, and had resigned, but had resumed office when efforts to form an alternative Government failed.

On March 3, 1857, Lord Palmerston's Government was defeated, on a motion for a select committee to inquire into its China policy.(4) It obtained a dissolution, March 21. The previous dissolution had been granted to Derby, in 1852. In the new Parliament his Government was defeated on the Budget by a majority of 19, and resigned,(5) making way for Lord Aberdeen's Government. Palmerston's Government was therefore the third to hold office in that Parliament.

On February 19, 1858, Palmerston's Government was defeated on the Conspiracy to Murder Bill, and resigned. The second Derby Government took office, but on March 31, 1859, it was defeated, 330-291, on its Reform

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(1) Ibid., vol. LVIII, pp. 668-673, 1241-1246.
(2) Ibid., vol. CXIX, p. 1301.
(3) Ibid., vol. CXXI, pp. 463-465.
(4) Ibid., vol. CXLIV, p. 1846.
(5) Ibid., vol. CXXIII, p. 1693.

Bill, and dissolved Parliament.(1)

Disraeli's Government, in 1868, was defeated on the Irish Church resolutions, April 3, by a vote of 328-272, and again on April 30, by a vote of 330-265. On May 4 Disraeli announced that Parliament would be dissolved "as soon as the public interests will permit". He was anxious to have the appeal take place to the new constituencies and electorate established by his Reform Bills, but was prepared to dissolve, if necessary, even before those Bills could take effect.(2) The House made no difficulty about facilitating the arrangements necessary to bring the Reform Bills into effect, and dissolution took place November 11. The previous dissolution had been granted to Palmerston, July 6, 1865. He had died shortly afterwards, and Lord Russell, his successor, had been defeated on his Reform Bill, June 18, 1866, and had resigned.(3)

On June 8, 1885, Gladstone's Government was defeated, 264-252, on the Customs and Inland Revenue Bill, and resigned.(4) Lord Salisbury took office, finished out the session, and secured dissolution, November 11. The previous dissolution had been granted to Lord Beaconsfield, 1880.

Salisbury's Government was defeated in the new House of Commons, January 26, 1886, and resigned. Gladstone resumed office. On June 7, 1886, he was defeated, 341-311, on his Home Rule Bill.(5) He secured dissolution, June 27.

On June 21, 1895, Lord Rosebery's Government was defeated, 132-125, on the cordite vote, and resigned.(6) Salisbury took office, finished out the session, and dissolved, July 8. He had had the previous dissolution, June 28, 1892, but had been defeated at the beginning of the new Parliament.

On December 3, 1905, Mr. Balfour's Government resigned. It had been defeated, 199-196, in Committee of Supply, July 20, but had been

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(1) Ibid., vol. CLIII, pp. 1257-1261.
(2) Ibid., vol. CXCI, pp. 1705 et seq.
(3) Morley, "Life of Gladstone" (Macmillan, 1903), vol. II, pp. 207-209.
(4) Parliamentary Debates, Third Series, vol. CCXCVIII, pp. 1511-1515.
(5) Ibid., vol. CCCVI, pp. 1240-1245.
(6) Ibid., Fourth Series, vol. 34, pp. 1712, 1746.

victorious in sixty-one subsequent divisions, and had finished the session.(1) On Mr. Balfour's resignation, Sir Henry Campbell-Bannerman took office and dissolved, not attempting to meet the existing Parliament. The previous dissolution had been granted to Lord Salisbury, September 25, 1900.

In December, 1909, following upon the Lords' rejection of the Budget, Mr. Asquith obtained a dissolution. He won the election, and the Lords passed the Budget. The Government then introduced a Parliament Bill to curtail the powers of the House of Lords. A heated controversy followed, and when a Constitutional Conference of representatives of the Government and the Opposition failed to reach agreement, the Government determined to carry through its own plan. The Parliament Bill had not yet been introduced in the House of Lords, but the huge Conservative majority there, and the temper of that majority, made the Bill's fate almost a foregone conclusion. On November 11, 1910, therefore, Mr. Asquith placed before the King a request for dissolution of Parliament. On November 15 he informed the King that he would require also an undertaking, if the election gave the Government an "adequate majority", to create enough peers to pass the Parliament Bill if the Lords should prove intransigent. The King, however, insisted that the Parliament Bill must at least be introduced in the House of Lords before dissolution. It was only after Mr. Asquith agreed to this that, on the afternoon of November 16, the King consented to dissolution and gave the desired undertaking with respect to the creation of peers.(2) This is the account given by Mr. Asquith's biographers. Sir Almeric Fitzroy, Clerk of the Privy Council, tells what appears to be substantially the same story in rather different terms. In an entry in his diary on November 16, he condemns the Government for "attempting to force a dissolution . . .

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(1) For details and references, see below, pp.
(2) Spender and Asquith, "Life of Lord Oxford and Asquith" (Hutchinson), vol. I, pp. 296-299.

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,(1) 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. . . . I put it to Lord Morley that the tactics of the Opposition were to defer a General Election till the new year, and the tactics of the Government to get it over before Christmas; on which he remarked drily, 'You have described the situation very exactly'. . . The King required the submission of some proof that Ministers were powerless in a Parliament of their own choosing, in which so far they have not met with a rebuff in either House, and during the existence of which they have not lost a seat." He notes the promise to introduce the Bill in the Lords, the speeches in that House of Lord Lansdowne and Lord Rosebery, and Lord Crewe's announcement, on behalf of the Government, that he would accept no amendments. Then, in the entry of November 18, he adds: "As Lord Morley not obscurely hinted, the situation has developed to a point at which the King's scruples in regard to an immediate dissolution have been overcome."(2) Lord Newton, in his "Life of Lord Lansdowne", adopts almost exactly Sir Almeric Fitzroy's account, and even several of his phrases.(3) There seems, therefore, to be little if any doubt that the King, on this occasion, at first refused Mr. Asquith's request for dissolution, and only granted it after the Government had agreed to introduce

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(1) Italics mine. This interview, it is clear, took place before the King had granted dissolution.
(2) Sir Almeric Fitzroy's "Memoirs" (Hutchinson), 5th. ed., vol. II, pp. 422-423. Italics mine.
(3) Newton, "Life of Lansdowne" (Macmillan, 1929), pp. 404-405.

the Bill in the Lords.(1)

In October 1922, Mr. Lloyd George's Coalition Government resigned as the result of an adverse vote at the Carlton Club. Mr. Bonar Law took office, October 24, and, without meeting the existing Parliament, dissolved, October 26. The previous dissolution had been granted to Mr. Lloyd George, November 25, 1918.

On Mr. Bonar Law's retirement because of ill health, Mr. Baldwin became Prime Minister. Mr. Bonar Law had given the electorate an undertaking that the Conservative party would not introduce Protection without a direct mandate from the people. Mr. Baldwin, having become convinced of the urgent necessity of Protection, asked and obtained a dissolution, in November 1923.

He emerged from the election at the head of the largest single party, but without a clear majority. In the new Parliament, he was defeated on a Labour amendment to the Address, and resigned. Mr. MacDonald formed a Labour Government, January 22, and carried on, with the support of the Liberals, till October 8, when the Conservatives moved a vote of censure against the Government for dropping the prosecution of one Mr. Campbell, editor of the Communist "Worker's Weekly". The Liberals moved an amendment for an inquiry. The Government chose to consider the amendment as also involving censure. The amendment carried, 359-198, and the main motion as amended carried by 364-198.(2) Mr. MacDonald asked and obtained dissolution, which took place November 10.

The only other British case which calls for notice is the dissolution granted to Mr. MacDonald's National Government, October 7, 1931.

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(1) Keith, in "The British Cabinet System, 1830-1938" (Stevens and Sons, 1939), p. 395, describes Sir Almeric's version of the affair as an "ignorant assertion of Sir A. Fitzroy, from whom Lord Morley, for whatever reason, had withheld the facts". For these improbable accusations he produces no evidence.

(2) Parliamentary Debates, Fifth Series, vol. 177, pp. 693-704.

The previous dissolution had been granted to Mr. Baldwin, in the spring of 1929. After the election, he resigned without meeting the new Parliament. Mr. MacDonald then formed his second Labour Government, which held office till August 24, 1931, when it resigned because of internal dissension, and was succeeded by the National Government. This Government enjoyed the undoubted confidence of the House of Commons, but felt it desirable, in view of the change in the political situation and the new issues which had arisen, to seek a fresh mandate. It accordingly dissolved Parliament, after passing certain urgent measures.

(b) Australia

(i) New South Wales

New South Wales secured responsible government in 1856. Its first Government, Mr. Donaldson's lasted two months and twenty days. Its second, the Cowper Government, had "a like brief existence". The third, the Parker Government, lasted "nearly a year". On September 7, 1857, the second Cowper Government took office. It was defeated in the Assembly, December 17, 1857, on a bill to increase the assessments and rents of squatters, and secured dissolution. It was successful in the election, and continued in office till October 26, 1859.(1)

On November 2, 1864, the Martin Government was defeated, 36-29, on an amendment to the Address, and on November 10 it obtained a dissolution.(2)

The fourth Cowper Government took office February 3, 1865 and continued till January 21, 1866, when it gave place to another Martin Government. This lasted till the end of October, 1868, when, having been

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(1) Sir Henry Parkes, "Fifty Years in the Making of Australian History" (Longman's, Green, 1892), pp. 96-99, 101.
(2) Ibid., p. 153.

sustained only by the Speaker's casting vote on an amendment to the Address, it resigned. The Government which succeeded appears to have lasted till December 16, 1870, when, after a defeat in the Assembly, it gave place to the Martin-Robertson Coalition. In January 1872, this Government was decisively defeated on the Border Duties question, and on February 1 it obtained a dissolution, though the Parliament was comparatively new and Supply had not been voted. The new House, by a vote of 36-11, condemned the grant of dissolution before the voting of Supply. The Government resigned, and Mr. (afterwards Sir Henry) Parkes took office, May 14, 1872.(1)

On November 25, 1874, the Parkes Government was sustained only by the Speaker's casting vote on the question of the Governor's Minute respecting the power of pardon. Under the new Triennial Act the existing Parliament was already nearing its end. The Government accordingly asked for and obtained a dissolution.(2)

In the new House the Government was defeated, January 28, 1875, by a majority of 4, and on February 8 it resigned. The new Government suffered repeated defeats. On March 6, 1877, Mr. Parkes moved "That the retention of office by Ministers after having suffered, within nine sitting days, four general defeats on motions expressive of condemnation and want of confidence, is subversive of the principles of the Constitution". This motion carried by 31-28.(3) The Government thereupon advised dissolution. The Governor agreed to grant it, subject to Supply being first voted, and reserving the right to reconsider his decision if Supply were refused. The Government tried to get Supply, but failed, 33-27. It resigned, and Sir Henry Parkes took office.

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(1) Ibid., pp. 154, 162, 197, 212, 227, 230-231, 240-248, 250.
(2) Ibid., pp. 290-292.
(3) Ibid., p. 294. Sir Hercules Robinson, in the Appendix to his "Speeches" (Gibbs, Shallard, 1879), pp. 241-258, calls the earlier reverses merely defeats on matters of detail, adding that "adverse motions upon other matters of a similar character were before the House".

After four months, the new Government found public business, except the Estimates, in much the same condition as when it took office. It had, like its predecessor, suffered repeated defeats on minor issues. When Mr. Garrett moved a motion on the legal interpretation of clause 31 of the Land Act, the Premier declared that this was a vital issue. The motion carried by a majority of 2. On August 7, Sir Henry Parkes announced that he would attempt to pass the Appropriation Act and would then advise dissolution. On August 8, the Treasurer moved that the House go into Committee to consider the San Francisco Mail Service. Sir John Robertson moved, in amendment, that the House do adjourn. The Premier said that if the amendment carried he would consider it equivalent to a refusal to pass the Appropriation Act. The amendment carried, 30-24, and on August 9 the Premier recommended dissolution. The Governor agreed to grant it, subject to Supply being first voted, and reserving the right to reconsider if Supply were refused. The Government considered this unsatisfactory, and resigned.

Sir John Robertson then formed a Government. Mr. Farnell, leader of the third party, gave notice of a motion of want of confidence. Ministers, on September 18, refused to postpone a Government measure; and in a division on a temporary Supply Bill for September they were defeated by 2 votes. On September 19 they were defeated, 28-27, on a motion to suspend Standing Orders to pass a Consolidated Revenue Bill through all its stages in one day. Sir John Robertson then asked for a dissolution, Supply or no Supply. The Governor refused, saying that he must first satisfy himself that no alternative was possible. He then called on Mr. Alexander Stuart, a prominent but independent supporter of Sir John Robertson. Mr. Stuart, on September 21, agreed to try to form a Government, but on September 26 was obliged to acknowledge his inability to do so. The Governor then sent for Mr. Stephen Brown, who occupied among Sir Henry Parkes' supporters a position similar to that of Mr. Stuart among Sir John

Robertson's. Mr. Brown also tried to form a Government, but failed (September 27). He advised the Governor to grant a dissolution to Sir John Robertson, saying that he, Mr. Brown, would support an Appropriation Bill. The Governor then, satisfied that there was no alternative, accepted Sir John Robertson's advice and granted dissolution. The Appropriation Act was then passed.(1)

The Governor, Sir Hercules Robinson, reporting to the Colonial Office on these proceedings, noted that in Britain it was customary for Parliament to vote Supply before a dissolution took place, but that in New South Wales there had come to be a habit of voting Supply for only a month at a time. The Crown was "habitually left without Supply". This, he considered, was obviously an unsatisfactory state of affairs. It was also, he thought, not good to allow Ministers to threaten dissolution when proper provision had not been made for the public service. He had therefore thought it necessary to insist upon Supply being voted, if at all possible, before dissolution took place. He had thought that in March dissolution was, apart from this consideration, desirable, because of the equal division of parties and the "impracticable character of the House, because nearly two and a quarter of the Parliament's three years had elapsed, and because the previous dissolution had been granted to the Government's opponents. But unconditional acceptance of advice to dissolve would, he thought, have been "not only inadvisable but improper -- at all events until every effort to obtain supply had been exhausted".

He noted that the House consisted of 73 members, of whom one was the Speaker, three were absent from the colony, 32 usually supported Sir Henry Parkes, and 30 Sir John Robertson. The remaining seven, Mr. Farnell's party, held the balance of power and had "for many months rendered govern-

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(1) Robinson, loc. cit.; Parkes, op. cit., pp. 294-297.

ment by either of the chief parties impracticable".

In these circumstances he asked for the opinion of the Colonial Office on the propriety of the course he had followed. Lord Carnarvon replied that he thought the Governor's course had been substantially right, though he thought it better not to give a hypothetical decision. Sir T. Erskine May, consulted by the Colonial Office, agreed that the Governor had a right to impose conditions, but thought the form in which he had done so in the first two cases was objectionable. When a decision in this form was communicated to the Assembly, as was customary in New South Wales, it gave that body a virtual veto on its own dissolution. The course taken in the third case was unobjectionable. Mr. Speaker Brand gave it as his opinion that to let the House be the master of its own dissolution by granting Supply only from month to month as it had been in the habit of doing was most undesirable.(1)

At the opening of the new Parliament, November 28, 1877, a want of confidence amendment to the Address, moved by Mr. Farnell, was carried, 33-31. The Governor called on Sir Henry Parkes, who, however, found himself unable to form a Government. Mr. Farnell then took office, December 18, 1877. On December 6, 1878, his Government was defeated, 41-22, on its Crown Lands Bill, "its principal measure". It asked for a dissolution. The Governor refused and the Cabinet resigned. The Governor called on Sir John Robertson, who agreed to try to form a Ministry, and asked Mr. Farnell to secure Supply. Mr. Farnell agreed, but the Assembly refused to make provision for the forthcoming International Exhibition. Sir John Robertson, who had got as far as submitting his list of Ministers to the Governor, thereupon relinquished his task, and Mr. Farnell resumed office, December 17. The Assembly, however, by a vote of 30-21, refused to transact business. Mr. Farnell

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(1) Robinson, loc. cit.

therefore resigned again, and the Governor sent for Sir Henry Parkes, who, with Sir John Robertson's help, formed a Government, December 21. Mr. Farnell then helped the new Government to obtain Supply, and the crisis passed.(1)

In July 1880 a Redistribution Act was passed, and at the end of the year Parliament, which was in any case approaching the end of its term, was dissolved. On November 16, 1882, the Parkes Government was defeated, 43-33, on its Lands Bill, and obtained a dissolution. It was unsuccessful in the elections, and resigned, January 4, 1883.(2)

On January 5, 1883, Mr. (afterwards Sir Alexander) Stuart took office. On October 2, 1885, he prorogued Parliament. Five days later his successor, Mr. Dibbs, obtained a dissolution.(3)

The Dibbs Government lasted seventy-five days, when it made way for a new Robertson Government, which lasted for sixty-six days, when it was defeated in the Assembly. It asked for dissolution and was refused.(4) The Governor then sent for Sir Patrick Jennings, who continued to hold office till January 15, 1887, when he resigned because of dissensions in his Cabinet.(5)

Sir Henry Parkes then undertook to form a new Government, asking the Governor to have Sir Patrick Jennings obtain Supply. But "On the pretext of demanding the names of the new Ministers (which the House knew well enough would be formally announced, in regular course, on the motion being made to declare their seats vacant), instead of granting Supply, the adjournment of the House was moved and carried as a vote of censure. At an Executive Council next morning, the Ministers were sworn, on accepting

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(1) Parkes, op. cit., pp. 297-299; Alpheus Todd, "Parliamentary Government in the British Colonies" (Longmans, Green, 1894), 2nd. ed., pp. 794-795; Keith, "Responsible Government in the Dominions" (Oxford), 1928 ed., p.162.
(2) Parkes, op. cit., pp. 332, 406-407.
(3) Ibid., pp. 407, 428.
(4) Keith, op. cit., 1928 ed., p. 163.
(5) Parkes, op. cit., pp. 407, 429, 431, 449.

their respective offices, except Sir Henry Parkes . He was sworn as Vice-President of the Executive Council without office, the office of Colonial Secretary being left vacant. Having obtained the Governor's assent to an immediate dissolution, he went to the Legislative Assembly alone, his colleagues being all out by reason of their acceptance of office. He now asked for Supply, . . . and dared them to refuse it at their peril! . . . The Supply asked for was of course granted." On January 19, Parliament was dissolved.(1)

Sir Henry Parkes fought the election largely on a free trade platform, and was victorious. He held office till January 17, 1889, when he resigned, following a defeat on the adjournment. Mr. Dibbs took office, and, after a fruitless attempt to secure Supply, dissolved Parliament, appealing to the country on a protectionist platform. When the new House met, he was defeated, 68-64, on a want of confidence amendment to the Address, after holding office only fifty days, and Sir Henry Parkes resumed power.(2)

In the spring of 1891 the Parkes Government was sustained only by the Speaker's casting vote, on a motion of want of confidence. The Parliament had only a little over eight months to run. The Government therefore asked and obtained a dissolution. In the new House the Government was dependent on the Labour party, and when, on October 15, 1891, Labour withdrew its support, Sir Henry Parkes was defeated, 49-41, on a motion to adjourn the debate. He resigned, and on October 22 Mr. Dibbs took office.(3)

On June 25, 1894, the Dibbs Government obtained a dissolution in the ordinary course of events. It resigned without meeting the new Parliament, and Mr. Reid took office. On June 25, 1895, the Legislative Council

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(1) Ibid., pp. 449, 451-452.
(2) Ibid., pp. 455-457, 516, 519.
(3) Ibid., pp. 568, 617-619. The Parliamentary Debates, Journals and Papers of New South Wales have not been available to me for the years prior to 1891.

rejected the Government's Land and Income Tax Assessment Bill. It had previously rejected a series of other bills. The Government therefore asked dissolution, and the request was granted, July 5, 1895.(1)

On July 8, 1898, the Reid Government secured another dissolution in the ordinary course. On August 30, 1899, the Government was defeated, 53-46, on a motion that the report of a committee be read. On the same day a motion of want of confidence dealing with a payment to Mr. Neild, M.P., was moved, and on August 31 an amendment of censure on the same subject. On September 7, the Government was defeated, 78-40, on the amendment, and 75-41 on the main motion as amended. It then advised dissolution. On September 13 it announced that the advice had been refused. The Reid Government resigned, and Sir William Lyne took office.(2)

On September 25, 1910, Mr. Wade's Government obtained a dissolution. It was defeated in the elections and resigned without meeting the new Parliament. Mr. McGowen formed a Labour Government, with a "secure" majority of 2 in a House of 90, and the probability of steady support from 4 or 5 Independents. On July 25, 1911, a motion of censure on the Government's land policy was defeated, 42-37; but after the vote two members resigned their seats, leaving the Government with 44 regular supporters in a House of 88. On July 26, the acting Premier asked for an adjournment till after the by-elections. The Independents objected. The Government was sustained on an amendment to the Public Works Funds Bill only by the Speaker's casting vote. On July 27, the acting Premier announced that the Cabinet had tendered "certain advice", which had been refused, whereupon the Government had resigned. "Certain advice" is the customary Australian formula

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(1) Parliamentary Debates (New South Wales), vol. LXVIII, pp. 7504, 7508.
(2) Ibid., vol. C, pp. 1042-1043, 1084, 1307-1309, 1312. Keith, op. cit., 1912 ed., p. 190, and 1928 ed., p. 163 says the Governor's refusal was "doubtless because there was no real public issue at stake".

for advice to dissolve; but according to Keith it meant in this instance merely advice to prorogue. The House adjourned, July 27. The Governor called on Mr. Wade, who, Keith says, asked for a promise of dissolution, which was refused. The Labour Government was recalled, and Parliament, which was still adjourned, was prorogued on August 1. At the beginning of the new session, the Labour Government announced that its resignation had been withdrawn.(1)

On February 18, 1920, Mr. Holman's Nationalist Government obtained a dissolution. The election resulted in the return of 45 Labour members, 28 Nationalists, 15 Progressives and 2 Independents. The Labour leader, Mr. Storey, formed a Government, one of the Nationalist members accepting the Speakership. In December 1921, however, the Speaker resigned. On December 13, the Government (now headed by Mr. Dooley) was defeated on the adjournment, 45-44, and asked for dissolution. The Governor refused, and the Cabinet resigned. Sir George Fuller, Leader of the Opposition, took office. After the change of Government, a new Speaker was elected, the new Government understanding that he would report a deadlock and support a dissolution. He did neither. Sir George Fuller nevertheless requested a dissolution, was refused, and resigned, December 20. Mr. Dooley was recalled, and, having finished the session's non-contentious business, secured a dissolution, February 17, 1922.(2)

Early in 1927, according to Keith, Mr. Lang, the Labour Premier, asked for dissolution with the support of only one of his Ministers. He was refused. He resigned, was recommissioned, and formed a new Government,

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(1) Parliamentary Debates (New South Wales), Second Series, vol. 41, pp. 1813, 1914, 1924, 1950, 1998, 2002; vol. 42, p. 2; Keith, "Responsible Government in the Dominions", 1912 ed., pp. 1615-1618; 1928 ed., pp. 175-176.

(2) Parliamentary Debates (New South Wales), Second Series, vol. 85, pp. 2602, 2619, 2621; Round Table, vol. 12, pp. 702-708.

which then requested and obtained dissolution.(1) The previous dissolution had taken place by efflux of time, April 18, 1925, under the auspices of the Labour party's opponents; the Legislature then elected had held five sessions, and had passed a Redistribution Act.

The next dissolution took place about the middle of 1930, under the auspices of Mr. Bavin's Government. The Government was defeated and resigned. Mr. Lang formed a Labour Government, which, however, was dismissed, May 13, 1932. Mr. Stevens' Government assumed office May 16, and dissolved Parliament May 18.(2)

(ii) Victoria

On December 30, 1867, the McCulloch Government obtained a dissolution because the Upper House refused to pass the Appropriation Bill. Parliament was in its fourth session.

In 1868, when the McCulloch Government resigned, Mr. Fellows "required a right to a dissolution, in case of a refusal of supplies. . . . The Governor reserved his judgment . . . according to circumstances."(3)

On May 29, 1872, the Duffy Government was defeated, 39-34, on an amendment to the Address, condemning its exercise of the power of patronage and expressing want of confidence. It asked for a dissolution, setting forth its reasons in an elaborate Memorandum. In the United Kingdom, it contended, when a Government was defeated in the Commons, "the alternative of resignation or dissolution is left absolutely to the discretion and responsibility of the Ministers". A dissolution is justifiable: "1. When a vote of 'no confidence' is carried against a government which has not

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(1) "Responsible Government in the Dominions", 1928 ed., p. xvii; Journal of Comparative Legislation, Third Series, vol. 9, p. 252.
(2) Evatt, "The King and His Dominion Governors", pp. 156-174; Australian Year Book, 1932, p. 72.
(3) Rusden, "Australia" (Chapman and Hall, 1883), vol. 3, pp. 364-365.

already appealed to the country; 2. when there are reasonable grounds to believe that an adverse vote against the Government does not represent the opinions and wishes of the country, and would be reversed by a new Parliament; 3. when the existing Parliament was elected under the auspices of the opponents of the Government; 4. when the majority against a Government is so small as to make it improbable that a strong Government can be formed from the opposition." The Memorandum also set forth that the Assembly contained three parties and had defeated two Governments, and contended that the House was "in the condition of an agent from whom his principal has withdrawn authority". There was at issue the "paramount question" of "mining upon private property".

The Governor, Lord Canterbury, refused the request for dissolution. In his reply to the Duffy Memorandum he noted his responsibility to the Crown, but based his decision mainly on United Kingdom usage. He observed that the fact that in Britain in recent years no Sovereign had refused a dissolution did not warrant the inference as to British practice made by the Memorandum. He declined to admit that any or all of the four points mentioned "would, under all conceivable circumstances, and without any reference whatever to any other fact or facts, however important, justify a dissolution". In the English cases of 1701, 1710, 1769 and 1784, cited in the Memorandum, there was an actual or prospective inability of the Government to carry some great "measure", which was not the case in this instance. He quoted Sir Robert Peel on the danger of admitting "any other recognized organ of public opinion than the House of Commons". In reply to the suggestion that the effect of refusal would be to give Mr. Francis, Leader of the Opposition, an opportunity of dissolving "a few months hence", Lord Canterbury said that, before granting a request for dissolution he must first try to find other advisers; that the necessity for a dissolution "would unquestionably arise" if the balance of parties proved to be such as to

prevent the successful conduct of public business; that he recognized "that it would not conduce to the present or future efficiency of Administrations or Legislatures if his acceptance of the resignations of his present advisers, instead of his acquiescence in their recommendation of a dissolution, were to be followed immediately, or closely, by his acceptance of a similar recommendation based on similar grounds from their successors", as that would give rise to charges (unfounded) of partisanship and "would not have removed or even materially palliated existing difficulties". The retiring Premier took this to mean that a new Government would be refused a dissolution. Mr. Harker, in the Assembly, protested that it would be unfair to the new Government to make this known. Mr. Wrixon pointed out that the Governor had said "under similar circumstances", and the Governor himself assured Mr. Francis, the new Premier, that he had inserted the provisoes purposely.(1)

Mr. Francis was able to carry on successfully with the existing Assembly. He secured a dissolution early in 1874, and somewhat later resigned on account of ill-health, being replaced by Mr. Kerferd. On July 29, 1875, Mr. Kerferd's Government was sustained, 37-36, on an item in the Budget resolutions. It requested dissolution. Mr. Kerferd's Memorandum to the acting Governor set forth: (a) that at the election of 1874 the only issue was constitutional reform; (b) that there was now an important new issue, financial policy; (c) that the Assembly, by a majority of 10, had rejected a motion that the Government's financial proposals were "not satisfactory"; (d) that the Opposition was not united; (e) that the Government expected a "decided working majority", as the press indicated a public opinion favourable to the Government. Mr. Kerferd denied that the acting Governor must

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(1) Parliamentary Debates (Victoria), vol. 14, pp. 435, 468-474, 485; Todd, "Parliamentary Government in the British Colonies", 2nd. ed., pp. 771-774.

exhaust all possibilities of carrying on the Government with the existing Assembly; no British statesmen or writers said so.

The acting Governor, in refusing the request, agreed with Mr. Kerferd that it was desirable to adhere to British practice, but added, "as closely as circumstances will permit". The Victorian Assembly, he contended, was "differently constituted . . . from the House of Commons";(1) the application of British principles was "attended with some difficulty, and required, if possible, more circumspection". The majority of 10 to which Mr. Kerferd referred was not in a full House; the electorate must have considered finance among other subjects at the previous election; the press did not give an adequate indication of public opinion, and no change in the general position could reasonably be expected as a result of dissolution.(2)

Mr. Kerferd resigned, and on August 10, 1875, Sir Graham Berry formed a Government. On October 6, the new Cabinet was defeated in two divisions on its Budget proposals, 38-35, and 39-34. It asked for a dissolution, on the grounds (a) that the House elected in 1874 had not legislated on the one issue of that election: (b) that there were reasonable grounds, furnished by the results of ministerial by-elections and other indications of public opinion, for expecting that the Government would win the election; that the Opposition was disunited; (c) that the Assembly had transacted no public business, and had rejected the financial proposals of two Governments in two months. Mindful, evidently, of Lord Canterbury's words about refusing dissolution to one Government and then granting it to another, soon afterwards, on similar grounds, the Premier took pains to point out that his position was very different from Mr. Kerferd's in July. Mr. Kerferd had had a majority (which, it had been said, might have been three instead of

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(1) Just what this meant is not explained. It may have referred to the existence of a multiple-party system in Victoria.
(2) Parliamentary Debates (Victoria), vol. 21, pp. 923-927.

one had not some of his supporters been absent), and some said that it had been only one part of his financial scheme which had been in question.

The acting Governor refused, saying that there was no substantial difference between the two requests, and suggesting that the differences over the financial proposals were matters of detail rather than of principle. The Government then resigned, October 13, 1875.(1)

Sir James McCulloch took office October 20 and carried on till after the dissolution of 1877, when he resigned. On December 4, 1879, Sir Graham Berry's Government was sustained by 42-38 and 43 -38 on its Constitution Act Amendment Bill. Under the provisions of the Constitution, these majorities were insufficient to carry such a measure. The Government asked and obtained dissolution, December 9. The Governor's reasons for granting the request, communicated to the Assembly on December 16, were (a) that the Parliament would soon expire by efflux of time; (b) that the previous dissolution had been granted to the Government's opponents; and (c) that the Reform Bill had never been submitted to the electors in its then shape.(2)

The Berry Government resigned before the new Parliament met, and Mr. Service formed a Government. On June 24, 1880, a month and thirteen days after the opening of the session, the new Government's Constitution Act Alteration Bill was defeated, 43-41. The House then adjourned. Next day the Governor gave assent to bills awaiting it; on June 26 Parliament was prorogued by Proclamation, and on June 29 it was dissolved. The Government, in requesting dissolution, pointed out that the previous dissolution had been granted to its opponents, and that as 41 newspapers favoured the bill as compared with 17 against it, and public meetings had favoured the bill and dissolution, there was a reasonable expectation of a good working majority. The Governor, Lord Normanby, in granting the request, noted

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(1) Ibid., pp. 929, 1255, 1258-1261, 1272, 1277.
(2) Ibid., vol. 32, pp. 2167-2168, 2176, 2267.

that Sir Graham Berry had been so decisively defeated at the polls that he had not even met the new House; that therefore the country presumably favoured the principle of the Service Bill; that the question had been agitated for three years and must be settled; and that an alternative Government was impossible.(1)

The new Parliament met July 22, 1880. A vote of want of confidence moved by Sir Graham Berry was carried without a division, July 23, before the Speech from the Throne. On July 27 a want of confidence amendment to the Address carried 48-35. Next day the Service Government resigned, and on August 3 Sir Graham Berry took office again.(2)

On June 30, 1881, Sir B. O'Loghlen's motion of want of confidence in the Berry Government carried, 41-38. The Government asked for a dissolution, and was refused, July 5. Sir Graham Berry, in making his request, pointed out to the Governor (a) that the previous dissolution had been granted to his opponents; (b) that at that election the one issue had been constitutional reform, and that the Government had now settled this question; (c) that there were three or four parties in the Assembly, of which the Government's was the strongest; (d) that an alternative Government would be feeble; (e) that public meetings favoured dissolution; (f) that the Opposition had brought forward no policy; (g) that as the colonial Constitution was, according to May, the very image and reflection of parliamentary government in England, British practice applied in Victoria; (h) that, "all burning questions having been disposed of", this was a "singularly happy occasion for asking the country to decide who its Administrators shall be".

Lord Normanby replied that all authorities agreed that frequent and sudden dissolutions were bad. It was necessary that there should be

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(1) Ibid., vol. 33, p. 757, and extract from the Gazette at end of that volume.
(2) Ibid., vol. 34, pp. 42, 52-53, 59.

some great question of public policy at issue before a dissolution could properly be asked for. "It is not considered a legitimate exercise of the prerogative to dissolve simply for the purpose of strengthening a party which has lost its majority in the House." There had been two elections within sixteen months: one to Sir Graham Berry on his Reform Bill, when the then Opposition won a majority; one to Mr. Service on his Reform Bill, which he had placed before the country at the previous election and which the Assembly had defeated. At the second election, July 1880, the Service Government had been defeated, but the margin between the two parties had been only about 4,000 votes. Hence it was clear that neither party could expect a clear majority. To grant the principle that a Government had a right to dissolution on demand would deprive Parliament of its independence. The Cabinet would become "the master of Parliament instead of the servant of the Crown". It was true that there was no recorded case of refusal in England since 1832; but there were two reasons for this: first, that the same publicity was not given to such communications between the Crown and its advisers in England as in Victoria; second, that no British Government would ask for dissolution in such circumstances as those in which Sir Graham Berry was making his request. It was at least the Governor's duty to try to find an alternative Government before granting the request for dissolution, and he must therefore refuse in this instance to accept his Ministers' advice. The Berry Government then resigned, and Sir B. O'Loghlen formed a Government, which carried on with the existing Parliament.(1)

On August 28, 1894, the Patterson Government was defeated, 46-42, on a motion of want of confidence. On September 4 it obtained a dissolution. The previous dissolution had been granted to its opponents, in 1891, and they had, after defeat in the Assembly, January 18, 1893, by a vote

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(1) Ibid., vol. 36, pp. 2918-2920, 2929-2930.

of 45-42 on a want of confidence motion, resigned.(1)

On November 30, 1899, the Turner Government was defeated, 47-36, on a want of confidence motion condemning its administrative weakness and vacillating conduct of public business, culminating in the imprisonment of a man whose guilt the Government itself said was not proven and on whose case it had advised that no further action be taken. The Government asked for dissolution, and was refused, and Mr. McLean assumed office, December 5.(2)

On December 3, 1908, the Bent Government was defeated, 37-25, on a want of confidence motion. It secured a dissolution, December 7. It had had the previous dissolution, about two years before, and the maximum term of Parliament was three years.(3)

On December 4, 1913, the Watt Government was defeated, 31-29, in committee, on a "vital" portion of its Electoral Districts Bill. It asked for dissolution and was refused. The previous dissolution had been granted to a Government of the same party, October 24, 1911. Upon being refused dissolution, the Government resigned. Mr. Elmslie took office, with a Government of eight Ministers with, and four without, portfolio. Under the law as it then stood, all the Ministers with portfolio vacated their seats. In their absence, on December 9, one of the Ministers without portfolio moved the customary adjournment, which was defeated, 35-13. On December 11, a motion of want of confidence was moved, and on December 16 this carried, 40-13. Mr. Elmslie then tendered advice to dissolve, pointing out that his Labour Government had 20 supporters, the official Opposition 28, and the

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(1) Ibid., vol. 74, pp. 1578, 1580.
(2) Ibid., vol. 93, pp. 2830, 2835; Keith, "Responsible Government in the Dominions", 1928 ed., p. 163; Quick and Garran, "Annotated Constitution of the Australian Commonwealth" (Angus and Robertson, Melville and Mullen, 1901), p. 464.
(3) Parliamentary Debates (Victoria), vol. 119, p. 785; Evatt, op. cit., pp. 229-233. Keith, "Responsible Government in the Dominions", 1912 ed., pp. 193-198, and 1928 ed., pp. 165-166, says the Prime Minister supported his claim by citing the results of by-elections, and that the Governor took into account the parliamentary situation.

Conservative Corner party 12. The Governor declined the advice, Mr. Elmslie resigned, and a new Watt Government took office, December 22.(1)

On March 13, 1918, the Bowser Government was defeated, 23-22, on an item in its railway estimates, dealing with wages of the lower grades of railwaymen. It asked for dissolution, March 14, and was refused, March 19. The previous dissolution had been granted October 23, 1917, to the Peacock Government. On Mr. Bowser's resignation, Mr. Lawson took office, with a Government including six Ministers from Mr. Bowser's Government and three (of whom the Premier was one) from Sir Alexander Peacock's. This Government carried on for the rest of the life of the Parliament.(2)

On September 30, 1920, Mr. Lawson secured a dissolution. The election returned 31 Nationalists (Government), 20 Labour and 13 Farmers' Union. Mr. Lawson survived the first session, but near the beginning of the second, he was defeated, 33-28, on an amendment to the Address expressing want of confidence in the Government's wheat, redistribution, land settlement, hydro-electric and Morwell schemes. On August 2, the Government asked and secured a dissolution.(3)

On May 20, 1924, Sir Alexander Peacock's Government (successor to Mr. Lawson's), was defeated, 31-26 on its Electoral Districts Bill. On May 28 it obtained a dissolution.(4)

The new Parliament met July 8. On July 16, the Peacock Government was defeated, 43-16, on a want of confidence amendment to the Address, and resigned. Mr. Prendergast took office, his party, Labour, having 28 members to the Nationalists' 24 and the Country party's 12. On November 12, the new

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(1) Parliamentary Debates (Victoria), vol. 135, pp. 2980-2981, 2983, 3017-3018, 3020, 3130-3131.
(2) Ibid., vol. 140, pp. 875, 877-878, 893.
(3) Ibid., vol. 157, p. 350. The Round Table, vol. 11, p. 407, and vol. 12, p. 407, makes it clear that the main issue was a wheat guarantee, and that the mutual hostility of Labour and the Farmers' Union made an alternative Government impossible.
(4) Parliamentary Debates (Victoria), vol. 166, p. 3690.

Government was defeated on a vote of want of confidence, 34-28. According to Keith, it asked for dissolution and was refused. On Mr. Prendergast's resignation, Mr. Allan took office, and carried on for the rest of the life of that Parliament.(1)

After the election consequent upon the dissolution of March 4, 1927, the Allan Government resigned without meeting the new Parliament, and was succeeded by the Hogan Government. On November 14, 1928, this Government was defeated twice, by 31-30, on its redistribution proposals. On November 20 it was defeated 34-28 on a want of confidence motion attacking its alleged maladministration of the police department, inefficient protection to dockworkers, and policy in regard to the carrying out of the Commonwealth Arbitration Award. It asked for dissolution, was refused, and resigned, November 21.(2)

On October 23, 1929, the McPherson Government was defeated, 34-30, on a motion to adjourn to discuss the necessity of public works for unemployment and drought relief. It secured a dissolution, November 1.(3)

The new Parliament met December 11. The Government was at once defeated, 36-28, on a want of confidence amendment to the Address, and resigned; and Mr. Hogan assumed office December 12. On April 13, 1932, the Hogan Government was defeated, 29-25, on a want of confidence amendment to the Address; it obtained dissolution, April 22. The issue at stake was the Premiers' Plan.(4)

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(1) Ibid., vol. 167, p. 56; vol. 168, p. 1410; Keith, "Responsible Government in the Dominions", 1928 ed., p. 169.
(2) Parliamentary Debates (Victoria), vol. 178, pp. 2937-2938, 2961-2962.
(3) Ibid., vol. 180, p. 2542. One Minister in this Government, Sir S. S. Argyle, had been a member of the Allan Government.
(4) Ibid., vol. 181, p. 64, and vol. 183, pp. 76-77.

(iii) Queensland

The first Parliament of Queensland was dissolved May 22, 1863. On May 10, 1864, Mr. Douglas, Leader of the Opposition, moving for papers on the dissolution, said the Premier had had one election, had received a "damaging rebuff", and had then obtained a dissolution, which enabled him to make a second appeal to the electors. The Colonial Secretary replied that the appeal had been successful.(1)

Mr. Herbert's Government, which had obtained the dissolution of 1863, broke up through internal dissension early in 1866, and a new Coalition Government under Mr. Macalister took office. On July 19, this Government resigned because of a dispute with the Governor. There followed the episode of Mr. Herbert's temporary Government,(2) after which Mr. Macalister resumed office. On May 21, 1867, the Government was defeated, 19-5, on the question of the right of the Minister of Works to take his seat without a by-election. It thereupon advised and obtained a dissolution. The reasons given were (a) that Parliament had been in existence for four years of its five year term; (b) that since the last dissolution the population had nearly or quite doubled; (c) that parties were disorganized; (d) that, as there had been a Coalition Government, all parties had been tried and there were no further expedients to be tried before resorting to another election; (e) that in England and in the Australian colonies the Government was regarded as entitled to a dissolution in the last session of Parliament. It might have been added that the previous dissolution had been granted to a different Government, Mr. Douglas, one of the Ministers, having then been in Opposition.(3)

In the new Parliament, which met in August, the Government was

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(1) Parliamentary Debates (Queensland), vol. I, pp. 28-29. I have not been able to get any further information on this case.
(2) See below, p.343.
(3) Parliamentary Debates (Queensland), vol. III, pp. 45-47, 497; vol. IV, pp. 189, 197-198.

victorious, 16-14, but resigned, August 14. Next day Mr. Mackenzie assumed office. On August 11, 1868, his Government was defeated, 13-11, on an amendment to the Address. The Government said it thought itself entitled to a dissolution, once redistribution had been carried; but it did not press this claim, preferring to tender its resignation. The Governor, however, refused the resignation. A most interesting debate followed. Mr. Macalister, for the Opposition, claimed that the Government had no right to carry on pending the passing of a Redistribution Bill. It must resign or dissolve at once. In support of his contention he quoted an article in the Saturday Review. This article condemned Disraeli's doctrine that a Government defeated in a House elected under its opponents' auspices was entitled to ask for a dissolution, and approved Gladstone's counter-proposition that even in these circumstances there must be some great question of public policy at issue and a reasonable probability of the electorate's reversing the decision of the House.(1) But it thought Gladstone's statement of the constitutional position incomplete. Even if the Government were undefeated, even if victory were not reasonably certain, even if the question were mainly one of the Government's own existence, the Government might properly dissolve if it had become impossible to carry on public business because support and opposition were so nearly equal. But dissolution, the article insisted, was "always an exceptional remedy. . . . The House of Commons is prima facie the exponent of the national will; and if the Ministry does not possess the confidence of the House of Commons, it ought to resign. . . . Far from having an inherent personal right to dissolve, a Minister must always show why he does not resign and why he dissolves. . . He must show that there are special reasons why immediate recourse should be had to an extraordinary and irregular manifestation of the national will.

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(1) See below, pp. 131-133.

. . . Either he must show that the national will has not been declared in the existing Parliament, because through the equality of parties, the shufflings and vacillations of members, or the varying views to which the House commits itself, there is no manifestation of the national will in the deliberations and decisions of the House; or else he must state that, on some great question, the national will is not really expressed by the existing Parliament, and to the best of his belief, a new Parliament would take a very different view, and represent the nation far more adequately." There must be something beyond the mere question of the auspices under which the previous election was held. But "if one Ministry after another were defeated, a dissolution must ultimately prevent this idle succession of weak Ministries, not because the particular Ministry advising the dissolution was not in office when the House of Commons was elected, but because its defeat, following on the defeats of the other Ministries, had established that the existing House of Commons was not a proper and adequate expression of the national will."

The Colonial Secretary replied that it was in fact impossible for either party to carry on in the existing Assembly. Dissolution followed almost immediately, without the passing of a Redistribution Bill, the debate having shown that such a bill would have no chance of adoption.(1)

In the new Parliament, on November 19, the Government was sustained on the Address only by the Speaker's casting vote. It resigned, November 24, and Mr. Lilley took office. On December 30, this Government was defeated, 14-10, on the election of a Chairman of Committees; but after a reconstruction, the Cabinet carried on.(2)

On April 26, 1870, the Lilley Government was defeated, 17-6, on the Address. It considered it was entitled to a dissolution, but did

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(1) Parliamentary Debates (Queensland), vol. VII, pp. 73, 84-85.
(2) Ibid., vol. VIII, pp. 72-73, 95.

not ask for one, preferring to resign, April 27. Mr. Palmer took office. When, on July 7, his Government in turn was defeated, 17-11, on a want of confidence amendment to the Address, he asked and obtained dissolution, July 12. His reasons for making the request were (a) that the first Government which had met the existing House had resigned after being sustained only by the Speaker's casting vote; that the second Government had then been defeated, 17-6; that the mover of the amendment which had defeated that Government had failed to form a Government, and he (Mr. Palmer) had taken office as a last resort; that there was therefore no alternative to a dissolution left to try; (b) that the previous dissolution had taken place under the auspices of his opponents; (c) that there was a reasonable expectation of success at the polls; (d) that there was a great question of public policy at issue, namely, whether a large increase of debt and taxation should be incurred to build new railways, or whether the Government should borrow only to meet existing liabilities, finish the railways already contracted for, and put the roads into passable condition.

The Governor, in granting dissolution, noted the terms of the want of confidence amendment. It had called for (a) encouragement to native industries, (b) a general railway policy, (c) repeal of the two-thirds clause in the Constitution, and (d) separation of the northern territory. The first involved Protection. On the second, the old Government's policy had been defeated. The third, the existing Government had proposed to deal with. The fourth had never before been submitted to the constituencies. Both parties had been defeated in the House, and there were vital issues at stake.(1)

At the end of 1879 the Douglas Government obtained a dissolution. On January 16, 1880, it was defeated, 32-20, on an amendment to the Address.

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(1) Ibid., vol. X, pp. 14-15, 112-114.

Next day it made way for the McIlwraith Government. On July 5, 1883, this Government was defeated, 27-16, on its Transcontinental Railway Bill. It asked and got a dissolution, Supply being first voted.(1)

On September 9, 1903, Mr. Philp's Government was sustained, 33-31, in Committee of Ways and Means, but resigned. Mr. Morgan took office. On June 22, 1904, the Morgan Government was sustained, 36-35, and asked for a dissolution. It was refused, June 28, and resigned. The Governor then called on Sir A. Rutledge, Mr. Philp's successor, to form a Government, July 5. On July 12, Sir A. Rutledge confessed that he had been unable to do so. The old Government, which had retained office pending the appointment of its successor, then renewed its request for dissolution, which was granted, July 21. The previous dissolution had been granted in 1902 to the Government's opponents.(2)

The election of May 1907 resulted in the return of 31 Conservatives, 27 Liberals, and 17 Labour. The new Parliament met in July. Mr. Kidston's Liberal Government, which had the general support of Labour, asked for enough appointments to the Upper House to ensure passage of its measures. The Governor, Lord Chelmsford, refused, and called on Mr. Philp, the Conservative leader, to form a Government. When, on November 12, Mr. Philp asked the Assembly to adjourn to allow him time to form his Cabinet, it refused, and passed a resolution expressing disapproval of the contemplated change of Government. Mr. Kidston then, at the Governor's request, asked the Assembly to adjourn, which it agreed to do. On November 19, the Philp Government met the House, which promptly refused Supply, and on November 20 refused to adjourn. On November 22, the House again refused Supply and addressed the Governor, saying that the new Government did not

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(1) Ibid., vol. XXXIX, p. 147.
(2) Ibid., vol. XCI, p. 503, and vol. XCII, pp. 559-561, 563-564.

have the confidence of the House and requesting him not to grant a dissolution. The Governor none the less granted dissolution. The previous dissolution had, of course, been granted to the Government's opponents.(1)

Mr. Philp's Government was defeated in the elections, and resigned. Mr. Kidston resumed office. During the session of 1909 he was several times sustained only by a majority of 1, and on August 31, 1909, he secured a dissolution.(2)

(iv) South Australia

The first South Australian Parliament was elected early in 1857, and opened April 22, 1857. On August 11, the Finniss Government resigned, after defeat in the Assembly. Mr. Baker took office, but on August 27 he also resigned, after defeat in the Assembly. Mr. Torrens then took office, but on September 24 he in his turn resigned, after defeat in the Assembly. Mr. Hanson took office, but on May 21, 1859, he also resigned, after defeat in the Assembly. He resumed office, however, and on March 1, 1860, obtained a dissolution in the ordinary course.(3)

Shortly after the second Parliament met, the Hanson Government resigned and the Reynolds Government took office, May 9, 1860. On September 1, 1860, it was sustained only by the Speaker's casting vote, but carried on till May 14, 1861, when it resigned, after defeat in the Assembly. Mr. Reynolds then formed a second Government, which also suffered defeat in the Assembly, and resigned, October 8, 1861. A new Government lasted from

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(1) Ibid., vol. C, pp. 1735 et seq.; vol. CI, pp. 38 et seq.; Keith, op. cit., 1912 ed., p. 325; Evatt, op. cit., pp. 137-138.
(2) Parliamentary Debates (Queensland), vol. CIII, pp. 31-32, 468, 580, 595-597, 645.
(3) Journals of the Legislative Assembly, 1857-58, pp. 135, 144-145, 182; 1859, p. 51; South Australian Blue Books listing Parliaments and Ministries, with dates, hereinafter referred to as "South Australian Blue Books".

October 8 to October 15, when it was defeated and resigned. The Waterhouse Government, formed October 17, 1861, resigned in July 1862 "on a question of 'assimilation of tariffs', but, after explanations, the resignations were withdrawn. In September the 'Ministry, considering that they had not a sufficient majority to carry on the business of the country',(1) again placed their resignations in the hands of the Governor, but an arrangement was made that the existing Ministry should continue in office until the prorogation on the 21st. of October."(2) On October 22, 1862, Parliament was dissolved.

The first session of the third Parliament met February 27, 1863. On June 30, the Waterhouse Government resigned. Mr. Dutton took office, but on July 7 was defeated in both Houses, and resigned next day. Mr. Bagot and Mr. Stow then successively tried to form Governments and failed. Mr. Ayers succeeded in forming a Government and finishing the session, though "up to the very last hour . . . the Ministry was in jeopardy, a member being in the act of moving a vote of censure when the arrival of the Governor to prorogue Parliament was announced."(3)

Mr. Ayers' first Government lasted till July 22, 1864, his second from July 22 to August 4, 1864. Mr. Blyth then took office. On August 9, 1864, the Assembly expressed dissatisfaction with the Government, 18-16. "On the 29th. of November such an attack was made on the Government that it was felt at length there was no other course left but to advise the Governor to dissolve the House, a course he consented to adopt and carry into effect

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(1) The Journals of the Legislative Assembly, 1862, p. 286, show the Government sustained only by the Speaker's casting vote on a motion of want of confidence.
(2) Journals of the Legislative Assembly, 1860, p. 215; 1861, pp. 23, 251, 261; South Australian Blue Books; Edwin Hodder, "History of South Australia" (Sampson Low, Marston, 1893), vol. I, pp. 365, 367.
(3) Hodder, op. cit., vol. I, pp. 367-368. The Journals do not record the moving of a vote of censure at the close of the session.

so soon as the business then on hand was disposed of."(1) Dissolution took place January 25, 1865.

Mr. Blyth resigned, March 22, 1865, without meeting the new Parliament. Mr. Dutton took office. On September 20, 1865, he resigned. Mr. Ayers then took office, but was defeated, October 19, and resigned. Mr. Hart took office, October 21, and carried on till March 27, 1866, when his Government was succeeded by Mr. Boucaut's. This Ministry lasted till May 2, 1867, when it gave place to another Ayers Government.(2)

On March 20, 1868, Parliament was dissolved in the ordinary course. The new Parliament met July 31. In September, it rejected the Government's land scheme, and Ministers resigned. Mr. Hay and Mr. Townsend both failing to form Governments, the Governor sent for Mr. Hart, who formed a Government which lasted from September 23 to October 12. Mr. Ayers then took office. His Ministry lasted till October 23, when "the acting Governor was advised to prorogue Parliament with a view to an immediate dissolution. . . . This catastrophe was, however, averted" by the formation of a new Government under Mr. Strangways, November 2, 1868, and "the session closed without the dissolution which more than once threatened the House of Assembly."(3)

During the session of 1869, the Strangways Government encountered many difficulties in the House, and suffered repeated minor defeats. On February 2, 1870, the Government was defeated, 12-9 and 13-9, on a motion to reduce salaries. On February 17, Ministers were again defeated on a motion expressing regret that they had advised dissolution, and asking the Governor to dismiss them. The Governor replied that he had already granted the request for dissolution. He noted that four Governments in less than

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(1) Journals of the Legislative Assembly, 1864, p. 117; South Australian Blue Books; Hodder, op. cit., vol. I, p. 369.
(2) Journals of the Legislative Assembly, 1865-66, p. 34; South Australian Blue Books.
(3) South Australian Blue Books; Hodder, op. cit., vol. II, pp. 1-2, 4-5.

one and a half years had all failed to retain the confidence of the Assembly. Dissolution took place March 2, 1870.(1)

After the election, Mr. Strangways reconstructed his Government, but at the beginning of the session he was crushingly defeated, and on May 28 he resigned. Mr. Hart took office, May 21. The second session of the sixth Parliament opened on July 28, 1871. On November 16, a motion of want of confidence was carried by the Speaker's casting vote. Mr. Boucaut, Mr. Ayers and Mr. Blyth having all found themselves unable to form Governments, the Governor granted dissolution. On November 22, the Assembly passed, 20-9, an Address to the Governor regretting the advice to dissolve and asking dismissal of Ministers. The Governor replied, November 23, refusing the prayer of the Address, and dissolution took place the same day.(2)

On October 18, 1877, a vote of want of confidence in the Colton Government was carried by the Speaker's casting vote. Mr. Colton resigned and Mr. Boucaut took office. On March 13, 1878, the new Government obtained a dissolution.(3)

The Downer Government, formed June 16, 1885, secured a dissolution in the ordinary course, March 2, 1887. On June 11, 1887, it resigned, and Mr. Playford took office. On December 6, 1889, after some (apparently minor) defeats in the Assembly, the Playford Government obtained a dissolution.(4)

On November 28, 1899, the Kingston Government was defeated on the adjournment, 26-25. It asked for dissolution, and was refused, November 29.

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(1) Journals of the Legislative Assembly, 1870, pp. 322, 356-357, 362; South Australian Blue Books; Hodder, op. cit., vol. II, p. 13.
(2) Journals of the Legislative Assembly, 1871, p. 5; 1871, second session, pp. 226, 235, 237; South Australian Blue Books; Hodder, op. cit., vol. II, pp. 15-17.
(3) Journals of the Legislative Assembly, 1877, p. 236; South Australian Blue Books.
(4) Journals of the Legislative Assembly, 1889, passim; South Australian Blue Books.

The previous dissolution had been granted to the same Government, May 1899. The Solomon Government took office December 1, was defeated on the adjournment, 25-22, on December 5, and resigned, December 7. Sir Frederick Holder then took office and was able to carry on with the existing House.(1)

In October 1906, Mr. Price's Government became involved in a dispute with the Upper House over the Council Franchise Extension Bill, and asked for dissolution. On October 4, the Governor refused. He pointed out that Parliament had not been long in existence, and that the Government had

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(1) Assembly Debates, 1899, pp. 918-919, 943; Council Debates, pp. 303-304.

only a small majority. He did not feel he could grant dissolution till all other means of carrying on the government had been exhausted. Efforts to find an alternative Government proving fruitless, the Governor retained Mr. Price in office, and on October 10 announced that he had accepted his advice to dissolve for the purpose of getting a mandate for the bill under dispute.(1) The previous dissolution had been granted to the Government's opponents nearly two years before.

Early in 1912, the Verran Government obtained a dissolution because of a dispute between the two Houses over the Appropriation Bill. The previous dissolution had been granted to its opponents two years before.(2)

(v) Tasmania

On July 20, 1872, the Wilson Government was defeated 16-14, on a want of confidence motion alleging that it had "no financial policy". On August 7, a motion to rescind the vote of want of confidence was lost, 15-14. On August 19, the Government obtained a dissolution. Parliament was in its second session, the previous dissolution having been granted to the same Government, August 7, 1871.(3)

In the second session of 1872, the Government was defeated twice, by 17-13, on a want of confidence amendment to the motion to go into Supply. It resigned, and Mr. Innes took office. On July 28, 1873, his Government was defeated, 14-10, on a motion to adjourn the debate on the Wast Lands Act Amendment Bill, and on July 30, 16-15, on a motion of want of confidence in its financial measures. It resigned, and Mr. Kennerly took office. In 1876, during the parliamentary recess, Mr. Reibey took office. On October 17, he was defeated, 11-5, on the representation of mining inter-

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(1) Council Debates, 1906, pp. 177, 188; Keith, "Responsible Government in the Dominions", 1912 ed., pp. 192-193, and 1928 ed., p. 165.

(2) Council Debates, 1912, pp. ; Assembly Debates, 1912, pp.

(3) Journals of the Legislative Assembly, vol. XXIII, pp. 48, 60.

ests in the House. On November 2, he was again defeated, 13-9, on an appropriation for a main road, and on November 17, by the Speaker's casting vote, on the question of the Colonial Treasurer's apology to the Upper

House. At the end of the session, however, he won adjournment, 12-11. On January 19, 1877, the Reibey Government was defeated again, 13-11, on the adjournment; on January 23, by the Speaker's casting vote, on a motion of censure for pardoning Mrs. Hurst. In the second session of 1877, the Government was again defeated, May 9, 16-13, on a motion that, to secure the concurrence of both Houses "in Public Works and Taxing measures", other Ministers were necessary. The Government thereupon asked for dissolution, on the grounds that (a) it had a reasonable expectation of success at the polls; (b) there was a great issue of public policy, public works and taxation, at stake; (c) it was necessary to secure co-operation between the two Houses. The Governor granted dissolution, noting that there had been conflict between the two Houses for several years and that the existing Parliament was "moribund" through efflux of time. Reporting to the Secretary of State, he noted that the Reibey Government had succeeded to office on the voluntary resignation of its predecessor during the recess; that it had not yet had a dissolution; that public business had been hung up by personal questions under both Governments; and that he had made it perfectly clear to Mr. Reibey in conversation that "nothing but the most extreme and clear public necessity would justify the Crown in dissolving after Supplies had been refused", and that if the Assembly refused Supplies in this case, he would have to reconsider his decision. He felt that a Governor should be more careful in granting dissolution than the Crown in Britain, "as he must sometimes be advised by ministers not sufficiently determined to waive small party advantages, somewhat accustomed occasionally to the sledge-hammer style of political warfare, and not uniformly imbued with that constitutional knowledge and spirit which often seems hereditary and is generally inherent in British statesmen."(1)

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(1) Ibid., vol. XXIV, pp. 20-21; vol. XXV, pp. 68, 72-73; vol. XXX, pp. 60, 89, 130; vol. XXXII, pp. 139, 147, 150, and second session, pp. 29, 31-32; Parliamentary Papers (Tasmania, Legislative Council), 1877, no. 19.

In the third session of 1877, the first of the seventh Parliament, the Reibey Government was defeated, July 31, on the adjournment of the debate on a want of confidence motion, 15-14, and on August 1, on a want of confidence amendment to the motion to go into Supply, 15-14. It resigned, August 9, and Mr. Fysh took office.(1)

On December 17, 1878, the Giblin Government (2) was defeated, 16-14, on a motion of want of confidence in its financial policy. It resigned, and Mr. Crowther took office. On October 9, 1879, the Crowther Government was victorious, 15-13, on a motion for economy and tariff revision before income tax, but on October 18 it was defeated, 15-14, on a motion of want of confidence. It requested dissolution, on the grounds that: (a) parties were so nearly equal that it was difficult, if not impossible, for any Government to carry on; and (b) that there were great issues of public policy at stake, namely income and property taxation and constitutional reform. The Governor, however, refused, because (a) the previous dissolution had taken place only a little over two years before, under the auspices of the same party; (b) there was no ground for believing that a new election would alter the strength of parties; (c) there was no distinct division between parties on any question to be put to the country; (d) an Income Tax Bill had been passed in the last session and the principle of direct taxation had been virtually reaffirmed; (e) the appeal would be on a financial policy never rejected by the Assembly, nor by the Council at this session; (f) that the issue had "not taken a substantial form, or become a line of party demarcation"; (g) that the Legislative Council had expressed no opinion on the issue this session; (h) that the real issue at an election would be a "personal question of confidence in certain Members of the Ministry . . . or of the

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(1) Journals of the Legislative Assembly, vol. XXXII, third session, p. 40; also vol. XXXIII, p. xxvii.
(2) Mr. Giblin had succeeded Mr. Fysh, without any other change in the Cabinet.

opposition"; (i) that the financial position was suffering by the delay of urgently necessary measures; (j) that dissolution was not warranted until it had been "proved" that there was no alternative.(1)

Mr. Giblin took office on the resignation of the Crowther Government. During 1881 Mr. Giblin suffered a series of minor defeats, including two by the Speaker's casting vote. On the other hand, he was successful in a considerable number of divisions. But his hold upon the House was plainly insecure. On May 5, 1882, he obtained a dissolution. The previous dissolution had been granted five years before to the Government's opponents.(2)

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(1) Journals of the Legislative Assembly, vol. XXXVI, pp. 31, 34-36.
(2) Ibid., vol. XL, pp. 31, 33, 43, 58, 70-71, 77-79, 82, 156-157, 173, 176-178, 188, 194.

On August 7, 1884, the Government was defeated, 15-8, on a motion to refer a question of guns, ammunition and torpedo stores to the committee on Torpedo Stores and Appliances, and on August 13 it resigned. The Douglas Government took office. During the session of 1885 it suffered a large number of minor defeats, several of them by the Speaker's casting vote. On June 28, 1886, the Agnew Government (successor to the Douglas Government) secured dissolution.(1) The previous dissolution had been granted to its opponents over four years before.

In 1887, during the parliamentary recess, the Agnew Government resigned and Mr. Fysh took office, March 29. On April 30, 1891, he obtained dissolution. On August 17, 1891, his Government resigned, and Mr. Dobson took office. On October 31, 1893, the Dobson Government was defeated, 14-10 and 15-13, on the Ulverstone Railway Bill, and on November 1, by the Speaker's casting vote, on the adjournment of the debate. It obtained dissolution, December 2.(2) By the Act 54 Victoria, c. 58 (1891), the term of Parliament had been shortened to three years; and the previous dissolution had been granted to a different Government.

Sir E. N. C. Braddon secured a dissolution in the ordinary course, December 29, 1896. On October 6, 1899, the Lewis Government was defeated, 16-15, on a motion of want of confidence. It secured dissolution, January 26, 1900.(3)

The Lewis Government secured another dissolution in the ordinary course, March 11, 1903. It was defeated, and resigned before the new Parliament met. Mr. Propsting's Government took office, April 9. On October 1, the two Houses disagreed on the Income Tax, and the Government asked for

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(1) Journals and Papers of Parliament (Tasmania), Assembly, vol. I, pp. 64, 69, 71; vol. IV, pp. 26, 41, 58, 69, 71, 101-102, 119-121, 132, 146, 148-149, 156, 159, 164, 180, 181, 184, 192, 200-202, 217-219, 232, 238, 253, 256.
(2) Ibid., vol. XXVII, pp. 254, 262.
(3) Ibid., vol. XL, p. 324.

dissolution. The Governor asked time to consider, as the Legislative Council had not finally pronounced on the question. On October 8, the dispute was settled without dissolution.(1)

On June 17, 1904, the Government was defeated, 12-10, on a motion for a Select Committee to inquire into the case of the Government Analyst, and also, 16-10, on a motion for a Select Committee to inquire into the Education Department. The Upper House had repeatedly rejected taxation measures. The Government asked for dissolution. The acting Governor refused, because (a) there had been, he said, no adverse vote in the Assembly; (b) the Government was having to give up its taxation proposals anyway, on account of the financial situation; (c) the Government had no definite new proposals; (d) the House was only fifteen months old; (e) an election would be expensive; (f) there was now no great difference between the two Houses.(2)

The Government resigned, and Mr. Evans took office, July 12, 1904. He secured dissolution in the ordinary course, March 2, 1906 and March 26, 1909. Before the new House met, Mr. Evans resigned, and was succeeded by Sir Elliott Lewis, who had not been a member of the Evans Government, and whose Ministry included only one of Mr. Evans' colleagues. On October 15, the new House voted, 18-10, want of confidence in the taxation policy of the Lewis Government, and Sir Elliott Lewis resigned. Mr. Earle, the Labour leader, took office October 20. Three days later the House voted want of confidence in his Government, 16-10. Mr. Earle thereupon asked for a dissolution. He pointed out that the previous dissolution had been granted to his opponents; that Mr. Evans had resigned before the new House met; that no member had been elected as a supporter of Sir Elliott Lewis personally; that the House contained 12 Labour members, 11 Lewis supporter, and 6 others,

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(1) Ibid., vol. XLVIII, pp. 97, 108.
(2) Ibid., vol. L, pp. 142, 159; Keith, "Responsible Government in the Dominions", 1912 ed., pp. 200-204.

of whom 3 were more or less sympathetic with Labour and 1 followed a middle course "inclining in many respects towards" Labour. The Opposition was united only against Labour, and contained no material for forming a stable Government. The attempt to unite in one party members elected on various policies was "a misrepresentation of the electors"; and the records of Parliament showed it had failed. "Within a week" the House had voted no confidence in two Governments. The Labour Government had been given no chance to carry on public business. It had had no chance of stating its policy as a Government at an election. It had new financial proposals, never yet submitted to the country. There was no possible alternative with sufficient support to carry on satisfactorily in that House. The Government had reasonable grounds for expecting victory at the polls.

The Governor refused the request. He said that the Labour party had had a chance of stating its policy at the election and of winning support; that in his judgment the Government had not reasonable grounds for expecting success; that the two Oppositions had arranged a coalition; that there was no new issue not before the electors at the previous election; and that it was undesirable to incur the "expense and unrest" of a fresh election "after such a short interval of time".(1)

The Earle Government then resigned, and Sir Elliott Lewis resumed office and carried on the government till after the dissolution of April 4, 1912, when, before the meeting of the new Parliament, he made way for a successor, Mr. A. E. Solomon. The election had resulted in the return of 15 Government supporters, 14 Labour and 1 Independent. Mr. Solomon's position was therefore precarious. He suffered several minor defeats, and was again and again sustained only by a majority of 1 or by the Speaker's casting vote. On December 13, when the session was practically over, the

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(1) Journals and Papers of Parliament (Tasmania), Assembly, vol. LX, pp. 140-141, 144; Parliamentary Papers (Tasmania), no. 52 of 1909.

Independent member deserted the Government. Mr. Earle then gave notice of a motion of want of confidence. The Speaker undertook to resign; the Independent proved unable, after all, to come to terms with Labour; and the motion of want of confidence was accordingly dropped. Clearly, however, a House constituted as this one was was incapable of providing an effective Government; and on December 27 Mr. Solomon obtained a dissolution.(1)

The election resulted in the return of 16 Government supporters and 14 Labour members. On April 1, 1914, however, a want of confidence motion carried, 15-14. The Government asked for dissolution. The Governor refused, and sent for Mr. Earle, informing him that he wished him to take office on condition of advising an immediate dissolution. Mr. Earle demurred, but accepted office. Once installed, he declined to advise dissolution. On April 7, four days after taking office, he set forth his reasons in a memorandum to the Governor. "Two of the cases" in which dissolution should be refused, Mr. Earle stated, were: when there is no alternative Government possible with the existing Parliament; and when there is no important political question directly at issue. In this case an alternative to the late Government had clearly been possible, and both parties were agreed that there ought to be a change in the electoral system before another election took place. By refusing dissolution to the late Government, the Governor had committed himself to the view that dissolution was not warranted.

The Governor replied that he was not forcing Mr. Earle to do something he was unwilling to do; that Mr. Earle had accepted office on the clear understanding that he was to advise an immediate dissolution. He added that the position of the Governor was not parallel to that of the Sovereign in the United Kingdom: the Governor was not obliged to act on advice in the same sense as the Crown in the United Kingdom. Next day,

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(1) Cd. 6863 of 1913, pp. 111-112.

the Assembly, without a division, voted that the Governor's imposing of conditions was "contrary to the well established usage of Responsible Government". The matter was referred to the Secretary of State for the Colonies, who agreed that the Governor's action in imposing conditions was unconstitutional; that Mr. Earle had accepted responsibility for the pledge that he would advise dissolution, but had then changed his mind; that in these circumstances, the only means of securing dissolution which the Governor could adopt were to persuade Mr. Earle to change his mind again, or to dismiss him and find advisers who would agree to a dissolution.(1)

The Nationalist Government received a dissolution in the ordinary course, April 27, 1922. The elections resulted in the return of 12 Nationalists, 12 Labour members, 5 Country party and 1 Independent. On October 25, the Lee (Nationalist) Government resigned, after the defection of some Nationalists had made its position untenable. It attempted to get a dissolution, but the Administrator refused.(2)

Mr. Lyons took office, and carried on till April 20, 1925, when he secured a dissolution. He won the election, and continued in office throughout the succeeding Parliament.

(vi) Western Australia

The third session of the fourth Parliament was held in 1904. The fifth Parliament was dissolved in September 1905, on the advice of the Rason Government, which had succeeded to office on the resignation of its predecessor. The first session of the sixth Parliament opened November 23, 1905. In 1906, Mr. Rason resigned during the recess, and Sir Newton Moore took office. The new Prime Minister and two of his colleagues had been members of the Rason

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(1) Journals and Papers of Parliament (Tasmania), Assembly, vol. LXX, pp. 9, 33-34; Parliamentary Papers (Tasmania), no. 6 of 1914.
(2) Round Table, vol. 14, p. 831.

Government. In the autumn of 1907, the Upper House, by a majority of 2, rejected the Government's land tax proposals. Sir Newton Moore asked for dissolution. The Governor refused, and also refused to accept the Government's resignation, on the ground that his Ministers commanded the approval of the Assembly. He prorogued Parliament from September 19 till October 8, in the hope that during the recess the two Houses would adjust their differences. His hope was fulfilled.(1)

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(1) Parliamentary Debates (Western Australia), vol. XXXI, p. 1504; Keith, op. cit., 1928 ed., p. 166.

(vii) The Commonwealth

The first Parliament of the Commonwealth was dissolved November 23, 1903, Mr. Deakin's Government being then in office. On April 21, 1904, the Deakin Government was defeated, 38-29, in committee on its Conciliation and Arbitration Bill. It resigned, and Mr. Watson (Labour) took office, April 27. On August 12, the Watson Government was defeated, 36-34, on its Conciliation and Arbitration Bill. It asked for dissolution and was refused.(1) No documents in the case were made public, but Keith says the refusal was "no doubt on the broad ground that the possibilities of Parliamentary Government had by no means been exhausted",(2) and "the possibilities of carrying on the Parliament were not exhausted, as indeed was the case".(3) Evatt notes that "Parliament was less than eight months old, and the state of parties was: Labour 24, Mr. Deakin's party (Protectionists) 27, Mr. Reid's party (Free Trade) 24."(4) It might be added that Supply had not been voted.

Mr. Reid took office. On June 30, 1905, he was defeated on the Address, 42-25, asked for dissolution, and was refused.(5) Evatt's comments are that "Parliament still had more than half its normal life of three years outstanding", and that Mr. Deakin was able to form a Government which carcied on for the rest of that Parliament.(6)

On November 5, 1906, Parliament was dissolved, Mr. Deakin being of course in office. Mr. Deakin retained office till November 1908, when Mr. Fisher (Labour) took office. On December 11, 1908, at the end of the session, the state of parties was: Labour 27, Deakin 15, Reid-Cook 32. Before the new

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(1) Parliamentary Debates (Commonwealth), vol. XIX, p. 1243; vol. XXI, pp. 4264-4265.
(2) Op. cit., 1912 ed., p. 191.
(3) Op. cit., 1928 ed., p. 164.
(4) Op. cit., p. 50.
(5) Parliamentary Debates (Commonwealth), vol. XXV, pp. 133-135. Turner, "Australian Commonwealth" (Mason, Firth and McCutcheon, 1911), pp. 97-100, says Mr. Reid had proposed to introduce a Redistribution Bill in order to get dissolution.
(6) Loc. cit.

session opened, May 26, 1909, a fusion of the Opposition parties had taken place. On May 27, 1909, the Fisher Government was defeated, 39-30, on the adjournment of the debate on the Address.(1) It asked for dissolution, setting forth its reasons in a memorandum to the Governor-General. A Cabinet, it contended, was entitled to a dissolution: "1. When a vote of 'no-confidence', or what amounts to such, is carried against a Government which has not already appealed to the country. 2. Where there is reasonable ground to believe that an adverse vote against the Government does not represent the opinions and wishes of the country, and would be reversed by a new Parliament." At the election there had been a definite assumption, so some of Mr. Deakin's party said, that there was no possibility of compromise between Mr. Deakin and the Reid-Cook party. Many members, the Government added, had been elected to support the measures set forth in the Speech from the Throne. "3. When the existing Parliament was elected under the auspices of the opponents of the Government. 4. When the majority against the Government is so small as to make it improbable that a strong Government can be formed from the Opposition. 5. When the majority against the Government is composed of members elected to oppose each other on measures of the first importance, and in particular upon those submitted by the Government. 6. When the elements composing the majority are so incongruous as to make it improbable that their fusion will be permanent. 7. When there is good reason to believe that the people earnestly desire that the policy of the Government shall be given effect to. All these conditions, any one of which is held to justify a dissolution, unite in the present instance."(2) The Governor-General refused the request. Evatt says the refusal was in accord with previous Australian practice.(3) Keith says it was "prima

(1) Evatt, op. cit., pp. 50 et seq.; Parliamentary Debates (Commonwealth), vol. XLIX, pp. 126, 228.
(2) Quoted in Evatt, op. cit., pp. 50-54.
(3) Op. cit., p. 54.

facie contrary to constitutional usage".(1)

On April 23, 1913, the Fisher Government (Labour) secured a dissolution in the ordinary course. The election returned 38 Liberals, under Mr. Cook, and 37 Labour members. In the Senate, however, the standing was Labour 29, Liberals 7. In June 1914, the Cook Government asked for double dissolution on the Government Preference Prohibition Bill, under the terms of section 57 of the Commonwealth Constitution. This section provides that the Governor-General may dissolve both Houses if the Senate rejects a bill passed by the House and after an interval of three months the House, in the same or the next session, again passes it. There was no precedent for such a request, and the Governor-General, before giving his decision, consulted Sir Samuel Griffith, the Chief Justice, and Sir Harrison Moore. Both assured him that he had a discretionary power in the matter, and was not a mere passive instrument in the hands of his Ministers. Sir Samuel Griffith's opinion is particularly notable. He said that the power of double dissolution "should . . . be exercised only in cases in which the Governor-General is personally satisfied, after independent consideration of the case, either that the proposed law as to which the Houses have differed is one of such public importance that it should be referred to the electors of the Commonwealth for immediate decision by means of a complete renewal of both Houses, or that there exists such a state of practical deadlock in legislation as can only be ended in that way. As to the existence of either condition, he must form his own judgment." The Governor-General "is not bound to follow that advice Ministers' , but is in the position of an independent arbiter." He should have regard, among other things, to the state of parties, whether the resignation of Ministers would follow his refusal to act upon their advice, and whether in such an event another Government could be formed which

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(1) Op. cit., 1928 ed., p. 165.

could carry on without a dissolution of the House.(1) Evatt thinks it clear that the Governor-General followed Sir Samuel Griffith's opinion, for Lord Novar himself explained that he based his decision on the "parliamentary situation" and the impossibility of finding an alternative Government.(2) The Governor-General granted the request for double dissolution, which took place on July 30, 1914.

Keith in 1917 treated this case as establishing for the Commonwealth what he then regarded as the United Kingdom convention that the Crown had no discretion in granting or refusing dissolution.(3) Evatt's comments are: "Keith gives too little attention to the particular facts of the case and the facts are of supreme significance";(4) and: "I have never appreciated the force of the argument that because the Governor-General chose to act upon the advice of Ministers who retained the full confidence of the House of Representatives (so that the possibility of any alternative Ministry had to be ruled out of consideration) therefore every Governor-General must act upon the advice of Ministers who had been defeated in the House of Representatives (so that the possibility of an alternative Ministry was immediately suggested, and such possibility might be capable of exclusion only by the Governor-General consulting the views of leading members of the House, or by a subsequent test vote of the House). The argument is a plain non sequitur."(5)

On October 9, 1928, the Bruce Government secured a dissolution in the ordinary course. Early in the autumn of 1929, its Maritime Industries

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(1) 18 Canadian Bar Review, no. 1, pp. 4-5. Sir Samuel added that "the element of the duty of an independent exercise of discretion on the part of the Governor-General" entered also into the question of granting or refusing dissolution of the Lower House alone.
(2) Ibid.
(3) Journal of Comparative Legislation, second series, vol. xvii, pp. 227-231.
(4) "The King and His Dominion Governors", p. 46; 18 Canadian Bar Review, no. 1, loc. cit.
(5) 18 Canadian Bar Review, no. 1, p. 4. For Keith's reply, see 18 Canadian Bar Review, no. 7, pp. 587-588.

Bill was amended in committee so that it should not be brought into force till after a referendum. As the Constitution provided for no such referendum, Mr. Bruce advised dissolution, promising to ask for Supply before the dissolution should actually take place. The Governor-General, "in view of this assurance", accepted the advice. Evatt notes that, though Parliament was only ten months old, the bill had been declared by the House to be urgent; that some supporters considered that the Government had no mandate for the bill; that the House had virtually invited its own dissolution; and that it was highly improbable that Mr. Scullin, the leader of the Labour Opposition, could have formed a Government. He adds, however, that neither Mr. Bruce nor the Governor-General seems to have paid any attention to the "parliamentary situation".(1) Dissolution took place, September 16, 1929.

During the session of 1931 charges were made that Mr. Theodore, Treasurer in Mr. Scullin's Labour Government, had used public relief funds for party advantage. On November 25, Mr. Beasley moved tha adjournment to discuss a matter of urgent public importance, namely the selection of men in connection with federal relief grants. Mr. Scullin warned the House that if the Government were defeated on this motion it would mean a general election. The motion that the question be now put was carried, 37-32, and the adjournment carried on the same division. Mr. Scullin thereupon asked for dissolution. The Governor-General, in granting the request, quoted Keith, "Responsible Government in the Dominions", 1928 edition, pp. 147-148, "Sovereignty of the British Dominions", pp. 244-246, and "Dominion Autonomy in Practice", p. 5;(2) but he also noted that the strength and relation of the various parties in the House, the fact that the Appropriation Bill had been passed, and the probability of an early election being necessary, tended to

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(1) "The King and His Dominion Governors", pp. 234-235.
(2) For Keith's opinions, see below, pp. 152-168, 234-236, 243-244, 247, 258-259, 262, 265, 270, 317, 334-337.

support the case for acceptance of the advice.(1)

(c) New Zealand

In October 1872, Mr. Stafford, defeated in the House, asked for dissolution. He pointed out that the previous dissolution had been granted to the Fox Government, December 30, 1870, and that the Parliament then elected had defeated both Mr. Fox's Government and his own. The Governor, in reply, asked about provision for Supply; and pointed out (a) that Parliament was only eighteen months old,(2) (b) that too frequent dissolutions would make members mere "delegates" instead of independent representatives; (c) that the country was indeed divided, but that there was no great public question at issue between the two parties. He wanted to try to get a new Government on a wider basis before having recourse to a dissolution. Mr. Stafford had said that he had a good prospect of winning a majority at an election. The Governor thought not. For these various reasons he therefore refused the request, basing his decision on British practice.(3) Mr. Stafford resigned, October 11, 1872.

On October 13, 1877, Sir George Grey took office, on the defeat of the Atkinson Government. Soon afterwards the Opposition moved amotion of want of confidence. An amendment was moved that, as the Government had not yet declared its policy, the House declined to express either confidence or want of confidence. On the motion that the words proposed to be omitted stand part of the question, the Government was sustained only by the casting vote of the Speaker, who took the stand that, in accordance with parliamentary tradition, it was his duty to give his vote in such a sense as to allow further discussion. On November 6, immediately after

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(1) On this case, see Parliamentary Debates (Commonwealth), vol. 132, pp. 1888 et seq., especially pp. 1899, 1906, 1910, 1926-1927.
(2) Its maximum duration was then five years.
(3) Parliamentary Debates (New Zealand), vol. XIII, pp. 580-582.

this division, Mr. McLean, of the Opposition, moved that, as the Government did not have a majority, it should resign. This motion was ruled out of order. The motion that the words of the amendment to the want of confidence motion be inserted was then negatived. On November 7, the Government was defeated, 38-37, on a motion that when the House rose it should stand adjournedd till Monday, November 12; on November 8, it was again defeated, 38-37, on an amendment to a motion to adjourn; later it was defeated by 34-32 on an amendment to a motion to adjourn the debate; on November 12, it was again defeated, 38-37, on a motion to adjourn the debate, and on an amendment to a motion to adjourn the debate.(1) On November 14, Sir George Grey asked for a dissolution.

In his memorandum to the Governor, he pointed out that the existing Parliament had been elected on the question of the abolition of the provinces, which had now been settled. It had been elected under the auspices of the Government's opponents. There were no distinct party lines. The vote of want of confidence in the late Government had been passed by 42-38. The motion of want of confidence in the Grey Government had been moved before it had even prepared its policy, and notice of the fresh motion of want of confidence had been given only on November 7, after the Government had intimated that prorogation would take place November 16. Several members had voted want of confidence in both the late and the existing Government. The fact that the Parliament had been elected under the auspices of the Government's opponents (2) was in itself sufficient to justify dissolution. But in addition there was the unsatisfactory state of public business after four months of the session; the Government expected a large working majority, and believed it could settle the native question; and there were questions

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(1) Ibid., vol. XXVII, pp. 22, 28, 64-65, 72-73, 100-102, 109-120, 145-147; Journals of the House of Representatives, 1877, p. 285.
(2) The previous dissolution had been granted on December 6, 1875.

of finance and the representation of the people to be considered. "An appeal to the constituencies appears, therefore, to be constitutional as well as just and necessary." Sir George also quoted Lord Derby and Lord Palmerston to the effect that an appeal was proper on the question of confidence in Ministers, and further quoted Lord John Russell, Cox, Bagehot and Disraeli to support his claim. He noted that an article in the London Times of March 23, 1877, on the refusal of dissolution to Sir Graham Berry, had emphasized that the questions of the time which had elapsed since the previous dissolution and the auspices under which it had been held were vital, and that it was "rarely" proper to ask for dissolution of a Parliament elected under one's own auspices.

The Governor, in refusing the request, said, in the first place, that the Grey Government had never had the confidence of the House, the Speaker's casting vote being always given to allow reconsideration. The prerogative of the Crown to dissolve at any time was of course undoubted. But it required to be exercised with great judgment. The Crown was called upon "to use, to some extent at any rate, its own discretion", and this was still more true of a Governor "who is directly responsible to the Crown". He felt obliged to refuse dissolution (a) because he was convinced the difficulties could be solved without it; (b) because this was only the second session of the Parliament, and both Governments had assured him that it would be necessary to pass a Redistribution Bill in the next year, which would almost necessitate a further dissolution; (c) because it was a bad time of year for an election, which would interfere with the harvest and shearing; (d) because there was no "great measure or principle in discussion in the House which could be submitted for the consideration of the constituencies", and "so far as the Governor is aware, no such measure or principle is at present known to the public"; (e) because there was no evidence for the Government's expectation of a majority; (f) because Supply had not been voted.

Next day Grey replied, insisting that he had the same rights as British statesmen; and on November 19, in a further communication to the Governor, he declared that the Governor was not responsible to the Crown but to the law: he was responsible to the Crown only in the sense that he was responsible for all his acts.

The Governor, on December 6, replied that he "in no way [wished] to deny that Ministers in New Zealand have, in matters which do not affect Imperial interests, the same rights that Ministers possess in England; but the Governor does not believe that, under similar circumstances, a Minister in England would ask for a dissolution". He then quoted the Peel-Russell-Gladstone doctrine,(1) which he said had often been expressed in Parliament, that a Minister was not entitled to a dissolution "when there was no great political question directly at issue between the contending parties, and simply in order to maintain in power the particular Ministers who happen to be in office".(2)

The Grey Government, thus rebuffed, resumed its attempt to conduct public business in the existing Parliament. On November 29, it was sustained by the Speaker's casting vote on the motion to commit the Civil List Bill, but defeated, 32-30, on the motion that the Chairman do leave the Chair. On December 6, it was defeated again, 33-32 and 27-13, in Committee of Supply, but was victorious on two other motions, 28-16 and 28-23, and then was defeated again, 21-17. It was, however, successful in obtaining Supply, and finished out the session.(3)

After prorogation, Grey again asked for dissolution and was again refused. The Governor said that there was a fair prospect of the Government securing support in the existing Parliament, and no definite question at

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(1) See below, pp.
(2) Parliamentary Papers (New Zealand), 1877, A 7.
(3) Parliamentary Debates (New Zealand), vol. XXVII, pp. 586-587, 753-754, 756, 761-763, 766-767.

issue. The Secretary of State for the Colonies approved the refusal.(1)

The Grey Government survived the session of 1878, but on October 3, 1879, it was defeated on an amendment to the Address, and asked and obtained dissolution, on condition of summoning the new Parliament at the earliest possible moment.(2)

Grey lost the election, and was succeeded by Mr. Hall. On November 8, 1881, the latter, who enjoyed the confidence of the House, obtained a dissolution.

On June 11, 1884, the Atkinson Government was defeated, 41-32, on a want of confidence amendment to the Address. It asked for a dissolution, which was granted, June 17, the actual dissolution taking place June 27. The previous dissolution had been granted on November 8, 1881, to a Government of the same party, but the maximum term of Parliament was now three years. Mr. Fish, in the House, denounced the Government for unconstitutional action in advising dissolution of "their own House". Mr. Bracken replied that there would have to be an election in a few months anyway.(3)

(d) Canada

(i) Prince Edward Island

Prince Edward Island secured responsible government in 1851. The first subsequent dissolution took place June 6, 1853. When the Government met the new Parliament, it suffered, February 9-13, a series of defeats, and on February 15 it resigned. The new Government appears to have suffered, on May 1, a defeat on the three months' hoist for the Bonded Warehouse Bill, by

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(1) Todd, op. cit., p. 778.
(2) Parliamentary Debates (New Zealand), vol. XXXII, pp. 162-163; Keith, op. cit., 1912 ed., pp. 187-188; 1928 ed., p. 161.
(3) Parliamentary Debates (New Zealand), vol. 47, pp. 85-86, 126-127, 153-155, 159.

a vote of 14-6. It secured a dissolution in the summer of 1854, an Act for the extension of the franchise having been passed meanwhile.(1)

On May 6, 1858, the Coles Government secured a dissolution in the ordinary course. The new Legislature met on February 17, 1859. Attempts to elect a Speaker, February 17-18, proving fruitless, the Coles Government secured a fresh dissolution, February 19, 1859.(2)

A dissolution took place on June 16, 1870. After the elections, the Government resigned, and Mr. Pope took office. In the session of 1872, his Government was defeated, March 5, before the Address had been considered, on the swearing in of new members, 15-8. On March 9, it was defeated again, 15-11, on a motion to discharge Mr. Carlton, witness in a bribery investigation. On March 11, it obtained a dissolution. (3)

On April 23, 1872, Mr. Haythorne took office. On June 24, his Government was defeated by the Speaker's casting vote, on an amendment to a motion to inquire into the late Government's conduct in respect to the railways; but it was victorious, 13-11, on the motion as amended, and was sustained on subsequent motions. It finished out the session, but on March 6, 1873, it obtained a dissolution.(4)

On March 6, 1879, the Davies Government was defeated, 19-10, on a vote of want of confidence. It resigned next day, and Mr. Sullivan took office, March 11. He announced an immediate dissolution, the previous dissolution having taken place July 1, 1876, and Parliament being then in its third session.(5)

On May 16, 1911, Mr. Palmer formed a Government in succession to one of the same party under Mr. Haszard, who had secured a dissolution in

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(1) Journals of the Legislative Assembly, 1854, p. 115 and passim.
(2) Ibid., 1859, pp. 5-9.
(3) Ibid., 1872, pp. 2-3, 13.
(4) Ibid., pp. 9, 19-25, 153-154.
(5) Ibid., 1879, pp. 14, 16-17; Debates of the Assembly, pp. 127, 136-138.

the ordinary course, October 15, 1908. The Palmer Government lost two ministerial by-elections and resigned, December 2, 1911. Mr. Mathieson took office, December 5, and dissolved Parliament December 6. In the previous session, the Haszard Government had on two occasions been sustained by votes of 14-12 and 14-13. Mr. Mathieson's majority in the old House would therefore have been very small, if not precarious.(1)

(ii) Nova Scotia

On April 15, 1859, the Legislature was dissolved, on the advice of Mr. Johnston. The election took place May 12, and the writs were returned June 1. The new House met on January 26, 1860. The Government was promptly defeated, 29-25, first on the election of the Speaker, then on that of the Assistant Clerk. On January 28, the Government was again defeated twice, 27-26, on the question of administering the oath to Mr. Moseley, one of the members-elect. On February 3, it was defeated by 28-26 on a motion of want of confidence and six other questions. It had asked the House to inquire into cases of members-elect who, it alleged, had been ineligible for election because they had held certain offices of profit under the Crown. The House had refused, referring the cases to committees. The Government thereupon asked for a dissolution. In its memorandum to the Lieutenant-Governor the Government said that at least five members were ineligible, but it would single out for attention only three cases. It quoted the opinion of the law officers of the Crown in England that members holding such offices were ineligible; that they could, however, sit and vote till declared ineligible; that there would be no remedy except dissolution; that the attempt of such persons to sit and vote in the Assembly would "render it necessary for the Crown to put an end to its existence".

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(1) Journals of the Legislative Assembly, 1911, passim; 1912, pp. 13-14.

The memorandum further set forth what it alleged would be the consequences of refusal of dissolution: the Government would resign; the Opposition would take office; the members in question would in due course be declared ineligible; the new Government would then lose its majority and be obliged to resign in its turn; Mr. Johnston would resume office, and while he and his colleagues were absent seeking re-election, the Opposition would again secure a majority and a third change of Government would take place.(1) The memorandum added that at the late election the Government had secured a popular majority of over 10,000, and that a change of 25 votes would have given it a majority of 3 seats.

The Lieutenant-Governor replied that Parliament itself was the judge of the eligibility of its members. A new Legislature should be dissolved "only . . . under the pressure of absolute necessity, either in consequence of the impossibility of carrying on public business, or on account of the House itself having committed some act so grossly illegal and unconstitutional as to render such a course unavoidable." An ex post facto Act or resolution would "undoubtedly" be ground for granting dissolution. But in this case the Assembly had not done anything of the sort. It had left the cases to committees. He therefore refused the request for dissolution, and the Government resigned, February 7, 1860.(2)

(iii) New Brunswick

In the spring of 1856, Parliament being then two years old, the Lieutenant-Governor tried to induce the Fisher Government (Liberal) to

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(1) As it turned out, all the members in question were declared eligible.
(2) Journals of the Legislative Assembly, 1860, pp. 9, 12, 15, 22-25; Appendix on "Constitutional Questions", pp. 38-43, 45-46. The Government raised the question of whether the Lieutenant-Governor was in the position of the Queen or of the British Prime Minister. The Lieutenant-Governor replied that he was not in the same position as the Queen.

advise a dissolution on the question of the repeal of the Prohibition Act which, he claimed, was not being enforced. The Government at first refused, but when the Lieutenant-Governor insisted, the Provincial Secretary, Mr. Tilley, one of the chief supporters of prohibition, agreed to countersign the proclamation. He did so, under date of May 21, leaving the date for the return of the writs blank. The Lieutenant-Governor then dismissed the Ministry, and the Gray-Wilmot Government took office and issued a new Proclamation, May 30.(1)

At the short special session following the election, the Government easily carried the bill repealing the Prohibition Act, but on the few subsequent measures of the session its majority dwindled rapidly.

The second session opened in February 1857. It was at once evident that the Liberals who had deserted their party on the liquor question had now returned to it. The Government, with 20 supporters, faced an Opposition of the same number. On February 23, an amendment to the Address was defeated only by the Speaker's casting vote. Next day, Sir A. J. Smith (Opposition) declared that he "thought it was time for the Government to advise a dissolution". Soon afterwards Mr. Connell, also of the Opposition, "advocated an appeal to the country". On an Election Bill the Government was sustained by 21-19, but only because the Speaker left the chair, called on an Opposition member to fill it for the time being, and proceeded to vote as an ordinary member of the House. On March 12, the Government was defeated, 22-18, on a motion for an Address to the Lieutenant-Governor in regard to appointments to the Legislative Council; but, as a contemporary observer put it, the Government's majority remained for most purposes still "adamantic". On March 21, however, the Government was defeated again, 19-17, on an amendment to a Government Railway Bill. It finally accepted the

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(1)Journals of the Legislative Assembly, 1856-1857, pp. 23-27, 88.

amendment, which was later embodied in a separate bill introduced by the Opposition. About this time, or shortly afterwards, one of the Government's supporters, Mr. McMonagle, finally went over to the Opposition. The Government was accordingly obliged to confess that the game was up. On March 26, immediately after the reading of the Journals, Mr. Gray announced that the Ministry had advised the Lieutenant-Governor to prorogue Parliament with a view to its immediate dissolution. Thereupon the Opposition moved a motion calling on the Government to resign because it had "declared . . . its inability to carry on the business of the country". A heated debate on this motion was in progress when Black Rod arrived to summon the House to the Legislative Council Chamber for prorogation. Dissolution followed, April 1, 1857.(1)

On February 8, 1865, the Tilley Government obtained a dissolution to test the feeling of the country on the Quebec Resolutions. It was defeated, and an anti-Confederation Government took its place. On April 7, 1866, the Lieutenant-Governor, in pursuit of the policy of the Colonial Office, virtually forced this Government to resign, and promptly granted dissolution to the new, pro-Confederation Government, May 9, 1866.(2)

On May 25, 1882, the Legislature was dissolved. On February 26, 1883, the Hanington Government was defeated, 22-18, on a want of confidence amendment to the Address. It asked for a dissolution, on the grounds (a) that a majority of the members had, on the hustings and after, supported the Government; (b) that the Government had won four subsequent by-elections; (c) that the Upper House had passed the Address unanimously; (d) that there were no charges of misconduct against the Government; (e) that Ministers

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(1) Journals of the Legislative Assembly, 1857, second session, pp. 21, 76, 106, 115; James Hannay, "Wilmot and Tilley" (Morang and Company, 1907), p. 184; G. E. Fenety, "Political Notes and Observations" (S. R. Miller, Fredericton, 1867), vol. II, nos. 16-19.
(2) Journals of the Legislative Assembly, 1866, pp. 83, 202-220, 224.

had had a majority of 4 on the election of the Speaker; (f) that three of those who had supported the amendment had "until very recently" supported the Government, even attending its caucus on February 23; (g) that the Speech from the Throne proposed a change to a unicameral Legislature, which would "necessarily, under existing circumstances, as we believe, . . . involve" an election; (h) that the Government had been unfairly condemned, "without notice or discussion". The Lieutenant-Governor refused the request, on the ground that the Assembly was "fresh from the people". Mr. Hanington resigned, March 2, Mr. Blair took office March 3 and secured an immediate prorogation, after which he carried on successfully for the rest of the life of the existing Legislature and indeed till he resigned to enter the Dominion Cabinet in July 1896.(1)

(iv) The Province of Canada

The Hincks-Morin Government obtained a dissolution in the ordinary course, November 6, 1851. At its first session, the new Parliament passed a Redistribution Act (c. 152) and a Franchise Act (c. 153). At the opening of the second session, June 13, 1854, the Government announced that it proposed to pass a further Franchise ~~Act (c. 153). At the opening of the second session, June 13, 1854, the Government announced that it proposed to pass a further Franchise~~ Bill and a Reciprocity Bill, and to introduce a Clergy Reserves Bill, and then to dissolve Parliament. On June 20, an amendment and sub-amendment to the Address, condemning the Government for not introducing a Seignorial Tenure Bill and for not secularizing the Clergy Reserves, carried, 42-29. On June 23, the Hincks-Morin Government obtained a dissolution.(2)

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(1) Journals of the Legislative Assembly, 1883, first session, pp. 21-24; documents of the second session, pp. 31-32.
(2) Journals of the Legislative Assembly, 1854, pp. 29-30; Toronto Globe, semi-weekly edition, June 22, 1854.

The Hincks-Morin Government was defeated in the opening days of the first session of the new Parliament, and resigned, September 8, 1854. The McNab-Morin Government took office, September 11. On March 10, 1856, this Government was defeated, 48-44, on a motion for an Address for a copy of Judge Duval's charge in a murder case, but on March 14 it won a vote of confidence, 75-42. The Government was then partially reconstructed, but on May 26 it resigned as a result of internal difficulties, three Ministers having resigned because of the adverse vote of the Upper Canadian members of the House in a division in which the Government had been sustained. The Governor-General said he would not dissolve at the request of the remaining Ministers, and sent for Mr. Taché. This Government carried on till November 28, 1857, when it secured a dissolution.(1)

On July 28, 1858, the Government was defeated, 64-50, on the question of the seat of Government. It carried the adjournment, 61-50, but resigned. Messrs. Brown and Dorion formed a new Government. On August 2, this Government was defeated (the Ministers being absent seeking re-election), 71-31, on a motion of want of confidence. It asked for a dissolution, on the grounds (a) that the late Government had, by its resignation, admitted its inability to conduct affairs in a parliament summoned under its own advice; (b) that the House, in the new Government's opinion, did not possess the confidence of the country, and that the public dissatisfaction had been greatly increased by "the numerous and glaring acts of corruption and fraud by which many seats were obtained at the last general election, and for which acts the house . . . has failed to afford a remedy"; (c) that the new Government intended "to propose constitutional measures for the establishment of . . . harmony between Upper and Lower Canada . . . essential

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(1) Parliamentary Debates (Province of Canada), 1854-1855, pp. 14, 17; 1856, pp. 123, 168, 170; Journals of the Legislative Assembly, 1856, pp. 133, 142.

to the prosperity of the province"; (d) that the House, "having, by their vote, compelled the late ministry to retire", had taken an "unprecedented and unparliamentary course" by voting want of confidence in the new Government within a few hours of its appointment, while Ministers were absent from the House, and before they had announced their policy. This last fact, Mr. Brown contended, "affords the most convincing proof that the affairs of the country cannot be efficiently conducted under the control of the house as now constituted."

The Governor-General replied that, though he was bound to deal fairly with all political parties, his paramount duty was to the Queen and the people of Canada, and that the question he had to decide was "what upon the whole is the most advantageous and fair for the people of the province. The resignation of the late government was tendered in consequence of a vote . . . which did not assert directly any want of confidence in them. The vote of Monday night the vote of want of confidence in the Brown-Dorion Government was a direct vote of want of confidence on the part of both houses. It was carried in the Assembly . . . by a majority of the whole house. . . . It is clear that under such circumstances a dissolution, to be of any avail, must be immediate. . . . It is not the duty of the governor-general to decide whether the action of the two houses on Monday night was, or was not in accordance with the usual courtesy towards an incoming administration. The two houses are the judges of the propriety of their own proceedings. His Excellency has to do with the conclusions at which they arrive. . . . There are many points which require careful consideration with reference to a dissolution at the present time. . . . I. It has been alleged that the present house may be assumed not to represent the people; if such were the case, there was no sufficient reason why . . . the late government should have given place to the present. His Excellency cannot constitutionally adopt this view. II. An election

took place only last winter. . . . The cost and inconvenience of such a proceeding are so great that they ought not to be incurred a second time without very strong grounds. III. The business before parliament is not yet finished. It is perhaps true that very little which is absolutely essential to the country remains to be done. A portion, however, of the estimates and two bills, at least, of great importance are still before the Legislative Assembly, irrespective of the private business. In addition to this, the resolutions respecting the Hudson's Bay Territory have not been considered, and no answer on that subject can be given to the British Government. IV. The time of year and the state of affairs would make a general election at this moment peculiarly inconvenient and burthensome, inasmuch as the harvest is now going on in a large portion of the country, and the pressure of the late money crisis has not passed away." On the question of the alleged bribery and corruption at the previous election the Governor-General asked what assurance he could have that a fresh election under the same laws, within "six or eight months of the last" would differ in its character. The fact alleged was rather a reason for postponing an election till Parliament had made provision against such abuses. As to the bitter sectional feeling which the new Government's proposed constitutional measures were to allay, His Excellency required to be satisfied that the measures in question were "a specific, and the only specific", and that the Brown-Dorion Government contained the only men who could "calm the passions, and allay the jealousies, so unhappily existing". "It would seem to be the duty of His Excellency to exhaust every possible alternative before subjecting the province for the second time in the same year to the cost, the inconvenience, and the demoralization of such a proceeding. The governor-general is by no means satisfied that every alternative has been thus exhausted, or that it would be impossible for him to secure a ministry who would close the business of this session, and carry

on the administration . . . during the recess with the confidence of a majority of the Legislative Assembly. . . . His Excellency declines to dissolve parliament at the present time."(1)

The Brown-Dorion Government then resigned. The Governor-General called on Mr. Galt, who, however, declined office. His Excellency next applied to Mr. Cartier, and the Cartier-Macdonald Government, practically identical with that which had so recently made way for Mr. Brown, now took his place. It avoided the necessity for ministerial by-elections by an ingenious use of the wording of the Act on the subject, a proceeding which became famous (or infamous) as the "double shuffle".(2) This Government was able to carry on for the rest of the life of the Parliament. On June 10, 1861, it secured a dissolution in the ordinary course.

On May 20, 1862, the Cartier-Macdonald Government was defeated, 61-54, on the Militia Bill. It resigned next day. On May 26, the Sandfield Macdonald-Sicotte Government took office. On May 8, 1863, this Government was defeated, 64-59, on a motion of want of confidence. About two-thirds of the Ministers then resigned, but Sandfield Macdonald persuaded Mr. Dorion to fill Mr. Sicotte's place, and on May 16 the Sandfield Macdonald-Dorion Government obtained a dissolution.(3)

The Sandfield Macdonald-Dorion Government resigned on March 21, 1864. The Governor-General called on Mr. Blair, March 22, then on Mr. Cartier, March 23, and finally on Mr. Taché, March 29. The Taché Government assumed office March 30. On June 14, it was defeated, 60-58, on a motion condemning its action in regard to the Grand Trunk-Montreal bonds guarantee. On June 17, it advised dissolution. The Governor-General accepted the advice, but,

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(1) Todd, op. cit., pp. 762-769.
(2) Sir Joseph Pope, "Sir John A. Macdonald" (J. Durie and Sons, 1894), vol. I, pp. 199-201.
(3) Parliamentary Debates (Province of Canada), 1862, pp. 113, 117-118, 140-144, 150-152; Journals of the Legislative Assembly, 1863, pp. 324-325; Parliamentary Debates (Province of Canada), 1864, p. 108.

being anxious to avoid an election if at all possible, urged negotiations for a Coalition Government. These were successful, and no dissolution took place.(1)

(v) Quebec

On March 2, 1878, the Lieutenant-Governor, Mr. Letellier de St. Just, having dismissed the de Boucherville Government (Conservative), called on Mr. Joly de Lotbinière (Liberal) to form a Government. On March 7, the Assembly, by a vote of 35-16, declared its confidence in the de Boucherville Government and its want of confidence in any Government which might be substituted for it, unless chosen from the majority in the House. Next day, by a vote of 34-12, the Assembly voted an Address to the Lieutenant-Governor, declaring that the dismissal of the de Boucherville Government "constitutes an eminent danger to the existence of responsible Government in this Province, is an abuse of power in contempt of the majority of this House, whose confidence they possessed and still possess and is a violation of the liberties and will of the people." On the same day, by a vote of 32-13, the Assembly voted that second reading of the Supply Bill be suspended "until such time as justice shall have been rendered to the majority of this House, inasmuch as when the Resolutions upon which the said Bill is based were adopted the cabinet charged with the public business, enjoyed the confidence of this House and of the Country, whilst the present administration does not possess that confidence." By a vote of 32-12 it also adopted a want of confidence amendment to the motion for new writs for by-elections in the Ministers' constituencies. On March 9, Mr. Loranger moved an Address to the Lieutenant-Governor, calling attention to the three defeats suffered by the new Government, to the refusal of Supply,

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(1) Ibid., pp. 108-109, 111-112, 198, 201.

and to the Government's retention of office against the will of "this House and of the Country", and declaring that, as the House contained a majority capable of carrying on the public business, there was no necessity for a dissolution, "a step which will cause considerable and useless expense to the Province, and seriously threaten the peace and tranquillity of the people of this Province." The Speaker ruled the motion in order, and his ruling was sustained, 33-12; but before any vote could be taken, Black Rod arrived to summon the House to the Legislative Council Chamber for prorogation. Dissolution followed, March 22, 1878. The previous dissolution had been granted to the Government's opponents. June 7, 1875.(1)

The election gave Mr. Joly what proved to be a rather unstable majority. On October 29, 1879, his Government was defeated, 35-29, on a motion of want of confidence, arising out of a refusal of the Upper House to pass the Supply Bill until the Lieutenant-Governor (Mr. Robitaille, who had succeeded Mr. Letellier de St. Just on the latter's dismissal by the Dominion Government) should have chosen new advisers. Mr. Joly asked for an immediate dissolution, alleging that the action of the Legislative Council was unconstitutional and did not express the opinion of the majority of the electorate and that the people should have an immediate opportunity to pronounce on this question, and affirming his belief that the election would give his Government a much larger majority than it had previously enjoyed.

The Lieutenant-Governor refused the request. He declared that he was "strictly bound to enquire whether the more than ordinary exercise of the Royal prerogatives, with which he is invested, is required for the greater advantage of the Province; for he is responsible towards the Crown for all political troubles and financial damages from which he can save the

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(1) Journals of the Legislative Assembly, 1877-1878, pp. 218-228.

Country, but from which he does not. When the Lieutenant-Governor received your request, what first struck him was the fact that, since your assumption of power, you had already asked the Crown for a dissolution and had obtained it. Two dissolutions for the same Cabinet, the extraordinary exercise of the most valued of the Royal prerogatives twice to the same administration with an interval of a few months, such was the first idea which presented itself to the mind of the Lieutenant-Governor! Immediately after your entering into office, you asked the Crown to dissolve Parliament, and you had a General Election. You came out of the electoral struggle --- with a majority, according to you, --- with a minority according to your opponents. But, in point of fact, you were enabled to carry on the Government, at first, with the vote of the Speaker only, and subsequently with a majority varying from four to two votes; and finally you come and announce . . . that you find yourself in the House, formed under the Elections asked for by yourself, in a minority of six votes, and you urge a fresh dissolution. Is it in the public interest that the Province should be subjected so frequently to general elections? Is it in accordance with the spirit of the Constitution that Parliament should be dissolved so often? Does the renewal of the popular representation at such brief intervals tend to ensure the stability and good working of our political institutions? To all these questions, the Lieutenant-Governor deems it his duty to answer: No. The , . . Constitution . . . has decided that the General Elections for this Province should take place every four years; and this period is not so long that it should be still further shortened, except for reasons of extraordinary gravity. The Prime Minister understands the deep and prolonged agitation into which a General Election plunges society at large, as well as the divisions and demoralization which follow it. Apart from these political and social considerations, there are those of a financial character. A General Election, and the Session, which a dissolution at this moment would render inevitable, would cost the Country a

hundred thousand dollars; and this is an expenditure which, in the financial situation in which we are placed, needs to be duly considered. However, if there were reasons sufficiently grave and serious to outweigh all other considerations, the Lieutenant-Governor admits that a dissolution might be had recourse to. But do such like reasons exist in the present case? A dissolution can have but one object, and that is to maintain in power, certain men or certain parties. There would not be in this a sufficient compensation for the sacrifices which the Country would be called upon to make. . . . One of the reasons which might be brought forward in support of an appeal to the people, would be the necessity of restoring harmony between the two branches of the Legislature. But this harmony is very nearly restored, and if there exists any other method than dissolution, to complete the reconciliation of the Council with the Assembly, the Lieutenant-Governor considers that it is his duty to make use of it. The question for the Lieutenant-Governor to decide, is not whether the Government is to become the victim of what his advisers call an irresponsible body. So long as his Ministers possessed the confidence of the popular branch of the Legislature, he considered them as the representatives of the will of the people and maintained them in their position, contrary to the wish expressed by the Legislative Council. But now the majority which the Government had in the Legislative Assembly has become a minority. The two branches of the Legislature agree upon one of the most important points, namely, a change of Government; and it cannot be alleged that recourse must be had to extraordinary means to terminate a conflict which is in a fair way to be terminated by ordinary ones." Noting that the existing House had been elected under Mr. Joly's auspices, His Honour said he could not understand why the Prime Minister thought a fresh election would give him a larger majority. As to the necessity of securing the opinion of the electorate on the constitutional question of the Council's refusal of the Supplies, he said that the Council's right to reject the

Supply Bill was questioned by no one; the only question was the "fitness of time", upon which the Assembly had already pronounced. He therefore refused the request for dissolution.(1)

On May 10, 1890, the Mercier Government obtained a dissolution in the ordinary course. In December 1891, as a result of disclosures of corruption, the Lieutenant-Governor dismissed Mr. Mercier. The de Boucherville Government took office, December 21, 1891, and next day dissolved the Legislature.(2)

On October 30, 1935, the Legislature was dissolved, the Taschereau Government being then in office. The Government emerged from the elections with only a slim majority. The new Legislature opened March 24, 1936. On April 29, an amendment to the Address was defeated, 47-41; on May 6, on a motion to revert to the Order for second reading of the Old Age Pensions Bill, the Government was sustained by a vote of 46-42; on May 19, on a motion to establish a rural credit system, the vote was 46-39. Meanwhile the Government's prestige had been severely damaged by revelations before the Public Accounts Committee, and the Opposition, much encouraged, was successfully obstructing public business. The Leader of the Opposition had at least twice "dared" the Government to go to the people. On June 10, the Lieutenant-Governor gave assent to the bills awaiting it. On June 11, Mr. Taschereau, as his last act before resigning in favour of one of his own colleagues, advised dissolution. He gave as his reason the fact that, though the fiscal year of the province would end June 30, the Budget had not yet been adopted and there was no prospect that it would be even if the Legislature sat on into July. The Lieutenant-Governor accepted the advice, and dissolution took place accordingly, June 11, 1936.(3)

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(1) Journals of the Legislative Assembly, 1879, pp. 356-360.
(2) Todd, op. cit., pp. 666-679; Canada Year Book, 1924, p. 78.
(3) Journals of the Legislative Assembly, 1936, pp. 63-64, 94-95, 123-124; Canadian Annual Review, 1935-1936, p. 281.

(vi) Manitoba

On November 11, 1878, the Norquay Government, which had taken office October 16, obtained dissolution of the Legislature elected in consequence of the dissolution of December 16, 1874. On November 26, 1879, Mr. Norquay obtained a second dissolution. During the session he had enjoyed the confidence of the Assembly. But a Redistribution Act (42 Victoria, c. 18) had been passed, and it was felt that the new constituencies ought to be appealed to forthwith.(1)

On November 11, 1886, Mr. Norquay secured a dissolution in the ordinary course. On December 26, 1887, Mr. Harrison succeeded him as Prime Minister. On January 19, 1888, however, the Harrison Government was obliged to make way for the Greenway Government. In the session of 1888, the second of the existing Legislature, Mr. Greenway passed a Redistribution Act (51 Victoria, c. 3) and extended the franchise from property owners to residents (by 31 Victoria, c. 2, section 3). Accordingly, though his Government enjoyed the full confidence of the House, he advised dissolution, which took place, June 16, 1888.(2)

On June 15, 1914, the Roblin Government secured a dissolution in the ordinary course. During the ensuing session, a committee was appointed to investigate charges of serious irregularities in the construction of the Parliament Buildings. When the motion that the report be received was made, Mr. A. B. Hudson, of the Opposition, moved (March 30) an amendment of censure condemning the Government for "gross and culpable negligence" and demanding further investigation by a Royal Commission. On this amendment the Government tried to force a division, prior to prorogation. Twenty-one members

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(1) Canada Year Book, 1924, p. 80; R. O. MacFarlane, "Manitoba Politics and Parties after Confederation", in Annual Report of the Canadian Historical Association, 1940, pp. 51-52.
(2) Canada Year Book, 1924, p. 80; Journals of the Legislative Assembly, 1888, first session, passim.

of the Opposition then petitioned the Lieutenant-Governor not to prorogue the Legislature till a Royal Commission had been appointed; and the Opposition press talked of a dismissal and forced dissolution. The Lieutenant-Governor did not proceed to such extreme measures, but he did insist on the Government appointing a Royal Commission; and there was a widespread belief that he had presented the Government with the choice of a Royal Commission or dissolution. Prorogation took place April 1, without a division on Mr. Hudson's amendment. Disclosures before the Royal Commission soon made the Government's position untenable, and early in May it resigned, Mr. T. C. Norris, Leader of the Opposition, taking office May 13. On July 16, Mr. Norris obtained a dissolution.(1)

Mr. Norris secured a dissolution in the ordinary course, March 27, 1920. The election returned 21 Liberals (Government), 13 Farmers, 11 Labour and 9 Conservatives. The Government survived the first session, though sustained on a vote of want of confidence, April 12, 1921, only by the Speaker's casting vote. But in the second session it was defeated, March 14, on a motion of censure for failing to abolish the Public Utilities Commission as ordered by the House on April 28, 1921. Mr. Norris thereupon resigned. The Conservative leader was reported to be ready to form a Government, but as the Labour party was ready to support Mr. Norris in finishing the session's business (Supply had not been granted), any alternative Government was in fact impossible. The Lieutenant-Governor, formerly an active Conservative, requested Mr. Norris to continue in office, suggesting dissolution after interim Supply had been voted. The views of the various groups, said His Honour, were "fundamentally divergent"; there had been "no cohesion or continuity of co-operation" among them in the past, and would be none in the

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(1) Canada Year Book, 1924, p. 80; Journals of the Legislative Assembly, 1914-1915, pp. 182, 187-188, 192; Canadian Annual Review, 1915, pp. 620 et seq.; Manitoba Free Press, March 31, April 1, July 14, 1915.

future; no Opposition group had a mandate from the people to carry on the government. His Honour therefore asked the Government to carry on till an "early election, . . . and I will accept your recommendation, subject to Supply being granted, that the electorate be consulted as soon as the antecedent necessary steps are taken." Mr. Norris read this proposal to the Legislature on March 20. The Opposition parties accepted it. Supply was granted; prorogation took place, April 6; dissolution followed, June 24.(1)

(vii) British Columbia

On August 30, 1875, the Walkem Government obtained a dissolution in the ordinary course. On January 25, 1876, it was twice defeated, 13-10 and 13-11, and on January 28 it resigned. On February 1, the Elliott Government took office. On March 12, 1877, the Elliott Government was sustained only by the Speaker's casting vote on an amendment to refer accounts to the Select Standing Committee on Public Accounts. On March 27, 1878, it was sustained, 12-11, but two days later was defeated, 12-11. On April 8, it was sustained, 11-10, and on the same day the Prime Minister announced that dissolution would take place shortly, by agreement with the Opposition. The Legislature was accordingly dissolved on April 12.(2)

After the election of July 9, 1898, the Lieutenant-Governor, Mr. McInnes, dismissed the Turner Government, August 8, and called on Mr. Beaven, a defeated candidate. Mr. Beaven accepted the commission, but found himself unable to form a Government. The Lieutenant-Governor then called on Mr. Semlin, who assumed office August 12, 1898. On October 21,

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(1) Journals of the Legislative Assembly, 1921, p. 198; 1922, pp. 238-239; Canadian Annual Review, 1922, pp. 765-768; Keith, in Journal of Comparative Legislation, Third Series, vol. vi, pp. 136-137, and "Responsible Government in the Dominions", 1928 ed., pp. 178-179; Toronto Mail and Empire, March 18, 21, 22, 24, 1922; Manitoba Free Press, same dates.

(2) Journals of the Legislative Assembly, 1876, pp. 15-16; 1877, p. 21; 1878, pp. 54, 57, 60-61.

His Honour asked the Secretary of State whether he could grant a dissolution of the new Legislature before it had been formally convened. The Secretary of State telegraphed against it. On September 12, 1899, the Lieutenant-Governor wrote the Secretary of State saying he was urging his Prime Minister to meet the Legislature or advise dissolution. On January 4, 1900, the Semlin Government was defeated; then a member who had been absent arrived and the Government was sustained by the Speaker's casting vote. On February 23, however, the Government was again defeated, twice, 19-18, first on the previous question and then on its Redistribution Bill. Mr. Semlin neither resigned nor advised dissolution, but asked for time, and on February 27 the Secretary of State telegraphed to the Lieutenant-Governor to give it to him, "rather than force a dissolution or a change". Mr. McInnes replied that it was too late, as he had already dismissed Mr. Semlin and called on Mr. Martin. Mr. Martin took office March 1. Meanwhile, on February 27, the Assembly had passed a resolution, 22-15, regretting the dismissal of the Semlin Government, which was asserted to have had "efficient control of the House". On March 1, the Assembly voted no confidence in Mr. Martin, 28-1, the Premier being the only dissentient! Not very surprisingly, Mr. Martin had a good deal of trouble finding colleagues willing to take office with him, and on March 24 his Cabinet was still incomplete. On April 10, the Lieutenant-Governor, in accordance, as he said, with the opinion of the Privy Council that the Martin Government should either meet the Legislature or dissolve it, granted Mr. Martin a dissolution.(1)

The Martin Government was defeated, and on June 15, 1900, Mr. Dunsmuir took office. On November 21, 1902, he was succeeded by Mr. Prior. On May 27, 1903, the Prior Government was defeated, 17-15 and 16-15. Next day, however, it was defeated, 19-16, on a motion to proceed to the Order

17-15, on the adjournment, but was sustained on subsequent votes by

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(1) Sessional Papers (British Columbia), 1899, pp. 879 et seq.; Sessional Paper (Canada) no. 89 of 1899; Journals of the Legislative Assembly (British Columbia), 1900, pp. 77-79.

for Supply. On June 1, the Lieutenant-Governor (Sir Henri Joly de Lotbinière, who had succeeded Mr. McInnes when the latter was dismissed by the Dominion Government), refused a dissolution to Mr. Prior and called on Mr. McBride. Mr. McBride announced his intention of forming a purely Conservative Government. His Administration was at once sustained, 19-14, on the adjournment; on June 2, the Government announced an impending dissolution; on June 3 and 4 it obtained Supply; prorogation followed, and dissolution on June 16.(1)

(viii) The Dominion of Canada

The first Parliament of Canada was dissolved July 8, 1872, on the advice of Sir John A. Macdonald. The second session of the second Parliament opened October 23, 1873. On October 27, Mr. Mackenzie moved a vote of censure. On November 6, while the motion was still under debate, Sir John A. Macdonald resigned. Mr. Mackenzie took office, Parliament was prorogued on November 7, and on January 2, 1874, the Governor-General granted dissolution.(2)

(e) Newfoundland

Newfoundland received responsible government in 1855, Mr. Little becoming the first Premier and Attorney-General. An election took place in 1855, and another in the autumn of 1859. Before the end of that year Mr. Kent succeeded Mr. Little as Prime Minister. Early in 1861, he attacked the Governor, Sir Alexander Bannerman, in the Assembly, refused to make any explanation, and was dismissed. Mr. Hoyles took office. On March 5, the Assembly voted want of confidence in the new Government, 16-12. It followed

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(1) Journals of the Legislative Assembly, 1903, pp. 62-63, 65-66, 69-86; Canadian Annual Review, 1903, pp. 214-217; 1903-1904, p. 3.
(2) Canada Year Book, 1924, p. 68; Toronto Globe and Toronto Mail, October 28-November 8. For the 1926 crisis, see below, pp. 220-409.

this up by refusing Ways and Means. Mr. Hoyles thereupon asked and obtained a dissolution.(1)

In the election of 1869, the Carter Government was defeated on the Confederation issue and resigned. Mr. Bennett took office. On June 17, 1873, the Bennett Government obtained a dissolution in the ordinary course. It won a small majority; but before the House met, two Government supporters accepted offices and vacated their seats, and one other deserted to the Opposition. The Government resigned; Sir Frederick Carter took office, and carried on till the end of the session, April 29. His majorities were, however, very small: 15-13, 13-12, 11-10, 11-9; and twice, including the division on the Address, he was sustained only by the Speaker's casting vote. On September 19, 1874, therefore, he asked and obtained a dissolution.(2)

On August 15, 1893, the Whiteway Government secured a dissolution in the ordinary course. The new Legislature met on February 15, 1894. On the last day allowed for filing election petitions, the Opposition filed petitions against a large number of Government supporters, including Ministers. In due course, two of the members in question were unseated by judicial decision; and, as all the petitions were on the same ground, infraction of certain provisions of the Election Act of 1889, the result of the remaining cases was a foregone conclusion. The Government, seeing its majority about to disappear, advised dissolution. The Governor refused, and called on Mr. Goodridge, Leader of the Opposition. From April 3-10, the Assembly was counted out. On April 11, Mr. Bond, one of the ex-Ministers, moved, and Mr. Morris seconded, an amendment to the motion to go into Ways and Means. The amendment noted that the Governor had reported to the House, through

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(1) D. W. Prowse, "History of Newfoundland" (Eyre and Spottiswoode, 1896), 2nd. ed., pp. 485-486, 488-489; material from an unpublished "History of Newfoundland" by Sir Alfred B. Morine.

(2) Prowse, op. cit., pp. 495-496; Morine, op. cit.; Journals of the Legislative Assembly, 1874, pp. 6, 10, 15, 36, 41-42.

the Speaker, that Messrs. Woods and Moores had been disqualified by a judgment of Judge Winter; declared that the Judge had gone outside his province, because the money spent in the elections had been spent on the advice of the Executive Council under authority of Acts of the Legislature; noted that the late Cabinet had advised dissolution "for the purpose of allowing the constituencies to decide this important constitutional issue", that the advice had been refused, that the Government had resigned, and that the government was about to be entrusted to a minority representing one-third of the Assembly; and proposed that the vote of an earlier date to go into Ways and Means be rescinded and that the Speaker do not now leave the chair. This was carried, 18-10. On the motion to go into Supply, a similar amendment was moved, rescinding the resolution of March 6 that a Supply be granted. This also was carried, 18-10. On April 12, the Legislative Council concurred. On April 13, the Assembly resolved that the representatives of the people were the "sole guardians of the public purse"; asked the Governor to cable the Secretary of State for the Colonies; and requested a dissolution. On April 14, the Goodridge Government appeared in the House (its members avoiding the necessity of ministerial by-elections by appearing only as Executive Councillors, and, in some cases, acting Ministers of departments). The Opposition promptly moved a vote of want of confidence, declaring that the new Cabinet represented only an "insignificant minority". While this motion was under debate, Black Rod arrived to summon the members to prorogation. A motion not to admit him was carried, 18-7, and the motion of want of confidence then passed, 20-7. Prorogation then took place.(1)

The Goodridge Government did not summon the Legislature again till the results of the election petitions had provided it with a majority. In a short summer session it then passed necessary legislation, including measures legalizing its collection of revenue during the recess without legis-

(1) Prowse, op. cit., pp. 534-536; Morine, op. cit.; Journals of the Legislative Assembly, 1894, first session, pp. 39-43, 45-54.

lative authority. On December 13, however, it resigned as a result of the banking crisis.(1)

In 1897, the Whiteway Government, which had returned to office in 1895, dissolved the Legislature. It was defeated, and made way for the Winter Government. Early in 1900, this Administration was defeated, and Sir Robert Bond, Sir William Whiteway's successor, took office. On August 7, he obtained a dissolution.(2)

On September 15, 1908, Sir Robert Bond secured a dissolution in the ordinary course. The election, November 2, resulted in a tie, 18-18, with the Minister of Marine and Fisheries having a majority of only one vote and a recount in prospect. On November 17, Sir Robert Bond wrote to the Governor, saying that it might not be possible to elect a Speaker, and asking whether the correct procedure would not be "for the Governor to convene the Legislature and immediately dissolve it? " One week before the date scheduled for the meeting of the Legislature, Sir Robert wrote that he would advise an immediate dissolution "when the Legislature meets". "There can be no good object served", he said, "by my attempting to have a Speaker appointed, for both parties are . . . equally divided, and a deadlock must ensue. . . . The Crown in England and the Representative of the Crown in the Colonies has in practice a regulated discretion to grant or refuse a dissolution, but in the Mother Country the uniform practice of two centuries has been for the Crown always to grant a dissolution when the Prime Minister requests it, with the result that . . . refusal . . . would be . . . exceptional and to that extent . . . unconstitutional. . . . In the colonies (owing partly, perhaps, to their shorter experience of party government, and partly to the fact that a Colonial Governor is responsible to the Crown for his discretionary exercise of the prerogative) different considerations have applied

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(1) Journals of the Legislative Assembly, 1894, second session, passim.
(2) Journals of the Legislative Council, 1901, passim; Morine, op. cit.

and different principles have obtained." Sir Robert then proceeded to quote the cases of Canada in 1858, Victoria in 1872, and New Zealand in 1872, adding that he might quote others, but that the cases would not be parallel, as there was always a majority for one side or the other.(1) "One broad general principle should . . . guide the Representative of the Crown . . ., viz., whether the representative house as then constituted is likely to be able to carry on effectively the public business of the country. When the Representative of the Crown is satisfied that it cannot do so, it has been the invariable practice for him to accede to the advice of his Prime Minister and at once grant a dissolution. It is incumbent upon the Representative of the Crown to exhaust every possible alternative before involving the country in the expense and inconvenience of a general election." But, Sir Robert contended, Sir Edward Morris could not command the confidence of the Assembly or form a coalition. Supply would run out on June 30, and the expense of two sessions should be avoided.

Two days later, February 20, the Governor refused to grant dissolution until it had been made clear that there was no alternative. He noted that a spring election had been condemned by the Assembly, November 27, 1854, and early in 1861; that Sir Robert Bond himself and the then Governor had both been against a late spring election in 1900; and that, though there had been elections in May 1837, 1855 and 1861, there had been none since. He felt that the Assembly must be allowed a chance to do business. Sir Robert Bond himself, in an earlier letter, had said that some Opposition members might support the Government. Supply had not been voted; he could not assume that the Assembly would refuse. There had recently been an election, under Sir Robert's own auspices, after he had been in power for

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(1) Curiously enough, neither Sir Robert Bond nor the Governor seems to have mentioned the Prince Edward Island case of 1859 (see above, p 73.) which obviously provided the closest parallel.

eight years. An unusually large number of votes had been polled. There was no great specific question at issue. The difficulties of locomotion were greater in May than in October or November. In May there would be many voters absent on the fishing grounds. Dissolution would involve great expense. Sir Robert Bond himself, in 1900, had said that he would not ask for dissolution till Supply had been granted. An election involved "abnormal excitement, turmoil and distraction from business"; it would provide no certain remedy for the deadlock; and the longer the delay before another election, the greater was the chance that the electorate would change its opinions and give a decisive verdict.

On February 22, Sir Robert Bond replied that he was willing to resign and let the Governor try another Government. He insisted, however, that his Government had a right to retain office till defeated in the Assembly or dismissed. It could not be defeated in the Assembly. If it now voluntarily relinquished its right to retain office, then "if, 'when it is made clear that by no other constitutional means can a ministry be obtained which can induce Parliament to vote supply and carry on the business of the country'", would the Governor grant dissolution to the present Government or its opponents? He noted the published, signed pledges of members to stand by their leaders. His own suggestion that some Opposition members might support the Government had been in reference to Sir Edward Morris' demand for resignation immediately after the election, and had been made before the pledges were announced. An immediate election might allow Supply to be voted before June 30. As to his own remarks in 1900, he noted that at that time the Governor had allowed Ministers to violate the law in respect of ministerial by-elections, and after the vote of want of confidence in February 1900, showed a disposition to retain his Ministers, declaring his intention to accede to their request to retain office pending a general election, if an immediate election were inevitable. The then Governor had

said that his Ministers had advised an immediate dissolution, and that "if such were found to be inevitable" he would grant it. It had been in relation to this set of circumstances that Sir Robert had said he would advise dissolution till Supply had been voted. As to the contention that there was no great specific issue, he declared that the Opposition had put forward a policy of contracts for railway construction and operation and other works, involving enormous expenditures disastrous to the Colony.

On February 24, the Governor said he declined to answer what he would do in the hypothetical circumstances mentioned in Sir Robert's letter. His action would depend on circumstances. As to the pledges of members, he noted Sir Robert Bond's previous statement that the attitude of members cannot be constitutionally disclosed till the House meets. On February 25 he added that Sir Robert had sent a personal note about the pledges, February 17, but that that was before the Opposition pledges had been signed, and anyhow such intimation would not be enough for the Governor to act on.

On February 25, the Governor wrote to Sir Edward Morris that his object was "a ministry that can obtain supply and carry on business so as to render a dissolution of Parliament and a general election in the Spring unnecessary". On the same day, Sir Edward Morris agreed to form a Government "with a reasonable prospect of passing supply and carrying on the business of the country". If he couldn't get supply, he asked for time to form a coalition, "and to allow of a general election, should that become inevitable, being held about May 10".

The Governor replied in a memorandum setting forth what he had in mind: "What I desire . . . is a ministry that can procure at least six months' supply and thus avoid, at least for this Spring, a dissolution of the House, a general election, and a second session of the Legislature." If Sir Edward failed, the Governor would hold himself free to apply to any member of the Legislature to secure these ends. He would give no promise about a dissolution.

On February 28, Sir Edward Morris agreed to the conditions of the memorandum. He accordingly assumed office.

On March 30, the House met. Both candidates for the Speakership, Mr. Warren from the Government side, and Mr. Ellis from the Opposition, withdrew. Mr. Warren was then renominated, and defeated, 18-17, Mr. Warren himself not voting. Mr. Ellis was then renominated and defeated, 18-18, all the Government members voting for him, and all the Opposition, including Mr. Ellis himself, against! The Governor thereupon prorogued the Legislature.

On March 31, Sir Edward Morris advised a dissolution. The late Prime Minister, he pointed out, had made no effort to obtain Supply. A coalition was impossible. No one else could carry on with the existing House. The country had never pronounced on the Morris Government. He was confident of securing a substantial majority. He quoted the Duffy Memorandum, in Victoria in 1872, noting that in the present case no "vote of confidence" had been carried against the Government; that there had been no "adverse vote" in the Assembly; and that there was no legislative majority against the Government. He noted also the electoral advantage of being the Government.

The Governor, however, wrote Sir Robert Bond, asking about the possibility of arranging a compromise which would allow the passing of Supply till the autumn. Sir Robert replied that he had resigned to let the Governor test the possibility of electing a Speaker and carrying on business under another Government. The result, he contended, had been the defeat of the new Government, on the Speakership. He accordingly refused to make any suggestions or express an opinion while the Morris Government remained in office.

On April 9 the Governor agreed to accept Sir Edward Morris' advice, and dissolution took place April 10.

Sir Robert Bond then remonstrated that the Governor was granting

to Sir Edward Morris what he had refused to Sir Robert himself. The Governor made the obvious reply that granting dissolution in the changed circumstances of April 9 was not at all the same thing as granting it at the time when Sir Robert originally requested it.(1)

Keith's comments are: "The course followed was exactly in accordance with the law of the constitution. It was the duty of the Governor to exhaust every possible chance of forming a Government before he dissolved a House which had just met, after a general election in which both sides had placed their policy fully before the country, and which, therefore, must be deemed to show that neither party had a clear majority in the country. To give under these circumstances a dissolution to the Premier would have probably meant either a repetition of the first equality of numbers, or at best a slight majority for one or the other party, for the possession of the Government in the case of dissolution in Newfoundland has always been regarded as a great advantage. It was therefore obvious that a dissolution granted to Sir Edward Morris would be likely to result in a substantial majority and . . . a stable Government." He adds that if Sir Robert Bond had let the Morris Government elect a Speaker, he could have passed a vote of want of confidence, and would then have had a stronger claim to be recalled and given a dissolution, but that it is "uncertain" whether he would have got it.(2)

It may be added that Sir Edward Morris won the election.

In May 1923, an election took place in the ordinary course, under

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(1) Appendix to the Journals of the Legislative Assembly, 1909: Correspondence between the Governor, Sir Robert Bond and Sir Edward Morris, pp. 342, 347, 356-363, 369, 371-377, 380, 382-385, 403-404, 406-409, 420, 437, 439. On the last point, compare Evatt's views in regard to the Canadian crisis of 1926, and my reply, pp. 381-383, below.

(2) Op. cit., 1912 ed., pp. 209-211; 1928 ed., pp. 168-169. Keith also does not mention the Prince Edward Island case of 1859. It seems clear that if Sir Robert Bond had followed Mr. Coles' example, and advised dissolution only after the House had failed to elect a Speaker, his claim would have been very much stronger.

the auspices of Sir Richard Squires. The Government was victorious, 23-10. On July 23, however, as a result of charges of corruption, Sir Richard Squires resigned in favour of Mr. Warren. The Legislature met for the second session, April 23, 1924. Next day a motion of want of confidence was moved and carried. Mr. Warren made new arrangements and carried on till May 7, when he resigned in favour of Mr. Hickman. On June 3, the Legislature was dissolved.(1)

In the election of October 29, 1928, the Alderdice Government was defeated and Sir Richard Squires returned to power. On February 18, 1932, the Assembly asked for an investigation of charges against the Premier, and on May 7 he resigned. Mr. Alderdice took office, and on June 16 obtained a dissolution.(2)

(f) South Africa

(i) The Cape of Good Hope

On August 25, 1903, Mr. Burton, Bond member for Albert, moved to create a court "to revise both the fines imposed on rebels and the compensation paid to farmers" for war losses. In the division, the Sprigg Government was defeated by a majority of 10. The Prime Minister thereupon announced that he proposed to dissolve, jettisoning four important bills. Dissolution took place without Supply being voted. The previous dissolution had been granted to Sir Gordon Sprigg, when he found himself in a minority in June, 1898; he had been defeated in the election, and resigned; Mr. Schreiner had taken office, carried on till June 1900, and then, on defeat in the House, had resigned; Sir Gordon Sprigg had then taken office again.(3)

The Sprigg Government was heavily defeated in the election of 1903.

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(1) Canadian Annual Review, 1923, pp. 145-146; 1924-1925, p. 76.
(2) Ibid., 1932, p. 350.
(3) Ian Colvin, "Life of Jameson" (Edward Arnold and Company, 1922), vol. II, pp. 181-182, 200-201, 220-224.

On February 18, 1904, it resigned, and the Governor sent for Dr. Jameson. The Jameson Government carried on till 1907, when it found itself in difficulties in the Upper House. When the President was in the chair, his casting vote gave the Government a majority, but when the House was in committee the Government was in a minority of 1. The Government therefore advised dissolution, and the advice was accepted.(1)

(ii) The Union of South Africa

On February 6, 1920, General Smuts, who had succeeded General Botha on November 3, 1919, secured a dissolution in the ordinary course. The election returned 41 South African party (Government) and 3 Independents who normally supported General Smuts, 44 Nationalists, 25 Unionists and 21 Labour. The choice before the Prime Minister was to resign at once, or to meet Parliament and try to carry on. If he resigned, it was clear that "no other party leader could attempt to form a Government with any prospect of success, and an immediate dissolution would have followed". He accordingly met Parliament, which supported him throughout the session. Efforts to form a composite four-party Government, or to unite the South African and Nationalist parties having failed, and the South African and Unionist parties having merged, General Smuts felt that the new political situation justified a fresh appeal to the electorate. He therefore advised dissolution. The advice was accepted, and dissolution took place, December 31, 1920. The election give General Smuts 78 members, the Nationalists 44, Labour 9 and Independents 1.(2)

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(1) Ibid., pp. 234, 265.
(2) South African Year Books; Round Table, vol. 11, pp. 193, 198-199, 339, 432-434. For the South African case of 1939, see Chapter VII.

Summary and Analysis of the Precedents in the Overseas Empire

There appear to have been altogether some 108 grants of dissolution in special circumstances, and some 46 refusals, with at least four cases in which the Crown or its representative declined to give a prior promise of dissolution. The United Kingdom cases are analyzed in Chapter III, the Canadian cases of 1926 in Chapters V and VI, and the South African case of 1939 in Chapter VII. There remain 86 grants (New South Wales 15, Victoria 9, Queensland 8, South Australia 8, Tasmania 8, Commonwealth of Australia 3, New Zealand 3, Prince Edward Island 6, New Brunswick 3, Province of Canada 3, Quebec 3, Manitoba 4, British Columbia 3, Dominion of Canada 1, Newfoundland 6, Cape of Good Hope 2, Union of South Africa 1), and 43 refusals (New South Wales 9, Victoria 10, Queensland 1, South Australia 3, Tasmania 5, Western Australia 1, Commonwealth of Australia 3, New Zealand 3, Nova Scotia 1, New Brunswick 1, Province of Canada 2, Quebec 1, British Columbia 1, Newfoundland 2). Of these some analysis is now in order.

The grants of dissolution may be divided into those to defeated Governments and those to Governments enjoying the confidence of the House, whether or not they had suffered minor or casual defeats. The distinction is not always easy to make, because the information available is sometimes not complete enough to make clear whether a given defeat was or was not of major importance. Continuance in office for some considerable period after a parliamentary defeat or defeats, however (as in New Zealand in 1877), or a statement by the Governor that there had been "no adverse vote" (as in Tasmania in 1904), may be regarded as evidence that the defeats were of small moment; and the number of other doubtful cases is small. For the sake of brevity, Governments enjoying the confidence of the House in the sense just indicated will be described as "undefeated".

(i) Grants to Defeated Governments

Grants of dissolution to defeated Governments (apart from the cases dealt with in other chapters) number at least 42. In some 10 or 11 of these the Parliament was approaching the end of its maximum term. In two cases there had been an extension of the franchise, in one a redistribution of seats, in one a very considerable increase of population since the previous dissolution. In one case, dissolution took place by agreement between Government and Opposition, in another by virtual invitation of the House itself. In two cases there was a virtual deadlock, the Government having been defeated only by the Speaker's casting vote. In four cases, dissolution was granted to a new Government which had taken office because of the dismissal of its predecessor; in one, to a Government which had recently taken office after the resignation of its predecessor. In 21 cases, one or more alternative Governments had already held office since the previous dissolution; in 11 others the parliamentary situation virtually precluded the formation of any alternative Government capable of carrying on with the existing House. In 19 cases (apart from those where dissolution was granted as a consequence of dismissal), the previous dissolution had been granted to the Government's opponents. In five cases the previous dissolution had been granted to a different Government. In 12 or 13 cases there was some great question of public policy at issue, in two the Government professed to have a reasonable expectation of success. In one only do the influence or instructions of the British Government appear to have played any part, while in one the instructions of the Dominion Government of Canada were clearly decisive. In one there had been a major change in the political situation since the previous dissolution. In two cases the Government had proffered its resignation before asking for dissolution. In one case there had been two prior refusals. In only one case does there appear to have been any assertion that the Governor enjoyed a special position

which entitled him to act otherwise than in accordance with British practice.

In at least 23 cases where dissolution was granted to defeated Governments the previous dissolution had been granted to the Government's opponents, and in at least five other cases to a different Government from the one then holding office. In six of these 28 cases there was a great question of public policy at issue; in six, the Parliament was already approaching expiry through efflux of time, in four more it was in the last year of its life; in one case, two alternatives, in four cases, three, had already been tried; in two, four; in one, five; in four, the previous Government had been dismissed; in one, there was a deadlock; in one, the Government offered to resign first; in three or four, the parliamentary situation made any alternative nearly or quite impossible; in one, there was a formal agreement between Government and Opposition, the two parties being very nearly at a deadlock; in one, there had been an extension of the franchise. In only two or three of the 28 cases does the mere fact that the previous dissolution had been granted to another Government seem to have been regarded as sufficient reason for a new dissolution.(1)

There appear to have been at least 11 cases where dissolution was granted to a Government which had had the previous dissolution. In five of these a great question of public policy was at issue; in three, the Parliament was approaching the end of its term; in two more, it was in its last year; in four, the parliamentary situation made any alternative Government nearly or quite impossible; in one, there had been redistribution and an extension of the franchise; in one, the Government had offered its resignation before asking for dissolution; in one, there was a deadlock; in one, the House virtually asked for dissolution; in one, it was at least arguable that there was a great question of public policy at issue, and

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(1) Here and elsewhere the incompleteness of the information available to me has made it impossible to be more definite.

the smallness of the majority against the Government made it at least highly doubtful whether any alternative Government could carry on.

There appear to have been eight cases in which defeated Governments obtained dissolutions when the previous dissolution had taken place about a year or less before. In each case there appear to have been cogent reasons for the grant. In Victoria in 1880, the previous dissolution had been granted to the Government's opponents, one alternative had been tried, the parliamentary situation rendered an alternative Government impossible, and there was a great question of public policy at issue. In Victoria in 1921, there was again a great question of public policy at issue, and the parliamentary situation precluded any alternative. In Queensland in 1907, the previous Government, under whose auspices the previous election had been held, had been dismissed. In Tasmania in 1872, the smallness of the Opposition's majority made it at least highly dubious whether an alternative Government could carry on: resignation of the Speaker and election of a new one from the other side of the House would have placed a new Government in much the same position as its predecessor. In the Australian Commonwealth in 1929, the House practically invited its own dissolution. In Prince Edward Island in 1854, the defeat was not necessarily decisive, and there had been an extension of the franchise. In New Brunswick in 1857, there was a deadlock, the Opposition had twice invited dissolution, and a new political situation had arisen since the previous election. The eighth case was that of Mr. Meighen's Government in Canada in 1926, discussed at length in Chapter VI.

(ii) Grants to "Undefeated" Governments

Grants of dissolution to "undefeated" Governments in anything like special circumstances number at least 40 (apart from the cases dealt with in other chapters). In eight cases the Parliament was approaching the end of its maximum term, in five more it was nearly, if not quite, in

this position. In one case there had been an extension of the franchise, in four a redistribution. In 9 cases there was a deadlock, the Government being dependent on the Speaker's casting vote. In five cases the previous Government had been dismissed, in seven others dissolution was granted to a new Government which had recently taken office as a result of the resignation of its predecessor. In 29 cases (apart from those where the previous Government had been dismissed), one or more alternative Governments had held office since the previous dissolution, in three more the parliamentary situation was such as to make any alternative Government nearly or quite impossible. In at least 25 cases (apart from those where dismissal was involved), the previous dissolution had been granted to the Government's opponents, and in three more to a different Government. In six cases (including the Australian "double dissolution" of 1914), there was a question of the relation between the two Houses; in four others there was some other great question of public policy at issue. In two cases there had been a major change in the political situation since the previous dissolution. In two others dissolution was granted only after it had been refused and attempts to carry on with the existing House had failed; in another, grant followed refusal to a defeated Government. In one the Government twice proffered its resignation before asking for dissolution.

Apart from cases dealt with in other chapters, there appear to have been at least 28 grants of dissolution to "undefeated" Governments where the previous dissolution had been granted to the Government's opponents, and three others where it had been granted to a Government other than the one making the request. In eight of these 31 cases, the Parliament was nearing the end of its maximum term; in four cases, two years of a three year term had elapsed (in one of these the Legislature had held five sessions), and in a fifth almost two years had elapsed; (in one, four years and one month of a five year term; in one, three years and one and a half months of a four year term had elapsed; in another, two years

and eight months. In six cases the relations of the two Houses were in question, in four others there was some other great question of public policy. In seven cases there was a deadlock; in two, redistribution; in one, an extension of the franchise. In one case, grant followed two refusals when it became unmistakably clear that no Government could carry on in the existing House; in another, there had been a prior refusal and an unsuccessful attempt to find an alternative Government; in a third, grant followed refusal to a defeated Government. In one, the Government had twice offered its resignation before asking for dissolution. In two cases the previous Government had been dismissed; in four, dissolution was granted to Governments which had recently assumed office after the resignation of their predecessors (in one of these last cases, the Legislature was in its last year, and the new Government's majority was so small as to make its position extremely difficult). In one, there had been a major change in the political situation since the last election, and there had been two other Governments since that election, one of which had been defeated and dismissed after being refused dissolution.

In at least nine cases dissolution seems to have been granted to a Government which had had the previous dissolution. In one case the Parliament was almost at the end of its term; in one case three years of a four year term had elapsed. In two cases there was a deadlock. In two, the previous Government had been dismissed. In one case, where Parliament was in its last year, a new Government had recently taken office after the defeat and resignation of its two predecessors; in another, where the Parliament was almost at the end of its term, a new Government had taken office upon the resignation of its predecessor. In one case there had been a redistribution. In one, the Opposition had been

able to block public business almost completely, and had twice invited dissolution.(1)

In some eleven cases, an "undefeated" Government obtained dissolution when the previous dissolution had taken place about a year or less before. In New South Wales in 1895, the previous dissolution had been granted to the Government's opponents, one alternative Government had held office since the preceding election, and there was the issue of relations between the two Houses. In Tasmania in 1912, and Prince Edward Island in 1859, there was a deadlock. In Prince Edward Island in 1873, the previous dissolution had been granted to the Government's opponents, and its majority was very small and unstable. In Quebec in 1936, the Opposition had succeeded in blocking essential public business; there was no chance that it could form a Government and carry on in the existing House; it had twice "dared" the Government to dissolve. In Manitoba in 1915, a new Government had just taken office on the resignation of its opponents, who had had the previous dissolution and carried on through the first session. In Newfoundland in 1874, there was a deadlock; in 1909, a deadlock following an election under the auspices of the Government's opponents. In Newfoundland in 1924, two alternative Governments had confessed their inability to carry on with the existing House. In South Africa in 1920, a new political situation had arisen since the previous election.

(iii) Refusals to Defeated Governments

Refusals of dissolution to defeated Governments (apart from the

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(1) In the five cases in which it is not clear, from the information available to me, whether the Government was defeated or "undefeated", the following points may be noted: in two cases, the previous dissolution had been granted to another Government, and in one of these Parliament was in the last year of a three year term; in another, Parliament had been in existence for between three and four years; in the fourth case Parliament had been in existence for four years and the relations of the two Houses were at issue; in the fifth, the Government had taken office on the voluntary resignation of its predecessor.

cases dealt with in other chapters) number at least 29. In four cases the Parliament was approaching the end of its term; in eight, the Government had recently taken office upon the resignation of its predecessor; in 21, one or more alternative Governments had held office since the previous dissolution; in 19, the previous dissolution had been granted to the Government's opponents; in one, it could be claimed that the relations of the two Houses were at issue; in 11 other cases, the Government claimed that some other great question of public policy was at stake; in one, it claimed to have a reasonable expectation of victory, and the Governor did not dispute the claim.(1) All these points strengthened the case for granting dissolution; yet dissolution was refused. The special circumstances in Nova Scotia in 1860 also provided a very strong case for dissolution, which was nevertheless refused.

In three cases the fact that Supply had not been voted was the single reason for refusal; in another, it was a contributing factor. In eight cases the Governor denied that there was any great question of public policy at issue requiring to be settled by a general election, and in a ninth case Keith surmises this was the reason for refusal. In one case the Governor denied that it was necessary to have an election to settle what had ceased to be a difference between the two Houses. In eight cases(2) the Governor clearly believed that the parliamentary situation was such that an alternative Government was possible, and in every one of these subsequent events proved that he was right. In two cases the expense was a contributing factor in the refusal; in one, the season of the year. In one case the ground of refusal appears to have been simply that the request came from only a minority of the Cabinet. In two, the Governor contended that to grant the

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(1) In six other cases the claim was made but disputed.
(2) Note also the Canadian case of 1926 (Chapter V) and the South African case of 1939 (Chapter VII).

dissolution would be to deprive Parliament of its independence. In five cases the Governor asserted a claim to a special position, different from that of the Crown in England, but in one of these the Secretary of State for the Colonies gave no support to the doctrine, and in two others the assertion appears to have been a mere obiter dictum, as the Governor proceeded to justify his action on other grounds.

(iv) Refusals to "Undefeated" Governments

Refusals of dissolution to "undefeated" Governments in the overseas Empire number at least 12. In seven, one or more alternative Governments had already been tried; in six , the previous dissolution had been granted to the Government's opponents; in three, it could be claimed that the relations of the two Houses were at issue; in four others, the Government asserted that there was some other great question of public policy at stake.(1) In one case there was a prospective deadlock, virtually certain; in two others, the Government had been sustained on certain divisions only by the Speaker's casting vote. All these points provided strong ground for granting dissolution, but dissolution was refused.

In two cases the fact that Supply had not been voted was a contributing factor in refusal. In one case where the Government claimed that there was a dispute between the two Houses requiring submission to the electors, the Governor denied it; in every case where the Government claimed that some other great question of public policy was at issue, the Governor denied it. In two cases the Governor insisted that he must try to find an alternative Government before granting dissolution (in one he succeeded), and in another he suggested (correctly) that the Government might be able to carry on in the next session of the existing Parliament. In two, the season of the year was a factor; in two others, the expense. In one case the Governor asserted

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(1) In two cases the Government claimed that it had a reasonable expectation of victory, and the Governor denied the claim.

a special position,(1) but explicitly admitted that in matters not involving Imperial interests (which were not in question at the moment) the rights of Dominion Ministers were the same as those of British Ministers. In one case the ground for refusal appears simply to have been that the request came from only a minority of the Cabinet.

(v) Some of the Principles Followed

One interesting feature of the overseas precedents is the number of times in which the Governor or the Government or both explicitly invoked the Peel-Russell-Gladstone doctrine(2) that dissolution is proper, in most cases, at any rate, only when there is some great question of public policy at issue, or the Peel-Gladstone doctrine that there must also be a reasonable probability that the Government will be victorious at the polls. In Victoria in 1872, the Government said there was a "paramount question" at issue, and the Governor gave as one of his reasons for refusal that there was no great "measure" which the Government was actually or prospectively unable to carry. The Government also claimed that there were reasonable grounds for believing that the electorate would reverse the decision of the House. In Victoria in July 1875, both the Prime Minister and the acting Governor raised both points; in October 1875, the Prime Minister raised both points, and the acting Governor said there was no substantial difference between the two requests for dissolution, that of July and that of October. In Victoria in 1879, the Governor gave as one reason for granting dissolution the fact that the Reform Bill had never been submitted to the electors in its then shape. In Victoria in 1880 both Governor and Government invoked both doctrines. In Victoria in 1881, the Governor emphatically asserted both the Peel-Russell-Gladstone doctrine and the Peel-Gladstone doctrine. In Queensland in 1870, the Government invoked both doctrines,

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(1) In Newfoundland in 1909, the Prime Minister raised the question of the

and the Governor explicitly recognized the former. In Tasmania in 1877, the Government invoked both doctrines. In Tasmania in 1879, the Government asserted, and the Governor denied, that there was a great question of public policy at issue, and the Governor gave as an additional reason for refusal his opinion that there was no reasonable probability of the Government winning the election. In Tasmania in 1904, the acting Governor gave as one reason for refusal that the Government had no definite new proposals. In Tasmania in 1909, both Government and Governor invoked both doctrines. In the Commonwealth in 1909 the Government asserted that it expected to win the election. In New Zealand in 1872, the Government said it expected to win the election; the Governor refused dissolution on the grounds, among others, that this expectation was not well founded, and that there was no great public question at issue between the two parties. In New Zealand in 1877, in the discussion of Sir George Grey's first request for dissolution, both the Prime Minister and the Governor invoked both doctrines. In the second New Zealand case of that year, the Governor again gave as a reason for refusal the fact that, in his opinion, there was no great question of public policy at issue. In Canada in 1858, and in Quebec in 1879, both Governor and Government referred to the two doctrines as factors in their respective decisions. In Newfoundland in 1909, the Governor invoked both doctrines, the Government one.

It should perhaps be added that in at least 15 cases the Governor explicitly considered the parliamentary situation and the possibility of the existing Government, or an alternative one, being able to carry on in the existing House; that in at least five cases he assigned as a reason for grant or refusal the fact that the previous dissolution had or had not been granted to the Government's opponents;(1) and that in at least 12 cases he gave as one reason for grant or refusal the length of time which

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Governor's position.
(2) See below, pp. 123-128, 131-133.

(1) The Government urged this point in seven cases.

had elapsed since the previous dissolution. It seems clear also that there was fairly general acceptance of the principle that every effort should be made to have Supply voted before dissolution took effect.

(vi) Forced Dissolutions

Forced dissolutions in the overseas Empire seem to have been comparatively rare. The dissolutions in New Brunswick in 1856 and 1866 were certainly forced, insisted upon by the Governor, and carried through by dismissal of Ministers. The dissolution of 1900 in British Columbia might be described as forced by the Dominion Government, but this would be rather stretching the term, as the Dominion gave the Lieutenant-Governor the choice of granting the Government a dissolution or having it meet the Legislature. Moreover, it seems clear that Mr. McInnes did not call Mr. Martin to office with the intention of bringing about a dissolution, but simply granted him dissolution when he found himself incapable of carrying on in the existing House.

The Tasmanian case of 1909 might be called an abortive attempt at forced dissolution. But in this case the Governor gave way. He had really no choice; for he could hardly recall the Government which had just left office because of his refusal to grant it dissolution. That would have been to admit that the refusal was unjustified, which in fact it clearly was not.

The dissolutions of 1861 in Newfoundland, 1878 in Quebec, and 1907 in Queensland were not, properly speaking, forced dissolutions. In a true forced dissolution, the Governor insists on dissolution, and, if his Ministers refuse to advise it, dismisses them and finds others who will tender the desired advice. Dismissal is a consequence, not a cause. In these cases, on the other hand, the Governor dismissed his Ministers for

reasons which had nothing to do with dissolution, and then, when his new Ministers found themselves unable to carry on in the existing House, granted them a dissolution. Dissolution was the consequence of dismissal.

Much the same remarks apply to the cases of Quebec in 1891 and New South Wales in 1932, the difference being that in these cases the new Ministers did not even attempt the hopeless task of carrying on in the existing Assembly. But the Governor does not appear to have dismissed his previous Ministers for the express purpose of bringing about a dissolution; on the contrary, dissolution was again rather the consequence of dismissal.

Chapter III

The Opinions of Constitutional Authorities

Precedent is an essential element in the conventions of the Constitution. But it is not and cannot be the only element. Every precedent begins by being unprecedented. Pitt's unprecedented dissolution of 1784 was denounced by Fox as unconstitutional. On the other hand, Fox and Grenville in 1806 brought forward a most imposing array of precedents to defend the inclusion of Lord Ellenborough, Chief Justice of the King's Bench, in the Cabinet and to deny the principle of collective responsibility of the Ministry. Fox stood in each case squarely on precedent; in each case, constitutional authorities now agree, he was wrong. What is unprecedented is not necessarily unconstitutional. Precedents have to be applied and adapted to new situations. This involves the use of "reason", in the eighteenth century sense of the term. We have to look beyond the mere letter of precendent to the spirit and intention of the Constitution.

Jennings, discussing conventions, says: "They grow out of practice, Their existence is determined by precedents. Such precedents are not authoritative, like the precedents of a law court. There are precedents which have created no conventions, and there are conventions based on precedents which have fallen into desuetude.... Every act is a precedent, but not every precedent creates a rule. It can hardly be

contended that if once the House of Lords agrees with the House of Commons it is henceforth bound to agree with the Lower House. Again, the fact that the King asked Mr. Baldwin and not Lord Curzon to form a Government in 1922 (sic) does not of itself imply that the King must never in future appoint a peer as Prime Minister. Similarly, the fact that the King, in 1924, granted Mr. MacDonald a dissolution does not of itself imply that in future he has no right to refuse. It is more important that there is a course of precedents. The fact that the King assented to the Parliament Bill of 1910-1911 and the Home Rule Bill of 1914 does not of itself prove that the King must invariably consent. It is a stronger fact that no monarch since Queen Anne has 'vetoed' a Bill. The facts that no government has been dismissed since 1783 (regarding the 'dismissal' of Viscount Melbourne is 1834 as not a dismissal), that no peer since the Marquis of Salisbury has been Prime Minister, that a dissolution has not definitely been refused for at least a century, and so on, are important.

"Even so, precedents do not definitely prove anything. 'Precedent, like analogy, is rarely conclusive', said Viscount Esher, who was an authority on precedents and the confidential adviser of King Edward VII. Precedents create a rule because they have been recognised as creating a rule. This is a distinction between simple precedents and normative precedents. It is sometimes enough to show that a rule has received general acceptance. Persons of authority for nearly a century have asserted the right of the Prime Minister to choose his colleagues, while recognising in the monarch

the power to offer strong opposition to individual nominations. Persons of authority have never, so far as is known, asserted the duty of the monarch to grant a dissolution on request. (1)

"But such general recognition cannot always be proved. There can be no sufficient general recognition of a recent precedent. Occasionally a simple precedent will overthrow a long-standing rule. Until Mr. Disraeli resigned in 1868, no Government had resigned on defeat at the polls and without meeting Parliament. Until 1932 no modern Government had 'agreed to differ' Was it possible to say in 1868 that Mr. Disraeli's act was unconstitutional, or in 1932 that the Cabinet's act was unconstitutional? The approach to the answer to these questions indicates an important characteristic of conventions. They do not exist for their own sake; they exist because there are good reasons for them. The Reform Act of 1832 and the strict party alignments which followed from it altered the nature of the Constitution. The power of the Government rested not on its ability by 'management' to secure a majority of the House of Commons, but on the vote of the electorate at the previous election. As Mr. Baldwin said in explanation of his resignation in 1929: 'The people of this country had shown plainly that whether they wanted Hon. Members opposite or not, they certainly did not want me, and I was going to get out as soon as I could.'

"The precedent of 1868 was due to the recognition of altered political conditions. The precedent of 1932 was due to

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(1) Jennings adds, in a footnote; "I exclude text-book writers; they are not persons of authority for this purpose."

exceptional political conditions....

"Precedents create conventions because they have reasons of a general nature which relate them to existing political conditions. The Reform Act fundamentally altered the political situation. So far as the older precedents depend upon the unreformed constitutional system, they are worthless. 'It is only within the last fifty years', said Mr. Gladstone in 1873, 'that our constitutional system has settled down'. 'The relations of the members of the Cabinet to their chief and to one another', said the Earl of Oxford and Asquith, 'present little resemblance to the practice of the eighteenth century.' The effects of the Reform Act in resting political power upon popular election were not immediately obvious. It was thought necessary even in 1850 to secure from the House of Commons a vote of confidence because the House of Lords had passed a vote of no-confidence. Viscount Melbourne, in 1835, asked whether it was not a serious question for a man with a House of Commons majority to 'engage in political warfare' with the Crown, a majority of the House of Lords, almost the whole of the clergy, and three parts of the 'gentlemen of the country' --- the kind of question which no Liberal or Labour Government has since asked itself. In the same year, Viscount Melbourne explained to William IV that the confidence of the Crown was essential to the existence of the Government. Sir Robert Peel's refusal of office in 1839 was due to his belief that the dismissal of the Queen's Whig ladies was necessary as a mark of the confidence of the Crown. At least as late as 1841 a dissolution of Parliament was regarded as an appeal by the Sovereign to the people, and not merely an appeal by the Government. Precedents arising before 1832 must be used in

rare cases only, for the Reform Act altered the fundamental assumption of the Constitution. The change was not immediately obvious. The King and his ministers continued to make the old assumptions until 1837. For most purposes the new Constitution may be assumed to date from 1841. In that year the accession of the Tory Government marked the acceptance of the principle of democratic government. The extension of the franchise, the hardening of party lines, and the intervention of the State in economic life, have shifted the emphasis. The essential principle remains. The British Constitution is democratic. The power of government rests in the last resort on the consent of the electorate, expressed at a general election. The powers of the Crown and the House of Lords must be exercised in accordance with that principle. Precedents created in an age when the principle was not accepted are of no value if they contradict the principle; if they do not, they must be scrutinised with care in order to ascertain how far they remain in accord with modern constitutional ideas. Precedents, in short, are not conclusive. Unlike the precedents of the courts, they are not built upon each other by a peculiar technique. They are related immediately to political ideas. They create rules because rules are necessary; and the rules are established by precedents which accord with the developing principles of constitutional government....

"Another difficulty is that full information about precedents is not always available... Most writers have been led astray on the subject of the monarchy, for instance, by Bagehot's exposition. The material now available makes it evident that Bagehot's analysis was in many respects faulty....

"Even Lord Bryce, whose competence as an expounder of constitutional questions cannot be doubted, says that the British Constitution 'works by a body of understandings which no writer can formulate'. Nevertheless, these understandings do exist, and the student of the Constitution is able to form some judgment as to their content, though he must recognize that his conclusions are necessarily subject to qualification as more information becomes available." (1)

What, then is "the spirit and intention of the Constitution", and how can we discover it? Dicey says that all the conventions have "one ultimate object, to secure that Parliament or the Cabinet ..... shall in the long run give effect to the will of ..... the nation". (2) Doubtless we should all accept this. But what precisely does it mean in relation to the dissolution of Parliament? Evatt points out that "of course, in one sense, every appeal to the people, whatever circumstances exist when it takes place, represents an attempt to get a decision from the political sovereign. In this sense a series of repeated dissolutions of the Parliament may be said to represent the 'triumph' of the people as political sovereign. In actual fact, however, by means of defamation and intimidation and the deliberate inculcation of disillusion and disgust, a series of repeated dissolutions would probably be the very means of first delaying and ultimately defeating the true popular will, and so represent a triumph over, and not a triumph

(1) "Cabinet Government", pp. 5-10, 12.
(2) "Law of the Constitution", 8th. ed. (Macmillan,1926), p.424.

of, the electorate." (1) Even without "defamation and intimidation and the deliberate inculcation of disillusion and disgust", a series of dissolutions, by preventing discussion in Parliament, and so keeping the electorate in ignorance of relevant facts, might well have the same effect.(2) As Lord Balfour said, "No constitution can stand a diet of dissolutions".(3)

Dicey's formula in its turn, therefore, requires interpretation, as he of course recognized. It finds it, in part, in the opinions of Dicey himself and other constitutional authorities on specific questions. Unfortunately the authorities are very far from unanimous.

Queen Victoria "invariably considered whether she should grant or refuse dissolution", and King Edward VII, in 1905, was displeased by Mr.Balfour's assumption that the grant was automatic. King George V's attitude in November 1910 showed that he certainly did not regard himself as bound simply to accept the advice tendered him. Lord John Russell, Lord Aberdeen, Disraeli, Lord Salisbury and other statemen supported the view that the Crown could refuse, though they

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(1) Op. cit., p. 109.
(2) For discussion of this point, see below, pp.
Note also Lord Morley's remark during the crisis of 1910-11, quoted in Sir Almeric Fitzroy's "Memoirs", 5th ed. vol.II, p. 427. Lord Morley said that if the King refused to create peers, Mr. Balfour would take office: "Of course another dissolution would follow, when he thought it likely that the country, in despair of any other expedient, would give the Unionists a majority."
(3) Quoted in Jennings, "Cabinet Government", pp. 317-318.

were not at all precise about the circumstances which would make refusal proper. (1)

Peel, in 1835, after a series of defeats in the Commons, resigned, declaring: "I can no longer bear defeat in a Parliament elected under my own auspices and on my own appeal." (2) By itself, this would suggest that he thought a Government defeated in the Commons, at least in the early stages of a new Parliament, was not entitled to a dissolution if it had had the previous dissolution. But when Lord John Russell, on March 2, 1835, eleven days after the opening of the new Parliament, asked about rumours of a second dissolution, Peel, while assuring him that he had not tendered such advice, flatly declined to give any pledge not to advise a second dissolution if the exigencies of the public service might appear to require it.(3) On the other hand, in a Cabinet Minute of March 25, Peel said: "We have tried the result of an

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(1) Jennings, op. cit., pp. 313,315,317; and Fitzroy, Newton and Spender and Asquith, loc. cit. Jennings notes (p.313) that "the earlier precedents proceed upon the assumption that an appeal to the country was an appeal by the Sovereign, so that failure of the Government was regarded as a personal rebuff to the Sovereign". For this reason I have omitted quotations from such authorities as Austin and Hearn, who had no doubts of the Crown's power to refuse dissolution, but whose views seem to have been based partly, at any rate, on ideas now no longer relevant.

(2) Quoted by Disraeli, Parliamentary Debates, Third Series, vol. CXCI, p. 1705.

(3) Parliamentary Debates, Third Series, vol.XXVI, pp.471-472, 476,478. J.R.Thursfield, in his "Peel" (Macmillan, 1898), p. 144, says: "A second dissolution was constitutionally open to him."

appeal to the people; we cannot, I think, entertain the belief that there will arise, through our maintenance of office, the justification of a second appeal." (1) What he meant by this last phrase would seem to have been made clear some eleven years later. In 1846, after his defeat on the Irish Coercion Bill, he refrained from asking for dissolution of the Parliament elected five years before under Lord Melbourne's auspices, because (a) no such advice should be tendered without reasonable assurance of a majority united with the Prime Minister on all great public questions, (b) there should always be, in such cases, a great public question at issue, and (c) in this case the only such question would be Coercion, which would set Ireland against England, a disastrous state of affairs. When Peel resigned in 1835, there was certainly no great public question at issue, except the Tithe question, which had already been before the electors at the preceding dissolution, and on which therefore they had already given their verdict. As Todd puts it, Peel did not think it proper to ask for dissolution "for the mere continuance of his own administration in office".(2)

The debate on Peel's want of confidence motion in 1841 produced a considerable discussion of the circumstance in which dissolution was proper. Peel himself quoted Burke on the dangers of the House becoming a mere appendage of administration and losing its independence. He added: "I should say with Mr. Fox, it is dangerous to admit any other recognized organ of public opinion than the House of Commons. It is dangerous

(1) Peel's"Memoirs", (John Murray,1857), vol.II, p.90.
(2) Op. cit., vol. II, pp. 506-507.

to set up the implied or supposed opinions of constituencies against their authorized organ, the House of Commons. The House and the constituencies should not be brought into this unseemly contest ..... I know that you have power at any time to dissolve ---- I know, too, that you can choose the most favourable time for a dissolution. No doubt that is the prerogative of the Crown, a prerogative of a delicate nature for the House of Commons to meddle with." (1) These remarks are not altogether clear, and some of them seem to contradict others. In themselves they can hardly be regarded as decisive one way or the other; but it is noteworthy that they reiterate Burke's warnings.

In the course of the debate it was made clear that the Government had intended to dissolve anyway after taking the sense of the House on its Corn Law policy,(2) and there can be no question that the defeat on the Sugar Duties had really raised the whole quesion of the Government's tariff policy. Peel was therefore wrong when, in 1846, he condemned the Whigs' dissolution of 1841 on the ground that there had then been no great question of public policy at issue. (3) But that he did so suggests that it was his settled doctrine that a great question of public policy was a necessary condition precedent to a request for dissolution. (4)

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(1) Parliamentary Debates, Third Series, vol.LVIII,pp.812,817-819.
(2) Ibid, pp. 820-821.
(3) Parliamentary Debates, Third Series, vol.LXXXVII,pp.1042-1043; Peel's "Memoirs", vol.II,pp.292-294; Todd,"Parliamentary Government in England" (Longman's,Green,1887),2nd ed., vol.II, p.508.
(4) Presumably he would have made an exception of cases where the House had rejected every possible Government, or where an alternative Government with the existing House was clearly impossible.

Lord Morpeth rejected the view that a Government defeated in the Commons is not entitled to dissolution of a Parliament elected under its own auspices. But his reason is significant: "They could not say, that if a Minister .... who had brought forward a measure of great public importance, and who had been defeated in his attempts to carry that measure through Parliament, but who thought, that that measure would meet with a very great and warm support throughout the country -- he did not think that it could be said, that that Minister should be debarred from testing the sense of the country upon the measure." (1) This seems to be a clear acceptance of Peel's doctrine of the "great question of public policy". It seems clear also that Morpeth thought the time which had elapsed since the last dissolution a point of some importance; for, discussing Peel's action in 1835, in resigning instead of asking dissolution, and declaring that it was "in the spirit of the constitution", he noted that Peel had resorted to dissolution"only a short time before, ... upon the precise issue, whether the people were ready to commit the Government of the country to the right honourable Baronet". (2)

Sir James Graham upheld the view that in general a Cabinet defeated in the Commons was not entitled to dissolution of a Parliament elected under its own auspices, but admitted that in this case the Government was entitled to a dissolution, despite the fact that the existing Parliament had been elected under its auspices. (3)

(1) Parliamentary Debates, Third Series,vol.LVIII,pp.934-935.
(2) Ibid, p. 937.
(3) Ibid., pp. 958-959.

Dr. Lushington observed that when Walpole had resigned after defeat in the Commons, he had been under "a moral impossibility of dissolving Parliament..... The Minister had just met a Parliament assembled by himself at a time when the influence of the Crown was almost predominant in the House, and being defeated within a few months of its assembly, it would have been in vain for him to have again appealed to the people." He declared that Canning in 1807 had had a right to threaten an appeal, and Peel in 1834 had had a right to dissolve, because the existing Parliament had been called by his political opponents. He thought, however, that the Government of 1841 had a right to dissolve, apparently at least in part because four years had elapsed since the previous dissolution.(1)

Lord John Russell stated his opinion that no alternative Government in the existing House was really possible. After the vote on Peel's motion, in which the Government was defeated 311-312, with 8 members absent and unaccounted for, he stated that an alternative Government in that House was unlikely. This may be disputable, but Russell's use of the point as an argument for dissolution is at least interesting.(2)

Russell later fully endorsed Peel's view that a great question of public policy must be at issue before it was proper to ask for dissolution. It was, he said, because there had been no such question at issue in 1852 that he had then resigned instead of asking for dissolution; and it was because he considered there had been no such question at issue that he

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(1) Parliamentary Debates, Third Series, vol.LVIII, p.1010.
(2) Ibid., pp. 1212-1214, 1265.

condemned Lord Palmerston's dissolution of 1857. "There seems to be an opinion acquiring weight", he said, "which I am very sorry to observe, that upon any occasion when the Minister has not a majority he may have recourse to..... a penal dissolution; ..... he may put the Members of this House to the great trouble and expense of an election, ... using the threat as a means of coercing the actions of Members of this House. I can conceive of nothing more likely to damage the constitution." (1) Disraeli, in reply, suggested that in 1852 Russell had really had no right to a dissolution because he had been defeated in a Parliament elected under his own auspices, after six years in office, and after having resigned, in 1851, in consequence of a previous defeat.(2) Subsequently, however, it became known that Queen Victoria had been willing to grant Russell a dissolution, but that the Cabinet had thought it "not advisable", apparently because the Estimates and the Army Act had not yet been passed. (3)

In 1849, Russell had said that if the Lords rejected the Navigation Acts Repeal Bill and the Queen sent for Lord Stanley, he "doubted whether the Queen would give him the power to dissolve". (4) On the other hand, during the fruitless negotiations for a Stanley Government in 1851, Russell told the Queen that if Stanley were willing to accept office only on condition of being allowed to dissolve, he thought

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(1) Parliamentary Debates, Third Series, vol.CL, pp.1076-1077.
(2) Parliamentary Debates, Third Series, vol.CL, p.1084.
(3) Letters of Queen Victoria, First Series,vol.II, pp.445-446.
(4) "Later Correspondence of Lord John Russell", (Longmans, Green,1925) vol.I, p.195; quoted in Jennings, op.cit.,p.314.

"the responsibility too great for the Crown to refuse"; but he added that he "thought a decision on that point ought to depend on the peculiar circumstances of the case". (1) Stanley himself told the Queen that he would have no chance in the House if it was thought the Queen would refuse him a dissolution on defeat there. But he asked no pledge: "I hope I know my duty to my Sovereign too well to insist upon a pledge upon a question with respect to which no Sovereign ought to give a pledge. On the other hand, I am confident that her Majesty knows too well, and respects too highly, the mutual obligations .... which subsist between a Constitutional Sovereign and her responsible advisers to refuse .... the ordinary powers entrusted to a minister, or to depart from the ordinary understanding of being guided by his advice."(2) The Queen refused to give "a contingent positive promise", but gave permission to deny that she would <u>not</u> consent. (3)

In regard to these two cases it must be noted that Stanley's claim to dissolution in 1849 would have been very weak, in 1851 very strong. If he had taken office in 1849 as the result of the Lords' rejection of an important Government bill, had then been defeated in the Commons, and had asked for dissolution, he would indeed have been asking dissolution of a House elected under his opponents' auspices two years

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(1) Letters of Queen Victoria, First Series, vol.II,p.348, quoted in Jennings, loc.cit.
(2) Parliamentary Debates, Third Series, vol.CXIV,p.1014; quoted in Jennings, loc.cit.
(3) Letters of Queen Victoria, First Series, vol.II, p.366; quoted in Jennings, op. cit., p.315. Stanley clearly thought that if the Queen refused him dissolution and he resigned, "his adversaries" would then have a right to dissolve.

before; but an alternative Government which could carry on with that House of Commons would clearly have been perfectly possible. In 1851, on the other hand, he would have been asking for dissolution of a Parliament which had been elected under his opponents' auspices four years before, and which had just defeated both his Government and the alternative Government.

In 1858, Lord Derby, fearing defeat in the Commons, and noting that Lord Palmerston's friends were spreading it about that in such an event the Queen would refuse dissolution, asked the Queen's permission to announce that if he were defeated he had her sanction for a dissolution. "The Queen said he must leave it quite undecided whether the Queen would grant a Dissolution or not; .... she must be left quite free to act as she thought the good of the country might require at the time when the Government should have been beat (sic); there had been a dissolution within the year, and if a Reform Bill was passed there must be another immediately upon it." She therefore refused to give her sanction, or any pledge. She felt that to allow Derby to make use of such a threat would involve an unconstitutional biasing of the decision of the House of Commons. She thought it well, however, to consult Lord Aberdeen. He told her that "There was no doubt of the power and prerogative of the Sovereign to refuse a dissolution", though of course the new Cabinet would have to accept responsibilty for the refusal and defend it in Parliament. But he had no doubt that the Queen would dissolve if advised: "The Sovereign was bound to suppose that the .... Minister was a gentleman and an honest man, and that he would not advise her

Majesty to take such a step unless he thought it was for the good of the country." He rather pooh-poohed the argument about the frequency of dissolutions. He thought Derby was entitled to threaten that he would advise dissolution, but agreed that he must not use the Queen's name. The Queen then told Derby that she would not refuse dissolution if he were defeated in the Commons, but that he must not use her name in anything he said in Parliament on the subject. (1)

When Lord Russell's Government was defeated on its Reform Bill in 1866, Gladstone and some other Ministers favoured dissolution rather than resignation. (2) Gladstone, indeed, went so far as to call dissolution "the course most conformable to the principles and spirit of the Constitution". But he added at once: "It would probably bring the great question of the Reform of Parliament nearer an issue." (3) Russell, discussing the matter with the Queen also emphasized the fact that there was a great question of public policy at issue. Even so, he explicitly admitted that the Queen could refuse dissolution if he requested it. (4)

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(1) Letters of Queen Victoria, First Series, vol.III,pp.359, 363-365,367; also Jennings, op. cit., p. 315.
(2) Virtually the same Government, under Lord Palmerston, had had the previous dissolution, July 6, 1865. On Ministers' opinions, see Morley, "Life of Gladstone",(Macmillam,1903), vol. II, pp. 207-209.
(3) "Later Correspondence of Lord John Russell", vol.II,p.351.
(4) Letters of Queen Victoria, Second Series, vol.I, p.337.

In 1868, Disraeli, defeated in the Commons on the Irish Church question, asked and obtained dissolution. There was obviously a great question of public policy at issue, and a Reform Bill had recently been passed. Disraeli did not base his claim on these facts, however, but simply on the fact that, unlike Peel in 1835, he had not had the previous dissolution, and on the contention that Derby's Government had been entitled to an immediate dissolution when it took office in 1866 but had "waived" that right because the House was recently elected and for other reasons of "weight and principle". (1) In making his request to the Queen, he was none the less careful to admit that she was entitled to refuse. (2) Gladstone, replying to Disraeli's speech in the House announcing dissolution, denied that the question of whose "auspices" the previous dissolution has been held under "enters into the case in the manner and to the degree in which the right honourable gentleman has represented it does"; denied the right of a Cabinet to a "penal dissolution" (i.e., an appeal to the electorate from defeat in the Commons) for "no other cause than its sitting in a Parliament that was called into existence before the Ministry itself"; reaffirmed Peel's and Russell's doctrine that there must be an adequate cause of public policy, and Peel's that there must be a rational prospect of the electorate's reversing the decision of the House; and added: "I entirely question this title of

(1) Parliamentary Debates, Third Series, vol.CXCI, pp.1695-1708.
(2) Buckle, "Life of Disraeli", vol.V, p.32.
(3) Parliamentary Debates, Third Series, vol.CXCI, pp.1710-1712.

Governments, as Governments, to put the country as a matter of course to the cost, the delay and the trouble of a dissolution to determine the question of their own existence." (1)

In 1873 Gladstone was defeated in the Commons and resigned. Disraeli refused to take office, even though the Queen was willing to grant him a dissolution. He wanted Gladstone to dissolve. Disraeli notes that there "is an idea that this, being my Parliament, cannot be dissolved by me"; but all the documents in the case go to show that neither the Queen, nor Gladstone, nor Disraeli, nor anyone else interested, took any stock in this idea, and that Disraeli's refusal to take office, and his attempt to force Gladstone to dissolve, were purely tactical. (2) Lord Salisbury, however, notes that Hardy, one of the Conservative leaders, took the ground that "if we dissolve now, and are beaten, --- as we shall be, --- we cannot dissolve again for three or four years. If we leave Gladstone to dissolve in July, the chapter of accidents may give us power to turn them out within a year or so; and then we can dissolve again with satisfactory results." (3) This view, which seems to have been accepted by Hardy's colleagues would appear to imply that if the Conservatives took office and dissolved, they would not, at least in the early stages of the new Parliament, be entitled to appeal from defeat in the Commons by a second

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(1) Parliamentary Debates, Third Series, vol. CXCI, pp.1710-1712.
(2) Monypenny and Buckle, "Life of Disraeli", vol.V, pp.206 et seq.; Morley, "Life of Gladstone", col.II, pp.447-456; Parliamentary Debates, Third Series, vol.CCXIV, pp.1931-1941.
(3) Lady Gwendolen Cecil, "Life of the Marquess of Salisbury" (Hodder and Stoughton), vol.II, p.41.

dissolution; that if the Liberals dissolved, and were beaten in the new Parliament "within a year or so", they would not be entitled to a second dissolution either; and that if, after a Liberal dissolution and subsequent defeat in the House, the Conservatives took office, they would be entitled to dissolve.

In regard to the case of 1873, however, it must be noted: (a) that the Parliament of the day, though elected in response to Disraeli's appeal, was one which had meanwhile defeated his opponents, after they had held office for over four years; (b) that it unquestionably contained a majority which, in general, was adverse to Disraeli; and (c) that if he had taken office and been defeated in the House, there would have been no further means of avoiding an election: a House of Commons which refused to support either a Liberal or a Conservative Government would have been ripe for dissolution.

In 1886, Lord Salisbury assured the Queen that he considered her perfectly entitled to refuse dissolution to Gladstone if he were defeated in the House (even though the previous dissolution had been granted not to Gladstone but to Lord Salisbury himself). But he advised the Queen, none the less, to grant the dissolution if Gladstone asked for it, because "It is the natural and ordinary course; it will shield the Queen from any accusation of partisanship; it is likely to return a Parliament more opposed to Home Rule than the present."(1) Advice unconstitutionally sought from, and unconstitutionally tendered by the Leader of the Opposition, is not a very reliable

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(1) Quoted in Jennings, op. cit., p. 317.

source of constitutional wisdom. Lord Salisbury, in the circumstances, could hardly be disinterested, and his third reason for advising the grant of dissolution is significant. But it must be noted that when he spoke of this as "the natural and ordinary course" and the one that would "shield the Queen from any accusation of partisanship", he was speaking of a dissolution to be granted, as in 1784, 1831, 1852, 1857, 1859 and 1868, to a Cabinet which had not had the previous dissolution. Indeed, Salisbury explicitly said that dissolution "should be on the advice of Mr. Gladstone according to the usual practice; for the present House of Commons was summoned on Lord Salisbury's advice". (1)

When Gladstone's Government actually was defeated on the Home Rule Bill in 1886, some Ministers favoured resignation "mainly on the ground that the incoming government would then have to go to the country with a policy of their own. Mr. Gladstone, however, ... opened the case with a list of twelve reasons for recommending dissolution..... He knew of no case where a ministry defeated under circumstances like ours, upon a great policy or on a vote of confidence, failed to appeal to the country." (2)

The possibility that Gladstone might resign and that the Conservatives, on taking office, might then dissolve, had already been discussed by Lord Salisbury. Writing to Lord Randolph Churchill, March 30, 1886, almost three months before the defeat of the bill, he said: "It does not seem to me possible

(1) Ibid, p. 308.
(2) Morley, "Life of Gladstone", vol. II, p.341.

that we should attempt to govern by a majority of which Hartington, Trevelyan and Chamberlain will be important parts. On the other hand, a dissolution by us as a 'Government of Caretakers', would be hazardous.... It would be much better for us that the dissolution should take place with Gladstone in power, and upon the Home Rule question..... But Gladstone may, if he is beaten, decline either to dissolve or go on".(1)

Clearly Salisbury did not doubt his own right to a dissolution if Gladstone "declined either to dissolve or go on". But if he had asked for dissolution in such circumstances, he would have been asking for dissolution of a Parliament which, though elected under his own auspices about seven and a half months before, had meanwhile defeated both his Government and his opponents'. In such circumstances, there would pretty clearly have been no further expedients to be adopted before resorting to another election.

In August 1887, Chamberlain wrote that he expected "to see Mr. Gladstone back again in the early half of next year". (2) In October he was more specific: "I cannot see how Mr. Gladstone can be kept out much longer. If he comes back he will dissolve." (3) These remarks evidently contemplated either a defeat of Lord Salisbury's Government in the Commons or its resignation because of parliamentary weakness. Chamberlain would appear to have taken it for granted that in the event of defeat Salisbury would not ask for

(1) Winston Churchill, "Life of Lord Randolph Churchill", vol. II, pp. 73-74.
(2) J. L. Garvin, "Life of Joseph Chamberlain" (Macmillan,1933) vol. II, p.316.
(3) Churchill, "Life of Lord Randolph Churchill", vol.II,p.92.

dissolution even of a Parliament elected under Gladstone's auspices a year and a half before, but that Gladstone would. In the supposed circumstances, it must be noted, Gladstone would have been asking for dissolution of a Parliament in which he and his opponents had both confessed their inability to carry on.

In January 1894, after the Lords had defeated the second Home Rule Bill and had mutilated the Employers' Liability Bill and the English Local Government Bill, Gladstone wanted to dissolve.(1) The previous dissolution had been granted to Lord Salisbury a year and seven months before; Gladstone's Government enjoyed the undoubted confidence of the Commons; and there was a great question of public policy, the relations of the two Houses, at issue.

In 1895, when Lord Rosebery's Government was defeated in the Commons, Lord Salisbury thought that the constitutional course was for Rosebery to advise dissolution. (2) Salisbury himself had had the previous dissolution, had met the new House and been defeated by it, and resigned. But of course when Rosebery resigned, declining to avail himself of his right to dissolve, Salisbury took office and himself secured a dissolution. As in 1873 and 1885, however, the existing Parliament, though elected under Conservative auspices, was one which had meanwhile defeated their opponents after they had held office for over four, over five, and nearly three years respectively. The

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(1) Morely, "Life of Gladstone", vol.III, pp.504-505.
(2) Jennings, "Cabinet Government", p. 45.

Parliament in existence in 1895 unquestionably contained a majority normally adverse to the Conservatives. It had defeated both Conservative and Liberal Governments. There was no third party large enough to make any third type of Government possible. Dissolution was therefore inevitable. As the Liberals would not advise it, the Conservatives' right to do so was unquestionable. (1)

On July 20, 1905, Mr. Balfour's Government was defeated in Committee of Supply on an Irish item in the Estimates. The vote was 199-196. The Government was, however, victorious in sixty-one subsequent divisions, by majorities of 24 to 132. (2) It finished the session's business, prorogued Parliament on August 11, and remained in office till early in December, when it resigned because of internal dissension. Mr. Balfour considered himself entitled to a dissolution, and Sir Henry Campbell-Bannerman actually thought of trying to force him to dissolve; no one seems to have questioned his right to dissolve if he chose. (3) The existing Parliament had been elected under the auspices of the Conservatives, but more than five years before; the Government unquestionably enjoyed the confidence of the Commons; there was not the faintest chance that an alternative Government could carry on in the existing House, as Sir Henry Campbell-Bannerman admitted when he asked for

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(1) For the same reasons, if Lord Salisbury, in 1885 or 1895 had tried to carry on with the existing House and had been defeated, his right to dissolution would have been unquestionable.

(2) Parliamentary Debates, Fourth Series, vol.149, pp.1485-1490; vol. 150, pp. 281-288, 293-298, 297-302, 309-314, 313-318, 317-322, 323,328, 365-370, 399-404,405-410, 709-714, 829-834, 851-954, 1025-1028, 1027-1032, 1283-1288, 1297-1300, 1299-1304, 1411-1418, 1417-1422, 1423-1428, 1429-1434, 1433-1438, 1439-1442, 1443-1446, 1447-1452, 1451-1456, 1465-1468; vol.151, pp.171-176, 177-182, 187-190, 189-194, 195-200, 205-208, 213-216, 277-280, 289-294, 401-404, 405-408, 413-416, 469-472, 475-480, 485-490, 491-494, 505-507, 507-512, 517-520, 523-528, 529-534, 535-538, 539-542, 541-544, 699-704, 703-706, 705-710, 725-730, 731-736, 735-740, 741-744, 863-866, 967-870.

(3) See, for example, Sir Sidney Lee, "Life of King Edward VII" (Macmillan, 1927), vol. II, pp. 189-190.

dissolution without even attempting to meet the existing House.

Bagehot was on the whole decidedly hostile to the exercise of royal discretion in regard to dissolution of Parliament. Of refusal of dissolution he said: "There are vestiges of doubt whether in all cases a sovereign is bound to dissolve parliament when the cabinet asks him to do so. But neglecting such small and dubious exceptions, the cabinet which was chosen by one House of Commons has an appeal to the next House of Commons.... The Queen can hardly now refuse a defeated minister the chance of a dissolution". (1) On the other hand, "The ultimate authority in the English Constitution is a newly-elected House of Commons. No matter whether the question upon which it decides be administrative or legislative; no matter whether it concerns high matters of the essential constitution or small matters of daily detail; no matter whether it be a question of making a war or continuing a war; no matter whether it be the imposing of a tax or the issuing a paper currency; no matter whether it be a question relating to India, or Ireland, or London, ---- a new House of Commons can despotically and finally resolve." (2) If these very sweeping and positive expressions mean what they say, they clearly involve the right of the sovereign to refuse to dissolve "a newly-elected House of Commons".

Of forced dissolutions Bagehot says: "The more we study the nature of Cabinet Government, the more we shall shrink from exposing at a vital instant its delicate machinery to a blow from a casual, incompetent, and perhaps semi-insane outsider. The preponderant probability is that on a great occasion the Premier and Parliament will really be wiser than the king... Principle shows that the power of dismissing a Govenment with which Parliament

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(1) "The English Constitution" (Kegan, Paul, Trench, Trubner,1922) pp.15,242.
(2) Ibid., p. 227.

is satisfied, and of dissolving that Parliament upon an appeal to the people, is not a power which a common hereditary monarch will in the long run be able beneficially to exercise. Accordingly this power has almost, if not quite, dropped out of the reality of our constitution..... The Queen can hardly now..... dissolve in the time of an undefeated (minister), and without his consent." (1)

In respect to forced dissolutions, Bagehot specifically does not apply his dicta to colonial Governors, of whose intervention in such cases, however, he does not appear to think very highly. (2)

Lord Bryce seems to have thought that in ordinary circumstances the grant of dissolution was automatic, (3) but that the normal procedure for a Cabinet which had been censured by the Commons was to resign. It might "in Britain and the self-governing Dominions dissolve Parliament, but this course is infrequent". (4)

May observes that "The leaders of parties, --- profiting by the experience of Mr. Fox and Lord North, -- have since been too wise to risk the forfeiture of public esteem, by factiously opposing the right of ministers to appeal from the House of Commons to the people. Unless that right has already been exercised, the alternatives of resigning office or dissolving Parliament have been left, --- by general consent, --- to the judgment of ministers who cannot command the confidence of the House of Commons." (5)

Todd described as "erroneous" the theory that, on defeat in the House of Commons, "the alternative of resignation or dissolution is left

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(1) Ibid., pp.239-240, 242-243.
(2) "The English Constitution", pp.234-236.
(3) "American Commonwealth", 2nd ed. (Macmillan, 1919), vol.I, p.217.
(4) "Modern Democracies" (Macmillan, 1921), vol.II, p.492.
(5) "Constitutional History of England" (Crosby and Nichols,1862), vol. I, p.432.

absolutely to the discretion and responsibility of the Ministers". (1) If there was no probability of the vote of the Commons being reversed by the electorate, "the sovereign ought clearly to refuse". (2) Todd further thought that in Britain a Cabinet defeated in the Commons had not an absolute right to a dissolution, even if the Parliament had been elected under the auspices of its opponents, when "there is no important political question upon which the contending parties are directly at issue." (3) He quotes Wellington that when the sovereign is asked to dissolve he "ought by no means to be a passive instrument in the hands of his Ministers; it is not merely his right, but his duty, to exercise his judgment in the advice they may tender him. And though by refusing to act upon that advice he incurs a serious responsibility if they should in the end prove to be supported by public opinion, there is perhaps no case in which this responsibility may be more safely and more usefully incurred than when the Ministers ask to be allowed to appeal to the people from a decision pronounced against them by the House of Commons." (4) On the other hand, it was the "constitutional right of a minister, upon taking office, to advise the crown to dissolve a Parliament elected under the influence of his political opponents." (5) A Cabinet which appealed from a defeat in the Commons to the electorate must accept the verdict of the new House.(6) Dissolution may properly take place, he concludes: (1) "After the dismissal of Ministers .... as in 1784, 1807 and 1834. (2) On account of disputes between the two Houses. (3) In order to

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(1) "Parliamentary Government in the British Colonies", 2nd ed., p. 772.
(2) "Parliamentary Government in England", 1st ed. (Longman's,Green,1869), vol. II, p.408
(3) "Parliamentary Government in the British Colonies", 2nd ed., p. 774.
(4) "Parliamentary Government in England", Spencer Walpole's ed.,vol.II,pp.127-128.
(5) "Parliamentary Government in England", 1st ed., vol. II, p.409.
(6) Ibid., p. 414.

ascertain popular opinion in relation to any important act of the Executive Government if 'some question of public policy' creates a dispute between Ministers and the Commons. (4) 'Whenever there is reason to believe that the House of Commons does not correctly represent the opinions and wishes of the nation'." (1) He limits the last to cases analogous to that of 1784, so that, as Evatt points out, it is really not different from the first.(2)

In the self-governing colonies, Todd thought, the Governor possessed a real discretion. He was always "free to make trial" of an existing Assembly, but might grant dissolution even though one or both Houses remonstrated. He could impose conditions before granting dissolution. Todd also thinks that the Governor's decision may properly be influenced by his opinion as to whether the request for dissolution proceeds from "corrupt, partisan or unworthy motives". (3)

Anson's view is that in Britain a request for dissolution cannot be constitutionally refused, but that it cannot always be constitutionally made. A request is proper if there is reason to suppose that the Commons and the electorate are at variance: reason which may be furnished by by-elections, new issues, the espousal by the Government of an important new item of policy, or such new electoral regulations as the extension of the franchise. The first dissolution of 1910 he treats as "altogether exceptional". (4) "If a Prime Minister who still has a majority in the House of Commons resigns after a casual defeat, as did Lord Rosebury in 1895, or.... because he considers his programme is exhausted, as did Mr. Balfour in 1905,

(1) "Parliamentary Government in England", Spencer Walpole's ed., vol.II, p.186.
(2) Op. cit., p. 254.
(3) "Parliamentary Government in the British Colonies", 2nd. ed., pp.801,802, 816-817.
(4) "Law and Custom of the Constitution", "Parliament", 5th ed., (Oxford, 1922), pp. 325-328, 405.

his successor can only take office on the understanding that Parliament will be dissolved at the earliest opportunity, so as to afford the country a means of expressing its opinion on the new ministry." It would seem to follow that the Crown cannot constitutionally refuse an unconstitutional request. Anson adds that where there is reason to suppose that the House and the electorate are at variance, the Crown can force dissolution, if necessary by dismissing its Ministers and calling on others who are willing to take responsibility for such action. (1)

Dicey says that "A Ministry placed in a minority by a vote of the Commons have, in accordance with received doctrines, a right to demand a dissolution of Parliament"; (2) but elsewhere he modifies this: "'A Cabinet, when outvoted on any vital question, may appeal once to the country by mean of a dissolution.' 'If an appeal to the electors goes against the Ministry they are bound to retire from office, and have no right to dissolve Parliament a second time.'" (3) "A dissolution is allowable, or necessary, whenever the wishes of the legislature are, or may fairly be presumed to be, different from the wishes of the nation..... There are certainly combinations of circumstances under which the Crown has a right to dismiss a Ministry who command a Parliamentary majority, and to dissolve the Parliament by which the Ministry are supported." (4) Like Anson, Dicey thought that such a "combination of circumstances" had arisen in 1913, just before the third introduction of the Third Home Rule Bill. (5)

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(1) See letter to the London Times, September 8, 1913.
(2) "Law of the Constitution", 8th ed. p.428.
(3) Op. cit., p. 416
(4) Ibid., pp. 428-429.
(5) Ibid., p. 428; also letter to the London Times, September 15, 1913, quoted in Jennings, "Cabinet Government", pp. 441-443.

Lord Courtney said: "A Ministry, conscious of growing divergence between itself and the House of Commons, or embarrassed by other difficulties in the conduct of administration or legislation, may, however, treat as serious an adverse vote which in itself is trivial, and the same results follow as if the vote had been a premeditated and indubitable declaration of want of confidence. Such a situation, however created, must be followed by a resignation of the Ministry, unless Ministers act on the belief that the House of Commons no longer reflects the balance of judgment of the constituencies, and accordingly advise the Crown to dissolve Parliament. The Crown has never, during the present reign, refused to accept and act upon such advice, but it would be too much to declare that it could not be declined. In the self-governing colonies, where Parliaments have been established on the pattern of that of the United Kingdon, and where the Governor bears the same relation to his Ministers as the Crown bears to its Ministers at home, the advice to dissolve the Assembly corresponding to the House of Commons has been often rejected. This has been done where the Assembly has been very recently elected, and the Governor for this, or for some reason in his judgment equally cogent, believes that it reflects the will of the constituencies, and that a new election is uncalled for and would be vexatious. The Governor, however, in refusing to accept the advice to dissolve, must be prepared to accept the resignation of his Ministers and his refusal can be maintained only where he finds other men ready to undertake the ministerial functions. Could similar circumstances arise in the United Kingdom, the Crown might be found acting as its vice-regents have acted; and the fact that the Crown has not during the present reign so acted may be due to this, that a dissolution has never been advised except under conditions making it reasonable and proper." He thought forced dissolutions in England conceivable,

but noted that there had been none during the century. (1)

Mr. Jenks' view was: "The King, in certain rare cases, may take the extreme step of refusing to act on his Ministers' advice, even in political matters..... The King, except in the rarest cases, must act on his Ministers' advice, for which they are responsible.... Still, it is the duty of the King, on rare occasions, to take this risk; but they are really rare..... There would appear to be now only two well-known cases in which the King is justified in opposing his personal will to the advice of his Ministers in matters of State, unless, of course, that advice should entail an actual breach of the law..... The other crisis occurs when the Cabinet cannot secure the support of the House of Commons, and, following the precedent of 1784, asks the King to dissolve Parliament.... Here it is said that, if the Ministry was formed (as in that case) after the existing House of Commons was elected, the King must accede to the Ministers' request; but if, on the other hand, a House of Commons was elected since the formation of the Ministry, then presumably, the latest expression of the popular will is adverse to the Ministry, which cannot, therefore, insist on a dissolution of Parliament. If these views are correct, it will be seen that, even in the case of a difference between the King and his Ministers, the wishes of the country are the final court of appeal." (2)

Sir Sidney Low considered that "The sovereign .... can .... demand or refuse a dissolution", and that he could refuse if the advice to dissolve were offered on "frivolous or inadequate grounds". (3) Lowell thought that

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(1) "The Working Constitution of the United Kingdom" (Dent. 1901),pp.8-11
Courtney notes the forced dissolution in New Brunswick in 1856.
(2) "Government of the British Empire" (Little, Brown, 1919),pp.41-42.
(3) "Governance of England" (Putnams, 1917), pp.109 and 263.

the Crown might, by refusing a Cabinet's advice, force its resignation, and he gave as an illustration, refusal of advice to dissolve. But he considered such refusal improbable, "because the rules of political fair play are so thoroughly understood among English statesmen that the power is not likely to be misused for party purposes". He considered the Crown's power of dismissal "practically obsolete", but added that "circumstances might arise in which it was evident that the Ministry and the House of Commons no longer represented the opinion of the country", and in these circumstances it was conceivable that the Crown might dismiss the Cabinet and force dissolution. Such action was "highly improbable" but not "impossible". (1)

Mr. Asquith, in a speech to the National Liberal Club, December 18, 1923, flatly denied the theory that a request for dissolution could not be constitutionally refused. Faced with a House of Commons in which no party had a clear majority, and with the prospect that a Labour Government might ride for a fall by proposing drastic Socialist measures (relying on an assumed right to dissolve Parliament), he gave it as his considered opinion that the existing convention allowed a certain discretion to the Crown. "This", he said, "does not mean that the Crown should act arbitrarily and without the advice of responsible Ministers, but it does mean that the Crown is not bound to take the advice of a particular Ministry to put its subjects to the tumult and turmoil of a series of general elections so long as it can find other Ministers who are prepared to give it a trial. The notion that a Ministry which cannot command a majority in the House of Commons.... a Ministry in a minority of 31 per cent.... in these circumstances is invested with the right to demand a dissolution is as subversive of constitutional

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(1) "Government of England", 1917 ed. (Macmillan), pp. 32-33.

usage, as it would, in my opinion, be pernicious to the general and paramount interests of the nation at large." He noted that when in 1910 he asked for and obtained a second dissolution within a year of the first, he had a "substantial working majority --- observe that!" and that "Although our position in the then House of Commons was absolutely impregnable, we thought we ought to be fortified by a fresh expression of the judgment of the nation. It was for that reason, and that reason only, we advised the second dissolution in December." (1)

This view, endorsed by Mr. Lloyd George and Sir John Simon, was denounced by Professor Swift MacNeill (2) and Keith (3). It is, however, hardly more than a development of the opinions, already quoted, (4) of Russell and Gladstone. The similarity of phrasing is notable, and can scarcely have been accidental. Mr. Asquith was simply saying that the Crown might properly refuse what Russell and Gladstone would clearly have considered an improper request.

His view has received the support of Professor Ramsay Muir (5) and Sir John Marriott. The latter has no doubt of the Crown's constitutional right to refuse dissolution. He believes that if Mr. Baldwin, on his defeat in the Commons in January 1924, or Mr. MacDonald immediately thereafter, had asked for dissolution, the King "might certainly have declined to assent." He considers also that the Crown may force dissolution. In 1913 the King could have dismissed the Liberal Government and granted an immediate dissolution to the Conservatives. He admits, however, that a Liberal victory at the ensuing election would have given rise to a "position of some

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(1) London Times, December 19, 1923
(2) Ibid., May 29, 1924.
(3) See below, pp.157-158, 198.
(4) See above, pp. 127-128, 131-133.
(5) "How Britain is Governed" (Constable, 1930), pp. 192-193.

embarrassment", "almost intolerable" for the King, who would then have been obliged to recall the Liberals. (1)

Professor Laski also emphasizes the dangers of a forced dissolution. In general his view is that in practice, the Crown can neither refuse nor force dissolution. As to refusal, he argues that a "majority" Government defeated in the Commons would resign, and the question therefore would not arise; while a "minority" Government, defeated in a House where no party had a clear majority, would be certain to get a dissolution on demand, because the alternative would be for the Crown to summon the leader of another minority party, who would sooner or later ask for dissolution, putting the King in the position of granting to one party what he had refused to another. Specifically, he contends that in 1924, if the King had refused dissolution to Mr. MacDonald and sent for Lord Oxford, the latter would have been obliged, sooner or later, to ask for dissolution himself; the King could hardly have refused; and he would then have appeared to be discriminating against the Labour party. This would have been too dangerous a position.(2) On the other hand, in "The Crisis and the Constitution", Laski argues that if Mr. MacDonald in 1932, at the head of a coalition Government, had disagreed with his Conservative colleagues and asked for dissolution, his right to a dissolution would have been "inherently vitiated by the fact that his position in his own Cabinet had a purely personal, and not a party significance. If he were to suggest a dissolution..... the King would have the very powerful reply that a dissolution in a situation where one party in the House of Commons had nearly five hundred Members was an impossible request". (3)

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(1) "The Mechanism of the Modern State" (Oxford, 1927), vol.II, pp. 32-35.
(2) "Parliamentary Government in England" (George Allen and Unwin,1938),pp.409-412.
(3) Hogarth Press and the Fabian Society, 1932, pp. 35-36.

In Ridges' "Constitutional Law of England" it is said that the King might have to refuse a request for dissolution "in case of a demand for a second dissolution after defeat on an earlier dissolution immediately preceding without any vital change of conditions", (1) Mr. C.S.Emden observes that a minority Government defeated in the Commons "may, in exceptional circumstances, be entitled to a dissolution". (2)

Wade and Phillips, in 1931, said: "It has long been a convention that the King will dissolve Parliament at the request of the Prime Minister of the day, and similarly will not dissolve Parliament unless so requested... Whether the convention as to the right to a dissolution will survive the growth of three parties is difficult to determine. It may be that the King would refuse, should the occasion arise, to grant a dissolution at the request of a Prime Minister who had never had a clear majority in the House of Commons." (3) They note, however, the grant of dissolution to Mr. MacDonald in 1924. In 1935, they added, after the passage quoted, "though this view is not generally accepted", and, in their comments on the 1924 case, "it is improbable that any other course would be taken in the future for fear of involving the King in political controversy". (4)

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(1) Keith's edition of 1934, (Stevens & Son),pp.146-147. The further comment on refusing advice "if a revolutionary measure were passed under the Parliament Act .... without a popular mandate" presumably ~~refers~~ does not refer to advice to dissolve.

(2) "Principles of British Constitutional Law" (Methuen, 1925),p.84. He notes (pp.83-84) that from 1837 to 1925, four times dissolution followed a change of Government (1847, 1852, 1885, 1895); four times it came towards the end of Parliament's term, when the Government's support was diminishing or it had suffered defeat in by-elections (1865, 1874, 1892, 1906 --- this last properly belongs under the first head); twice it came towards the end of Parliament's term at a time the Government thought fit.(1880, 1900)

(3) "Constitutional Law", 1st ed. (Longman's, 1931), p.120.

(4) "Constitutional Law", 2nd ed. (Longman's, 1935), pp. 126, 127.

Dr. Jennings, in "The Law and the Constitution", says that "it is not at the present time settled whether the King is bound to dissolve Parliament at the request and at the request only of the Prime Minister. 'Weighty precedents and high authorities are cited on either side of this knotty question'.... Whatever the constitutional powers of the King may be, it is quite certain that in normal times he could not refuse to dissolve Parliament when a Government loses its majority ..... It might be thought that, with three or more Parties, none of which has a majority, conditions would be very different..... But even without a Coalition the Government is in a very strong position.... It has the prerogative of dissolution at its command. No doubt the King is more reluctant to grant a dissolution, since another Government might be possible. But the fact that he granted a dissolution to Mr. MacDonald in 1924 shows that he would refuse only in very exceptional circumstances." (1)

In "Cabinet Government", he is more specific. He notes first that dissolution cannot take place without advice. Some Cabinet must take the responsibility. If the existing Cabinet declines, the Crown "can do no more than dismiss them," But he agrees with Marriott, Laski and Professor J.H. Morgan that this would be dangerous. A forced dissolution, therefore, would seem to be highly improbable, to say the least. "It is not always true that a refusal of dissolution implies resignation", but "During the last hundred years there is no instance of a refusal of dissolution by the King when advised by the Cabinet. There has been, nevertheless, a persistent tradition that he could refuse if the necessary circumstances arose. It is difficult to see what those circumstances would be. An appeal to the electorate is an appeal

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(1) University of London Press, 2nd. ed., (1938), pp.71-72, 166, 168.

to the supreme constitutional authority. It is true, as Lord Balfour said, that 'no constitution can stand a diet of dissolutions'; but dieting would be demanded only because the Constitution failed to carry out its proper function of providing a Government with a stable majority. If the electorate persists in returning a nicely balanced House, it will impel a coalition or compel one party to support another without a coalition. But political forces alone can produce such a result. The King can suggest it but not compel it. If the opposition coalesces, it is not unreasonable for a minority government to challenge the coalition in the country. If the major parties break up, the whole balance of the Constitution alters; and then, possibly, the King's prerogative becomes important. Thus, while the King's prerogative is maintained in theory, it can hardly be exercised in practice. It is of course not true that the grant of dissolution to Mr. MacDonald in 1924 settled the issue. The King could have taken no other decision. The Labour Government could reasonably demand that it should ask the electors whether its record was not such as to warrant a majority. It could reasonably ask how many of the electors desired to continue to support the Liberal Party, which first put it into office and then turned it out (1) nine months later. The fact that its appeal was unsuccessful and that it appeared to detached observers that it would be unsuccessful is irrelevant. It was a reasonable exercise of the prerogative to ask the electors whether the three-party system was a success and, if the answer was in the negative, whether the Labour or the Conservative Party should have the majority." (2)

(1) To speak more exactly, tried to turn it out; though the Labour Government need not have regarded the Liberal motion for an inquiry into the Campbell case as intended in this sense.
(2) "Cabinet Government", pp. 317-318.

Again, "Where no party obtains a majority at the general election..... another dissolution is not practicable." (1) This presumably means another dissolution forthwith, before the new Parliament meets.

Few of the authorities so far quoted, except Todd, have much to say about the power of dissolution outside the United Kingdom. Both Keith and Evatt, however, discuss overseas experience at considerable length, and lay down general propositions for both Britain and the Dominions.

Keith's earlier view seems to have been that in Britain the Crown had no discretion, no right to refuse advice to dissolve, while in the Dominions the Governor had a discretion but was tending to lose it, and that this tendency was desirable. (2) In his later works, however, he has continuously modified this view. As early as 1924 he added the proviso that "It is obvious that the Crown could not constitutionally grant a Prime Minister, who had obtained one dissolution and had been defeated, a second dissolution of Parliament if any other means of carrying on the government could be found. In practice, however, it is hardly conceivable that a case would arise in Great Britain in which the Crown could properly refuse to grant a dissolution on the request of a Prime Minister." (3) In 1927, replying to Mr. C.H.Cahan, K.C., he said; "Mr. Cahan argues that on the new rule a Prime Minister who obtained a dissolution and was defeated at the polls could still advise and receive another dissolution. No one, I imagine, seriously contends that His Majesty could constitutionally grant a second dissolution in such circumstances, even assuming that a Prime Minister should be so lacking in

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(1) Ibid., p. 27.
(2) E.G., "Speeches and Documents on British Colonial Policy" (Humphrey Milford, 1918) vol.1, introd., pp. ix-x; "Imperial Unity and the Dominions" (Oxford, 1916), p. 104; Journal of Comparative Legislation, Second Series, vol. XVII, November 1917, pp. 227-231.
(3) "Constitution, Administration and Laws of the British Empire",(Collins), pp. xiii-xiv.

public duty as to suggest it." (1) In 1928 he said: "It is notorious that even (in the United Kingdom) the Crown retains the prerogative of refusing advice, if that advice is flagrantly contrary to the constitution. British precedent permits a beaten ministry to dissolve, but it would not permit a second dissolution if the first failed to give the majority hoped for. .... The grant by the King to Mr. Ramsay MacDonald of a dissolution in 1924 was by no means an automatic following of ministerial advice; it was an action strictly in accord with the spirit of the constitution, which places in the electorate the ultimate sovereign authority, and the exercise of the power secured the effective expression of the will of the sovereign authority." (2) In the same year he explicitly declared that a Cabinet which had had one dissolution and had failed to get the desired majority at the polls could not secure a second dissolution forthwith. Moreover, "It is not, of course, contended that the right to receive a dissolution is absolute; it is obvious that a Ministry which has obtained a dissolution is not entitled, if it is barely sustained in office, to ask for one again at an early date, and if a Ministry neglects its duty, it may be the obligation, as well as the right, of the Crown to decline to accept its advice". (3) But in Britain, he added, the assumption of responsibility ex post facto by a Ministry which has taken office after a previous one has been forced to resign by royal action was "no longer constitutional, ... and could be resorted to only in a grave emergency involving national stability.... and ..... at grave risk to the stability of monarchical institutions." (4)

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(1)"Letters on Imperial Relations, etc." (Oxford, 1935), p.68, Mr. Cahan had been protesting against the "new rule".
(2) Canadian Hisbbrical Review, vol. 9, no.2, June 1928, pp. 111-112.
(3) "Responsible Government in the Dominions", 1928 ed. preface, p.xvi, and p.156.
(4) "Responsible Government in the Dominions", 1928 ed., p. 156.

The reserve power could be used in Britain to expel a Cabinet which sought to "cling to office by prolonging the duration of Parliament, or to govern without Parliament .... but it may earnestly be hoped that no such catastrophe may arise". (1) In 1929 he stated that "in the United Kingdom a defeated ministry might obtain one dissolution to test the will of the people." (2) But "It is clear that if a Ministry who had obtained one dissolution of Parliament were then defeated, and none the less asked for another, the King would be compelled, in the interests of the maintenance of the Constitution, to refuse .... Any such violation [of the Constitution] by neglect of the fundamental rules of responsible government... seems remote from possibility." (3) In 1931 he asserted: "The King will not refuse dissolution to any ministry, subject, of course, to the rule that it has not shortly before obtained a dissolution without materially strengthening its position". (4) Could "the King refuse a request for a dissolution from a defeated or weak government"? "He might in such a case find an alternative ministry, but, on the other hand, as the people ought to control the ministry, it would be extremely invidious to refuse permission to take its verdict. The matter, of course, would be different if after one dissolution a government which had failed to obtain a majority thereat asked for a second. In that case it would be impossible to accede to its request, as that would be to defy the popular verdict and to prevent the functioning of the Parliament which the electorate had returned." (5) In 1933 he went even farther: "It is, of course, too much to say that the Governor must grant

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(1) Ibid., p. 123.
(2) "Dominion Autonomy in Practice" (Oxford), p.4.
(3) "Sovereignty of the British Dominion" (Macmillan, 1929), p.246.
(4)"British Constitutional Law" (Oxford), p.49.
(5) Ibid, pp. 38-39.

a dissolution inevitably on a request from his Government. It is obvious that only one dissolution can be asked for by the same Ministry within a limited period; if it fails to secure a majority at a dissolution, it cannot imitate continental practice and endeavour to secure a complacent legislature by a series of dissolutions. The King in a like case would clearly be compelled to refuse dissolution and would then find a new Government to support his action .... If a Ministry at an election secures only a slight majority and after a substantial period seeks again a dissolution, the issue would be different and must be decided according to circumstances." (1) By 1936 his view had come to be: "Needless to say, the power to dissolve Parliament cannot be exercised without ministerial advice..... but the King may refuse to dissolve when advised, and if he deems a dissolution necessary in the public interest he may urge such a course on his ministers, and, if they will not accept his suggestion, he may compel their resignation or dismiss them.... These are, of course, powers of high importance and seriousness, not to be lightly used, but their use is justifiable if they are necessary for giving the will of the people its just course, though such a criterion of action is plainly difficult to apply ..... It is .... plain that the issue of the time which has passed since a dissolution was given to a ministry must always be borne in mind in considering the right of dissolution. It is clear that a ministry which has had a dissolution and has been unsuccessful in securing a majority therein cannot at once have another; but if it is able to command enough votes to carry on for a time, delicate questions may arise as to when and whether another dissolution was due..... The essential use of the prerogative of dissolution is to obtain the verdict of the electorate on the conduct

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(1) "Constitutional Law of the British Dominions", (Macmillan 1933), pp.150-151.

of government and their choice of the party to govern. The employment of the plan is proper, apart from the expiry of Parliament by efflux of time, when a new Ministry succeeds another and is in a minority in the Commons, as in 1922; when a Ministry, undefeated in the Commons, meditates an important change of policy, as in 1923 and 1931; when a Ministry comes into power after the formation of a new House of Commons and finds that it has not an effective majority therein, as in 1924". (1) Whether "the existing House of Commons has been elected under the auspices of [the Government's] rivals is a relevant point." (2)

In 1939, Keith discussed the question of dissolution at great length. "Dissolutions ..... based mainly on efflux of time", he notes, "are few and far between." This was a factor, he implies, in 1865, and an "additional incentive" in 1874. "A more frequent cause of dissolution is defeat in the Commons on an issue deemed vital, the alternative being resignation". "A dissolution is equally necessary if, on the resignation of its predecessor, a new Government is formed. In theory it may be held, as Sir R. Peel did in 1841, that the endorsement of the electorate is not essential for the change, and in the Dominions retirement of ministers, without a dissolution, has been held not to require a dissolution by their successors. But this has been due to considerations irrelevant under actual British conditions. It has been due to the existence of less effective party opposition, through the existence of groups, which can coalesce to provide a ministry with an effective support in Parliament, so as to allow postponement of an election until the early expiration of Parliament, which has often had

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(1) For exceptions to this, see pp. 186, 192.
(2) "The King and the Imperial Crown", pp. 145, 171-172, 177.

no more than three years' duration, rendering dissolutions so frequent that an extra dissolution, with its serious cost, is unpopular. Under modern British conditions such a result could be contemplated only if a three-party system of a serious and lasting character came into being. It would then be possible to argue, as Lord Oxford argued in 1923, that the Sovereign should not, in the event of the defeat or resignation of a ministry, grant a dissolution to it or to its successor, if it were possible to arrange a working agreement to carry on in the Commons. But that condition of things manifestly did not exist in 1924, and the objections to denying the electorate a voice are of very great strength. A refusal would normally be possible, only if there were general agreement within and without the Commons, that an election should be delayed pending further development of the situation. Where the view of the people can be gathered without a dissolution it would be absurd to insist upon it." (1)

Elsewhere Keith speaks of "the fundamental misunderstanding which induced Mr. Asquith to formulate the doctrine that the King would not be bound to give a dissolution to Mr. MacDonald, if that were asked for, in view of the fact that there was in operation a three-party system. What he failed to remember was that the Crown must be wholly reluctant to refuse to give the electorate a chance to give a clear verdict in favour of one political party or another, and that that consideration would drive it forthwith to concede, as it in fact did in 1924 concede, a dissolution to the Labour leader .... [It was] a clear case of sound judgment being obscured by personal feelings, for any serious consideration should have shown that,

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(1) "The British Cabinet System,1830-1938" (Stevens and Sons, 1939), pp. 288, 290-291.

when the occasion arose, the King would be under every conceivable obligation to take the verdict of the country. It is clear that Mr. Asquith forgot that a dissolution is an appeal to the political sovereign, and that when it is asked for every consideration of constitutional propriety demands that it be conceded." (1)

Noting that under the pre-1832 Constitution, the Crown was "clearly not bound to grant a dissolution....., provided that it [could] obtain other ministers to take responsibility for the royal refusal", Keith observes that the King could have refused without hesitation in 1806 or 1807 or 1831. (2) But the passing of the first Reform Bill marked a decisive change. On the other hand, "It is, of course, true that the right to a dissolution is not a right to a series of dissolutions. The King could not, because a ministry had appealed and lost an election, give them forthwith another without seeming to be endeavouring to wear out the resistance of the electors to the royal will..... The Crown might have to refuse, and to enforce the retirement of a ministry." (3)

"How long must elapse before a ministry with a small plurality, or dependent on aid from other groups at one election, can be given another dissolution, depends entirely on circumstances, and defies any attempt at definition." (4)

Subject, presumably, to these provisoes, the question whether to resign or dissolve is "a matter for the Government to decide in the light of all the circumstances". (5)

(1)"The British Cabinet System, 1830-1938", pp.7-8, 395.
(2) Ibid., p. 393.
(3) Ibid., pp.395-396.
(4) Ibid., p.396. For Keith's application of this to the Canadian case of 1926, see below, p. 243.
(5) Op. cit., p. 298

"Of dissolutions on the appointment of a new ministry", Keith observes, "there is that of 1847 accorded to Lord John Russell, because patently having taken over power a year earlier, because of Sir R.Peel's loss of Conservative support .... he needed additional authority; moreover, the time element spoke in his favour. Lord Derby in 1852 had a clear case, for it was plainly impossible to carry on effectively, unless he could be reinforced". In this context he notes also the dissolutions of 1885, 1895 and 1906. In 1831 "a complete change of the political position, without the consent of the electorate, would have been wrong". (1)

Keith has a great deal to say, in this work, about forced dissolutions. In 1859, he says, the Queen "had seemingly meditated ..... forcing a dissolution" to negative "the dangerous pro-Italian attitude of her Prime Minister and Foreign Secretary". (2) In 1893, she asked Lord Salisbury if she could force dissolution, if for example, she were approached, after the rejection of the Home Rule Bill by the Lords, by a numerously signed petition or an Address from the Lords. Salisbury replied that it would be risky; it would raise the issue of the royal authority. This was undesirable without urgent reason, which did not exist. (3) In 1894, however, the Queen insisted that Lord Rosebary would not only have to get her consent but also dissolve before moving resolutions on the relations of the two Houses. Lord Salisbury favoured this, but Lord James, the Dukes of Devonshire and Argyll, Chamberlain and Balfour were against it. Lord James was clear that the Queen could insist on dissolution after the resolutions had been moved, if necessary by dismissing Rosebery and granting a dissolution to his successor.

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(1) Ibid., pp. 291-292.
(2) Ibid., p.370
(3) Ibid., pp. 370-371

But even if Rosebery agreed to dissolve at the Queen's request, it would raise the issue of the Queen's action; and if he refused and was dismissed it would raise the same issue in a more acute form. The Queen could, however, insist on dissolution if she were asked to swamp the Lords, or if the proposed measure were of a very revolutionary or destructive character.(1)

Keith also notes that in the autumn of 1910 Mr. Austen Chamberlain not only thought that the King could refuse Mr. Asquith's request for an undertaking to swamp the Lords if the Liberals secured a sufficient majority, and could then call on Mr. Balfour and grant him a dissolution; but also thought that if the Liberal majority were reduced, and Mr. Asquith, recalled to office, asked for the creation of peers, the King could recall Mr.Balfour and grant him a second dissolution. This last suggestion Keith calls "unconstitutional". He notes also that after the second election of 1910 Lord Morley thought the King could still refuse to swamp the Lords, and, on Mr. Asquith's resignation, send for Mr. Balfour and grant him a dissolution.(2)

In 1913, when the question of a "mandate" for the coercion of Ulster arose, Mr. Balfour thought the King could force a dissolution, if necessary by dismissing Mr. Asquith and sending for Lord Rosebery or Mr. Balfour himself. Mr. Bonar Law asserted the right of the King to dismiss the Government and grant a dissolution to its successor, but stressed the monarch's personal responsibility and the attendant risks. Lord Lansdowne considered that the Parliament Act had destroyed the power of the Lords to force an appeal to the country, and that the duty devolved on the King to force either a dissolution or a referendum. Keith comments on the difficulty

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(1) Op. cit., pp. 371-372.
(2) Ibid., pp.372-373. Mr. Balfour himself thought that in either case a third general election would be impossible; see Blanche Dugdale, "Life of Arthur James Balfour" (Hutchinson), vol.II, p.64.

the King will experience in assessing public opinion in cases where he is being urged to force dissolution because the opinion of the country is alleged to be different from that of the Commons; neither the press nor by-elections, in Keith's opinion, being fully reliable indices. (1)

Keith is clear that there cannot be a series of forced dissolutions on each of the steps in a clearly defined policy. "The duty of the electors", he says, "must be to approve principles, of Parliament to give shape to the principles. Otherwise every change of substance can be seized upon and a further reference to the electors demanded." (2)

A year later, in 1940, Keith said: "The right..... to a dissolution neet not be claimed to be absolute. There is a wide agreement that the right does not exist in the case of a ministry which already has had one unsuccessful dissolution, and shortly thereafter is defeated in the Commons and asks for another, in the hope of success at the hands of an electorate weary of political strife. But any such case would have to be judged by the King on its merits, and no rule of general application could be laid down. It was partly on this difficult question that Lord Byng in 1926 refused a dissolution to Mr. Mackenzie King, who at the general election of 1925 had failed to secure an effective majority, and who therefore sought a new dissolution in order to test the question (3)..... Normally, it may be held, the electorate should be allowed to decide, for it may be held that it must take the consequences of returning a dubious verdict at the preceding contest."(4)

That Keith considers British conventions at least partially

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(1) Op. cit., pp.375-379.
(2) Ibid., p. 311.
(3) For the further comments in this passage on the Canadian crisis, see below, pp. /317-318.
(4) "The Constitution of England from Victoria to George VI" (Macmillan), vol. I, pp.86-87.

applicable to the overseas Commonwealth is evident. One might have expected that, after the Report of the Imperial Conference of 1926, he would consider that no detailed separate discussion of the position in the Dominions (at any rate apart from the Australian States and Canadian provinces) was necessary. But on the contrary he declares that the assimilation of the relation of the Governor-General to his Ministers to that of the King to his Ministers "breaks down hopelessly", because while the King can threaten to abdicate, the Governor-General can only resign or be recalled. If a Governor-General dismisses his Ministers, for example, and his new Cabinet fails to get a majority, he would "virtually have to resign", and his resignation would have none of the far-reaching consequences of a royal abdication. (1) Subsequent events suggest that perhaps a King may be got rid of as easily as a Governor-General, and without any very far-reaching consequences. Be that as it may, Keith does draw a distinction between the conventions in Britain and in the Dominions, a distinction which might possibly, at least in some instances, bejustified by the limiting phrase of the Report, "in all essential respects".

In 1921 he said: "In the Dominions.... constitutional usage still permits a Governor to decline to accept the advice of his Ministers, if he thinks he can procure other advisers to take their place in the event of their resignation. In particular a Governor is expected, in the event of a request from a ministry for a dissolution on a reverse in Parliament, to withhold his assent if he considers that an alternative government can be found to carry on business; the short life of Australian Parliaments renders

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(1) "The King and the Imperial Crown", pp. 173-174.

members adverse to a penal dissolution, and refusals of ministerial advice on this score have been common." But he considered that there was a tendency in Australia towards adopting the "British usage". "The British rule has of late been followed in Canada as regards the Dominion government, in New Zealand, and the Union [of South Africa], but it is not yet established in the Canadian Provinces or Newfoundland; the explanation is obvious: it is in the larger communities alone that there has been fully developed that sense of political responsibility among ministers which would render intervention by the Governor unwise and dangerous." (1) In 1924 he said that "practice in the Dominions.... empowers the representative of the Crown to decline to grant a dissolution, provided that he is able to find a politician willing to carry on the government and to accept responsibility for the refusal". (2)

Even after 1926 he was still willing to concede a greater degree of discretionary authority to Dominions Governore-General than to the King. Lord Byng, he considered, had asserted "powers which are admittedly obsolete in the United Kingdom". But "It is impossible to lay down that a governor-general must always grant a dissolution when advised to do so. What he must do is to assimilate his action to that expected of the Crown in the United Kingdom". Having explained that it is notorious that even there the Crown "retains the prerogative of refusing advice... flagrantly contrary to the constitution", and so forth, in a passage already quoted, he added: "It may safely be assumed that Canada will recognize that the governor-general even under the new understanding, retains the power to intervene to prevent any abuse of the constitution." (3) In the same year, 1928, he said:

(1) "Dominion Home Rule in Practice" (Oxford), pp. 9-10.
(2) "Constitution, Administration and Laws of the Empire", p. xiii.
(3) Canadian Historical Review, vol.9, no.2, June 1928, pp. 111-112.

"In the Dominions, the discretion of the Governor is still constitutional and real, however much it may be deemed preferable that the British plan should persist, and however clearly events are moving in that direction."(1) The principle of universal responsibility applies only to the King: "It is not and never has been true heretofore of a Governor." (2) In the Dominions, "The normal case of refusal to accept ministerial advice is when a Ministry defeated in the Lower Houses, or no longer sure of a majority, asks for a dissolution in order to strengthen itself by an appeal to the electorate... The Governor must act on ministerial responsibility (save in those few cases where he acts on Imperial instructions), (3) but this responsibility may be either assumed in advance by a Ministry in office whose advice he accepts, or assumed ex post facto by a Ministry which has taken office after he has forced one to resign". (4) The question which arises in regard to the power of dissolution "implies that the Government is in difficulties and that its Parliamentary position is not secure.... There may be an alternative Government which could carry on for the rest.... of the life of the Parliament, either because it has already secured a superiority in numbers, or because if given the opportunity to form a Ministry it will succeed in detaching enough supporters of the Government to have a working majority. Moreover, the country, as a rule, expects the Governor to exercise his discretion; he can perhaps shield himself behind assimilation to the British practice, but that is very imperfectly understood in the Dominions, and at any rate long usage in some territories is clearly in favour

(1) "Responsible Government in the Dominions", 1928 ed., p. 156.
(2) Ibid.
(3) For Governors-General this is surely obsolete since 1926?
(4) "Responsible Government in the Dominions", 1928 ed., pp. 154, 157.

of the view that the Governor has not merely a right to exercise his discretion, but that he is worthy of censure if he does not do so. In exercising this discretion the Governor may legitimately consider many different points of view". The short duration of Dominion Parliaments (1) means that there is bound to be a dissolution soon anyway. Members expect to draw their indemnity, "in lieu of being put to the expense, anxiety and risk of an election", Whether Supply has been granted is a relevant point, though not a sine qua non. "A vital element in every case ... is the length of time to go before a dissolution must come. If it is comparatively short, it may be a valid ground for hastening a dissolution; if on the other hand it is long, there is a better case for refusing one. But regard must be had to the chance of obtaining an effective Government, if a dissolution be refused; it may be better to allow the country a chance of making up its mind, or, per contra, this may be useless, in view of the division of opinion, and it may be wiser to allow the formation of a new Ministry in the hope that things will gradually be cleared up." That the House "had been elected under the aegis of [the Government's] rivals... [is] a frequent ground for arguing for dissolutions, and doubtless of importance." (2) "Whether weakness is caused from internal difficulties, or from the growth of the power of the Opposition, whether owing to these difficulties, or as often, the coming together of different opposing sections; or as the outcome of by-election defeats or other sign of the loss of popular favour, the ministry may, of course, advise a dissolution in lieu of resignation. Whether a ministry

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(1) This would seem to be a valid reason for differentiating between the conventions in Britain and in those Dominions to which the remark applies. It does not, of course, apply to Canada.
(2) "Responsible Government in the Dominions", 1928 ed., p. 160.

ought to resign or advise a dissolution is a matter on which no principles can be laid down with assurance; each case presents normally special features which must all be weighed before a decision is arrived at. It must,however, be recognized that in the Dominions practice shows that it is a distinct advantage to be the party which dissolves and under whose auspices an election is held.... No principle can be laid down as to when a Parliament ought to be dissolved to allow the people to express their feelings. A priori, it would seem right that any great change, which had not been deemed a pressing matter at the last election, should thus be made a matter of the arbitrament of the people, but it is impossible to claim that much attention has been paid to this principle." (1) "In the Dominions the reserve power may easily be held to be more necessary [than in the United Kingdom], in view of the fact that parties sometimes seem to have little regard for anything save their immediate advantage, but that it should be rarely used is undoubted, and examples of its employment are rare." (2) "The Governor is not an umpire between parties." (3)

Of the "double dissolution" of 1914 in the Australian Commonwealth he observes: "It is clear that the whole weight of Australian precedent was dead against [Sir Ronald Munro Ferguson's] action; thrice Governors-General had refused dissolution because they thought that in Australia the constitutional rule was that before granting dissolution a Governor should exhaust every possibility of carrying on in Parliament. The action of the Governor-General was explicable on one theory only, that he had decided to act strictly on the British principle and to throw

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(1) Ibid., pp. 265,266. Keith cites cases to prove the last statement.
(2) Ibid., p. 123.
(4) Ibid., p. 154, note 2.

responsibility on his Ministers and not on himself..... There was no doubt that if the Constitution was to be given any reasonable meaning, the matter must have been intended to be one to be dealt with by the Governor-General at his discretion." (1) On the other hand, in the same work, he termed the refusal of dissolution in June 1909 "prima facie contrary to constitutional usage", (2) and his condemnation of Lord Byng's action in 1926 is well known. (3)

In "Dominion Autonomy in Practice" (1929), Keith said that the 1926 Report "does not mean that [the Governor-General] is deprived of all authority to refuse to act on Ministerial advice, for, if for instance after one unsuccessful dissolution Ministers asked him to grant another, he would clearly be bound to refuse thus to violate the Constitution. But it means that he should save in extreme crises, accept the advice of Ministers, as readily as did the King in 1924, when he dissolved Parliament at the request of Mr. Ramsay MacDonald without trying to find an alternative government."(4) In "The Sovereignty of the British Dominions" (1929) he added: "It is clear that if a Minister who had obtained one dissolution of Parliament and were then defeated, and none the less asked for another, the King would be compelled, in the interests of the maintenance of the Constitution, to refuse... In the Dominions likewise the Governor-General must remain responsible in the last resort for the maintenance of the Constitution from violation by neglect of the fundamental rules of responsible government, though in them

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(1) "Responsible Government in the Dominions", 1928 ed., pp 137-138.
(2) Ibid., p. 165.
(3) See below, pp. 234-236, 243-244, 247, 258-259, 262, 265, 270, 317, 334-337.
(4) P. 5.

also any such violation seems remote from possibility." (1) In "The Constitutional Law of the British Dominions" (1933), he again asserted that in the Dominions the Governor had the right to refuse dissolution if he could find another Ministry, though "in England [this practice] has almost died out." (2)

Evatt's discussion of the position in Britain is in the main an elaborate critique of the dicta of the text-writers, especially during the crises of 1910-1914, designed to show the extraordinary uncertainty and confusion which prevailed and still prevail, and the dangers of allowing this situation to continue. (3) He carefully refrains from making any sweeping generalizations of his own. He notes the lack of evidence for Keith's assertion that in 1924 the King "dissolved Parliament... without trying to find an alternative government". (4) He points out that Anson's principle is not consistent with the grant of the first dissolution of 1910, and that his limitations on a Cabinet's right to ask for dissolution are not consistent with the grant of dissolution in 1924. (5). He draws attention to the possibility that a Cabinet defeated in the Commons after passage of the Army and Air Force (Annual) Act and the granting of Supply, might, without running afoul of any of Dicey's "sanctions", prorogue Parliament and carry on for many months, enjoying full control over the conduct of home and foreign affairs, till the very moment when Supply ran out,

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(1) P. 246
(2) PP. 147-148.
(3) See above, pp. 1-2, , , and Evatt, op. cit., pp. 10-11, 109, 114-115, 260, 263, 268, etc.
(4) Ibid., p. 263.
(5) Ibid., pp. 114-115.

and then dissolve. (1) He observes that of course the King could not persist in refusing dissolution to a Government assured of Parliament's support, as this would exclude the possibility of an alternative Government. (2)

It is in his discussion of the position in the overseas Commonwealth that he makes his major, and indeed invaluable, contribution to the literature of the subject. His general propositions are laid down most explicitly in an article in the Canadian Bar Review for January 1940. In regard to refusal of dissolution, "It is unnecessary", he says, "to elaborate the great difference between cases where Ministers remain in full possession of the confidence of the Lower House and cases where they face, or have met with, defeat in that House. (3) In the former case, ex hypothesi, no alternative Ministry is possible, and the King's representative.... must act upon the advice to dissolve. But, in the latter case, very different considerations arise, particularly where the 'parliamentary situation' embraces three distinct parties and the Ministry has no working majority in the House..... I have never appreciated the force of the argument that because the Governor-General chose to act upon the advice of Ministers who retained the full confidence of the House of Representatives (so that the possibility of any alternative Ministry had to be ruled out of consideration) therefore every Governor-General must act upon the advice of Ministers who had been defeated in the House of Representatives (so that the possibility of an alternative Ministry was immediately suggested, and such possibility

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(1) Ibid., pp. 114-115.
(2) Ibid., p. 260.
(3) This is a trifle optimistic. Much of the discussion in Canada in 1926 showed that on the contrary it is highly necessary.

might be capable of exclusion only by the Governor-General consulting the views of leading members of the House, or by a subsequent test vote of the House). The argument is a plain non sequitur." (1) Speaking of the refusal of dissolution in South Africa in 1939 he adds: "Here one point should be emphasized. Cases where the Governor-General has dissolved in accordance with the advice of existing Ministers can never establish the rule that in no case can the Governor-General refuse a dissolution. On the other hand, one exception alone is sufficient to destroy the theory that in every case, whatever the parliamentary situation may be, the Governor-General must dissolve if asked to do so by the Prime Minister for the time being. There are many such exceptions". (2) The South African case, he considers, "proves beyond all reasonable doubt that, in relation to requests for dissolution, the Governor-General possesses a discretionary power."(3)

The repeated reference to the "parliamentary situation" is significant. For Evatt both in this article and in "The King and His Dominion Governors" insists again and again that Governors have, in granting or refusing dissolution, considered the parliamentary situation and the possibilities of finding other Ministers who are prepared to give the existing House a trial, and that such consideration was right and proper.(4) But he is careful to add that "The mere fact that some sort of alternative Ministry is possible does not, and should not, prevent the grant of a

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(1) 18 Canadian Bar Review, no. 1, pp. 1 and 4. The second quotation refers specifically to Keith's contention that the grant of the double dissolution in Australia in 1914 established in that jurisdiction the rule that the Governor-General must always(subject, presumably, to provisoes laid down by Keith himself as already noted) act on the advice of his Ministers. But Evatt's comments have obviously a much wider bearing, and seem capable of general application.
(2) Ibid., p. 7,
(3) Ibid., p. 8

dissolution by the King's representative. Presumably the Governor would never lose sight of the popular 'mandate' possessed by the existing Assembly. Again, it might be disastrous to democratic feeling to permit the continuance of an Assembly if (say) the alternative Ministry would have little or no popular backing or if it proposed to act, or was dependent on the support of members who were proposing to act, in flagrant disregard of pledges to the electors." (1)

Here, as elsewhere, Evatt lays stress on the undesirability of the present uncertainty as to what the conventions are, and the common assumption that any Cabinet, in any circumstances, can obtain a dissolution on demand: "The present constitutional position is so unsatisfactory that in Australia it has led to some grave abuses. Cases have occurred where, owing to the existence of three or four political parties in the popular House, or of a revolt within a Ministerial party, Ministers brought face to face with a critical vote of the House assert that they possess an unconditional right to dissolve the House, and, in the event of an adverse vote, will assert such right. In New South Wales, for instance, such a crisis arose quite recently. After a defeat in the House upon a vital issue, the Premier of the State ultimately resigned and was replaced by another Premier. In the meantime, the State Governor had stayed his hand for several days to permit of the election of a new leader by one of the government parties, and took no steps whatever to consult other leaders in the popular House..... The most serious feature of the position was that the newspapers and, it has been asserted, one or more members of the Ministry, intimated to supporters whose vote was regarded as doubtful that if they voted against Ministers, they would recommend a dissolution, and the State

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(1) 18 Canadian Bar Review, No. 1, p. 9.

Governor was compelled to act upon the advice of the Premier for the time being, even after his defeat by a vote of the House. Many similar 'intimations' have been published by the press in relation to the Commonwealth House of Representatives where, as has often been the case, it happens the Ministers for the time being represent only one party out of three and possess no working majority. The newspapers supporting Ministers assert that, under modern constitutional practice, the Prime Minister for the time being 'always has a dissolution in his pocket'. These matters are of general importance. In my opinion, similar 'intimations' are a very serious interference with the regular processes of parliamentary government..... They are designed to put pressure upon members of parliament who are thus hindered in the free exercise of their duty to vote in accordance with the interests of the electors." (1)

On forced dissolutions in the overseas Commonwealth Evatt makes only one comment, (2) and that by implication. In "The King and His Dominion Governors" he discusses the position of a Governor faced with the question of giving or withholding assent to a bill prolonging the life of Parliament, which might be "nothing less than [an attempt] to cheat the electors of their right to control the Legislature .... an impudent attempt to thwart their will by a coup d'état under the forms of law." (3) The implication clearly is that it might be the Governor's duty to refuse assent; equally clearly, this might result in the resignation of the Cabinet and the assumption of office by an alternative Cabinet prepared to take the

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(1) 18 Canadian Bar Review, no. 1, p.8.
(2) Though in discussing the dismissal of Ministers by Sir Bartle Frere in Cape Colony in 1878 he uses a phrase which might be taken to mean a forced dissolution. See below, p. 174.
(3) P. 200.

responsibility for the early dissolution deemed necessary by the Governor. (1)

Evatt elaborates his general propositions in illuminating comments on particular cases. He notes that "at any rate up to the nineties, the Governor assumed the role of political superintendent and also that of political prophet", but that "As time went on the more preposterous reasons for the exercise of discretionary powers came to be abandoned, and he considers Todd's observations on "corrupt, partisan or unworthy motives", (2) clearly inapplicable to-day. (3) One might expect, therefore, that he would attach little or no importance to precedents of earlier years. In general this is so; for instance, he considers that the action of Governor Weld of Tasmania in granting a dissolution to the Reibey Fysh Government in 1877 and refusing one to the Crowther Government in 1879 does not lay down any constitutional rule. (4) But there is one curious exception: the discussion of Sir Bartle Frere's dismissal of his Ministers Cape Colony in 1878. Frere dismissed the Ministry because, during the recess of Parliament, it gave what he regarded as disastrous advice on military affairs and made appointments without his sanction. The matter was complicated by the fact that the Governor was also High Commissioner for adjoining

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(1) In Canada, of course, this situation could never arise in precisely this form (though it could in the provinces), because to prolong the life of the Canadian Parliament an Act of the British Parliament is necessary. The procedure would be, as in 1916, for both Houses of the Dominion Parliament to address the Crown praying for the submission of such a measure to the British Parliament. The action taken in abolishing self-government in Newfoundland at the request of the Legislature alone, without reference to the electorate, suggests that the British Parliament would grant the request of the Dominion Parliament. It might well be, therefore, that in Canada as in other Dominions the only defence against such an attempt to thwart the will of the electors would be a forced dissolution.

(2) See above, p. 142.

(3) "The King and His Dominion Governors", p. 249.

(4) Ibid., p. 223.

territories whose defence was intimately bound up with that of the colony but for which the Ministry had of course no responsibility. The new Ministry was able to secure the support of Parliament. (1) Evatt notes the insistence by both the Governor and the Secretary of State for the Colonies on the necessity of making full explanations to the Assembly "to enable a clear and impartial judgment to be formed upon the course adopted." This case, says Evatt, should be "carefully distinguished from those cases in which Ministers who are dismissed not only possess, but are reasonably certain of retaining, the confidence of the existing Assembly.... All it seems to show is that, under such special circumstances as existed in 1878, especially when Parliament is in recess, a Governor may dismiss Ministers and assume primary responsibility for a grave military decision, providing that his action is approved by the Assembly after it meets. The action of dismissing Ministers in such special circumstances, though admittedly quite outside the ordinary domain of constitutional practice, does not involve so violent an exercise of the prerogative as where the legal power... is exercised against a Ministry although it is quite certain that the Governor's action would be immediately repudiated by Parliament. In the latter case, one grave act of personal prerogative must necessarily be followed by an even graver ..... dissolution must follow upon dismissal." (2)

In a careful review of grants and refusals of dissolution in the Australian Commonwealth in 1904, 1905, 1909, 1914, 1929 and 1931, in Queensland in 1907, in Victoria in 1908, in Tasmania in 1914, in New South Wales in 1932, in Canada in 1926 and in South Africa in 1939, Evatt's main point is the importance of the "parliamentary situation": in the event of

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(1) Todd, "Parliamentary Government in the British Colonies", 1st ed., pp. 283-292.
(2) "The King and His Dominion Governors", pp.239-240.

the Governor or Governor-General refusing the advice to dissolve, could he find another Cabinet prepared to carry on with the existing House? In the Australian Commonwealth in 1904, 1905 and 1909, the answer was clearly "yes". In each of these cases, a new Cabinet actually did carry on with the existing House. In 1904 and 1905, the three parties were about equal in numbers, in 1909 they were not. In 1904 Evatt notes,"Parliament was less than eight months old", and in 1905 it "still had more than half its normal life of three years outstanding"; (1) in 1909, it was already within a few months of dissolution by efflux of time. None the less Evatt considers that the 1909 refusal was in accord with previous Australian practice, (2) a verdict which suggests that he attaches primary importance to the possibility of forming an alternative Government which can carry on with the existing House, and very much less to the number and size of parties and the length of time which has elapsed since the last dissolution (though he seems to think these also relevant factors). (3) In 1929 neither Mr. Bruce nor Lord Stonehaven seems to have paid any attention to the "parliamentary situation"; the Governor-General seems to have felt that the Prime Minister's assurance that he would first ask for Supply was all that was necessary. Evatt comments, however, that the Maritime Industries Bill had been declared by the House to be urgent; that some Government supporters considered the Government had no mandate for the bill; that by asking for a "referendum" (which was impossible) the House had virtually invited dissolution; and that it was highly improbable that Mr. Scullin could have formed a Government. (4) In 1931 the Governor-General clearly did take into account the "parliamentary situation", for his

(1) Ibid., p. 50
(2) "The King and His Dominion Governors", p. 54.
(3) See above, pp. 169-170.
(4) "The King and His Dominion Governors", pp. 234-235.

letter to Mr. Scullin, after noting that the Appropriation Bill has been passed, says that the strength and relation of the various parties in the House and the probability of an early election being necessary anyhow, tend to support acceptance of the request for dissolution, which he accordingly grants. (1) In both 1929 and 1931, Evatt is clear, the Governor-General did not act as a mere passive instrument in the hands of the Cabinet, but exercised, and felt himself fully entitled to exercise, a real discretion.

The 1914 grant of "double dissolution" is of course a very special case, which Evatt treats at some length. Keith, at least in 1917, (2) thought that this established in Australia the principle that the Governor-General must act on the advice of his Ministers in granting either a double dissolution or a simple dissolution of the Lower House. (3) Evatt insists that on the contrary the Governor-General in 1914 both had and used a discretion in granting the double dissolution, and in the article on "The Discretionary Authority of Dominion Governors" he prints documents which provide strong evidence in support of his view. The Governor-General of the day, Sir Ronald Munro Ferguson (afterwards Lord Novar), before granting the double dissolution asked for the written opinions of Sir Samuel Griffith, the Chief Justice and a well known authority on the Australian Constitution, and of Sir Harrison Moore. Both took the view that the Governor-General could use his discretion. Sir Samuel Griffith said that the power to grant a double dissolution "should ..... be exercised only in cases in which the Governor-General is personally satisfied, after independent consideration of the case, either that the proposed law as to which the Houses have differed

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(1) Debates of the Australian House of Representatives, 1931, vol.132, pp. 1910 and 1926-1927.
(2) Again, presumably, subject to the provisos he later lays down.
(3) Journal of Comparative Legislation, loc. cit.

is one of such public importance that it should be referred to the electors of the Commonwealth for immediate decision by means of a complete renewal of both Houses, or that there exists such a state of practical deadlock in legislation as can only be ended in that way. As to the existence of either condition, he must form his own judgment." "The Governor-General "is not bound to follow that advice" (i.e. to grant the dissolution) "but is in the position of an independent arbiter." He should consider among other things the state of parties, whether the resignation of Ministers would follow his refusal to act upon their advice, and whether in such an event another Government could be formed which could carry on without a dissolution of the House. Sir Samuel added that "the element of the duty of an independent exercise of discretion on the part of the Governor-General" entered also into the question of granting or refusing an ordinary dissolution of the House alone. Evatt thinks it clear that the Governor-General followed Sir Samuel's opinion, for he himself explained that he based his decision on the "parliamentary situation" and the impossibility of finding an alternative Government. (1)

In dealing with the Queensland crisis of 1907-08, Evatt sets forth an interesting and novel doctrine. "The error of Lord Chelmsford", he says, "lay, not in his original refusal to make appointments, nor in his sending for Mr. Philp after such refusal, but in his determination to aid Mr.Philp in securing a dissolution of an Assembly, newly elected by the people, willing to continue to support Mr. Kidston, and so unwilling to support or condone the acts of the Philp Ministry that it refused him supply." He thinks that when Mr. Philp proved unable to carry on with the existing Assembly, Lord Chelmsford should have dismissed him and recalled Mr.Kidston.(2)

(1) 18 Canadian Bar Review, no. 1, pp.4-5.
(2) "The King and His Dominion Governors", p. 139.

CHAPTER IV

Critique of the Opinions of Constitutional Authorities

As the opinions of the authorities are by no means unanimous, and often leave something to be desired on the score of precision and clarity, it is now necessary to make a critical examination of their dicta, before proceeding to consider the two most recent and most important cases of refusal of dissolution, those of Canada in 1926 and South Africa in 1939.

The concensus of opinion among the authorities appears clearly to be that in the United Kingdom the Crown has some discretion to refuse a dissolution. But how much?

Keith seems to be the only writer who says plainly that a Cabinet which has had one dissolution and failed to get a majority at the polls cannot have a second dissolution forthwith. But Jennings' statement that "Where no party obtains a majority at the general election... another dissolution is not practicable" presumably means the same thing. It is probable, however, that the only reason the other authorities did not say the same thing is that they thought it went without saying: no Prime Minister would dream of asking for dissolution in such circumstances. What happened in Newfoundland in 1909 and in Canada in 1926 showed that this assumption is not necessarily a safe one. (1) To admit a claim that a Cabinet which has just had a dissolution may, immediately after the election, dissolve the new Parliament before it has even met, would be to reduce Parliament to a cipher: we might as well dispense with Parliament altogether. If, on the other hand, the British parliamentary system is to be preserved in anything like its present form, the Crown

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(1) See above, pp. 95-99, and below, pp. 220-221, 280-284.

must have the right to refuse to dissolve a new Parliament before it has met. Keith's doctrine on this point, therefore, seems eminently proper. (1)

Mr. Asquith, Low, Marriott and Keith would all limit still further the right even of a Government undefeated in the Commons to ask for a dissolution.

Mr. Asquith's statement of 1923 seems to have been intended to apply not only to defeated but also to undefeated minority Governments. It suggests that the Crown is not bound to grant a dissolution to an undefeated minority Government unless every possible alternative means of carrying on the government has been exhausted. Mr. Asquith did not, however, say that the Crown was bound to refuse. That the Crown never has refused is therefore no proof that Mr. Asquith was wrong. But it may be instructive to look at the precedents.

Peel's minority Government of 1834, undefeated in the Commons, asked and got dissolution. But the peculiar circumstances of the case make it possible to argue that Melbourne's Government had in effect resigned, and that therefore, when Peel asked for dissolution, there was no alternative means of carrying on the government; that both parties had declared themselves impotent in that Parliament, and the Whigs had not asked for dissolution. On the other hand, if Peel's acceptance of office is looked upon as the result of a dismissal of his predecessors, then it may be argued that if the dismissal was constitutional (a point which does not concern us), the dissolution was the logical and proper consequence. (2)

(1) In 1939 he restated it in hesitant and rather curious terms: "The King could not, because a ministry had appealed and lost an election, give them forthwith another without seeming to be endeavouring to wear out the resistance of the electors to the royal will.... The Crown might have to refuse and so enforce the retirement of a ministry". Why "the royal will", and why "might"? Surely it would be the Cabinet's will which would be in question, and surely the Crown could not for a moment entertain the idea of a further grant?

(2) See below, pp. 215-219.

Russell's Government of 1846 was also a minority Government. It asked and got dissolution, in 1847. But the Parliament then dissolved was nearing its legal limit, so that a dissolution could not long have been postponed in any event; and it was a Parliament which had defeated both a Whig Government (in 1841) and a Conservative Government (in 1846). If the Queen had refused Russell, she would have been obliged to call on either the Protectionists or Peel; neither could have carried on the government with the existing House. There was therefore no alternative to a dissolution, and certainly no reason for denying dissolution to the undefeated Government in office and granting it to one of the opposing parties.

In 1885, Lord Salisbury's minority Government secured a dissolution. But the Parliament was five years old; it had defeated Gladstone's Government; it unquestionably contained a majority adverse to Salisbury; and the passing of the Franchise and Redistribution Acts made a dissolution proper anyhow. Gladstone had confessed his inability to carry on in the existing House and had not asked for a dissolution (which was, in fact, impracticable at the moment of his resignation, because the Reform Bills had not yet become law); Salisbury also confessed his inability to carry on in the existing House; there were, even apart from this, good reasons for dissolving, and none for recalling Gladstone and granting him the dissolution.

Lord Salisbury's Government of 1886-1892 was technically a minority Government. It secured a dissolution, in 1892. But the existing Parliament was then drawing near its legal limit; the Conservative Government enjoyed the firm support of the Liberal Unionists; there was no alternative to a dissolution, and no reason for granting it to anyone but Salisbury, (especially as Gladstone had had the previous dissolution and had resigned

without meeting Parliament.) (1)

Lord Salisbury's Government of 1895 was likewise a minority Government, and it secured a dissolution. But the existing House of Commons had defeated both a Conservative Government (in 1892) and a Liberal Government (in 1895). The Liberals had not asked for dissolution. There was no alternative but to grant it to the Conservatives. (2)

Campbell-Bannerman's minority Government of 1905 asked and got a dissolution. But the previous Conservative Government had resigned, and the House unquestionably contained a majority hostile to the Liberals. It was clear that there was no alternative to granting dissolution to the Liberals.

Mr. Asquith's Government, when it secured dissolution in November 1910, was technically a minority Government; but it enjoyed, as he pointed out when discussing the question on December 18, 1923, the firm support of Labour and the Irish nationalists; no one ever suggested that any alternative Government could have carried on with the existing House of Commons. Once the behaviour of the House of Lords had demonstrated the Government's helplessness in that Parliament, dissolution was inescapable; and there were substantial reasons for granting it to the Government in office instead of dismissing it and granting dissolution to its successor.(3)

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(1) Had Salisbury resigned,in 1887, either because of a defeat or because of weakness, Gladstone would have been entitled to a dissolution, because both parties would then have confessed their impotence in the existing Parliament, and the Conservatives would have refrained from asking for dissolution. The only conceivable alternatives would have been a Liberal Unionist Government, which was in fact impossible, or a Conservative-Liberal-Unionist Coalition, which no one seems to have considered practicable at the time.

(2) Had Gladstone asked for dissolution in January 1894, when his Government was a minority Government, he would have been entitled to it, because (a) there was a great issue of public policy at stake; (b) the previous dissolution had been granted to his opponents; (c) the existing House of Commons had defeated his opponents, so that an alternative Government in that Parliament at that time was clearly impossible.

(3) See above, pp. 20-22, 180.

There was also a great question of public policy at issue.

Low says that the Crown may refuse a request for dissolution if it is made on "frivolous or inadequate grounds". This is not very definite. For what a Prime Minister and a considerable part of the electorate might consider most serious and adequate grounds for dissolution, the King, and perhaps also a considerable part of the electorate, might think thoroughly frivolous and inadequate. Low does not discuss what would be the position if the King refused dissolution to a particular Cabinet with a majority in the Commons, that Cabinet resigned, and the Commons persisted in its support of that Cabinet. Formation of another Cabinet able to carry on with the existing House would clearly be impossible. What then? Would the Crown be entitled to grant dissolution to the new Cabinet? If so, might not this action be considered to proceed from "frivolous and inadequate grounds"? Or would the Crown be obliged to recall the old Cabinet? If so, it is to say the least highly probable that the old Cabinet would insist on dissolution. The only results of the performance would be that the King would have made himself obnoxious to the first Cabinet and its supporters by refusing dissolution, and to the second Cabinet and its supporters by allowing them to shoulder responsibility for the refusal and then leaving them in the lurch. (1)

Keith says that the question of "the time which has passed since a dissolution was given to a Ministry must always be borne in mind"; that if a Cabinet has had one dissolution "and has been unsuccessful in securing a majority" at the polls, but "is able to command enough votes to carry on for a time, delicate questions may arise as to when and whether

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(1) Low may have intended the words "frivolous and inadequate grounds" to apply only to requests made by a defeated Cabinet, or one in a precarious parliamentary position. For discussion of such cases, see below, pp. 183 et seq.

another dissolution was due"; that "It is obvious that only one dissolution can be asked for by the same Ministry within a limited period; if it fails to secure a majority at a dissolution, it cannot imitate continental practice and endeavour to secure a complacent legislature by a series of dissolutions. The King..... would clearly be compelled to refuse"; that "If a Ministry at an election secures only a slight majority, and after a substantial period seeks again a dissolution, the issue..... must be decided according to circumstances"; that "it is obvious that a Ministry which has obtained a dissolution, is not entitled, if it is barely sustained in office, to ask for one again at an early date, and if a Ministry neglects its duty, it may be the obligation, as well as the right, of the Crown to decline to accept its advice"; and that "The King will not refuse dissolution to any ministry, subject, of course, to the rule that it has not shortly before obtained a dissolution without materially strengthening its position." "How long must elapse before a ministry with a small plurality, or dependent on aid from other groups at one election, can be given another dissolution, depends entirely on circumstances, and defies any attempt at definition."

The statement that the length of time since a Cabinet got the previous dissolution must "always" be borne in mind is presumably meant to be taken subject to the qualifying phrases which follow; otherwise it would be open to the objection that it confers on the Crown a vast and vague discretion to refuse dissolution even to a Cabinet whose parliamentary position is unassailable.

Keith's more precise limitations on the right of an undefeated Cabinet to a dissolution raise some difficulties of interpretation. What

is meant by carrying on "for a time"? How long? Who is to settle the "delicate questions", and by what criteria? What are "a limited period", "a slight majority", "a substantial period", "barely sustained", "an early date"? Who is to decide, and how? What are the "circumstances" according to which it will be decided whether a Cabinet with a "slight" majority, seeking a second dissolution after a "substantial" period, will get it or no? In "The King and the Imperial Crown" Keith describes a majority of 40 in a House of 670 members as "small" (1); apart from this he gives us no inkling of what the various terms might mean in practice, except by implication in his discussion of the Canadian crisis of 1926.(2)

"The rule" which denies a second dissolution to a Cabinet which has "shortly before" obtained one "without materially strengthening its position" is open not only to the objection that it is vague (what is "shortly", and how much is "materially"?), but to the still more serious objection that it seems to be flatly contrary to the precedent of 1910. At the first election of that year the Government majority (counting Labour and Irish Nationalists) was cut from 335 to 125. (3) This can hardly be described as "materially strengthening" the Liberal Government's position; yet within less than a year it asked and got a second dissolution. Does Keith consider that December 1909 was not "shortly before" November 1910? Or was this "rule" not intended to cover cases of disagreement between the two Houses?

In substance, what Keith seems to be saying is that frequent dissolutions are, other things being equal, undesirable; and that therefore,

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(1) P. 101.

(2) See below, pp. 245-246.

(3) Annual Register, pp. 15-16.

in certain not very clearly defined circumstances, the King might refuse dissolution even to a Cabinet with a "slight majority". A fortiori, it would seem, he might refuse it to a minority Government, even if it were undefeated in the Commons: and Keith himself, in 1939, hinted that within a period which depended on "circumstances", and "defied definition", refusal might constitutionally take place. This can hardly be called very helpful.

Marriott would apparently limit even further than Keith the right of a Cabinet undefeated in the Commons to receive a dissolution, for he denies that Mr. MacDonald could have had a dissolution on taking office in January 1924, when he was of course still "undefeated" in the House if only for the reason that he had not yet come before it as Prime Minister. Presumably he thinks Mr. Asquith's dictum would have applied. This view appears to run counter to Todd's, that it is the "constitutional right of a minister, upon taking office, to advise the crown to dissolve a Parliament elected under the influence of his political opponents." (1) Peel exercised such a right in 1834; Derby, in 1852, announced very soon after he had taken office that he intended to dissolve; (2) Campbell-Bannerman, in 1905, dissolved without meeting the existing House. In these cases, of course, a much longer time had elapsed since the previous dissolution than in the hypothetical case of Mr. MacDonald. But in 1868 Disraeli claimed that Lord Derby had the right to dissolve on taking office in 1886, (3) when the previous dissolution had taken place barely a year before;(4)

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(1) But see below, pp. 186, 192.
(2) See above, p. 18. footnote.
(3) Parliamentary Debates, Third Series, vol. CXCI, pp. 1694-1708.
(4) Morley's "Life of Gladstone", vol. II, pp. 144, 211.

and the precedent of 1807, if relevant, (1) is even more striking. Grenville had secured dissolution on October 24, 1806; the new Parliament met December 15; Grenville was dismissed March 24, 1807; the Duke of Portland, after carrying on with the existing House for only a very short time, secured dissolution on April 27, 1807. (2) In none of these cases, however, had the new Ministry taken office almost at the very outset of the first session of the new Parliament, as Mr. MacDonald did in 1924, It probably never occurred to Todd, or anyone else till Marriott raised the point, that a Ministry in such a position would think of asking for dissolution. The arguments in favour of Marriott's view are so obvious and strong as to require no discussion.

Is a Cabinet defeated in the Commons entitled to a dissolution on demand?

Bagehot thought the Crown could "hardly refuse". But his view that "a new House of Commons can despotically and finally resolve" seems logically to involve the right of the Crown to refuse dissolution of a newly elected Parliament (unless, presumably, an alternative Government is clearly impossible). (3) Precise definition of "new" and "newly-elected" might be a matter of some difficulty; that Bagehot did not mention refusal and the final authority of a new House together suggests that he may have assumed that no Prime Minister would ever ask for dissolution unless he had a clear case. In any event, as Jennings points out, the evidence now available makes it manifest that Bagehot certainly underestimated the real power of the Crown.

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(1) There are two reasons why it may not be: (a) that, as Jennings contends, precedents dating from before the first Reform Bill are of dubious authority; (b) because the 1807 case was one of dismissal, not of a new Cabinet "normally" taking office after its predecessor had been defeated in the House.

(2) Todd, "Parliamentary Government in England", 1st ed., p. 163; Hansard, First Series, vol. 9, p. iii.

(3) A fortiori, it would seem, the Crown has a right to refuse a dissolution which would prevent a new House of Commons from resolving at all; on this, see below, pp. 267-299.

Todd, basing himself on Peel and Gladstone, thought that "the sovereign ought clearly to refuse" unless there was a great question of public policy at issue and a probability that the vote of the Commons would be reversed. He held that this was so even if the House had been elected under the auspices of the Government's opponents. (1) The difficulty with this view is that whether there is reasonable probability of the electorate's reversing the decision of the House is one on which there is room for almost infinite difference of opinion. Was there in 1924, for example, reason to believe that the electorate would reverse the decision of the House? The Labour Government thought there was; "detached observers", according to Jennings (himself a sympathetic observer), thought not. If the answer to this question is crucial, as in Peel's, Gladstone's and Todd's opinion it seems to be, who is to decide, and how? To thrust the burden on the King might easily result in bringing the Crown into the arena of party politics and endangering the existence of the monarchy.

A rather similar difficulty arises in connection with Dicey's "A Cabinet, when outvoted on any vital question, may appeal once to the country". Who decides whether or not the question is "vital"? The Cabinet itself? Or the Crown? If "vital question" means a great question of public policy, then the difficulty disappears; otherwise it would seem that the only safe rule would be to let the Cabinet itself decide whether the defeat is or is not "vital".

Whether Dicey's other rule, "If an appeal to the electors goes against a Ministry they are bound to retire from office, and have no right

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(1) The same considerations, presumably, would apply (mutatis mutandis) to a request by a Cabinet on taking office in a Parliament elected under its opponents' auspices. Todd says that a Cabinet in such a case has a right to advise dissolution; he does not say that it has an indefeasible right to get it.

to dissolve Parliament a second time", is meant to be read in conjunction with the former rule, which, in the text, immediately precedes it, is not clear. The two sentences are in separate quotation marks. Certainly, the second one means at least that a defeated Cabinet which appeals to the country and is again defeated has no right to dissolve a second time. The same is true of May's words on the same subject; of Hearn's, that if the "new House of Commons remains of the same opinion as its predecessor, that opinion shall prevail"; (1) and of Keith's, "a defeated ministry might obtain one dissolution to test the will of the people". Even this interpretation is not free from difficulty. If the result of the election is decisive (if, that is, one party, or one group of parties united on the major issues of the moment, obtains a clear majority over all others) against the Government, then unquestionably the principle must mean that the defeated Cabinet could not get a second dissolution forthwith. Nor, presumably, could it get a second dissolution if it met the new Parliament and were defeated at once there, for example on the Address in Reply to the Speech from the Throne. But suppose the result of the election is indecisive enough to allow the Cabinet to meet the new Parliament and survive the vote on the Address, perhaps a number of subsequent votes as well; and suppose it is then defeated in the new House: is it entitled to a second dissolution? Does the answer depend in any degree on the length of time it has survived in the new House? If so, what length of time? Events in Canada in 1926, though not precisely parallel, (2) suggest

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(1) "Government of England" (Longmans, Green,1867), p.151. In general this work is now too "dated" to be considered very authoritative. For instance, it asserts that a Cabinet defeated on a vote of want of confidence in the Lords must seek a vote of confidence in the Commons.

(2) Because Mr. King's first dissolution was not an appeal from defeat in the House; see below, p. 220.

that such questions are more than academic. But Dicey provides no answer, and Keith no precise answer.

Dicey's principle, however, is capable of a wider interpretation. It may mean that any Cabinet which has had one dissolution and is defeated has no right to dissolve Parliament a second time. This would accord with Keith's "It is clear that if a Ministry who had obtained one dissolution.... were then defeated, and none the less asked for another, the King would be compelled..... to refuse". Again, if the result of the election is decisive, no difficulty of interpretation arises: the Cabinet must resign; it cannot dissolve. But again, if it is able to carry on for a time and is then defeated, must it resign, or is it now entitled to a dissolution? "Delicate questions", says Keith, "may arise". "The right [to a dissolution] does not exist in the case of a ministry which has had one unsuccessful dissolution, and shortly thereafter is defeated in the Commons and asks for another, in the hope of success at the hands of an electorate weary of political strife. But any such case would have to be judged by the King on its merits, and no rule of general application could be laid down..... Normally, it may be held, the electorate should be allowed to decide, for it may be held that it must take the consequences of returning a dubious verdict at the previous contest."

This passage is open to very serious criticism. In the first place, the last sentence is in glaring contradiction to the very positive language of the first sentence. Second, what conceivable "merits" could there be in a dissolution asked for by a ministry which had already had one unsuccessful dissolution, had shortly thereafter been defeated in the Commons, and then asked for another dissolution "in the hope of success at the hands of an electorate weary of political strife"? Surely, to grant

a dissolution in such circumstances would "represent a triumph over, not a triumph of, the electorate?" Third, if there can be any "merits" in such a request, what are they? Fourth, when is "normally"? Fifth, what exactly is the force of the repeated phrase "it may be held"? Does it mean that the opposite view, which certainly may be, and in fact has been, held (notably by Mr. Asquith, Muir and Marriott), is equally permissible? Sixth, why must the electorate "take the consequences" of a dubious verdict at one election by having to undergo another "shortly thereafter"? Why should it not take the consequences in the form of a coalition, or a series of minority Governments? (1) Presumably, in any case, the electorate could only be called upon to take the consequences in the form of a new election once, for Keith, as we have seen, agrees with the Hearn-May-Todd-Dicey doctrine that a defeated Cabinet is allowed only one appeal to the people. Perhaps this is the clue to the meaning of the word "normally"; of the answers to the other questions we have not even this slight hint.

There is also the difficulty of interpreting the phrase "shortly thereafter". Here Keith gives us a more definite, though not altogether unambiguous, indication of his meaning. He notes that it was "partly on this difficult question" that Lord Byng refused Mr. King's request for dissolution in Canada in 1926, and that Lord Byng's action was "erroneous", Mr. King had secured a dissolution on September 5th, 1925. Before the dissolution he had 117 supporters in a House of 235; after it, he had 100 in a House of 245. On June 28, 1926, after certain votes which Keith here (though not always elsewhere) appears to consider "defeats", he asked

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(1) For further discussion of this point, see below, pp. 194-195.

for a second dissolution. (1) Presumably, then, we may take it (a) that nine months and twenty-three days after a dissolution is not "shortly thereafter", or (b) that in the Canadian case there were "merits"(2) which outweighed this particular consideration.

Mr. Asquith, Muir and Marriott all take the view that in a House in which no party has a clear majority, a defeated minority Government is not entitled to a dissolution if the Crown can find another Cabinet willing to try to carry on with the existing House. The Crown may properly take into consideration the "parliamentary situation" and the possibility of finding an alternative Government. Emden says that in "exceptional circumstances" (undefined) a minority Government defeated in the Commons may have a right to dissolution. None of these authors, of course, says that the Crown would be bound to refuse dissolution even if an alternative Government were possible. Precedents of grants of dissolution to minority Government defeated in the Commons cannot therefore disprove their contentions. None the less, the precedents are instructive.

Melbourne's Government asked and got dissolution in 1841. But there was a great question of public policy at issue; four years had elapsed since the previous dissolution; and it was at least dubious whether an alternative Government could carry on in that House.

Derby's Government got dissolution in 1852. But the Parliament was one which had defeated both a Whig and a Conservative Government; there was no third party which could hope to form a Government; and a

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(1) For details of the Canadian case, see below, pp. 220-222.
(2) What Keith seems to have considered the "merits" of Mr. King's request are discussed below, pp. 234-236, 243-244, 258, 262, 317, 334, 336.

coalition was plainly impossible. The same was true in 1859 and 1868.

In 1924 alone, it would seem, was dissolution granted to a minority Government defeated in the House when it might have been possible to find an alternative Government to carry on with the existing House. We do not, of course, know positively that the King made no attempt to see whether some other arrangement was possible. But even if he did not, it does not follow that he could not.

Laski, Jennings and Keith reject Mr. Asquith's doctrine.

Laski's objections are open to question. He seems to think that even if Mr. Asquith had taken office and had been able to carry on with the existing House for a time, long or short, and had then been defeated, he would not have been entitled to a dissolution; that a grant to him in such circumstances would have meant discrimination against the Labour party and in favour of the Liberals; and that as such discrimination is inadmissible, refusal of dissolution to Mr. MacDonald would also have been inadmissible. Is this necessarily so? It is of course hardly open to question that if Mr. Asquith, taking office after a refusal of dissolution to Mr. MacDonald, had <u>immediately</u> asked for dissolution himself, the King would have been bound to refuse. To grant dissolution in such circumstances would have violated Mr. Asquith's own principle, and would certainly have been discriminatory. This is presumably a case in which scarcely anyone would contend that the incoming Cabinet had a constitutional right to dissolve a Parliament elected under the influence of its political opponents. But a request for dissolution by Mr. Asquith <u>after defeat</u> would not have been the same thing at all. To ask for dissolution of a House which has rejected a Conservative Government and a Labour Government,

but has had no opportunity of giving its opinion of a Liberal Government, is one thing; to ask for dissolution of a House which has rejected a Conservative Government, a Labour Government and a Liberal Government is quite another. In the former case, there is still a possibility of carrying on with the existing House and avoiding an election; in the latter, there is no such possibility: every alternative has been exhausted. Refusal of dissolution to Mr. MacDonald, therefore, would not have been inconsistent with a subsequent grant of dissolution to Mr. Asquith after he had found himself unable to carry on with the existing House; and the charge that the Crown was discriminating against the Labour party would have been unjustified. As Jennings remarks of the situation in 1858 (when there was no coherent third party), "A House of Commons which had rejected both a Liberal and a Conservative Government needed to be dissolved" (1); so in 1924, a House of Commons which had rejected Conservative, Labour and Liberal Governments would have "needed to be dissolved". But surely it does not follow that in 1858 a House which had rejected only a Liberal Government, or in 1924 a House which had rejected only Conservative and Labour Governments, would have "needed to be dissolved"? If Palmerston in 1858 had asked for dissolution instead of resigning, and the Queen had refused, and if, on Derby's being defeated, the Queen had granted him a dissolution, would that have been discrimination against the Liberals?

It is necessary to emphasize this point because not only in Laski's comments on this case but also in a very large number of comments in the Canadian crisis of 1926 there is a tendency to assume that a dissolution's

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(1) "Cabinet Government", p. 316.

a dissolution for a' that.

Laski himself seems to take the view that the Crown may refuse dissolution to a Prime Minister who is not the head of any great, coherent national party, capable of carrying on the government, when there is available the leader of a party with an overwhelming majority in the House of Commons. This seems reasonable enough and not overly difficult to apply, but it certainly involves an admission that the King may properly consider the "parliamentary situation".

Jennings does not directly controvert Mr. Asquith's theory. He simply suggests that there is no need for it. A "diet of dissolutions" would be necessary, he contends, only if the Constitution "failed to carry on its proper function of providing a Government with a stable majority. If the electorate persists in returning a nicely balanced House, it will impel a coalition or compel one party to support another without a coalition."

This view involves two assumptions, both questionable: first, that it is the proper function of the Constitution to provide a Government with a stable majority; and second, that in a "nicely balanced House", the formation of a coalition, or the giving of support by one party to another, will be long-lived enough virtually to re-introduce the two party system.

Is it the proper function of the Constitution to provide a Government with a stable majority? Surely it is the function of a democratic Constitution to give expression to the will of the people. But each of three or more parties may, as in Britain in 1924, be divided from each of the others on some major issue of public policy which makes any but

a very temporary co-operation impossible except at the cost of political principles; and the electorate, by its persistence in refusing a majority to any one of the parties, may be indicating that it does not want "a Government with a stable majority" to do something drastic, but a Government with a precarious and shifting majority, which will let it alone.(1) If so, it surely is undesirable that it should be bludgeoned, by a series of dissolutions, into accepting a Government and a policy which it does not want, simply because it is sick and tired of general elections. This would, in Evatt's words, represent "a triumph over, and not a triumph of, the electorate." (2)

Second, would the coalition, or the independent support, be long-lived enough virtually to re-introduce the two party system? Surely it is perfectly possible that a coalition might break up after a few months, or that the support given in January might be withdrawn in October (as in 1924). What then? Must the Crown grant dissolution on the request of the Prime Minister? May it not be the wish of the House, and also of the country, that there should be a new coalition, or a new minority Government with independent support from another party, without a general election? If a dissolution is granted, and the new House also is "nicely balanced", and again after a few months a new coalition breaks up, or whatever Government is in office loses its third-party support, must the Crown again grant dissolution? If so, how often is the performance to be repeated? Is there any good reason why it should be repeated, as it might be, ad nauseam?

Jennings insists that "political forces alone" can bring about

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(1) This may be, as I think it would be, a very unfortunate preference. But that is not the point.
(2) See above, p. 122. And note again Lord Morley's remark there referred to.

the desired coalition or stable independent support. "The King can suggest it but not compel it." The exclusion of the King from the category of "political forces" again begs the question. Of course the King cannot "compel" a party to enter a coalition or to give independent support to another (though he may, as the events of 1931 proved, exert powerful persuasion in that direction). But who ever said he could? Even if we assume that a relatively permanent coalition, or a minority Government with relatively permanent third-party support is the end to be desired, it is at least questionable whether a convention that the Crown must grant dissolution at the request of the Prime Minister is more likely to bring about the desired result than a convention which allows the Crown to refuse if it can find other Ministers prepared to give the existing House a trial. A Prime Minister with a dissolution in his pocket can afford to snap his fingers at dissentient colleagues in a coalition, or at a third party which threatens to withdraw its support. The break-up of the coalition, or the collapse of the less formal arrangements with the third party, has no terrors for him. Why should he bother to try conciliation? On the other hand, a Prime Minister who knows that failure to conciliate colleagues of another party in a coalition, or third-party supporters, may lead not to a general election but simply to his retirement from office, is, one would think, rather more likely to try to hold the coalition together or modify his policy to keep the independent support. Refusal of dissolution might be the very best way to produce the result which Jennings considers desirable.

"If the Opposition coalesces", Jennings proceeds, "it is not unreasonable for a minority Government to challenge the coalition in the country." This is hardly precise enough. If two Opposition parties,

hitherto at issue on some great question of public policy, drop their opposition to each other and fuse, then it certainly seems "not unreasonable" for the minority Government to challenge the new, fused party in the country. But if the Opposition "coalition" is merely a temporary arrangement for the purposes of the division lobby; if, that is, it expresses no more than a purely negative agreement that the existing Government is undesirable; then it may be questioned whether, in all circumstances, it is reasonable that a minority Government should be granted a dissolution. And even if we accept the view that it is always reasonable that a minority Government defeated once in the House of Commons should have the right to dissolve Parliament, we may "not unreasonably" ask whether it should be entitled to do so again and again, of if there is any limit, and if so, where. The King certainly cannot "compel" a coalition or independent third-party support of a minority Government; but he could, on Mr. Asquith's theory, compel an unscrupulous minority Government to stop defying the House of Commons and the electorate by appealing from House to electorate, and from electorate to House, again and again, till the lapse of Supply and the Army and Air Force (Annual) Act forced it to give way. (1)

All these considerations Jennings simply dismisses with, "If the major parties break up, the whole balance of the Constitution alters; and then, possibly, the King's prerogative becomes important." This, surely, is precisely the question that demands discussion.

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(1) For further discussion of this point, see below, pp. 275-/277./It is probably of more immediate practical importance in the Dominions than in the United Kingdom.

Keith in 1928 described Mr. Asquith's doctrine as showing "the stateman's obvious and regrettable decline in mental power and sense of political realities", (1) a condemnation which presumably would apply also to Mr. Lloyd George, Sir John Simon, Sir John Marriott and Professor Ramsay Muir, all of whom endorsed it. But Keith himself, in the same work in which he denounced Mr. Asquith's view, had declared that "a Ministry which has obtained a dissolution, is not entitled, if it is barely sustained in office, to ask for one again at an early date, and .... it may be the obligation .... of the Crown to decline to accept its advice"; subsequently he added (a) that "If a Ministry at an election secures only a slight majority and after a substantial period seeks again a dissolution, the issue.... must be decided according to circumstances", and (b) that "a ministry which has had a dissolution and has been unsuccessful in securing a majority therein, cannot at once have another; but if it is able to command enough votes to carry on for a time delicate questions may arise as to when and whether another dissolution was due". These remarks clearly imply that the Crown might refuse a dissolution even to a Government with a majority, and even after a substantial period had elapsed since the preceding dissolution, if the Government in question had had the preceding dissolution. A defeated minority Government which had had the preceding dissolution could scarcely claim to have a more absolute right to a second dissolution. Moreover, Keith's own view of Dominion practice closely approximated Mr. Asquith's of British practice. Clearly, therefore it was impossible to maintain the sweeping denunciation of Mr. Asquith's doctrine. Accordingly, we find Keith in 1939 saying that in Britain "if a three-party system of a serious and lasting character came into being..... it would.... be possible to argue, as Lord Oxford argued

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(1) "Responsible Government in the Dominions", 1928 ed., p. 148.

in 1923, that the Sovereign should not, in the event of the defeat or resignation of a ministry, grant a dissolution to it or to its successor, if it were possible to arrange a working agreement to carry on in the Commons". "But", he adds, "that condition of things manifestly did not exist in 1924, and the objections to denying the electorate a voice are of very great strength. A refusal would normally be possible only if there were general agreement within and without the Commons that an election should be delayed pending further development of the situation."

On this passage two comments are necessary. First, to say that in 1924 "a three-party system of a serious and lasting character.... manifestly did not exist" is to be wise after the event. It is obvious now; but how could the King have known it when Mr. MacDonald asked for dissolution? Second, to say that "A refusal would normally be possible only if there were general agreement within and without the Commons that an election should be delayed" is to say that the King may "normally" refuse only when the Government which asks for dissolution, presumably because it considers it necessary, agrees that it is not necessary!

None the less, Keith proceeds, in the same work, to describe Mr. Asquith's statement of 1923 as originating in a "fundamental misunderstanding", and accuses him of "failing to remember that the Crown must be wholly reluctant to refuse to give the electorate a chance to give a clear verdict in favour of one political party or another, and that that consideration would drive it forthwith to concede..... a dissolution to the Labour leader... [It was] a clear case of sound judgment being obscured by personal feelings, for any serious consideration should have shown that, when the occasion arose, the King would be under every conceivable obligation to take the

verdict of the country. It is clear that Mr. Asquith forgot that a dissolution is an appeal to the political sovereign, and that when it is asked for every consideration of constitutional propriety demands that it be conceded."

What this passage amounts to is simply a statement that Mr.Asquith "failed to remember" that he was wrong and Keith was right. For what Keith here lays down as the constitutional doctrine Mr. Asquith described as"subversive of constitutional usage". What one asserts, the other denies. Keith is of course perfectly entitled to differ from Mr. Asquith. But it may be questioned whether any writer is entitled to set aside in this fashion the considered opinion of Gladstone's colleague and pupil, one of the greatest of English constitutional lawyers, Prime Minister for eight years, and during that period called upon to deal with two of the major constitutional crises of modern times; especially when that opinion had been endorsed by another ex-Prime Minister, another great lawyer, and two distinguished academic authorities. Certainly few other writers would have ventured to assert that Mr. Asquith, of all people, "forgot that a dissolution is an appeal to the political sovereign".

Mr. Asquith did nothing of the sort. What he did was to say that in certain defined circumstances an appeal to the political sovereign is not proper. Keith himself, and a host of other writers and statesmen, have also said that in other defined circumstances an appeal to the political sovereign is not proper.

Todd's view that dissolution was proper when there was a dispute between the two Houses was, down to 1911, the accepted doctrine, Ministers considered it their right, if the Lords rejected a vital Government measure, to appeal to the country. The Lords considered it their right to insist that

any major measure to which they objected should be submitted to the country before they were called upon to pass it. The Crown considered it its right to insist that there should be a general election before it was called upon to create enough peers to swamp the Lords.

But since the passage of the Parliament Act it may be doubted whether all this remains true. The Lords could still insist that a bill prolonging the life of Parliament should be submitted to the people before the Upper House was called on to pass it. But their power to reject money bills has virtually disappeared, and they can certainly no longer insist that any other public bill must be submitted to the country. They may urge such a course, but their power to force it is gone. If the Cabinet does not choose to have a general election, it can simply bide its time and get its measure through under the Parliament Act.

The Parliament Act, however, leaves the Lords with the power to delay a vital Government measure, and it is not hard to imagine circumstances in which delaying passage for two years would in fact kill the bill as effectively as outright rejection. (1) It would appear, therefore, that the Lords still have the power to force a Cabinet either to wait for two years or to submit to a general election. This is a power of very great importance. As the House of Lords has always a huge Conservative majority, it means in practice that Conservative Governments will have no difficulty in getting their bills passed promptly, without either waiting for two years or submitting to an election, while Labour Governments will, unless the Crown creates enough peers to swamp the Lords, find themselves under a permanent handicap of having either to wait two years or submit to an election, indeed probably to a series of elections, one for each bill the

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(1) Cf. Jennings, "Parliament" (Cambridge, 1939), pp. 414-415.

Lords objected to. (1)

It is arguable that they would not have even this choice. For if they ask for dissolution when the Lords reject one of their bills, it is conceivable that the King might reply that there was no necessity for an election, that his Ministers had only to wait two years and their bill would go through under the Parliament Act without the "tumult and turmoil" of an election. He might argue that Ministers were formerly considered entitled to a dissolution in such circumstances only because there was then no other means of making the will of the Cabinet and the House of Commons effective, but that under the Parliament Act this was no longer true and the reason for granting dissolution had therefore disappeared. This is of course a plausible argument. In theory it applies equally to all parties,

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(1) Jennings, "Parliament", pp. 388, 392, 394, gives some illuminating quotations. Lord Newton, the Conservative biographer of Lord Lansdowne, in 1907 said of the House of Lords: "Overgrown, unrepresentative and unwieldy, when the Unionists were in office it was expected merely to act as a kind of registry office, and to pass without amendment, and occasionally without discussion, any measure sent up to it at the last moment. When, however, a Liberal Government was in power, it was expected to come to the rescue of a discomforted Opposition. Although the House of Lords has occasionally shown itself to be a more correct interpreter of public feeling than the House of Commons, its gigantic and permanent Conservative majority deprived it of any appearance of impartiality, and, unfortunately it had not shown any sign of independence by throwing out any Conservative measure." Laski ("Parliamentary Government in England", pp. 111-118, 129-130) shows that this has been no less true since. Mr. Balfour once declared that it was the duty of the House of Lords to see that "the great Unionist party should still control, whether in power or whether in Opposition, the destinies of this great Empire." (Quoted in J.A.Spender and Cyril Asquith, "Life of Lord Oxford and Asquith" (Hutchinson, 1932), vol. 1, p.232). Sir Charles Dilke said that the claim of the Lords to "force us to 'consult the country' is a claim for annual Parliaments when we are in office and septennial Parliaments when they are in office". To-day, of course, "septennial" would have to read "quinquennial".

and the King, who in the nature if things is likely to move rather in Conservative than Labour circles, might very possibly be unable to see that in practice it applied only to one. If he is considered entitled to refuse, the effect is that a Labour Government would work not only under the handicap imposed by the perpetual Conservative majority in the Lords but under the additional handicap of being unable to appeal from the Lords to the electorate. The Crown would become, willy-nilly, and doubtless quite unconsciously, the ally of the Conservative Party. The dangers of such a situation are obvious.

If the Crown is to be conceded the right to refuse dissolution in such cases, it would seem to follow, unless we are prepared to jeopardize monarchical institutions, that the Cabinet must be conceded the right to insist on the creation of enough peers to swamp the Lords. If the Crown insists on its old right of demanding a general election as a prerequisite to a wholesale creation of peers, then it cannot claim the right to refuse a ministerial request for dissolution as a means of overcoming the Lords' obstruction. (1)

On the Crown's right to force dissolution, as on its right to refuse, there is considerable difference of opinion. The term "forced dissolution" is applied to one which takes place not at the wish of the Cabinet but of the Crown itself. The element of "force" is most clearly evident when the Cabinet of the moment will not accept responsibility for dissolving Parliament, and is dismissed to make way for a new Cabinet

(1) Keith, in "The Constitution of England from Victoria to George VI", vol. 1, pp. 97-100, discusses this question and concludes that the Crown may still insist on a general election before consenting to create enough peers to swamp the Lords; he does not suggest that it could refuse a dissolution asked for by a Government faced with obstruction in the Lords. His conclusions would appear, therefore, to agree with those stated here.

which will. But even when the Cabinet of the moment yields to the royal urging and accepts responsibility for the dissolution, it does so presumably under the threat, explicit or understood, of dismissal; hence the term "forced" is appropriate in this case also. In this latter case, however, no problem arises; indeed the general public will probably not be aware that the general election is taking place at the wish of the King himself rather than his Cabinet. That will become known only a generation or so later, when the memoirs of the leading actors in the drama are published. Moreover, if the Crown's rights in the matter do not extend to dismissing a Cabinet which refuses to advise dissolution, then there clearly cannot be a "forced dissolution" in any sense. The real problem, therefore, is whether the Crown can force dissolution by dismissing a Cabinet which refuses to give the desired "advice" and finding a Cabinet which is willing to do so, and if so, when.

Anson's answer is that the Crown can force dissolution whenever there is "reason to suppose that the House of Commons and the majority of the electorate are at variance". Evidence leading to such a belief might be furnished by by-elections, the appearance of new issues of policy, or new electoral regulations such as the extension of the franchise. He seems to have felt that no drastic changes in the Constitution should take place without being submitted to the people at a general election, for, as we have seen, he favoured a "forced dissolution" in 1913, before the final introduction of the third Home Rule Bill. Anson's doctrine is a sweeping one, and would thrust a heavy burden on the King or whatever informal advisers he chose to rely on. (1) The interpretation of by-election results, as

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(1) His formal advisers, the Cabinet of the moment, would, ex hypothesi, be unavailable.

a recent writer has shown, (1) is a very tricky business. "New issues" is a vague term, and leaves plenty of room for wide differences of opinion.

Dicey is more cautious, though also less precise. He speaks of occasions when "the wishes of the legislature are, or may fairly be presumed to be, different from the wishes of the nation", without giving any indication of how this "difference" is to be discovered or recognized. He adds that there are "combinations of circumstances" when the Crown may dismiss Ministers and dissolve the Parliament which supports them. But specifically he mentions only the "combination of circumstances" before the final introduction of the third Home Rule Bill.

Laski, Marriott, Jennings and Professor J.H.Morgan, however, all agree that dismissal and forced dissolution in September 1913 would have been dangerous to the Crown; for if the Liberals had won the election, the King would have been obliged to recall them to office, and they would undoubtedly have felt that the Crown had descended into the arena of party politics and fought against them. But it seems questionable whether such a feeling would have been justified, for it is doubtful whether the Liberal Government had a "mandate" for Home Rule; (2) and it seems not unreasonable that a constitutional change of such magnitude should take place only if the electorate has pronounced clearly in its favour.

Jennings and Lowell consider a forced dissolution highly improbable; Laski thinks it impossible. None of them, however, discusses the question of whether a forced dissolution might be proper if a revolutionary measure were passed under the Parliament Act without a popular mandate. There is

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(1) John C. Sparks, "British By-Elections: What do They Prove?"; American Political Science Review, vol. xxxiv, No.1, February 1940, pp.97-104.
(2) Cf. W.Jennings, "Cabinet Government", p.436, and Spender and Asquith, "Life of Lord Oxford and Asquith", vol. I, p..201.

obviously some reason for saying that it would. But what is a "revolutionary measure"? Does it mean only a bill which would work a revolutionary change in the political Constitution, for example, a bill abolishing the House of Lords or the monarchy, prolonging the life of Parliament without the consent of the Opposition, restricting the franchise, gerrymandering the constituencies, establishing proportional representation, abolishing the existing system of municipal government and setting up a centralized non-elective system? Would a bill to change the succession to the Throne be revolutionary, or would some such bills, for example one to allow a Roman Catholic to be King? Would disestablishment of the Church of England be revolutionary? Would the term extend to economic change: socialization of the banks or of industry, abolition of the co-operative prohibition of trade unionism? It would be easy to multiply examples, and it is clear that what one honest man might consider"revolutionary" another would think merely part of the normal process of development, the slow "broadening down from precedent to precedent". Obviously much would depend on whether the Government had a "mandate" for the measure in question, whether, that is, the electors at the previous general election, had had it clearly placed before them that in voting for Party X they would be voting for the abolition of the monarchy, or that a vote for Party Y meant a vote for the abolition of co-operative societies. But, as the discussions in 1913 showed, it may not be at all easy to find out whether the measure in question was "the" issue, or even "an" issue, at the previous election. It seems clearly undesirable that a party which has got into power on, let us say, the issue of a defensive alliance with the United States and the Soviet Union, should be able, without consulting the electors afresh, to abolish the trade unions, or socialize the banks, or deprive women of the franchise,

or allow a Roman Catholic to succeed to the Throne, whatever the merits of any of these measures; on the other hand it is as clearly undesirable that a Government elected on a platform which announced plainly an intention to socialize the banks and big industry, disestablish the Church of England and abolish the House of Lords, should be compelled to undergo a series of general elections on each of these issues successively. The whole matter is further complicated by the fact that a minority of the electorate may easily return an overwhelming majority of the House of Commons, so that even a resounding electoral victory would not necessarily indicate electoral approval for whatever measure was at stake. (1)

Keith thinks that the King may force dissolution if he deems it "necessary in the public interest", "necessary for giving the will of the people its just course". He very properly adds that "such a criterion of action is plainly difficult to apply", but he gives us very little help in meeting the difficulty. He has no doubt that the power could be used to expel a Cabinet which sought to "cling to office by prolonging the duration of Parliament", which seems reasonable; beyond that, he gives only one hint of the circumstances in which a forced dissolution would be justified. Dissolution is "proper", he says, when a Cabinet, undefeated in the Commons, "meditates an important change of policy, as in 1923 and 1931"; does it

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(1) See the statistics in Keith, "The King and the Imperial Crown", pp. 210-211. In "The Constitution of England from Victoria to George VI", vol.1, pp. 99-102, Keith's view seems to be that an attempt to "destroy" the Parliament Act, or to prolong the life of Parliament (except by general agreement, as during the last and the present Wars), or to swamp the House of Lords, would be revolutionary measures in the sense in which that term is used here, and should be preceded by a dissolution, forced, if need be. Revolutionary changes in the economic system, if the electorate has given a clear mandate for such changes, he would apparently allow to go through without a fresh general election on each particular measure involved in a general plan.

follow that if a Cabinet meditates an important change of policy and does not advise dissolution, the King may dismiss it and call on Ministers who will? If so, the difficulty again crops up of deciding whether a particular policy is a "change" (let alone an "important change"), or whether it was placed before the country at the last election. If Keith's "necessary in the public interest" and "necessary for giving the will of the people its just course" are meant to cover more than the specific sets of circumstances he mentions, then they can hardly escape the charge of conferring on the Crown a vague and very ample discretion.

On the conventions in the overseas Commonwealth, Todd, Keith and Evatt are, as we have seen, the chief authorities. Todd wrote at a time when the present "Dominions" could still properly be described as "colonies". One might have expected, therefore, that his view would long since have become hopelessly out of date. But to a quite astonishing degree the general principles he laid down are still considered valid: Keith and Evatt do little more than elaborate upon them. The elaboration is of course highly important, for one of the most difficult aspects of this subject is the application of broad principles to particular situations. But it remains true that Todd's successors are still building on his foundation: that the Governor has a real discretion, is always free to make trial of an existing Assembly, may grant dissolution even if one or both Houses object. Only one of Todd's doctrines is now obsolete. No one would now contend that a Governor, in granting or refusing dissolution, should undertake to decide whether the request proceeded from "corrupt, partisan or unworthy motives". The Governor is no longer an "umpire", a "political superintendent" or a "political prophet.

In his earlier works Keith drew a marked distinction between United Kingdom and Dominion conventions. The King's action was automatic, the Governor's was not. The King could not refuse dissolution and find other Ministers who would take responsibility for the refusal; the Governor could. In later works this distinction tended to disappear. Differences perhaps still remained, but they were differences of detail rather than of principle. The King, like the Governor, had now a real discretion: and the circumstances in which he might exercise it had become more and more closely assimilated to those in which Keith thought a Governor might exercise his. In his 1939 and 1940 works, however, Keith showed a tendency to revert in some degree to his earlier position with respect to the King.

Unfortunately, it is by no means clear just how far Keith's view of the conventions in the Dominions has been affected by the change in his view of United Kingdom conventions. His most recent explicit statements on the Dominions are in "Responsible Government in the Dominions", 1928 edition. But at that time he seems still to have thought that in Britain the King's action was (except in certain specified circumstances) automatic. Even as late as 1933 he was clearly ready to concede more discretion to a Governor than to the King, but the context shows that his view of United Kingdom conventions was then decidedly different from what it had become three years later. It remains uncertain, therefore, whether Keith still thinks a Governor has more discretion than the King, and to what precise extent he considers United Kingdom conventions applicable to the Dominions.

In the Dominions, as in Britain, a Cabinet defeated in the Commons may dissolve once, but not twice; it must accept the verdict of the new House.

In the Dominions, as in Britain, a Cabinet which "has had one unsuccessful dissolution, and shortly thereafter is defeated in the Commons and asks for another" has no absolute right to receive it. In the Dominions, as in Britain, a Cabinet which has had one dissolution and failed to get a majority at the polls is not entitled to a second forthwith. In the Dominions, as in Britain, "only one dissolution can be asked for by the same Ministry within a limited period; and if it fails to get a majority at a dissolution, it cannot imitate continental practice and endeavour to secure a complacent legislature by a series of dissolutions." In the Dominions, as in Britain, "If a Ministry at an election secures only a slight majority and after a substantial period seeks again a dissolution, ... the issue must be decided according to circumstances". In the Dominions, as in Britain, "a Minister who had obtained one dissolution..... and [been] defeated, and none the less asked for another" would be refused. In the Dominions, as in Britain, "if..... after one unsuccessful dissolution Ministers asked [the Crown] to grant another, [it] would clearly be bound to refuse thus to violate the Constitution". In the Dominions, as in Britain, "the right [to a dissolution] does not exist in the case of a ministry which already has had one unsuccessful dissolution, and shortly thereafter is defeated in the Commons and asks for another, in the hope of success at the hands of an electorate weary of political strife. But any such case would have to be judged..... on its merits, and no rule of general application could be laid down..... Normally, it may be held, the electorate should be allowed to decide, for it may be held that it must take the consequences of returning a dubious verdict at the previous contest."

Keith has also, however, laid down a variety of propositions applicable only to the Dominions, and these now call for some comment.

In 1921, when he still thought the King's action automatic, he said that in the Dominions, when a Cabinet had suffered a "reverse" in Parliament and asked for a dissolution, "the Governor is expected ..... to withhold his assent if he considers that an alternative government can be found to carry on business". He explained that in Australia "the short life of .... Parliaments renders members adverse to a penal dissolution." On the other hand, in New Zealand, where the life of Parliament is exactly the same, "the British rule has of late been followed". The difference in practice is left unexplained. "The British rule has of late been followed" also "in Canada as regards the Dominion Government, and the Union [of South Africa], but is is not yet established in the Canadian Provinces or Newfoundland". As no South African Union Government and no Canadian Dominion Government, down to 1921 appears ever to have asked for a dissolution after suffering a "reverse" in Parliament, it is not easy to see on what evidence this statement of Keith's is based.

In the 1928 edition of "Responsible Government in the Dominions" he lists a large number of points which a Governor should consider in making up his mind whether to grant or refuse dissolution, but just how much importance should be attached to each he does not indicate. The Governor is left with the by no means easy task of deciding whether it is "better to allow the country to make up its mind" by a general election, or whether "this may be useless, in view of the division of opinion", and Keith's conclusion (as of that date) is that in the Dominions, "Whether a Ministry ought to resign or advise a dissolution is a matter on which no principles can be laid down with assurance; each case presents normally special features which must all be weighed before a decision is arrived at..... No principle

can be laid down as to when a Parliament ought to be dissolved." Yet in spite of this cautious and sceptical conclusion Keith did not hesitate, in the same work, to describe the refusal of dissolution in the Australian Commonwealth in 1909 as "prima facie contrary to constitutional usage", nor to condemn in the strongest terms Lord Byng's refusal of dissolution in Canada in 1926, without, in either case, relating his condemnation to any of the points which he had himself declared to be relevant. (1)

Evatt's cardinal doctrine, as we have seen, is that in the Dominions the Governor is entitled to refuse dissolution if he can find an alternative Cabinet which can carry on with the existing Lower House. But he adds important reservations about the House's "popular 'mandate'", the new Government's "popular backing", and the pledges given to the electors by its members or their individual supporters. What do these reservations mean?

As already noted, it is hard enough to say when a Government has or has not a "mandate" for this or that particular action. But at least it is clear what a Government's "mandate" means. What, however, does the "mandate" of an Assembly or a House of Representatives or a House of

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(1) Even in regard to the case of 1909, the application of Keith's relevant considerations to the facts of the particular case presents some difficulty. There was an alternative Government which could carry on for the rest of the life of the existing Parliament. Supply had not been voted. These facts pointed to refusal of dissolution. On the other hand, the time to go before a dissolution was due anyway and was certainly "comparatively short" (only a few months); the House had been elected under the auspices of the Government's rivals; and it would probably have been a distinct advantage to the Labour party to be the party which dissolved. These facts pointed to a grant of dissolution. What were the "special features" of the case which led Keith to asset so positively that the refusal was "prima facie contrary to constitutional usage"? On the application of Keith's principles to the Canadian case of 1926, see below, pp.

Commons mean? Is it simply a question of the length of time since the last election and/or before the next? Does it involve a question of the major issue or issues at the last election? Does an Assembly's "mandate" expire automatically after the lapse of a certain length of time, and if so, what length of time? Or is the "mandate" exhausted when an important new issue arises, regardless of the length of time since the last election or before the next? Or are both factors involved? Who is to decide what were the major issues at the last election, and by what criteria? There is room for plenty of difference of opinion. Who is to decide, similarly, whether an issue is "new" and "important"? If the Governor is to decide these points, or others where there is room for wide difference of opinion, what special facilities has he for reaching a juster decision than his Cabinet of the moment?

Even greater difficulties arise in interpreting the phrase "the Government's popular backing". There may be cases, as in British Columbia in 1900, where it is clear beyond shadow of doubt that a Cabinet has no popular backing; but in that case the chief reason why it was so clear was that the Cabinet in question had only one supporter in the Assembly, the Premier himself! It can never be equally clear that a Cabinet which, ex hypothesi, has a majority in the Assembly, has no, or insufficient, "popular backing". By-elections are often a poor indication. The press may be an even worse one. Mr. Roosevelt in 1936 won a sweeping victory, but throughout the campaign the press was overwhelmingly against him. There is no reason to think this sort of situation peculiar to the United States. On the contrary, there is every reason to expect that whenever the cleavage of opinion follows class lines, the press, controlled almost entirely by

the wealthy, will be markedly unrepresentative of the real feeling of the public. In any case, it may be doubted (as the work of "Mass Observation" has shown (1)) whether the press is really correctly informed about what the ordinary man and woman are feeling. Where then is the Governor to look for guidance? Perhaps to a "Gallup poll" or something of that sort; but such devices probably owe some part of their success hitherto to the fact that no official decisions were formally dependent on them. Make the results the official criterion by which a Governor would, in certain cases, grant or refuse dissolution, and there might be a considerable temptation to "rig" the machinery, whether it was in public or in private hands.

Again, to discover just what were the pledges which the electors considered a party to be making at a particular election is not easy. The official programme of the party may be accessible enough. But that does not settle the question. A considerable part of that programme may have been tacitly considered outside the real issues of the election. In Canada, for example, the Liberal party embodied in its official programme of 1919 a declaration in favour of unemployment insurance, but it is perfectly safe to say that at the elections of 1921, 1925, 1926, 1930, 1935, and 1940 not one Canadian elector in a thousand thought that in voting for a Liberal candidate he was voting for unemployment insurance. Whatever the issues of those elections were, unemployment insurance certainly was not one of them. It would be easy to multiply examples of the same sort of thing, anywhere in the British Commonwealth, or beyond it. And if it is not easy to decide just what were the effective pledges of a party, it is certainly far harder

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(1) See "Britain by Mass Observation" (Penguin Books, 1939) pp. 36,40, 100-103, 105-107.

to decide what were the effective pledges of an individual Member of Parliament. The unfortunate Governor (usually, be it noted, not a native of the country, and almost certainly imperfectly acquainted with its political history) who undertakes to investigate such questions is likely to find himself in a "vast Serbonian bog, where armies whole have sunk".

Evatt's discussion of the dismissal of Ministers in Cape Colony in 1878 falls for the most part outside the subject of this work. It may be doubted whether most Dominion statesmen, or most constitutional authorities either in Britain or the Dominions, would agree that nowadays a Governor could properly dismiss Ministers who gave what he regarded as disastrous advice on military affairs, even if his action were subsequently approved by Parliament; but the point does not directly concern us here. What does concern us is the view that if it were certain that Parliament would repudiate the Governor's action, a dissolution granted to the new Government would be a fresh and "even graver" act of "personal prerogative". The implication seems to be that if the Governor cannot be sure of support in the existing House, it is highly dubious whether he has the right to dismiss his Cabinet and grant a dissolution to a new one. This is open to question. If, as Evatt seems to think, dismissal because of "disastrous advice" on military affairs is allowable at all, why should the Governor be denied the right to seek ex post facto support not merely from the existing House but, if necessary, from the electorate? Why should dissolution granted to the new Cabinet be regarded as a fresh exercise of "personal prerogative"? Evatt offers neither precedent nor authority, nor even argument, in support of his view. Precedents, weighty authority and arguments may all be adduced against it.

That Evatt's theory of the relation between dismissal and dissolution is at times highly novel becomes even clearer in his discussion of the Queensland crisis of 1907-1908. He makes it perfectly clear that he thinks the dismissal of Mr. Kidston and the appointment of Mr. Philp constitutionally unobjectionable; but he insists that when the Assembly emphatically refused to support Mr. Philp's Ministry, the Governor was not entitled to grant it a dissolution but ought to have recalled Mr. Kidston. Why? The only hint of an answer Evatt gives is that the Assembly was "newly elected by the people". This presumably implies that it might therefore be assumed to represent faithfully the wishes of the electorate, and that accordingly there was no reason to seek a fresh expression of those wishes. But if this were so, what right had the Governor to dismiss Mr. Kidston in the first place? If he was convinced that Mr. Kidston's advice was contrary to the wishes of the Assembly, why should he not have waited for the Assembly to express its own wishes by a vote of want of confidence? What reason was there for the Governor's intervention unless he considered Mr. Kidston's advice grossly at variance with the public interest that not only the House but, if necessary, the country should be given an opportunity to pronounce unequivocally on the matter? To say that a Governor can appeal only from the Cabinet to the existing House is to remove what is in most circumstances the most important reason for dismissal of a Cabinet.

Neither in precedent nor authority is there the slightest warrant for saying that Mr. Philp was not entitled to a dissolution, or that the Governor was under a constitutional obligation to recall Mr. Kidston. All the precedents, and the opinions of leading authorities (some of them quoted by Evatt himself), go to show that if the King is conceded the right to

dismiss a Cabinet in this, that or the other set of circumstances, he must be conceded also the right to grant a dissolution, either immediately or after defeat in Parliament, to his new Cabinet, and that such a dissolution is not a "fresh" act of personal prerogative but a logical, normal and usually inevitable consequence of the dismissal. (1) Any other view, indeed, might render the dismissal pointless and nugatory. The King granted dissolution to the new Cabinet in 1784 and 1807, and after the dismissal or quasi-dismissal of 1834. Todd is perfectly explicit on the new Cabinet's right to dissolution, and it is difficult to attach any other meaning to the statements of Dicey, Anson, Lowell, Marriott and Keith, to mention no others. Evatt himself specifically discusses the precedent of 1807, and, though he condemns as "unconstitutional" the King's action in asking a certain pledge of the Grenville Government and dismissing it when it refused, he does not question the propriety of granting dissolution to its successor. He quotes, without disapproval, the opinions of Todd, Dicey, Anson, Lowell, and Marriott, and in discussing the British crises of 1910-1913, cites, again without disapproval or even question, statements by Lord Morley, Lord Lansdowne, Mr. Asquith and Mr. Bonar Law which clearly take it for granted that if the King dismissed the Liberal Cabinet, the new Conservative Cabinet would be entitled to a dissolution. Discussing the position in 1910 he apparently concludes, with Mr. Asquith, that dismissal would have been an act of very doubtful wisdom, but he does not even hint that if it had taken place the Conservatives would not have had the right to a dissolution. Discussing the situation in 1913 he speaks without hesitation or question, of a dismissal followed by a dissolution.

In 1784, 1834 and 1913, of course, the House of Commons was not

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(1) Subject, of course, to the considerations noted above, pp. 186, 192.

"newly elected", but in 1807, 1910 and 1911 it was. In 1784, the new Cabinet suffered repeated and decisive defeats in the House of Commons, but Evatt does not suggest that Pitt was not entitled to a dissolution, nor that George III should have recalled Fox and North. In 1807 and 1834 the new Cabinet did not suffer defeat in the existing House (in 1834 for the excellent reason that it did not meet the existing House at all); in 1910, 1911 and 1913, it seems to have been taken for granted that a new Cabinet, taking office after the dismissal of Mr. Asquith, would not have sttempted to appear before the existing House. Are we to infer from Evatt's statements that if a Cabinet is dismissed (or forced to resign, by refusal of what it regards as essential advice), the new Cabinet is entitled to an immediate dissolution, which will prevent the House from passing judgment on it, but is not entitled to a dissolution at all if it allows the House to pass judgment and the verdict is adverse? If so, we may safely conclude that no Government taking office as the result of a dismissal will ever be stupid enough to risk an adverse verdict of the House. Unless it feels absolutely sure of support there (which is most unlikely), it will simply ask and get an immediate dissolution, neatly evading Evatt's principle that, at least if the existing House is "newly elected", an adverse vote there must be followed by recall of the old Cabinet.

It might perhaps be argued that there is really no inconsistency between Evatt's statements on the United Kingdom cases and on the Queensland cases, because what is true for the King is not necessarily true for a Governore This argument itself, however, requires justification: <u>why</u>

should the United Kingdom rule on this point not hold good in the overseas Commonwealth? In any case, Evatt is not is a strong position for making any such plea, for in his discussion of the dismissal of Mr. de Boucherville in Quebec in 1878 and Mr. Lang in New South Wales in 1932, he makes out not the slightest suggestion that the new Cabinet was not entitled to a dissolution or that the dissolution was a fresh and "even graver" act of personal prerogative. In Quebec in 1878 the new Cabinet was defeated four times in the existing House, (1) but it secured a dissolution, and neither Evatt nor anyone else has ever suggested that the Lieutenant-Governor ought to have refused dissolution and recalled Mr. de Boucherville. In New South Wales in 1932, to be sure, the new Cabinet was not rejected by the existing House; but it certainly would have been if it had met that House. If it had met that House and been defeated, does Evatt think the Governor would have been obliged to recall Mr. Lang? Or would he say that the decisive difference between these cases and that of Queensland in 1907 was that the Quebec and New South Wales Assemblies were not, at the dates in question, "newly elected"? But if that is the decisive factor, why should it be decisive in the Dominions but not in the United Kingdom? (2) And what about the British Columbia case of 1900, which Evatt does not mention?

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(1) Journals of the Legislative Assembly of Quebec, 1878. The change of Government took place, March 2. The House voted no confidence on March 7 and twice on March 9, and postponed Supply on March 7.

(2) For Evatt's own opinions, and his citations, on these points, see "The King and His Dominion Governors", pp. 77, 79, 88, 92, 95, 101, 156-174, 259.

CHAPTER V

The Canadian Constitutional Crisis of 1926(I)

(a) The Events of June 25 - July 2

In the fourteenth Parliament of Canada, elected December 6, 1921, the Liberal party, under Mr. Mackenzie King, had a majority of one over the combined Opposition. The standing was: Liberals 118, Conservatives (official Opposition) 51, Progressives (including Labour) 66. For most purposes, however, the Liberal Government formed shortly after the election enjoyed the support of a majority of the Progressives, so that it was able to carry on for four years without difficulty. By September 5, 1925, Mr. King had become convinced of the necessity of seeking at the polls a clear working majority over all other parties. He accordingly advised a dissolution, which was granted. The election was held October 29. It resulted in the return of 101 Liberals, 116 Conservatives and 28 Progressives, Labour members and Independents.(1) The Prime Minister and eight of his Ministers lost their seats.

The writs were returnable December 7, on which date, under Canadian law, the new Parliament would enter upon its legal existence. On November 5, one week after the election, and one month and two days before the new Parliament's legal existence could begin, the Prime Minister issued a statement, in which he asserted that three courses were open to him: to resign at once, to meet the new House of Commons, or to

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(1) Under the Redistribution Act of 1924 the total membership of the House had been increased to 245.

advise His Excellency "to grant an immediate dissolution".(1) He announced that he had decided to meet the new House, at the earliest practicable moment.(2)

This proved to be January 7, 1926. From that date till the House adjourned on March 2, to permit the Prime Minister to find a seat in a by-election, and again from March 15, when the sittings resumed, till June 25, the Conservatives made repeated efforts to defeat the Government in the House, but without success. The Government's majorities were: 3, 10, 10, 1, 7, 8, 11, 13, 6, 9, 13, 13, 15, 1, 6, 8.(3) On June 18, a committee appointed to investigate alleged scandals in the Customs Department(4) presented its report. The Conservatives were not satisfied with

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(1) This claim (which Keith, Dawson and Evatt do not mention) is of course flatly contrary to Keith's statement that a Cabinet which has had one dissolution is not entitled to a second forthwith. See below, pp. 282-283 and above, pp. 152-153.

(2) Montreal Gazette, November 5, 1925.

(3) Journals of the House of Commons (Canada), 1926, passim.

(4) Keith's reference to this in "Responsible Government in the Dominions", 1928 ed., is peculiar. Mr. King's Government, he says, "had learned of serious malpractices in the Customs Department, and Mr. Boivin [the Minister] .... was eager to probe the matter. A Select Committee was accordingly appointed on the proposal of the Government." (Pp. 146-147). What actually happened was that on February 2 Mr. Lapointe, Leader of the House of Commons, moved that when the debate on the Address was finished, the House should adjourn till March 15. Mr. H. H. Stevens, Conservative, who had already had on the Order Paper a motion calling for an investigation of the Customs Department, moved in amendment that there should be no adjournment till a committee of seven members had been appointed to investigate "allegations of grave irregularities in the Department of

the report, and one of them, Mr. Stevens, on June 22, moved an amendment which, among other things, described the conduct of "the Prime Minister and the government" as "wholly indefensible" and the "conduct of the present Minister of Customs in the case of Moses Aziz" as "utterly unjustifiable".(1) On June 23, Mr. Woodsworth (Labour) moved a sub-amendment which would have struck out of the Stevens amendment the phrases quoted and added a condemnation of various persons on both sides of politics and in the Civil Service. The Government accepted this sub-amendment, the Conservatives opposed it. On June 25 the sub-amendment was defeated by two votes. Mr. Fansher (Progressive) then moved a second sub-amendment, which would have left in the Stevens amendment the condemnation of the Prime Minister, the Government and the Minister of Customs, and added Mr. Woodsworth's proposed condemnation of other persons. The Speaker ruled this sub-amendment out of order. His ruling was challenged, and overruled by two votes. A motion to adjourn the debate, supported by the Government, was lost by one vote; somewhat later, at 5.15 a.m., Saturday, June 26, a second motion to adjourn the debate, also supported by the Government, was carried by one vote . The Fansher sub-amendment had meanwhile been carried by agreement, but the Stevens amendment had not been voted on.(2)

During the week-end Mr. King asked for dissolution of Parliament.

Customs and Excise", which he then proceeded to set forth in detail. Mr. Boivin replied at length, declaring that the Government was perfectly willing to have a committee appointed, and that in fact he had intended, when Mr. Stevens' original motion was reached, to move an amendment providing for a more thorough investigation than that motion proposed. (Commons Debates (Canada), 1926, pp. 630, 700-702.)

(1) House of Commons Debates (Canada), 1926, p.4832. (Hereinafter referred to as "Commons Debates (Canada), 1926").

(2) Journals of the House of Commons (Canada), 1926, pp.475-476, 477-478, 479-480,480-481.

The Governor-General, Lord Byng, refused. Mr. King thereupon resigned. He announced his resignation to the House when it met on Monday, June 28, saying that he believed that "under British practice" he was "entitled" to a dissolution. He moved that the House adjourn. The following exchange then took place:

Right Hon. Arthur Meighen (Leader of the Opposition): Mr. Speaker, if I caught the Prime Minister's words aright, they were that the House adjourn; that the Government has resigned. I wish to add only this, that I am -----

Mr. Mackenzie King: I might say that this motion is not debatable.

Mr. Meighen: I do not propose to debate it, but I presume the Prime Minister will agree that I have a right to make a statement. As the House knows, we are close to the end of the session and the question of how the session should be finished is one of great importance to the country. I think there should be a conference between myself and the Prime Minister.

Mr. Mackenzie King: May I make my position clear? At the present time there is no Government. I am not Prime Minister; I cannot speak as Prime Minister. I can speak only as one member of this House, and it is as a humble member of this House that I submit that inasmuch as His Excellency is without an adviser, I do not think it would be proper for the House to proceed to discuss anything. If the House is to continue its proceedings, some one must assume, as His Excellency's adviser, the responsibility for His Excellency's refusal to grant a dissolution in the existing circumstances; and until His Excellency has an adviser who will assume this responsibility, I submit that this House should not proceed to discuss any matters whatever.

Mr. Speaker: The right hon. gentleman is technically right. The

motion to adjourn is not debatable. The right hon. gentleman (Mr. Meighen) stated that he did not intend to debate that motion but he wanted to make a statement. Under the circumstances, according to Bourinot, he should be allowed to make a statement.

Mr. Meighen: The only statement I wish to make is this. I think on the question of the completion of the session there should be a conference between the Prime Minister and myself, in which conference I am prepared to engage.

Mr. Mackenzie King: There is no Prime Minister ---- may I emphasize that? When there is a Prime Minister he may come to this House and announce his policy and his wishes."(1)

The House accordingly adjourned, at 2.15 p.m. The Governor-General at once sent for Mr. Meighen, and asked him "if he could command a majority in the House to get the work of the session concluded in orderly manner. Mr. Meighen replied that he could, having received informal promises from a number of the Progressives to the effect that they would vote with the Conservatives to get these all-important Bills through, pass Supply, and prorogue."(2) The Governor-General then requested Mr. Meighen to form a Government, and in the evening of Monday, June 28, he undertook to do so. On Tuesday, during a conference of the Progressive group, the Governor-General sent for the Progressive leader, Mr. Forke. The Progressive group thereupon drew up and gave to Mr. Forke "a confidential memorandum for his guidance in any conversation that might take place."(3)

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(1) Commons Debates, (Canada), 1926, pp.5096-5097.

(2) Commons Debates, (Canada), 1926, p.5097, and Montreal Gazette, July 3, 1926.

(3) Statement by Mr. E. J. Garland, M.P., Montreal Gazette, July 5, 1926.

According to an official statement by Mr. E. J. Garland, M.P., on behalf of the Progressive group, "It was clearly understood by all our members, first, that the memorandum was simply a guide for Mr. Forke; secondly, a general indication that we were prepared to act fairly with the new administration and facilitate the completion of the session's business, and, thirdly, was purely voluntary and in no sense could it be regarded as a contract. It was, of course, always based on the assumption that the new Ministry was legally constituted and capable of functioning. The memorandum was not addressed to His Excellency, nor was any other communication from the Progressive group directed to the Governor-General. Mr. Meighen had no assurance from our group, nor did he seek an assurance. . . . No promise had been made . . . The Progressives requested an interview with Mr. Meighen and secured it at the very time when Mr. Forke was being consulted by His Excellency. In this interview no mention whatever was made of co-operation or assistance, and it was solely for the purpose of ascertaining the procedure Mr. Meighen intended to adopt."(1)

The memorandum was as follows: "Memo. for Mr. Forke from Progressive group before he visited the Governor-General. Tuesday June 29, 1926. Motion agreed to by Progressive group: That we assist the new administration in completing the business of the session. That we are in agreement on the necessity of continuing the investigation into the customs and excise department by a judicial commission. We believe it advisable that no dissolution should take place until the judicial commission has finished its investigation into the Customs and Excise Department, and that Parliament be summoned to deal with the report."(2)

Mr. Meighen had accepted office as Prime Minister, but the formation of his Cabinet presented unusual difficulties. Mr. King had abruptly resigned,

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(1) Ibid.

(2) Montreal Gazette, July 3, 1926.

and refused to engage in a conference on the question of finishing the session's business. The utmost he had been prepared to do was to hold his resignation "in abeyance" until the Governor-General "had the opportunity to take such further steps as he wished to take",(1) which seems to have meant until he had had the opportunity to take the step Mr. King wished him to take (namely, asking London ~~the Dominions Office for its advice~~ about refusing dissolution) and which he refused to take.(2) This was not very helpful. Supply had not been voted. A bill to amend the Special War Revenue Act, a bill to amend the Canada Evidence Act, thirteen divorce bills and eight other private bills had passed both Houses and awaited the royal assent. The important Long Term Farm Mortgage Credit Bill was still before the Senate. Under the law as it then stood,(3) if Mr. Meighen formed a Government in the ordinary way, every one of the Ministers (with portfolio) from the Commons,(4) upon accepting office, would have automatically vacated his seat. This would have left the Conservatives with about 100 members to the Liberals' 101. The Government would have had to seek an adjournment of, or prorogue Parliament for, about six weeks,

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(1) Commons Debates (Canada), 1926, pp. 5231-5232.

(2) See below, p. 394.

(3) The Act of 1931, 21-22 George V, c.52, did away with the necessity for ministerial by-elections.

(4) Canadian Cabinets usually have about sixteen or seventeen members, of whom normally only one is from the Senate; often one or two of the Ministers from the Commons are Ministers without portfolio. Acceptance of office as a Minister without portfolio never rendered a seat vacant.

to allow time for ministerial by-elections.(1) It is by no means certain that it could have secured an adjournment. Mr. King's attitude on the question of a conference suggests that he might have opposed an adjournment. A few days later, moreover, when Sir Henry Drayton (Leader of the House), in the House, said, "We know very well that my right honourable leader had the right to send us all away, to come back again in six weeks' time, or the right of prorogation", Mr. King interrupted with: "He had not that right, I submit."(2) Shortly afterwards, also, Mr. King declared that on June 28 he had known that the Conservatives could only "form a Government by going back to the people for re-election" and "that if they attempted to do that they could not carry on successfully the business of this parliament."(3) If these remarks do not mean that he would have opposed adjournment, it is hard to say what they do mean. If he had opposed adjournment, subsequent events suggest that, in spite of the Progressive memorandum of June 29, it is by no means impossible that he could have carried with him enough Progressives to succeed. Mr. Meighen might

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(1) The time required for ministerial by-elections in Canada in 1926 was much longer than in Great Britain. In the Prince Albert by-election in 1926, the writ was moved for on January 15 and returned March 5; in the March 8 and returned April 10; in the Regina by-election, the writ was moved for Middlesex West by-election, the writ was moved for February 20 and returned March 19. (Journals of the House of Commons, 1926, pp.130, 213-214, 168.) The Prince Albert and Middlesex by-elections took slightly longer because the Ministers were opposed; in Regina there was no opposition. In view of the circumstances, there can be no question that in all three cases the matter was carried through with the utmost possible celerity.

(2) Commons Debates (Canada), 1926, p.5179.

(3) Ibid., p.5253. Note also the remark of Mr. J. S. Ewart, K.C., in his "Independence Papers", vol.2, no.6, p.185.

have got prorogation for six weeks. But either adjournment or prorogation would have involved a long delay, highly inconvenient to the members of Parliament, especially the farmer members at that time of year; prorogation would have killed the Long Term Farm Mortgage Credit Bill, the Montreal Harbour Commission Loan Bill and two private bills; and either adjournment or prorogation would have involved arrrying on for six weeks without Supply, which would have been possible,(1) but not desirable.

Mr. Meighen's official statement sums up the situation and the means he took to meet it: "Having in mind the fact that the present session has now continued for almost six months, and is very near its close, Mr. Meighen believed it to be the first duty of any Government he might form to conclude with all convenient dispatch the work of the present session. Such a course in preference to a somewhat prolonged adjournment was demanded also by a just regard for the convenience of honourable members, especially those who come from a great distance. It was manifestly impossible to effect this result if a government was to be formed in the usual way and if Ministers were to be assigned portfolios necessitating the vacating of their seats and consequent by-elections. The delay thus involved would, especially at this time of year, have entailed unnecessary hardship. The Prime Minister accordingly decided to constitute and submit to His Excellency a temporary Ministry composed of seven members, who would be sworn in without portfolio,(2) and who would have responsibility as acting Ministers of the several departments . . . . So soon as prorogation takes effect Mr. Meighen will immediately

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(1) By means of special Governor-General's warrants; Revised Statutes of Canada, 1927, c.178, section 42(b). This provision of the Act dates from at least 1878 (41 Victoria, c.7, section 32).

(2) As Ministers without portfolio, in Canada, had never been sworn in as such, (see below, pp.354-355), this presumably meant that any of the new Ministers who were not already Privy Councillors would be sworn of

address himself to the task of constituting a Government in the method established by custom. The present plan is merely to meet an unusual if not unprecedented situation."(1)

The new Government met the House Tuesday, June 29, and proceeded to deal with the business on the Order Paper. The first main item was of course the still unfinished debate on the Stevens amendment to the report of the Customs Committee, as amended by the Fansher sub-amendment. Mr. Rinfret, Liberal, now moved a fresh sub-amendment, which the Speaker declared to be in order. Mr. Geary, Conservative, challenged the Speaker's ruling, which was sustained by a majority of one. On a vote on the sub-amendment itself, the new Government received a majority of 12. A further new sub-amendment was then carried by agreement, the Stevens amendment so amended was carried by a majority of 10, and the report of the Committee, as amended, was also carried by 10.(2)

On June 30, the Liberal Opposition moved a vote of want of confidence in the new Government on the ground of its fiscal policy. This was defeated by a majority of 7.(3)

Mr. King followed this up in Committee of Supply by an elaborate cross-examination of the Ministers, designed to show that they were not validly appointed and were therefore not Ministers at all.(4) Mr. Lapointe, Liberal ex-Minister of Justice, then raised a question of privilege: that the acting Ministers of departments, having really (so he alleged) accepted offices of profit under the Crown, had vacated their seats and had no right

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the Privy Council.

(1) Commons Debates (Canada), 1926, pp.5097-5098.

(2) Journals of the House of Commons (Canada), 1926, pp.492-496.

(3) Ibid., pp.503-504.

(4) Ibid., pp.5211-5219. Note especially p.5218: "A group of gentlemen not one of whom is a minister of the crown."

to appear in the House.(1) These two propositions, as Mr. Bury, Conservative M.P. for Edmonton East, pointed out,(2) are of course mutually exclusive. If the acting Ministers of departments were really Ministers of departments, there could be no question of the validity of their appointments; if they had not been validly appointed, and were not Ministers of departments, then they had not vacated their seats. The two propositions, however, were ingeniously reconciled in a motion of Mr. Robb, Liberal ex-Minister of Finance: "That the actions in this House of the Honourable Members who have acted as Ministers of the Crown since the 29th. of June, 1926, namely the Honourable Members for West York, Fort William, Vancouver Centre, Argenteuil, Wellington South, and the Honourable senior Member for Halifax, are a violation and an infringment of the privileges of this House for the following reasons:---That the said Honourable gentlemen have no right to sit in this House and should have vacated their seats therein if they legally hold office as administrators of the various departments assigned to them by Orders-in-Council; that if they do not hold such office legally, they have no right to control the business of Government in this House and ask for supply for the Departments of which they state they are acting Ministers."(3) After debate, this motion was put. Mr. Meighen's seat was of course vacant, which reduced the Conservative strength by one. Mr. Bird, Progressive member for Nelson, broke his pair and voted with the Liberals.(4) As a result, the Government was defeated by one vote.(5) The House then adjourned. Next day, July 2, before it could meet again,

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(1) Commons Debates (Canada), 1926, p.5238.

(2) Ibid., p. 5286.

(3) Journals of the House of Commons (Canada), 1926, p. 508.

(4) Commons Debates (Canada), 1926, p. 5311.

(5) Ibid., pp. 5310-5311.

Mr. Meighen advised the Governor-General to dissolve Parliament. Lord Byng accepted the advice, and Parliament was accordingly dissolved, without prorogation and without the royal assent being given to any of the bills which were awaiting it.

(b) Constitutional Questions Raised by These Events

These events raised no less than eight constitutional questions.

1. Was Lord Byng's refusal of dissolution to Mr. King constitutional in the light of the circumstances as they stood on the morning of June 28?
2. Did the constitutionality of that refusal depend on Mr. Meighen's actually being able to carry on with the existing House of Commons?
3. Did the constitutionality of the refusal depend on the constitutionality of the Government of Ministers without portfolio?
4. Was that Government constitutional?
5. Was the grant of dissolution to Mr. Meighen constitutional?
6. Was the constitutionality of refusing dissolution to Mr. King on June 28 affected by the grant of dissolution to Mr. Meighen on July 2?
7. Was the manner of the dissolution of July 2 constitutional?
8. Did Lord Byng's action relegate Canada to a status inferior to that of Great Britain?

Mr. King and Keith unite in condemning Lord Byng's refusal to dissolve on Mr. King's advice. But neither of them seems ever to have made up his mind whether the refusal was unconstitutional per se, in the light of the circumstances as they stood when Mr. King announced his resignation to the House of Commons; or whether the unconstitutionality depended on Mr. Meighen's ability to carry on with the existing House, or on the constitutionality or otherwise of the Government of Ministers without portfolio, or on the refusal of dissolution to Mr. King "coupled",

as Keith says, "with the grant to Mr. Meighen".(1) On June 28, announcing his resignation, Mr. King asserted plainly and unequivocally that he believed that "under British practice" he was "entitled" to the dissolution which he had been requesting over the week-end.(2) In his official statement of "The Liberal Case", during the election, he repeated this claim.(3) But in the debate in the House after the change of Government, he said: "As His Excellency believed that all reasonable expedients should be tried before dissolution took place, he was prepared to send for . . . the leader of the then Opposition . . . to give him an opportunity to carry on the business of Parliament constitutionally . . . The present Prime Minister took the responsibility of being able to carry on . . . without a dissolution.(4) If he cannot ----(Interruption.) Before we can finally pronounce any definite opinion as to His Excellency's action we must wait to see whether the present Prime Minister can fulfil the undertaking which he then gave . . . In being declined the right of dissolution, I believe I was declined the right because His Excellency had the honest belief that some other member of this House could be found who . . . could carry on the business of government . . . in the way that it should be carried on . . . and which would . . . avoid the necessity of a general election. . . . Until I find out just whether or not it is going to be possible for

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(1) Letter to the Scotsman, May 11, 1927.

(2) Commons Debates (Canada), 1926, p. 5096.

(3) MacLean's Magazine, September 1, 1926; quoted in MacGregor Dawson, "Constitutional Issues in Canada, 1900-1931" (Oxford, 1933), p. 88. (This source will hereinafter be cited as "Dawson, 'Constitutional Issues'".)

(4) This, it should be noted, is simply Mr. King's assumption. It is not necessarily correct. See below, p. 382.

any individual chosen from the ranks of honourable gentlemen opposite to carry on . . . in the manner the country will think right and proper . . . and until I see what action His Excellency takes in these circumstances . . . I am quite prepared to withhold any . . . expression of view as to the constitutionality of the action taken in not accepting my advice. I have no objection that the right honourable gentleman who is to-day Prime Minister . . . should be given his chance. . . . I do say, however, that when he took the responsibility of His Excellency's refusal to grant a dissolution he put himself under the necessity of making very clear . . . that he would be able to conduct the affairs of this country in this parliament in a manner . . . befitting the honour and dignity . . . of parliament. If he is unable to do that, it is then his duty to return . . and tell His Excellency that he has not been able to carry out his undertaking. Then . . . I will wait and see what His Excellency does before I judge of the motive which governed with respect to the non-acceptance of the advice which I tendered . . . I believe that His Excellency the Governor-General 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 recognized principles of responsible government. . . . Now if the right honourable gentleman can demonstrate to the country, if he has demonstrated to this House and this parliament, 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 have another day of the character we have had to-day, when the 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."(1) Here Mr. King seems

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(1) Commons Debates (Canada), 1926, pp. 5189-5225.

to be saying that the refusal of dissolution was unconstitutional only if Mr. Meighen was unable to carry on without a dissolution (which at the moment he was still actually doing), and unable to do so "constitutionally", "in a manner that would accord with the recognized principles of responsible government", etc., that is (according to Mr. King), without resorting to the device of a Government of Ministers without portfolio, acting Ministers of the various departments. The unconstitutionality (alleged) of the refusal is no longer absolute, but conditional, depending on the unconstitutionality (also alleged) of the Government of Ministers without portfolio.(1)

Keith likewise oscillates between the view that the refusal was unconstitutional per se, and the alternative view that its unconstitutionality depended on various concomitant circumstances or subsequent events. On November 17, 1926, he said that Lord Byng's error lay "in seeking to effect an innovation in Canadian public life, the refusal of a dissolution to a Prime Minister who assured him ---- correctly as it proved(2) ---- that the step was essential in the interests of the country."(3) This seems to make the refusal absolutely unconstitutional. But on July 8, 1926, Keith had said that "Lord Byng's action is, of course, perfectly constitutional . . . if Canada has the same status as the States of Australia or her own provinces"(4), and that the refusal "relegated Canada decisively to the colonial status which we believed she had outgrown." This seems to make

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(1) Mr. King assumes that carrying on with a Government of Ministers without portfolio was unconstitutional and contrary to the principles of responsible government. The assumption is not necessarily correct. See below, pp. 341-379.

(2) On this see below, pp. 258-262, 382-383.

(3) Letter to the Scotsman.

(4) Letter to the Manchester Guardian.

the constitutionality of the refusal depend on Canada's status.(1) Again, when Mr. C. H. Cahan, K.C., M.P., claimed that "no Ministry has the right to attempt to dissolve the court before which it is being tried until a verdict has been rendered upon the issue in question. No cases can be found in which the Sovereign, or any viceroy representing the Sovereign, has attempted at the request of a Prime Minister to destroy the very court before which he and his colleagues were compelled to appear"(2), and that therefore the refusal had been justified, Keith replied that his criticism of Lord Byng was based "not merely on his refusal to grant a dissolution to Mr. King, but on that refusal coupled with the grant to Mr. Meighen. . .. Colonial precedents would have justified the refusal to Mr. King had Mr. Meighen been able to form a Government and command a majority in the Commons." (3) This seems to make the constitutionality of the refusal depend on (a)Canada's status, (b)whether Mr. Meighen was able to form a Government (which he did) and command a majority in the Commons (which in fact he did, for three days), and (c)an undefined relationship between the refusal of dissolution to Mr. King and the grant to Mr. Meighen. In 1940, in "The Constitution of England from Victoria to George VI", Keith says: "The right [to a dissolution] does not exist in the case of a ministry which already has had one unsuccessful dissolution, and shortly thereafter is defeated in the Commons and asks for another . . . But any such case would have to be judged by the King on its merits, and no rule of general application could be laid down. It was partly on this difficult question that Lord Byng in 1926 refused a dissolution to Mr. Mackenzie King, who at the

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(1) Which is by no means so simple a matter as Keith here assumes. See below, pp. 390-399.

(2) Commons Debates (Canada), 1926-27, p. 1729.

(3) Letter to the Scotsman, May 11, 1927.

general election of 1925 had failed to secure an effective majority (1) and who therefore sought a new dissolution.. . . Lord Byng's refusal was proved at once erroneous, because Mr. Meighen, who accepted office when Mr. King resigned, was unable to carry on the government without a dissolution(2), proving the soundness of the opinion of Mr. King that the time had come when the electorate must be given the opportunity to cast a decisive vote."(3) This seems to make the constitutionality of the refusal depend on (a) some undisclosed "merits" of the case, and (b) whether Mr. Meighen was in fact able to carry on without a dissolution.

(c) The Refusal of Dissolution in the Light of the Circumstances of June 28

It is simplest to begin with the question whether the refusal was constitutional in the light of the circumstances as they stood at the moment when Mr. King announced his resignation.

Mr. King declared: "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."(4) The first statement overlooks Sir Almeric Fitzroy's assertion that the King at first refused Mr. Asquith's request for dissolution in November 1910. The second is true of Dominion Prime Ministers

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(1) Mr. King had not secured a majority at all. See above, p. 220.

(2) On this, see below, p. 264.

(3) Vol. 1, pp. 86-87. Keith here seems to consider Mr. King's Government on June 28 a "defeated" Government. On the confusion of thought involved in the "proof" of Lord Byng's "error", see below, pp. 258-262.

(4) Commons Debates (Canada), 1926, p. 5224.

in Canada; but there had been three refusals in Canadian provinces (Quebec in 1879, New Brunswick in 1883, and British Columbia in 1903) and thirty-five in various other parts of the Empire between 1867 and 1926, as well as three in British North America before 1867.

But Mr. King could certainly have said with perfect truth that there had never been anywhere a refusal to a Government in the position of his Government. For, in the first place, his Government had not been defeated on any Government bill or on any motion of censure or want of confidence; second, it had been defeated on the Woodsworth sub-amendment, which the Government had supported and which would have deleted the censure from the Stevens amendment; third, a motion of censure was under debate in the Commons when the Government asked for dissolution; fourth, Mr. King had had the previous dissolution, less than ten months before; fifth, there was no great new issue of public policy at stake. No Government in this position has ever been refused dissolution. No Government in this position has ever asked for dissolution. The refusal was unprecedented; so was the request.

The statement of Mr. King's position just given will be challenged at two points.

First, Mr. King denies that his Government had been defeated in the Commons: "When I advised His Excellency that, in my opinion, a dissolution of Parliament was necessary, my colleagues and I enjoyed the confidence of the House of Commons. . . .Never once as Prime Minister had I encountered defeat."(1) Mr. King's use of the words "confidence" and "defeat" is peculiar. To defeat a Government-supported, censure-deleting motion is certainly a very extraordinary way for the House of Commons to show its "confidence" in the Government. To say that a Government in

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(1) "The Liberal Case", quoted in Dawson, "Constitutional Issues", p.88.

this position has "never encountered defeat" is to take unwarranted liberties with the English language. It is open to Mr. King to say that the defeat was not decisive, not of sufficient consequence to compel resignation. It is not open to anyone to say that it was not a defeat at all.(1)

Mr. King also denies that a motion of censure against his Government was under debate in the House of Commons when he asked for dissolution: "No vote which could be termed a vote of censure, in the parliamentary use of that term, was under debate at the time dissolution was requested."(2) In one sense, this is strictly accurate. As far as

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(1) It is doubtful whether votes on Speaker's rulings may be considered either victories or defeats for a Government. Certainly no Government would consider any such vote as in itself decisive. The defeat of the first motion to adjourn the debate was a Government defeat, though not a decisive one; the passing of the second motion to adjourn the debate was a Government victory, but certainly not decisive enough to wipe out the effect of the vote on the Woodsworth sub-amendment, or to warrant the statement that the Government "enjoyed the confidence of the House". It may be noted in passing that Keith describes the votes of June 25-26 as "defeats" but "not technical government defeats", adding: "but they naturally showed that the Government no longer commanded support in the House of Commons". (Journal of Comparative Legislation, Third Series, vol. VIII, p. 275). On the next page, and in "The Dominions as Sovereign States" (Macmillan, 1928), p. 221, he describes Mr. King's Government as "undefeated". In "The British Cabinet System, 1830-1938" (Stevens and Sons, 1939) he is non-committal. In "The Constitution of England from Victoria to George VI" (Vol. I, p.86), on the other hand, he seems clearly to regard it as a defeated Government.

(2) Policy speech of July 23, 1926, quoted in Keith, "Speeches and Documents on the British Dominions", p. 151.

we know, Mr. King did not make his request for dissolution until after the House had adjourned at 5.15 a. m. on Saturday, June 26; so that at the precise moment when the request was made no motion of any kind was "under debate" in the sense that someone was actually speaking on it. If this is what Mr. King means, it is true, but trivial and irrelevant. If his words are to be taken in any other sense, it is hard to know what they mean. The Stevens amendment, as we have seen, described the conduct of "the Prime Minister and the government" as "wholly indefensible" and the conduct of the Minister of Customs as "utterly unjustifiable". True, the word "censure" does not occur in the motion. But Mr. King himself had no hesitation in describing as "a motion of censure" the British Liberal party's motion of 1924 on the Campbell case, which was no more than a request for an inquiry into the conduct of a Minister(1); a motion whose carrying Keith describes as "a mere incident".(2) Nor did Mr. King hesitate to describe his own party's motion on the subject of the Government of Ministers without portfolio as "censure" of that Government, (3) though the word "censure" does not appear in that motion either. Moreover, during the debate on the Stevens amendment itself, both Mr. King and several of his Ministers made it perfectly clear that they considered it a motion of censure. At p. 4960 of Hansard, Mr. King said: "If Mr. Boivin [the Minister of Customs] was to be singled out for censure, why was not that censure brought on weeks ago?" and at p. 4961: "I believe the majority in this House will vote down that censure." Mr. King might, of course, plead that he was here admitting only that the

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(1) Ibid.

(2) "The King and the Imperial Crown", p. 129.

(3) Policy speech of July 23; Keith, "Speeches and Documents on the British Dominions", p. 151.

motion was one of censure of an individual Minister; but if so, two questions are in point: (a) Why should the words "utterly unjustifiable" be taken as "censure" and the words "wholly indefensible" as something less? To most minds the distinction will seem diaphanous. (b) On this showing, what becomes of the principle of the collective responsibility of the Cabinet? In any event, at pp. 5132 and 5135 Mr. King was perfectly unequivocal in his description of the Stevens motion: "The amendment moved by the honourable member for Vancouver Centre . . . is largely confined to a vote of censure on ministers of the Crown. . . . The amendment of the honourable 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." The Minister of Customs himself seems to have been in no doubt about the nature of the motion. At. p. 4855 of Hansard he spoke of the "proposed motion of censure" and "the censure it implies", and at p. 4856 of "the motion of censure contained in the amendment moved by my honourable friend from Vancouver Centre (Mr. Stevens)." At p. 4986, Mr. Cannon, the Solicitor-General, called the motion "a vote of censure" on the Minister of Customs, and at p. 4997 asked: "Are we going to overturn and throw out the government over the Aziz case?" At p.5028, Mr. Dunning, Minister of Railways, said: "The amendment . .. is carefully worded to involve not only the Minister of Customs but the fate of the government as well", and at pp. 5034-5035, twice: "We are asked to vote out this government." At p. 5074, Mr. Motherwell, Minister of Agriculture, spoke of "the one question of censure of the government", and at p. 5076 asked: "What is the charge? It is that this government is subject to censure." It would be easy to add a dozen quotations from private members showing that they considered the motion one of censure, but they would add little to the conclusiveness of the quotations already given from Mr. King and his own colleagues.

Furthermore, of the authorities who have commented on the case, not even those most favourable to Mr. King have hesitated to describe the Stevens amendment as a motion of censure. Keith so

describes it no less than six times,(1) and MacGregor Dawson four or five times.(2) What Mr. King means by "a vote of censure, in the parliamentary use of that term" remains, therefore, an impenetrable mystery. What anyone else would certainly call a vote of censure was undoubtedly under debate when he asked for dissolution.

Refusal of Dissolution to an Undefeated Government

To begin with, let us, for purposes of argument, accept at its face value the statement that Mr. King's Government, up to June 28, 1926, had never been defeated in the House of Commons.

If, as MacGregor Dawson contends, the King "has become an automaton with no public will of his own" and the British Prime Minister's "advice may not be refused"; and if the same authority is correct in the further statements that "In recent years practically all authorities agreed that the Governor-General's independent action had become a relic of history . . . If responsible government is not a mockery, it must mean a genuine democratic rule based in large measure at least upon the English model",(3) then no further question arises. Lord Byng had no discretion; his refusal was simply wrong, and that is all there is to it. As to the King, Keith in his earlier works agreed. But on the whole the weight of authority, including Keith in most of his later works, is, as we have seen, heavily against Dawson's simple view. Todd, Dicey, Anson,

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(1) "Sovereignty of the British Dominions", p. 244; "The Dominions as Sovereign States", p. 220 (twice); Journal of Comparative Legislation, Third Series, vol. VIII, p. 275; "Constitutional Law of the British Dominions", p. 148; "Speeches and Documents on the British Dominions", Introduction, pp. xxii-xxiii.

(2) Dalhousie Review, vol. 6, pp. 332,334, 335; "Constitutional Issues", p. 72.

(3) Dalhousie Review, vol. 6, p. 333.

Low, Lowell, Muir, Marriott, Jennings, Laski, and Jenks among academic authorities, and Wellington, Peel, Russell, Aberdeen, Disraeli, Gladstone, Salisbury, Courtney, Mr. Asquith, Mr. Lloyd George and Lord Simon among statesmen, let alone Queen Victoria and King Edward VII, all unite in denying that the King or Queen is a mere automaton and that the Prime Minister's advice may not be refused; and no one has suggested that a Governor's discretion is less than the King's.

On the other hand, very few authorities explicitly state that the King may refuse dissolution to a Cabinet undefeated in the Commons. Low says the Crown may refuse a request made on "frivolous or inadequate grounds". Lowell's words might be taken to cover such cases. Mr. Asquith seems clearly to have meant that the King might refuse dissolution even to an undefeated minority Government in circumstances such as those of June 28, 1926 in Canada: "The notion that a Ministry which cannot command a majority in the House of Commons . . . is invested with the right to demand a dissolution is as subversive of constitutional usage is it would, in my opinion, be pernicious to the general and paramount interests of the nation at large. . . .The Crown is not bound to take the advice of a particular Ministry to put its subjects to the tumult and turmoil of a series of general elections so long as it can find other Ministers who are prepared to give it a trial." Marriott denies that Mr. MacDonald could have had a dissolution in January 1924, when he was still undefeated in the Commons.

Most of these writers do not discuss Dominion usage. Todd conceded to the Governors in the "colonies" of his day a very wide discretion indeed, wide enough, apparently, to cover refusal of dissolution even to an undefeated Cabinet; but it is in some respects dubious how far his view may still be considered relevant. Marriott says that

Lord Byng's "attitude" in 1926 "seems to have been entirely 'correct'",(1) but does not say that he considered Mr. King's Government "undefeated". Evatt's views on the general question we have already noted; his opinions on the Canadian case of 1926 we shall discuss in detail presently.(2)

According to Keith, a United Kingdom Cabinet which has had one dissolution "and has been unsuccessful in securing a majority" at the polls, but "is able to command enough votes to carry on for a time", has not an unqualified right to a second dissolution: "delicate questions may arise as to when and whether a second dissolution was due". Mr. King had had one dissolution; he had most certainly not been successful in securing a majority at the polls (Keith himself says that Lord Byng "had regard . . . to the fact that the normal dissolution in 1925 had failed to give the Liberal party a clear lead", "an effective majority"(3)); and he had been able to command enough votes to carry on from January 7 to June 25. Was he, on this version of the British conventions, entitled to a second dissolution on June 28? The point would seem, on Keith's own showing, to be debatable; he calls it "difficult".(4) But he dismisses it with the statement that Mr. Meighen's subsequently demonstrated inability to carry on without a dissolution "proved" that Lord Byng's action was "erroneous". This is a complete non sequitur.(5)

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(1) "The Mechanism of the Modern State", vol. II, p. 34.

(2) See below, pp. 262, 267, 381-386.

(3) "The Dominions as Sovereign States", p. 220; "The Constitution of England from Victoria to George VI", vol.I, p.86. The election had not given the Liberal party a "lead" or "majority" of any kind. See above, p. 220.

(4) "The Constitution of England from Victoria to George VI", loc. cit.

(5) For a discussion of its validity, see below, pp. 258-262, 382-383./ Strictly speaking, perhaps, the passage may not be relevant here, as it assumes that Mr. King's Government was defeated, June 25-26.

In 1939, however, Keith made a fresh attempt to deal with the same point, and this time to apply his principles to the Canadian case. The result is not very happy. "How long must elapse", Keith observes, "before a ministry returned with a small plurality, or dependent on aid from other groups at one election, can be given another dissolution, depends entirely on circumstances, and defies any attempt at definition.(1) In Canada the plurality given to the Liberal party by the election of 1925 was too small to allow it to carry on effectively, and one reason for Lord Byng's refusal of a dissolution in 1926 was, no doubt, the fact that Mr. Mackenzie King had had so recently a dissolution without achieving full success, so that another was not proper. The crushing defeat of the new Government of Mr. Meighen in the election . . . was largely due to the raising of the constitutional issue of the refusal of the Governor-General to grant a dissolution,(2) and no very exact conclusion can be drawn, except that in all the circumstances, the refusal of a dissolution to Mr. King was an unfortunate error of judgment, since an election was patently necessary to enable an effective ministry to be formed and, that being so, to refuse it to the Premier, and then to give it to his successor, looked like political partisanship, though in fact it was not." Unfortunately the whole of this argument on the Canadian case is based on false premises. The Liberal party did not secure a "plurality" of any kind, large or small, at the election of 1925. It emerged with 101 seats to the Conservatives' 116. It not only had not "achieved full success": its strength had fallen from 118 seats in a House of 235, to 101 in a House of 245. An election was not, on June 28, "patently necessary to allow an effective ministry to be formed".(3)

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(1) For criticism of this general proposition, see above, pp. 183-184.

(2) This is disputable. See below, pp. 399-400.

(3) On this point, see below, pp. 258-265.

Again, "Only one dissolution can be asked for by the same Ministry within a limited period." Mr. King's Ministry had asked and got dissolution on September 5, 1925. Is the period from that date till June 28, 1926, "limited", or is it not? Keith does not discuss the point, but as he condemns Lord Byng's action as contrary to usage in the United Kingdom, presumably the answer is no. It would be interesting to know why. In the same passage Keith adds that if a Cabinet which has had one dissolution fails to get a majority at the polls, "it cannot imitate continental practice and endeavour to secure a complacent legislature by a series of dissolutions" He apparently thinks this charge could not be brought against Mr. King; but he does not explain why. Yet he is clear that if a Cabinet did try to secure a complacent legislature by a series of dissolutions, "The King would be compelled to refuse."

Or again: "If a Ministry at an election secures only a slight majority, and after a substantial period seeks again a dissolution, the issue must be decided according to circumstances." Mr. King's Ministry at the election of 1925 had not even secured a slight majority; on the contrary, its majority of one had been changed into a minority of 43. This particular statement of the United Kingdom conventions is therefore not strictly applicable. But it may be pertinent to ask whether the period from September 5, 1925 to June 28, 1926 was "substantial"; and it is certainly pertinent to ask what, in Keith's opinion, were the "circumstances" which led him to think that a Ministry which had not even obtained a "slight" majority at the previous dissolution was entitled to a second dissolution after what might not unreasonably be considered a not very "substantial" period.

Further, "A Ministry which has obtained a dissolution, is not entitled, if it is barely sustained in office, to ask for one again at an early date, and if a Ministry neglects its duty, it may be the obligation, as well as the right, of the Crown to decline to accept its advice."

Mr. King's Ministry had obtained a dissolution. Its majorities, from January 7 to June 25, had ranged from 1 to 15(1) in a House of 245 members. If this is not being "barely sustained", and if June 28, 1926, is not "an early date" in relation to September 5, 1925, what do those terms mean? Keith again does not offer any explanation; but from his condemnation of Lord Byng's action as contrary to United Kingdom usage, we must infer that such majorities are better than "bare", and that June 28 was not "an early date". But why?

Or again: "The King will not refuse dissolution to any ministry, subject, of course, to the rule that it has not shortly before obtained a dissolution without materially strengthening its position." By no stretch of the imagination can a change from 118 members in a House of 235 to 101 in a House of 245 be described as "materially strengthening" a Government's position; from Keith's condemnation of Lord Byng we must again infer that September 5, 1925, is not "shortly before" June 28, 1926. But again why? Surely it would not be unreasonable to place on such terms an interpretation more favourable to Lord Byng?

In still another passage, as we have seen, Keith says that if a "defeated or weak(2) government" which has had one dissolution asked for a second, "it would be impossible" for the King "to accede to the request, as that would be to defy the popular verdict and to prevent the functioning of the Parliament which the electorate had returned". A Government in the position of Mr. King's on June 28, 1926, is certainly "weak"; it had had one dissolution and was asking for a second. It

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(1) There were majorities of 16 and 8 on Speaker's rulings challenged by Opposition members; but, as a majority against the Speaker's ruling on June 26 was probably not a Government defeat, certainly not a decisive one, earlier majorities for Speaker's rulings probably cannot be considered Government victories.

(2) Italics mine.

would seem to follow that it was "impossible" for Lord Byng "to accede to the request, as that would [have been] to defy the popular verdict and to prevent the functioning of the Parliament which the electorate had returned". But Keith, for undisclosed reasons, denies this consequence of his own argument.(1)

Keith notes that Mr. Meighen "argued that the Governor-General had only acted as the King would have done in like circumstances" and calls this "an impossible thesis".(2) The quotations just given suggest that, accepting Keith's own statements of the principles on which the King would have acted, Mr. Meighen's thesis was by no means "impossible", but on the contrary perfectly reasonable.

On the triple assumption that Mr. King's Government was "undefeated", that the Governor-General was bound to act on the United Kingdom conventions, and that Keith's statement of those conventions is correct, it is in fact clear that Lord Byng's refusal of dissolution to Mr. King on June 28, 1926, was, as Marriott says, "entirely 'correct'".

In the overseas Empire there appear to have been some eight cases of refusal of dissolution to a Government with a majority in the Commons.

In Tasmania in 1904 the reason for requesting dissolution was a dispute between the two Houses. The Government had suffered two minor defeats, which the Governor considered of so little consequence that he said there had been "no" adverse vote in the Assembly. The previous dissolution had been granted to the Government's opponents, fifteen

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(1) He may perhaps have meant that dissolution could be refused only if requested immediately after the election. But he does not say so, though he elsewhere provides for this contingency in very precise terms.

(2) "The Dominions as Sovereign States", p. 221.

months before. In South Australia in 1906 the reason for the request was again a dispute between the two Houses. The previous dissolution had been granted to the Government's opponents, about a year and three quarters before. None the less the Governor refused to grant dissolution till all other means of carrying on the government had been exhausted. In both cases (dissimilar as they were from the Canadian case of 1926) the Government's claim to dissolution was far stronger than Mr. King's, yet dissolution was refused.

In Newfoundland, in 1894, the Government had had the previous dissolution, eight months before; election petitions had already unseated two members of the Government, and similar petitions against a large number of its supporters were before the Courts and certain to succeed. This case bears no resemblance whatever to Mr. King's and requires no further comment here.

In Canada in 1856, the request was made by only a part of the Cabinet. The previous dissolution had been granted almost two years before, to a Cabinet which was very largely different. This case also bears no resemblance to Mr. King's.

In New South Wales in 1927, according to Keith, the Governor refused a dissolution to Mr. Lang when the Premier requested it against the wishes of all the rest of the Cabinet except one Minister. Mr. Lang resigned, was recommissioned, and formed a new Cabinet which supported his renewed request for dissolution. Dissolution was then granted. The Legislature had lasted for almost two years of its three year term and had held five sessions. This case sheds no light on Mr. King's claim in 1926.

In Victoria on July 29, 1875 Mr. Kerferd's Government was sustained, 37-36, on an item in the Budget resolutions. It thereupon asked for dissolution. A Government of the same party had had the previous dissolution, about a year and a half before. The Government asserted, and the Governor denied, that there was an important new issue, financial policy.

Mr. Kerferd's claim was certainly stronger than Mr. King's; but dissolution was refused.

In Queensland, June 22, 1904, the Morgan Government, sustained on division only by a vote of 36-35, asked for dissolution. Its opponents had had the previous dissolution, two years before, and had resigned office, September 9, 1903, when sustained in Ways and Means only by a vote of 33-31. The Government had not had the previous dissolution; Parliament had only a year to run; it might well have been held that both parties had confessed their inability to carry on effectively in the existing House. The case for granting dissolution was therefore very strong; infinitely stronger than Mr. King's case. But the Governor refused, and called on Sir A. Rutledge to form a Government, the Morgan Government meanwhile retaining office in the customary way till its successor was appointed. It was only after Sir A. Rutledge confessed his inability to form a Ministry that the Governor granted dissolution to the Morgan Government.

In Western Australia in 1907, there was a difference between the two Houses; Parliament had served for two years of its three year term; and the previous dissolution had been granted to a Government which was only in part the same. Sir Newton Moore's claim to dissolution was therefore far stronger than Mr. King's, yet his request was refused.

In none of these cases, it must be noted, was there a motion of censure under debate when dissolution was requested.(1)

It is important, however, to examine not only the cases in which dissolution was refused to a Government enjoying the confidence of the Commons, but also those in which dissolution was granted, in anything like special circumstances. Of such grants there appear to have been twenty-eight.

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(1) On the importance of this point, see below, pp. 267-299.

Five of these (New South Wales in 1895, South Australia in 1906 and 1912, the Cape of Good Hope in 1907, and Australia in 1914) arose out of disputes between the two Houses. In the second case dissolution was only granted after it had just been refused and efforts to find an alternative Government had failed; in at least the last four cases the previous dissolution had been granted to another Government; in all five a longer time had elapsed than in Canada in 1926. In all five the claim to dissolution was incomparably stronger than Mr. King's.

In Queensland, in 1904, dissolution was granted only after a previous refusal to the same Government and the Opposition's failure to form an alternative Government. The previous dissolution had taken place under the auspices of the Government's opponents, two years before. None of these cases has any direct bearing on Mr. King's claim of June 28, 1926, though again it is clear that in all of them the grounds for dissolution were far stronger than any he could urge.

In ten cases (Prince Edward Island in 1873, 1879 and December 1911; Canada in 1873; South Australia in 1878 and 1889; Manitoba in 1888; Newfoundland in 1874 and 1900; and British Columbia in 1903) dissolution was granted to a new Government called to office because its predecessor had confessed inability to carry on in the existing Parliament. In Newfoundland, the Bennett Government had had a dissolution in the autumn of 1873 and had won a small majority. Before the session of 1874, however, two of its supporters accepted offices of profit and vacated their seats, and one joined the Opposition. This left the Government in a minority of one, and it resigned. Mr. Carter became Premier and carried on for the session of 1874, sustained on one critical and one minor division by the Speaker's casting vote. He secured a dissolution in the autumn. In Newfoundland in 1900 the new Government was largely the same as that which had had the previous dissolution; but that dissolution had taken place three years before, and an alternative

Government had meanwhile held office for over two years and had then been defeated. In British Columbia in 1903 a dissolution had been refused to the defeated Government of Colonel Prior only fifteen days before it was granted to Mr. McBride; but there had been three Governments since the previous dissolution; that dissolution had taken place two years and ten months before; Mr. McBride had obtained Supply, which Colonel Prior had been unable to do; and Mr. McBride's formation of a purely Conservative Government had produced a major change in the political situation, on which the electorate might reasonably be cassed upon to pronounce. In Manitoba in 1888 there had been two sessions of the Legislature since the previous dissolution (under the auspices of the Government's opponents, a year and seven months before); a Redistribution Act (51 Victoria, c. 3) and an important extension of the franchise (c. 2, section 3) had been passed. In all the other cases, the previous dissolution had been granted to a different Government, anywhere from a year to three years before. In all of these cases, therefore, the claim to dissolution was immeasurably stronger than Mr. King's.

In Manitoba, on November 26, 1879, the Norquay Government obtained a dissolution. It had had the previous dissolution, November 11, 1878. But the Legislature had meanwhile passed an important Redistribution Act (42 Victoria, c. 18). In New Zealand in 1881 the Hall Government obtained a dissolution, the previous dissolution having been granted to its opponents two years before, and the maximum term of Parliament being three years. In Victoria, in December 1879, the Berry Government, which had secured for its Constitution Act Amendment Bill majorities less than those required for such legislation under the Constitution, secured a dissolution. The Governor explained that the Assembly would soon expire by efflux of time anyway; that the previous dissolution had been granted to the Government's opponents; and that the Bill at issue had never been submitted to the electors. In

Queensland in 1909 Mr. Kidston's Government, which had several times been sustained only by a majority of one, secured a dissolution. The previous dissolution had been granted to its opponents, a year and eight months before. None of these cases provides any support for Mr. King's claim in 1926.

In New South Wales in 1874 and 1891, and in South Australia in 1862, there was a deadlock, the Government being dependent on the Speaker's casting vote. In New South Wales in 1880 and 1927 a Redistribution Act had been passed. In New South Wales in 1880 and South Australia in 1862, the previous dissolution had been granted to a different Government, in the other four cases to opponents of the Government asking dissolution on the dates in question. In all six cases, the Parliament was approaching expiry from efflux of time.

The South African case of 1920 is of special interest. General Smuts had obtained a dissolution on February 6. The election returned 41 members of his South African party (with 3 Independents who could be counted on for support), 44 Nationalists, 25 Unionists and 21 Labour. General Smuts met the new Parliament and carried on successfully throughout the session. On December 21 he obtained a second dissolution, which he justified on the grounds of the new political situation arising out of the failure of attempts to unite the South African and Nationalist parties or to form a composite cour party Government, and the subsequent union of the South African and Unionist parties. If Mr. King in 1926 had carried on successfully throughout the session and had brought about a union of the Liberal and Progressive parties, his claim to dissolution would then have been comparable to General Smuts' in December 1920. But these conditions were not present.

In Quebec, on October 30, 1935, the Taschereau Government obtained a dissolution. It emerged from the elections much weakened but still with a clear majority. The new Legislature opened March 24, 1936, and the Govern-

ment was sustained on critical divisions by majorities of 47-41, 46-42 and 46-39; but disclosures before the Public Accounts Committee undermined its position, and the Opposition was able to block essential public business. On June 11, the Prime Minister suddenly asked and obtained a second dissolution.(1) He based his request on the fact that, though the fiscal year would expire on June 30, the Budget had not been adopted and there was no prospect that it would be even if the House sat on into July. It may be noted also that the Leader of the Opposition had at least twice "dared" the Government to dissolve.

In every respect except the length of time which had elapsed since the preceding dissolution Mr. Taschereau's claim was stronger than Mr. King's. Mr. Taschereau had suffered nothing that anyone could call a defeat in the House; effective conduct of public business by the existing Government was apparently impossible in the existing House; but there was no third party, and no possibility of any alternative Government which could carry on without a dissolution. Moreover, the Opposition itself had challenged the Government to dissolve. This point is of first rate importance.

In all these cases, it must again be noted, there was no motion of censure against the Government under debate when it asked for dissolution.

The precedents in the overseas Empire seem to reveal no case where an undefeated Government in anything like the position of Mr. King's has obtained dissolution.(2) But, once more, precedents are not in themselves conclusive. We must examine also what the text-writers on Dominion Constitutions have said.

Keith has insisted again and again, even since 1926, that a Governor-General has a greater discretion than the King. In 1921 he said: "In the Dominions . . . constitutional usage still permits a Governor to

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(1) There was no prorogation.
(2) For fuller details of the cases, with references, see above, chapter II.

decline to accept the advice of his ministers, if he thinks(1) that he can procure other advisers to take their place in the event of their resignation. In particular, a Governor is expected, in the event of a request from a ministry for a dissolution on a reverse in Parliament, to withhold his assent if he considers that an alternative government can be found to carry on business." True, what follows suggests that these remarks were intended to apply only to Australia, and Keith explicitly says that what he then considered "the British rule" "has of late been followed in Canada as regards the Dominion government"; but, as already noted, in Canada from 1867 to 1921 there had been no case of a Govern-

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(1) Italics mine, throughout.

ment suffering a "reverse" in Parliament, let alone asking for a dissolution after such a reverse; so that it is hard to see what foundation there could be for the addendum Keith attached to his general statement. If the general statement were to be applied, it would clearly support Lord Byng; for he unquestionably "thought" he could find other advisers, and did find them; Mr. King's Government had certainly suffered a "reverse" in Parliament, if not a "technical defeat" (whatever that means); and Lord Byng certainly "considered" that an alternative Government could be found to carry on business. It is noteworthy that in this passage Keith throughout makes the propriety of refusal depend on the Governor's opinion about the possibility of an alternative Government.

In 1924, in the latest of his works available at the time Lord Byng was faced with the question of granting or refusing dissolution to Mr. King, Keith had said that "practice in the Dominions . . . empowers the representative of the Crown to decline to grant a dissolution, provided that he is able to find a politician willing to carry on the government and to accept responsibility for the refusal." (He repeats this in "The Constitutional Law of the British Dominions", 1933.) Mr. Meighen was "willing to carry on the government and to accept responsibility for the refusal." If, as is not impossible, Lord Byng consulted this work of Keith's, he must have been bewildered by its author's subsequent condemnation of him for following what seems to be the perfectly clear principle there laid down.

Moreover, in the 1912 edition of "Responsible Government in the Dominions" (the latest available in 1926), in a passage which is reprinted verbatim in the 1928 edition, Keith says that in the Dominions "The normal case(1) of refusal to accept ministerial advice is when a Ministry defeated

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(1) Italics mine, in both instances.

in the Lower Houses, or no longer sure of a majority, asks for a dissolution in order to strengthen itself by an appeal to the electorate.. . . In the Dominions . . . the Governor must act on ministerial responsibility, . . . but this responsibility may be either assumed in advance by a Ministry in office whose advice he accepts, or assumed ex post facto by a Ministry which has taken office after he has forced one to resign."(1) Mr. King's Ministry may not have been "technically" defeated, but it is not overstating the case to say that he was "no longer sure of a majority". Mr. King himself insists that he and his colleagues still enjoyed the confidence of the House of Commons, but Keith, in two places anyhow, as we have seen, thinks otherwise. Mr. King has also asserted that he would not have been defeated on the Stevens amendment had he awaited the vote,(2) and this is not impossible.(3) But it is certainly at least, as MacGregor Dawson says, "a disputed question".(4) To say that the Government was "sure" of

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(1) In the 1928 edition, the passage is found at pp. 154 and 157.

(2) Commons Debates (Canada), 1926, p. 5233.

(3) That the motion was passed, after the change of Government, by a majority of 10 is not conclusive; for it is quite possible that some of the Progressives who then voted for it did so because they were anxious to see the session completed, under any Government, and would have voted the opposite way if the Liberals had still been in office. Private information leads me to believe that this was certainly true of some of them.

(4) "Constitutional Issues", p. 72. In an earlier statement he was a good deal more positive: "The Liberal Government, owing to certain disclosures in the administration of the Customs, found itself faced with an adverse majority in the House of Commons and a possible vote of censure. Mr. Mackenzie King, failing to obtain a non-partizan Commission, and

a majority, in any but a purely subjective sense, is ridiculous. If it was sure in any other sense, why did it not wait for the vote?(1)

If, then, on Keith's own showing, Mr. King's Government had lost the support of the House, and if it was "no longer sure of a majority", why, on Keith's statement of "normal" Dominion usage even after 1926, was it not constitutional for Lord Byng to refuse Mr. King's request for dissolution? Again, if, as is not impossible, Lord Byng had read this passage in "Responsible Government in the Dominions", he must have felt astonished when its author condemned him out of hand.

Still more striking is the passage in "Responsible Government in the Dominions", 1928 edition, in which Keith sets forth that the question which arises in regard to granting or refusing dissolution "implies that the Government is in difficulties and that its Parliamentary position is not secure." Mr. King's Government was certainly "in difficulties", and perhaps Mr. King himself would hardly go so far as to say that its "Parliamentary position" was "secure". In these circumstances, says Keith, "There may be an alternative Government which could carry on for the rest of the life of the Parliament, either because it has already secured a superiority in numbers, or because if given the opportunity to form a Ministry it will succeed in detaching enough supporters of the Government to have a working majority. Moreover, the country, as a rule, expects the Governor to exercise his discretion; . . . at any rate long usage in some territories is clearly in favour of the view that the Governor has not merely

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anticipating the verdict of the House, thereupon asked the Governor-General to dissolve Parliament." (Dalhousie Review, vol. 6, p. 332.) This statement contains an error of fact. The Liberal attempt to "obtain a non-partizan Commission" was Mr. Rinfret's sub-amendment, which was not moved till June 29, after the change of Government. (Commons Debates (Canada), 1926, p. 5106.)

(2) Mr. King's own explanation of this is dealt with below, pp. 281-292.

a right to exercise his discretion, but that he is worthy of censure if he does not." Keith then lists a series of points which the Governor may properly consider in making up his mind: whether Supply has been voted, how long it will be before a dissolution must come through the efflux of time ("if it is long, there is a better reason for refusing"), "the chance of obtaining an effective Government if dissolution be refused", whether the existing House was elected under the aegis of the Government's rivals ("a frequent ground for arguing for dissolutions, and doubtless of importance").

Here again it is not difficult to make out a strong case for Lord Byng. Keith's words clearly contemplate the possibility that the Government which asks for dissolution is still "undefeated" in the House, for he contrasts the case of an Opposition which has "already secured a superiority in numbers" with that of one which could get a "working majority . . . if given the opportunity to form a Ministry".

Keith contends elsewhere that on June 28, 1926, there was no "alternative Government which could carry on for the rest of the life of the Parliament", no "chance of obtaining an effective Government" if dissolution were refused to Mr. King. "It must have been clear from the first", he says, "that [Mr. Meighen] could not carry on without a dissolution, and must exact a promise of one."(1) "Mr. Meighen had not the slightest chance of carrying on without a dissolution . . . [He] admittedly would have to obtain a dissolution if he were to be able to maintain himself for a moment."(2) "An election was patently necessary to allow an effective Ministry to be formed."(3)

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(1) "Responsible Government in the Dominions", 1928 ed., p. 148.

(2) Journal of Comparative Legislation, Third Series, vol. VIII, p. 276. Who "admitted" this is not stated.

(3) "The British Cabinet System, 1830-1938", p. 396.

In proof of these assertions Keith offers no evidence whatever; on the contrary, he says elsewhere: "Very possibly the Governor-General thought that a dissolution could be avoided."(1) "Very possibly" should read "undoubtedly"; for Lord Byng, in his letter of June 29, 1926, to Mr. King, distinctly states that his position was "that all reasonable expedients should be tried before resorting to another election".(2) Unless we are to assume that the Governor-General was completely destitute of honour (which no one has ever suggested), it is inconceivable that he could have given Mr. Meighen a promise of dissolution when he took office, or have called on him to take office on any such understanding.(3) Any suggestion that he did is an irresponsible and unwarranted imputation against Lord Byng's public character.

Keith appears to have been misled by the statements of his "much-esteemed friend"(4) Mr. J. S. Ewart, K.C., of Ottawa. Mr. Ewart, in his "Independence Papers", volume 2, number 6, has a great deal to say on the subject. First, at pages 191-192, he remarks: "As between Mr. King and Mr. Meighen, it was indisputable that Mr. King had a better chance of carrying on the government without a dissolution than had Mr. Meighen. . . . As the result proved, the situation was such that only by a new election could the difficulties be solved. . . . The advice of the prime minister was before [the Governor-General]. The only ground upon which his refusal could be justified was that, for remedy of the situation, there was some method of pro-

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(1) "The Dominions as Sovereign States", p.221.

(2) Quoted in Dawson, "Constitutional Issues", p. 73.

(3) Granting him dissolution in the wholly changed circumstances of July 2 is another matter altogether; see below, pp. 382-383. Mr. King himself repeatedly asserted that Mr. Meighen gave Lord Byng an undertaking to carry on without a dissolution; see above, p. 232. This also is an unwarranted assumption; see below, p. 382.

(4) "Responsible Government in the Dominions", 1928 ed., p. xxiii.

cedure other than recourse to an election. It may be believed that His Excellency thought that an election could be avoided by calling upon Mr. Meighen to form a government. And it may be that His Excellency can say that he so believed because of the assurance given to him in that respect by Mr. Meighen. That is all possible. But it is very difficult to believe that Mr. Meighen's opinion as to the remedy for the situation was different from that of almost everybody else; or that he was able to persuade the Governor-General to accept a view that was held by nobody outside Government House. One has only to look at the newspapers to see what the general belief was." And Mr. Ewart then quotes an editorial from the Montreal Gazette, leading Conservative newspaper.

On these remarks a number of comments are in order. First, it was <u>not</u> "indisputable" that Mr. King had a better chance of carrying on the government without a dissolution than had Mr. Meighen". Mr. Meighen disputed it, most, if not all, of the Conservative party disputed it, the Governor-General disputed it, Evatt disputes it.(1) Second, the "result proved"(2) that <u>on July 2</u> "the situation was such that only by a new election could the difficulties be solved"; it could, in the nature of things, prove nothing about what was or was not <u>possible</u> on <u>June 28</u>. Third, His Excellency most certainly did think that "by calling on Mr. Meighen" an election <u>might</u> be avoided: his letter shows it. (Mr. Ewart's statement was originally written before the correspondence was published, but he

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(1) See below, p. 267.

(2) Mr. Garland's statement of July 5, 1926, claims that Mr. Meighen, on July 2, might still have sought an adjournment, formed a Government in the ordinary way, and tried to complete the session's work; but Mr. Garland seems to have assumed that dissolution would follow.

left it unchanged.) Fourth, the Governor-General can have had, at the date when he refused Mr. King's request for dissolution, no "assurance" from Mr. Meighen, unless we are to assume, without a shadow of evidence, what no one has ever alleged: that he entered into secret and unconstitutional communication with Mr. Meighen before Mr. King's resignation. Mr. Meighen, after he had been called on, was able to assure the Governor that, in his opinion, the attempt to avoid an election by letting an alternative Government try to carry on with the existing House was worth making; had Mr. Meighen said the opposite, of course, Lord Byng would almost certainly have been obliged to recall Mr. King.(1) Fifth, Mr. Ewart's concluding(and contradictory) assertions that "almost everybody" except Mr. Meighen, and everybody "outside Government House", was certain that a Conservative Government could not carry on with the existing House, rest upon no better foundation than a vague reference to "the newspapers" and a single quotation from the Montreal Gazette.

Elsewhere Mr. Ewart is even more positive and sweeping. At page 209, commenting on a quotation from Todd that the Governor may refuse dissolution "if he believes that a strong and efficient Administration could be formed that would command the confidence of the existing Assembly", he says: "The Governor-General did not so believe. Nobody so believed." But confident assertions as to other people's states of mind are not evidence. At pages 223-224, however, Mr. Ewart returns to the charge with: "It is not disputed (1) that the constitution of the Commons in June last was such as precluded the effective discharge of governmental duties by either Mr. King or Mr. Meighen, and (2) that the only remedy for the situation was a new election." On the contrary, it was disputed, and strongly: by the

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(1) See below, p. 291.

Governor-General, by Mr. Meighen, by the bulk of the Conservative party, and, as the memorandum of June 29 shows, by the Progressives.

Finally, at page 230, Mr. Ewart, in a passage written on July 23, 1926, says: "Neither Mr. King, Mr. Meighen nor Mr. Forke could effectively carry on the government of the country [with that House of Commons], as everybody knows." Everybody knew it by July 23; but it does not follow that anybody knew it on June 28.

Keith seems to attach great importance to Mr. King's "assurance" to Lord Byng that, on June 28, dissolution was "essential in the interests of the country", and observes that subsequent events proved its correctness. This last is of course Mr. Ewart's confusion of thought over again. What Mr. King's "assurance" of June 28 really amounted to was that dissolution was "essential" <u>on June 28, without allowing Mr. Meighen a chance to show whether he could carry on with the existing House</u>, because Mr. King "could not see wherein there was any probability of the House giving [Mr. Meighen] the support which would enable him to carry on the Government".(1) What subsequent events proved on this point was that a dissolution was essential <u>on July 2</u>, <u>after</u>, and <u>because</u>, Mr. Meighen <u>had</u> tried to carry on with the existing House and had failed.(2) Anyhow, even if Mr. King's "assurance" of June 28 could have been proved correct by subsequent events, that, as Evatt points out, would not "necessarily prove that Lord Byng was in error in refusing to act upon it."(3) There was no reason why Lord Byng should look upon Mr. King as a political clairvoyant.(4) Furthermore, as Evatt also points out, every Prime

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(1) Letter to Lord Byng, July 3, 1926; quoted in Dawson, "Constitutional Issues", p. 75.

(2) For further discussion of these and related points, see below, pp. 382-386.

(3) "The King and His Dominion Governors", pp. 132-133.

(4) This remark is mine, not Evatt's.

Minister advising dissolution will assure the Governor that the step is essential in the interests of the country. Implicit reliance on such assurances simply put a premium on political brazenness.(1) In this instance, against Mr. King' assurance that Mr. Meighen could not command a majority, the Governor-General had Mr. Meighen's subsequent assurance that he could; and of this assurance he received some confirmation, after Mr. Meighen had accepted office but before his Government met the House,(2) in the famous Progressive "Memorandum for Mr. Forke", of whose contents that gentleman presumably apprised him. The interview with Mr. Forke, however, is also not strictly relevant, because it did not take place till after the Governor-General had refused dissolution to Mr. King and called on Mr. Meighen; but it is quite as relevant as the other subsequent events to which Keith refers.

What events subsequent to June 28 could and did prove, unmistakably, was that it could <u>not</u> have been "clear from the first" that Mr. Meighen "had not the slightest chance of carrying on without a dissolution . . . and must exact a promise of one." For in fact he did try to carry on without a dissolution, and for three days was sustained, by

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(1) This remark also is mine, not Evatt's.

(2) While Mr. Forke was at Government House, the Progressive group was interviewing Mr. Meighen "for the purpose of ascertaining the procedure he intended to adopt". (Mr. Garland's statement, quoted above, p.225). But at the opening of the sitting of the House that same day, Mr. Meighen, through Sir Henry Drayton, Leader of the House, stated clearly the procedure he intended to adopt. The Governor-General's interview with Mr. Forke must therefore have taken place before the House met.

majorities of 12, 10, 10, 7 and 21, an average higher than that enjoyed by the previous Government.(1)

In the light of these facts it is idle to contend that on June 28, when Lord Byng refused dissolution to Mr. King, there was no "chance"of an effective alternative Government. True, Mr. Meighen was unable to retain his majority in the Commons for more than three days. But that was due to the fact (which neither the Governor-General nor anyone else, on June 28, could have foreseen) that a number of members of the Progressive party suddenly reversed their attitude towards the new Government after helping to defeat the want of confidence motion of June 30. There was, on June 28, no certainty that Mr. Meighen could not form a Government

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(1) Mr. Meighen enjoyed these majorities, of course, for a much shorter period; but the fact that he enjoyed them at all shows that his chances of carrying on without a dissolution were real. I have excluded from consideration here the vote on the Speaker's ruling, after the change of Government, in which that ruling was sustained, in spite of the Government's opposition; for, as already explained, votes of this sort probably cannot properly be considered either victories or defeats for a Government. In regard to the vote in Committee of Supply, in which the Liberal motion that the chairman do leave the chair was defeated by 21, the largest majority obtained by either Government during the whole session; it should be noted that Mr. Garland explained that he and others voted against this motion solely because they resented what they considered an attempt to choke off discussion after the Liberals had presented an elaborate case against the Government of Ministers without portfolio, but before the Government could make anything like a full reply. (Commons Debates (Canada), 1926, p. 5229)

which could carry on "for the rest of the life of the Parliament", and good reason to think that he could.

What of the other points listed by Keith as relevant in such cases? Supply had not been voted; the length of time which would have had to elapse before a dissolution must come through the efflux of time was long; the existing House had been elected under the Government's own auspices. All these considerations, on Keith's showing, pointed to refusal.(1) Yet without discussing their application to the particular case, he concludes that the refusal was unconstitutional; and this in the face of his own positive statements in 1928 that when a Ministry in the Dominions is in difficulties, whether it ought to resign or advise dissolution "is a matter on which no principles can be laid down with assurance. . . . No principle can be laid down as to when a Parliament ought to be dissolved." To be sure he adds that "each case normally presents special features which must all be weighed before a decision is arrived at"; but his explanation of the decisive "special features" of the Canadian case of 1926 leaves everything to the imagination.

Keith also says, however, that the Ramsay MacDonald "precedent" of 1924 "ought to have been conclusive".(2) Why? Mr. MacDonald's request for dissolution was in perfect accord with six or seven British precedents. Mr. King's was contrary to all of them. Mr. MacDonald did not ask for dissolution while a motion of censure was under debate. Mr. King did. Mr. MacDonald had not had the previous dissolution. Mr. King had. (3) Mr.

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(1) Keith's reference to "the country" expecting the Governor to exercise his discretion and deeming him worthy of censure if he does not is probably not intended to apply to Canada, though he does not say so. If it is meant to apply to Canada, his case against Lord Byng is further, and disastrously, weakened.

(2) "Responsible Government in the Dominions", 1928 ed., pp. 147-148.

(3) Melbourne, in 1841, after being defeated in the Commons, obtained

MacDonald's case was in fact not a "precedent" for Mr. King at all, though it was a precedent for Mr. Meighen on July 2. (1)

Evatt lays stress, as already noted, on "the great difference between cases where Ministers remain in full possession of the confidence of the Lower House and cases where they face,(2) or have met with, defeat in that House." In the latter cases, "particularly where the 'parliamentary situation' embraces three distinct parties and the Ministry has no working majority in the House", he thinks the Governor-General has discretion to refuse dissolution: "I have never appreciated the force of the argument that because the Governor-General chose to act upon the advice of Ministers who retained the full confidence of the House . . . (so that the possibility of any alternative Ministry had to be ruled out of consideration) therefore every Governor-General must act upon the advice of Ministers who had been defeated in the House. . . . (so that the possibility of an alternative Ministry was immediately suggested, and such possibility might be capable of exclusion only by the Governor-General consulting the views of leading members of the House, or by a subsequent test vote of the House)." This passage, of course, applies in set terms only to Australia and to a Cabinet defeated in the House. But the context makes it perfectly clear that Evatt considers it equally applicable to the other Dominions and to a Ministry which is still "undefeated" but "faces" defeat

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a dissolution of a Parliament elected under his own auspices. But that Parliament had been in existence for four years, not less than ten months; and Melbourne did not ask for dissolution till after the vote of want of confidence had been passed. His case also is therefore no precedent for Mr. King.

(1) See below, pp. 379-380.

(2) Italics mine, throughout.

or no longer has the "full" confidence of the House. It is important to note that he thinks the "possibility of an alternative Ministry might be capable of exclusion only by . . . a subsequent test vote of the House". In Mr. Meighen's case, no less than four subsequent test votes, one of them a vote of censure on the late Government (passed by a majority of 10), and another a direct vote of want of confidence in the new Government (defeated by a majority of 7), showed that the possibility of an alternative Government was decidedly not capable of exclusion on June 28.

As we might expect, therefore, Evatt has no fault to find with the refusal of dissolution on June 28.(1) "It seemed by no means impossible"at that date, he observes, "that Mr. Meighen, who had a larger direct following than Mr. King, would be able to obtain support from the third (Progressive) party to form a Ministry and carry on the Government. . . . Even the vote of censure upon Mr. Meighen's method of forming the provisional Government was carried by a majority of only one vote",(2) and that one, he might have added, cast in forgetfulness of a pair.

The Question of the Pending Vote of Censure

So far we have been considering Mr. King's Cabinet on June 28 as simply (to accept his own contention) a technically "undefeated" Cabinet, though one which (as can scarcely be disputed) was "weak"(3), which "no longer commanded support in the House of Commons",(4) which was (at best) "barely sustained in office",(5) which had suffered a

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(1) For his criticism of Lord Byng's subsequent actions, see below, pp. 381-386.

(2) "The King and His Dominion Governors", p. 60.

(3) See above, p. 246.

(4) See above, p. 238.

(5) See above, p. 246.

"reverse" in Parliament,(1) which was "no longer sure of a majority",(2) which had recently had a dissolution which had materially weakened its position,(3) and which was asking for another. For the purposes of the argument heretofore advanced, any one of the conditions described in the preceding sentence is enough. But in fact Mr. King's Cabinet was much more (or less) than that. For a motion of censure was under debate in the House of Commons. This point is of capital importance. Mr. Meighen put it in these terms: "It can be definitely stated that never within a century, never in the history of parliamentary government as we have it to-day, has any Prime Minister ever demeaned himself to ask for a dissolution while a vote of censure was under debate."(4) "A dissolution very manifestly should not be granted when its effect is to avoid a vote of censure. . . . To avoid impending censure, Mr. King . . . advised dissolution. . . . His advice was properly and constitutionally declined. . . . If it had been granted, Mr. King, again appealing to the people and finding himself in a minority could with equal reason apply at the next session for a third dissolution and so on indefinitely. It is manifest that His Excellency could not for a moment entertain a principle involving such extraordinary and unconstitutional results. His plain duty was to decline the advice. . . . The Prime Minister said to His Excellency: 'This jury must disappear; this Parliament must be dissolved.' The effect of that advice was simply this: 'If Parliament shows signs of going against me, even if that Parliament was elected on my own appeal, that Parliament must not live.' If such advice must always be accepted, then the supremacy of Parliament would be over and the Prime Minister would be supreme himself. . . . Even a Govern-

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(1) See above, p. 255.

(2) See above, p. 256.

(3) See above, p. 246.

(4) "The Conservative Case", MacLean's Magazine, September 1, 1926; quoted in Dawson, "Constitutional Issues", p. 91.

ment coming into office after a general election held under the auspices of another . . . would not have a right of dissolution in the midst of a debate on a vote of censure. To demand such a right 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 sphere of discretion left to a Governor-General under our constitution and under our practice is a limited sphere indeed, but it is a sphere of dignity and great responsibility. Within the ambit of discretion residing still in the Crown in England, and residing in the Governors-General in the Dominions, there is a responsibility as great as falls to any estate of the realm or to any House of Parliament. . . . Within the sphere of that discretion 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 responsible government is maintained, that the rights of parliament are respected, that the still higher rights of the people are held sacred. It is his duty to make sure that parliament is not stifled by government, but that every government is held responsible to parliament, and every parliament held responsible to the people."(1) Or, as Mr. Cahan put it: "No Ministry has the right to attempt to dissolve the court before which it is being tried until a verdict has been rendered upon the issues in question. No cases can be found in which the Sovereign, or any viceroy representing the Sovereign, has attempted at the request of a Prime Minister to destroy the very Court before which he and his colleagues were

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(1) Passages from several speeches, quoted in Ewart, op. cit., pp. 186-188, 194-195. The last two sentences closely resemble one of Keith's in "Responsible Government in the Dominions", 1928 ed., p.xvi: "The essen-

compelled to appear."

Mr. King's reply is twofold. First, as we have seen, he denies that any such motion of censure was under debate when he asked for dissolution. With this contention we have already dealt. Mr. King himself, at least two of his colleagues, and two constitutional writers favourable to him, repeatedly called the Stevens motion a motion of censure. Second, he says: "Assuming, however, for the sake of argument, that the Stevens amendment constituted a censure of the administration and that it had been carried while the late Liberal Government was in office, I would still under British constitutional practice have been entitled to ask for and

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tial part played by the sovereign in the . . . British Constitution is that of preserving the system from violation by ministers or Parliament. The one service which he can render the people is . . . assuring that ministers and Parliament alike do not forget that the final authority lies with the people. Hence . . . the King cannot properly refuse the first request of a ministry for a dissolution, for that means a reference to the real sovereign power in the state; on the other hand his obligation to the people would necessitate the refusal of an immediately ensuing second request, for that would be to defy the will of the people as expressed at the polls." Keith's second sentence, indeed, restricts the operation of the principle, but fails to explain why. Keith describes Mr. Meighen's statements quoted above, and others quoted below at p. 300 , as a "curiously cautious defence of Lord Byng's action" ("Responsible Government in the Dominions", 1928 ed., p. 129) and a "feeble and evasive response" to Mr. King's arguments ("Constitutional Law of the British Dominions", p. 149).

receive dissolution. British constitutional history is full of precedents(1) where governments have not only been afraid of censure, but have actually been censured by parliamentary vote, yet have asked for and obtained dissolution"; and he cites, as an example,

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(1) In the United Kingdom since 1783 there have been perhaps three cases in which a Cabinet "censured" in the House of Commons "asked for and obtained dissolution". The numerous motions carried against Pitt in 1784 (or at any rate some of them) may be called votes of censure, though it would perhaps be more accurate to say "want of confidence"; the motion for a select committee carried against Palmerston's Government in 1857, and the similar motion carried against Mr. MacDonald's Government in 1924, were certainly regarded as votes of censure, though in terms neither was as severe as the Stevens amendment. Grey's Government in 1831 procured dissolution after defeat on an amendment to the Reform Bill and a refusal to proceed with Supply; Melbourne's, in 1841, had been defeated on the sugar duties and a vote of want of confidence; in 1852, the order of the day was carried against a Government notice of a bill to assign the seats of two disfranchised constituencies to Yorkshire and Lancashire; and there was a defeat on the Budget; in 1859, the defeat was on an amendment to the Reform Bill; in 1868, it was on the Irish Church resolutions, carried against the Government; in 1886, it was on the Government's Home Rule Bill. Mr. King might reply that in all these cases defeat was tantamount to censure. But if so, what becomes of his attempt so to limit the meaning of "vote of censure" as to exclude the Stevens amendment?

the case of Mr. MacDonald's Government in 1924.(1)

This answer completely misses the point. To allow a Cabinet,

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(1) Policy speech of July 23, 1926, quoted in Keith, "Speeches and Documents on the British Dominions", p. 151.

Mr. Ewart offers a third defence. He claims (op. cit., p. 199) that Mr. King denied that the Stevens amendment was mentioned in the discussions between him and Lord Byng, and that Mr. Meighen did not question the denial. Apart from the fact that in the speeches quoted by Keith and Mr. Ewart himself Mr. King does not make any such denial (though his words allow it to be inferred), this contention is of doubtful relevance. In the first place, the responsibility for refusal, as Mr. King rightly insisted again and again, was Mr. Meighen's. If he chose to accept that responsibility for a reason which may not actually have been in Lord Byng's mind, then that reason is as much in point as if it had been present in Lord Byng's mind during his discussions with Mr. King. Second, the constitutionality of the refusal surely cannot be said to rest on whether or not the Governor-General gave, or even knew, all the reasons which could be given for it. Keith's comments on the South African case of 1939 clearly recognize this: "The Governor-General's reasons for refusal were naturally not announced, but his attitude can be supported on two substantial grounds."(Modern Law Review, vol. IV, no.1, July 1940, p. 6.) Third, as Mr. Ewart himself says, in another context (op. cit., p. 232): "The Governor-General reads the newspapers, and he is not a fool." It was quite unnecessary to mention the Stevens amendment in the discussions of June 26-28; it must obviously have been before the minds of both Mr. King and Lord Byng, unless we are to assume that both spoke and acted without any reference to, or awareness of, the circumstances which had led up to the position in which they found themselves.

while a motion of censure is under debate in the House of Commons, to choke off discussion by dissolving Parliament is a wholly different thing from allowing a Cabinet which has permitted the debate to proceed to a vote and has been defeated to appeal from the verdict of the House to the electorate. To follow Mr. Cahan's metaphor: a Cabinet condemned by the High Court of Parliament is, by British usage, certainly entitled, at least in some circumstances,(1) to appeal to the Supreme Court of 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 had 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 in 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 close by appealing to the higher Court of the Electorate? That is the point. The point which Mr. King answers (and which no one had ever raised) is entirely different and completely irrelevant, and if there were fifty British precedents of Governments censured in the House of Commons getting dissolutions, instead of two or three, they would not go one inch towards answering Mr. Meighen's and Mr. Cahan's point. 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 Great Britain, the Dominions or the colonies.

Mr. MacDonald, in 1924, after his defeat on what he chose to

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(1) Cf. Alexander Mackenzie, quoted below, p. 333. For a discussion of circumstances in which it may not be entitled to a dissolution, see below, pp. 299-334.

consider a motion of censure, asked and got dissolution, as two or three other British Prime Ministers had before him. But he did not even try to get a dissolution while the motion was still under debate.

It has been necessary to insist on this point at some length, even at the risk of being tiresome, because Mr. King himself does not seem to have understood it,(1) Keith notes it without discussing it, MacGregor Dawson discusses it for several pages without, apparently, grasping its significance, and none of the other authorities mention it at all.

MacGregor Dawson is quite clear about the facts of the situation: "The Liberal Government . . . found itself faced with . . . a possible vote of censure. Mr. Mackenzie King, . . . anticipating the verdict of the House, thereupon asked the Governor-General to dissolve Parliament." But his discussion of the point is perplexing: "Mr. King is alleged to have asked for dissolution in order to escape a vote of censure", he begins. "It is difficult to see how this affects the question. Suppose he had waited until the vote had been passed, would the Governor-General have been justified in refusing the advice?" The answer to this question we shall discuss presently. Here it is enough to note that in asking it Dawson shows a confusion of thought similar to, though perhaps not quite the same as, that of Mr. King himself, which we have already discussed. For Dawson goes on, a few lines farther down: "It would seem fairly reasonable to assume that a Prime Minister's position is no weaker with a vote of censure pending than it is after such a vote has been passed." A complete answer to this argument may, for purposes of convenience, be postponed for the moment, till we have examined some of the others

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(1) Nor, incidentally, does Mr. Ewart, from whom Mr. King appears to have borrowed his remarks on the subject.

associated with it. At this stage it must suffice to answer by metaphor: It would seem quite as reasonable to assume that an accused person's position is no weaker while he is being tried in a lower Court of Justice than it is after he has been convicted in that Court; but to make such a theory the ground for allowing an accused to appeal from the lower Court before it has had a chance to pronounce its verdict would be subversive of the whole British judicial system. The country has an absolute right to the judgment of Parliament on a motion censuring a Government for misconduct. No Prime Minister can ever justify denying the country that right.(1) No Prime Minister except Mr. King ever ventured to try.

Dawson proceeds: "If, . . . either consciously or unconsciously, it was an impending vote of censure which prompted Mr. King's advice, there can be little doubt that he acted unwisely. As one writer puts it, such a claim by the Premier would have meant nothing less than a claim of immunity of expulsion from office. 'When he finds he cannot control parliament, he appeals to the electorate. The electorate rejects his appeal, and back he goes to Parliament and furbishes up a temporary majority. Parliament becomes tired of him and is ready to condemn him, and he asks the Governor-General to allow him a second appeal to the voters. Presumably, if Lord Byng had acceded to his demands and he had not improved his position at the election, he would again have claimed the right to meet Parliament and made another attempt to conjure up another majority, which would probably have been available until members had earned another sessional indemnity. Then the majority would have crumbled away, and by his doctrine he could have demanded a third dissolution.'"(2)

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(1) Cf. Edward Blake, quoted below at p. 297.

(2) Quotations from Dawson from Dalhousie Review, vol. 6, pp. 332, 334-336. Dawson's quotation is from the New Statesman of July 31, 1926. The unpleasant remark about sessional indemnities is not necessary to the argument.

It might be added that in Canada neither the necessity of securing **Supply** nor of passing an Army and Air Force (Annual) Act would have interfered with this constitutional merry-go-round. Under the statutory provision already noted,(1) it is possible for a Government to expend money "in cases of urgent necessity not foreseen or provided for by Parliament" by means of Governor-General's warrants. These may be issued on presentation to the Governor-General of a certificate signed by the Minister of Finance, stating the necessity for such expenditure. Such warrants have been used on a large scale at least four times in Canada: in 1896, when Parliament came within a day of being dissolved by the efflux of time, before it had voted Supply; in 1911, when the Liberal Government abruptly dissolved Parliament during the debate on the Reciprocity Agreement; in 1926, when the Conservative Government also abruptly dissolved Parliament after being defeated in the House of Commons, before Supply had been voted; and in 1940, when Mr. King himself dissolved Parliament on January 25, after a session of only three hours. Unless the Governor-General broke all precedent by refusing to issue the warrants (an action which, it is safe to say, would expose him to charges of acting "unconstitutionally"), there would be nothing to prevent a Government from spending as much money as it chose without having to seek parliamentary sanction. Under the Act as it stood in 1926, the Government had indeed to lay before Parliament within three days of the opening of the session an account of all such warrants issued during the recess,(2) and it may be argued that Parliament, if it disapproved, could then vote

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(1) Now embodied in 21-22 George V, c. 27, section 25.

(2) Section 44 of the Act then in force. Under section 50 of the present Act, the account must be laid before Parliament before October 31, or, if Parliament is not then in session, within one week of the opening of the next session.

censure of the Government. But if the Government is entitled to dissolve Parliament while a motion of censure is under debate, this safeguard disappears. Moreover, since Parliament may be dissolved after a session of only three hours, and since a session of this length fulfils the legal requirement of one session per year, the Government may be freed even of the necessity of laying any account before Parliament.

Nor is there in Canada the safeguard provided in Britain by the Army and Air Force (Annual) Act. Canada has no such Act. She has instead what was intended to take its place under modern conditions and make it superfluous: a provision in the British North America Act, section 20, that "There shall be a session of the Parliament of Canada once at least in every year, so that twelve months shall not intervene between the last sitting of the Parliament in one session and its first sitting in the next session." But if a session of three hours' duration is enough to satisfy this requirement, clearly there is no safeguard here against a Government armed with (a) the power to dissolve Parliament even if and while a motion of censure is under debate, (b) the power to spend unlimited amounts of public money without parliamentary authority or sanction (subject only to the precedent-breaking exercise of personal discretion by the Governor-General, either by refusing to issue the warrants or by dismissing the Government for advising such issue), and in fact what amounts in practice to (c) the power to govern without Parliament at all, unless it becomes necessary to impose new taxes.

Dawson, however, though he quotes the New Statesman article with apparent approval, and agrees that to allow a Prime Minister to secure dissolution while a motion of censure is pending would mean

"nothing less than a claim of immunity of expulsion from office",(1) and though he makes no demur to the cogent arguments by which this conclusion is supported, seems really not to have appreciated what the whole passage means. For he merely comments mildly: "The blame must therefore rest in a large degree on Mr. King for offering improper advice:(2) he had made a demand which was, to say the least, inexpedient and unwise. The admission of this, however, does not clear the Governor-General from the charge of acting unconstitutionally, though it undoubtedly was a mitigating circumstance. He had the privilege of advising, cautioning and warning Mr. King that his policy was not in the best interests of the country, and of asking him to place the larger good ahead of party advantage. He could have reminded Mr. King that he had had a dissolution less than a year before;

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(1) A more literal construction of Dawson's words is that <u>if</u> Mr. King's <u>motive</u>, conscious or unconscious, in asking for dissolution was to escape being censured, then his request amounted to a claim of "immunity of expulsion from office". But this would make the propriety of the request not merely a matter of a Prime Minister's motive (as to which there might be differences of opinion) but a matter for psychoanalysis. A Prime Minister might protest, with perfect sincerity, that he was not"prompted" by a desire to escape censure in the House; but his opponents might reply that in fact, though "unconsciously", he was, and that his request was therefore "improper", and constituted a claim of "immunity of expulsion from office". It seems more reasonable, therefore, not to place too literal a construction on Dawson's words.

(2) Keith, in 1928, disagreed: "Mr. King very properly advised dissolution." ("Responsible Government in the Dominions", 1928 ed., p. 147.)

he could have drawn attention to the possibility that Mr. Meighen might be able to carry on a government; he could have argued that Mr. King would suffer in the election because he had precipitated it; he could have indicated the harmful effects of another general election campaign at that particular time. The Governor-General was justified in pointing out all these objections and many more; but if Mr. King remained adamant, Lord Byng should have shrugged his shoulders and granted the dissolution. The Prime Minister could have been left to the people for punishment; if they were satisfied, the Governor-General could view the result with equanimity. . . . The Prime Minister should be the sole judge of the appropriateness of his policy, and its subsequent rejection or endorsation could safely be left to the people at the polls."(1)

But could it? Could "the Prime Minister have been left to the people for punishment"? Dawson's conclusion begs the whole question at issue. The whole point of the New Statesman article is that, if we admit Mr. King's claim, the Prime Minister could not be left to the people for punishment, nor could the rejection or endorsation of his policy be left to the people at the polls. If the Prime Minister is conceded the right to get a dissolution while a motion of censure against his Government is under debate; if,when even in danger of rejection by Parliament, he may appeal to the electorate, and, rejected by the electorate, appeal once more to Parliament, and in danger of rejection by Parliament, appeal once more to the electorate, and so on ad infinitum; then any attempt by the electorate to "punish" him or to "reject" his policy can always be frustrated. To accept Dawson's argument is to embrace with open arms the doctrine that a Prime Minister can, with a "big stick" at Buckingham

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(1) Dalhousie Review, vol. 6, pp. 335-337.

Palace or Government House, assert "nothing less than a claim of immunity of expulsion from office".

To suggest, as Dawson appears to do,(1) that this is "responsible government", "genuine democratic rule based . . . upon the English model" (or any other model, for that matter), is to deprive these terms of all meaning. Government by a Prime Minister immune to expulsion from office is dictatorship and nothing else.

Keith says: "Debate was in progress on a motion of censure. . . . To Lord Byng the situation presented itself in the light of an effort to avoid a decision on a motion of censure."(2) How it could present itself in any other light to anyone Keith does not explain. Nor does he explain why, though he said in 1928 that in Britain "it is notorious that . . . the Crown retains the prerogative of refusing advice . . . flagrantly contrary to the constitution", and that in Canada "the governor-general . . . retains the power to intervene to prevent any abuse of the constitution", he absolves Mr. King of the charge of having tendered precisely such advice. He ignores the point entirely.

That the (in a constitutional sense) unpleasant prospect conjured up by the New Statesman article was no mere figment of a heated imagination is clear from two things. In the first place, Mr. King, one week after the election of 1925, and one month and two days before the new Parliament could enter on its legal existence, boldly claimed a right to advise "an <u>immediate</u>(3) dissolution of Parliament", and the wording of his statement leaves no doubt that he thought he was entitled to have such advice accepted.(4) Second, we have in Mr. King's own official

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(1) See above, p. 241.

(2) "The Dominions as Sovereign States", p. 220.

(3) Italics mine.

(4) See below, p. 282.

statement of "The Liberal Case" in the election of 1926 a most extraordinary and novel theory of parliamentary government, which seems never to have received the attention it deserves.

In that statement Mr. King advances a very special defence of his request for dissolution on June 28: "When I became convinced(1) that the late Parliament could not last, that no leader could so control the business of the House as to enable government to be carried on in a manner befitting British Parliamentary institutions; in other words, that the government of the country could not be conducted with the authority which should lie behind it, I . . . advised an early(2) dissolution. . . . I took the position that Mr. Meighen's chances to secure support had been quite as good as my own, that throughout the session the House of Commons had consistently declined to give him its confidence,(3) and I did not see how it could now be expected to give its confidence to any Ministry he might attempt to form; that as to which political party had the right to govern, that was a matter which, as I had pointed out after the last general elections, it was for Parliament to decide, IF PARLIAMENT WERE IN A POSITION SO TO DO; that WHEN PARLIAMENT CEASED TO BE IN A POSITION TO MAKE A SATISFACTORY DECISION as to which party should govern, it was then for the people to decide(4). In neither

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(1) Italics mine, throughout.

(2) Just how "early" is discussed below, pp. 389-390.

(3) This overlooks: (a) Keith's point that an Opposition which has not "already secured a superiority in numbers" may be able to do so if given a chance to form a Government; (b) the fact that by June 28 an important new issue, the report of the Customs Committee, which had not been present earlier in the session, had arisen; and (c) the fact that there were distinct signs that the House was changing its mind.

(4) Capital letters mine, in both instances. Even this Delphic oracle

Footnote (4), p. cont.

is a great deal clearer and more definite than what Mr. King actually said after the general election of 1925. He did not, on November 5, 1925, "point out" that "it was for Parliament to decide . . . " "which political party had the right to govern", still less did he insert in his statement of that date the proviso "if Parliament were in a position so to do"; and the statement says nothing whatever about "the people" deciding "when Parliament ceased to be in a position to make a satisfactory decision". It speaks, first, of summoning Parliament "to ascertain the attitude of the parliamentary representatives towards the very important question raised by the numerical position of the respective political parties". (Italics mine.) There is nothing here about Parliament deciding who should govern, nothing about what the Government will do when Parliament's "attitude" has been "ascertained". On the contrary, the statement goes on to assert that it was "open" to Mr. King to advise an "immediate" second dissolution; but that "It was felt that it was not in the interests of the country to occasion the turmoil and expense of another general election until at least Parliament had been summoned and the people's representatives in Parliament had been afforded an opportunity of giving expression to their views." (Italics mine.)

On this passage, two comments are in order. First, it shows clearly that Mr. King thought he could not only advise, but also obtain, an immediate second dissolution; otherwise there is no point at all in his announcement that he has decided to spare the country, for the moment, "the turmoil and expense of another general election." (Such a claim Keith denounces in very suitable terms: "No one, I imagine, seriously contends that His Majesty could constitutionally grant a dissolution in such circumstances, even assuming that a Prime

Footnote (4), p. cont.

Minister should be so lacking in public duty as to suggest it." Curiously enough, he does not even mention the point in his discussion of Mr. King's manifesto of November 5, 1925, which, he says, was "issued . . . with much good sense". ("Responsible Government in the Dominions", 1928 ed., p. 145. See also p. xvi, quoted above at pp.

)) Second, there is again nothing about Parliament deciding who should govern, nothing about what the Government will do when the "views" have been "expressed"; simply an announcement that Mr. King has decided not to dissolve Parliament "at least" until it has had a chance to "express its views". This leaves the way open for Mr. King to request a second dissolution if the "expression" of "views", even at the very opening of the session, is adverse.

The statement proceeds, however: "The majority are entitled to govern, . . . the majority as determined by the duly elected representatives of the people in Parliament. To summon Parliament and to allow the House of Commons to disclose its attitude upon division is the procedure warranted by constitutional precedent and by the present circumstances. To take any other course would be to fail to recognize the supreme right of the people to govern themselves in the manner which the constitution has provided, namely, expressing their will through their duly elected representatives in Parliament." (Italics mine.)

This paragraph appears at first sight to be an unequivocal statement of the absolute supremacy of Parliament, an unqualified undertaking to abide by the decision of the House of Commons. As such, of course, it would decisively condemn both Mr. King's claim to be entitled to a second dissolution on November 5, 1925 and his action in requesting dissolution on June 28, 1926. But closer examination reveals that even here Mr. King has not committed himself to accepting the verdict of

Footnote (4), p. cont.

Parliament. The House of Commons is to be "allowed" to "disclose its attitude upon division"; that is all. When it has "disclosed its attitude", the Government remains, as far as this statement is concerned, perfectly free to take any action it pleases.

In short, what Mr. King "pointed out" on November 5, 1925, was that it was for Parliament to decide if he saw fit to let it decide; it was for the people to decide if he saw fit to let them decide. Parliament would decide subject to the "right" of the Prime Minister to dissolve it either before or after it had "disclosed its attitude". The statement of November 5, 1925 left Mr. King free to take any course that suited him. It committed him to nothing except the principle that a Prime Minister may, if he chooses, defy the verdict of people and Parliament alike. The speech of July 23, 1926, was simply a reaffirmation of this principle, a principle certainly unknown to the British Constitution.

The statement of November 1925 may be found not only in the Montreal Gazette of November 5, 1925, but also in House of Commons Debates, 1926-27, p. 439, where it is quoted in full by Mr. King himself.

case, I maintained, was it a duty or responsibility of the Governor-General to make the decision. I stated that in my humble opinion it was not for the Crown or its representative to be concerned with the differences of political parties."(1)

This passage calls for the most careful analysis. Apart from the subsidiary points touched on in footnotes, it raises at least four questions.

1. The expressions "I became convinced" and "I did not see", in the context, seem to suggest that the Prime Minister's opinion on the matters in question must be decisive; that the moment he becomes convinced that Parliament cannot carry on its business in the fashion he thinks proper and that it will not give its support to the Leader of the Opposition, that moment the Governor-General must consent to dissolve Parliament. That the weight of opinion is against this view, whether in respect of Britain or of the Dominions, we have already seen.

2. What do the expressions "in a manner befitting British Parliamentary institutions" and "with the authority which should lie behind it" mean? They are not self- explanatory, and the context furnishes no clue. Is the definition to "repose in the cranium" of the Prime Minister, whoever he may be? Or is there some objective standard, and if so, what? The difficulty of the question is increased by the fact that Mr. King's own opinion on such points seems to have undergone two changes between September 1925 and June 26, 1926. In his Richmond Hill speech of September 5, 1925, announcing dissolution of the fourteenth Parliament, he said: "Is it sufficient that as a Government we should continue in office, drawing our indemnities and salaries as members and ministers and enjoying the fruits of office

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(1) Quoted in Dawson, "Constitutional Issues", pp. 88-89.

when great national questions press for solution with which for want of an adequate majority we are unable satisfactorily(1) to cope? . . . I have come to the conclusion that it is not in the national interest further to postpone the day when questions that are pressing urgently for a solution can be dealt with in a reasonable and satisfactory manner. . . . I refer now to all-important national problems that are pressing for solution, and which cannot be solved in a parliament constituted after the manner of the parliament elected in 1921, or by any government which does not command a substantial majority in the House of Commons. . . . The fourteenth Parliament of Canada . . . from its record on divisions will be known as the Parliament of large majorities."(2)

The election which followed converted Mr. King's majority of one into a minority of 43. None the less he appears to have decided that this would not preclude him from carrying on the government "in a manner befitting British Parliamentary institutions"; he was willing to try. During the period January 7 - June 25, 1926, though his majority on divisions twice fell as low as one and never rose above 15, as compared with majorities of 7 to 188 (an average of almost 70 in 51 divisions)(3) under the less than "reasonable and satisfactory" conditions of "the Parliament of large majorities", he never seems to have felt either that the government was not being carried on "in a manner befitting British Parliamentary institutions" or "with the authority which should lie behind it". Moreover, even after the events of June 25-26, he considered himself "undefeated", and had no doubt that his Government "enjoyed the confidence of the House of Commons", and, he assures us, believed he would be sustained if he allowed the Stevens amendment to proceed to a vote. Clearly, therefore,

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(1) Italics mine, throughout.

(2) Montreal Gazette, September 7, 1925.

(3) Journals of the House of Commons (Canada), 1922-1925.

the size of the majority is not a sufficient indication of whether government is being carried on "in a manner befitting British Parliamentary institutions" or "with the authority which should lie behind it". What, then, is the criterion?

3. It is for Parliament to decide which party shall carry on the government if, and as long as, Parliament "is in a position so to do"; but when Parliament ceases to be "in a position to make a satisfactory decision", then it is for the people to decide. This raises the same difficulties of definition. How are we to know whether, and when, Parliament is in a position to decide? Are there, again, any objective standards? If so, what are they? Or is this a matter for the Prime Minister alone, in the exercise of his sovereign discretion? The difficulty is further enhanced by the phrase "a satisfactory decision". Satisfactory to whom? Satisfactory by what criteria? Mr. King, it must again be emphasized, assures us that he had not lost the confidence of the House and that it would have voted for him if the Stevens amendment had come to a vote. It follows, therefore, that a decision favourable to him would not have been "satisfactory". Why not? Perhaps the majority he expected would have been too small? But twice, earlier in the session, he had apparently considered a majority of one quite satisfactory.

In the context, it seems hard to discover in Mr. King's theory on this point any other meaning than: As long as, in the opinion of the Prime Minister, Parliament is in a position to make a satisfactory decision as to which party should govern, Parliament will be allowed to decide. When, in the opinion of the Prime Minister, Parliament is no longer in a position to make a satisfactory decision, then Parliament shall be brought to an end, and the electorate shall decide. This seems to leave the final decision to the electorate; but in 1925, when the electorate gave Mr. King

101 members to Mr. Meighen's 116 and Mr. Forke's 28, Mr. King intimated that, if he wanted to, he could have another election forthwith. Suppose that had had a similar result, or even one slightly better for Mr. King: could he then, if he had chosen, have had another, and so on till he got a result which satisfied him? How many successive elections, following one another at intervals of a few weeks, would he have been entitled to? If two, why not three? Why not an indefinite number? In fact Mr. King did not, on November 5, 1925, exercise his assumed right to an immediate second dissolution. Instead he claimed, and exercised, the right to appeal to the new Parliament. In plain terms, Mr. King's doctrine seems to be that he is entitled, when he sees fit, to appeal from Parliament to the electorate, and, again when he sees fit, from the electorate to Parliament, or alternatively, if he sees fit, from the electorate to the electorate again forthwith. How often any of these appeals, or any combination of them, could properly take place, does not appear. Mr. King's words provide no reason for thinking that the performance might not go on indefinitely: a "heads I win, tails you lose" theory of the constitution.

4. Mr. King is very emphatic that it is not the duty and responsibility of the Governor-General to decide which party should govern. Who ever said it was? Certainly not Lord Byng or Mr. Meighen. Lord Byng's position, stated in the clearest terms in his letter to Mr. King, June 29, 1926, was "that Mr. Meighen has not been given a chance of trying to govern, or saying that he cannot do so, and that all reasonable expedients should be tried before resorting to another election."(1) Lord Byng was <u>not</u> saying that Mr. Meighen should govern. He was saying that, as Mr. King professed himself unable to carry on with the existing House "in a manner befitting British Parliamentary institutions" and "the

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(1) Quoted in Dawson, "Constitutional Issues", p. 75.

honour and dignity of Parliament"(1) and "with the authority which should lie behind" government, Mr. Meighen should be given a chance to carry on, or to say that he could not do so. True, Mr. King undertook to answer for Mr. Meighen as well as himself, by assuring the Governor-General that Mr. Meighen also could not carry on with the existing House "in a manner befitting British Parliamentary institutions" and so forth. But the Governor-General was not obliged to accept this latter assurance. As Keith points out, an Opposition, "if given an opportunity to form a Ministry", may "succeed in detaching enough supporters of the Government to have a working majority"; or, as Evatt puts it, the possibility of an alternative Government may be "capable of exclusion only by a subsequent test vote in the House." To be sure, neither Keith nor Evatt says anything about carrying on "in a manner befitting British Parliamentary institutions" or "with the authority which should lie behind" government. But does the constitutionality of a refusal depend on the mere uttering, or failing to utter, those magic phrases? If so, it is safe to say that no Prime Minister determined to get a dissolution will ever risk refusal by leaving them unuttered. The Opposition will never, except by grace of the existing Government, have "an opportunity to form a Ministry" which might "succeed in detaching enough supporters of the Government to have a working majority", and there will never, again except by grace of the existing Government, be any "subsequent test vote in the House" to see whether an alternative Government is possible. It seems equally safe to say that neither Keith nor Evatt nor any other constitutional authority ever intended to suggest that the answer to an important constitutional question depended on anything of the sort.(2)

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(1) This phrase also is Mr. King's, specifically applied to himself, in "The Liberal Case"; Dawson, op. cit., p. 88.

(2) Whether Mr. King intended to suggest it either is not clear. Perhaps

Footnote (2), p. cont.

the phrases were meant to be no more than rhetorical flourishes. One would think it was hardly open to him to plead that they referred to Mr. Meighen's subsequent attempt to carry on with a Government of Ministers without portfolio. For Mr. King is here speaking of his convictions and advice on June 28, before Mr. Meighen had even been called on. But Mr. King declares that even then he foresaw the possibility of such a Government: "I had in my mind, when I was considering the question" (of whether someone else could carry on) "a vision of precisely the spectacle we see here to-night . . . an attempt to carry on the government without a prime minister in the House and without . . ."(interruption). (Commons Debates (Canada), 1926, p. 5218.) Such prevision is almost more than human. At p. 5220, however, Mr. King says: "I never anticipated having a successor who would attempt to carry on under the present conditions."

If the phrases "befitting British Parliamentary institutions" and so forth were meant to be more than rhetorical flourishes, they are on a par with Mr. King's statement to Lord Byng, in his letter of July 3, 1926, 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, "Life of Gladstone", vol. III, pp. 512-514.)

Lord Byng's position was simply that Parliament should be given another chance to decide who should govern, before recourse to a second general election within less than a year; and that if Parliament proved unable to decide, there would then have to be "another election" to enable the people to decide. To read any other meaning into his words is altogether gratuitous. They offer no evidence that he considered it his duty and responsibility to decide who should govern, no evidence that he was "concerned with the differences of political parties", no evidence that he (as Mr. King also alleged) "conceived it to be his duty, in the circumstances of the late Parliament, to act as a sort of umpire between the political parties of Canada."(1)

But, it may be objected, who is to decide, and by what criteria, when Parliament has proved itself unable to decide who should govern and another election has become necessary? In other words, while Mr. King's principle enthrones the absolute discretion of the Prime Minister in this matter, would not Lord Byng's enthrone the absolute discretion of the Governor-General? Not at all. There are perfectly clear objective criteria by which the Governor-General may recognize when Parliament is unable to decide which party should govern and another election is necessary.

First, as Lord Byng himself pointed out, Mr. Meighen might have said that he was unable to carry on with the existing House (or unable to do so "in a manner befitting British Parliamentary institutions", etc.). In that case, just as the Governor-General was obliged to take Mr. King's word that he could not carry on with the existing House "in a manner befitting British Parliamentary institutions", etc., so he would have been obliged to take Mr. Meighen's word that he could not carry on either (or could not carry on "in a manner befitting British Parliamentary institutions", etc.). If each had professed himself unable to carry on (or unable to carry on "in a manner befitting British Parliamentary institutions", etc.), there would clearly have been no further "reasonable expedients" to be tried

(1) "The Liberal Case"; Dawson, "Constitutional Issues", p. 89.

"before resorting to another election".

The second criterion is well illustrated by what actually happened in 1926. When Mr. Meighen professed himself willing to form a Government and try to carry on with the existing House, the first thing his Government had to do in Parliament was to bring the Stevens amendment to a vote. The House passed it, thereby censuring Mr. King's Government. A few days later it also defeated Mr. Meighen's Government. It was then unmistakably clear that Parliament was unable to decide which party should govern. There were no further "reasonable expedients" to be tried before resorting to another election.(1)

Neither of these criteria involves in the slightest degree the discretion of the Governor-General.

The examination of Mr. King's peculiar constitutional theories has led us a considerable distance away from the question of the right to dissolution while a motion of censure is under debate in the Commons. To that question we must now return.

In addition to the reasons already given against allowing a Government against which a motion of censure is pending to cut off discussion by dissolving Parliament, there is another, far more fundamental. The value of having a House of Commons at all will be, to say the least, very seriously reduced, if its discussions of the conduct of government are liable to be cut short at any moment at the whim of a Cabinet which happens to find them inconvenient. If a Cabinet really wants to meet and refute criticism, the House of Commons is the place to do it. "For on the floor of the House there can be real debate, real question and

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(1) Two points arise here: (a) who was then entitled to get the dissolution (on this, see below, pp. 381-386); (b) who would have been entitled to dissolution if the House had <u>defeated</u> the Stevens amendment, after the change of Government (on this, see below, pp. 424-425).

answer. . . . But in the hurly-burly of a modern election there is little or no possibility of any fair or clear presentation of evidence on either side. If we have not some preliminary procedure ensuring the orderly presentation and sifting of evidence for the benefit of the public, a modern general election becomes a vulgar perversion of the democratic process."(1) Parliamentary debate may not be the ideal method of arriving at abstract truth. But it is at least a better method than debate on the hustings without previous parliamentary debate. And parliamentary debate which may be abruptly cut short whenever it shows signs of causing the Government any embarrassment will not be worth much.

It may be urged that in 1926 the debate on the Stevens amendment had gone on long enough(2) for all the relevant facts, charges and suggestions to be fully discussed; that the essential purpose of preliminary parliamentary discussion had therefore been served and it did not matter whether the motion was allowed to proceed to a vote or not. To this there are two answers. First, it is not true. Even after the change of Government two new sub-amendments were proposed and one carried. Second, to suggest that dissolution can properly take place, on the request of the Prime Minister, at any time before the division when there has been a "long enough" debate, is again to enthrone the absolute discretion of the Prime Minister. He might easily be convinced that all that it was necessary to say against him and his Government had been said, at a time when his opponents felt that they were only beginning. An accused person is not ordinarily allowed to decide just how much time the prosecution should be permitted to develop its case. Surely we cannot be called upon to accept

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(1) Canadian Forum, February 1940, vol. XIX, no. 239, p. 339, discussing the dissolution of January 25, 1940.

(2) Four days.

a theory of parliamentary government under which Parliament debates a motion of censure for just so long as the Prime Minister sees fit, and no longer, any more than we can be called upon to accept a theory under which Parliament votes on a motion of censure only if the Prime Minister sees fit, and not otherwise. Parliament sets its own rules as to the length of a debate. By these rules the Prime Minister and every other member are bound. If the Prime Minister thinks the debate has gone on long enough, the closure rules enable him, with the consent of the House, to bring it to an end, though of course they do not enable him to avoid the division on the motion.

Two celebrated cases, one British, one Canadian, in which a Prime Minister against whose Government a motion of censure was under debate did <u>not</u> ask for dissolution during the debate, are instructive.

In 1924, Mr. Ramsay MacDonald, as we have seen, allowed the debate on the Campbell case to proceed to its conclusion. Suppose that before the vote was taken he had asked the King for dissolution. Would he have got it? Keith (at least in some of his works) and MacGregor Dawson,(1) are very positive in general terms that the King would not, in the circumstances as they existed in Canada on June 28, 1926, have acted as Lord Byng did. But they seem not to have asked themselves this specific question. If Mr. MacDonald had asked for dissolution while the motion was under debate, if he had thus tried to shut off discussion in the House, he would have been asking the King to pluck the Labour party's chestnuts out of the fire. If the King had granted the request, he would have become an accomplice in a flagrant act of contempt of Parliament. A constitutional theory which says that in these circumstances the King could not refuse can only be described as novel, extraordinary,

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(1) Dalhousie Review, vol. 6, p. 334.

subversive of the rights of Parliament, and pernicious to the general and paramount interests of the nation at large.

In 1926, Mr. King, asserting his right to a dissolution on June 28, said: "When I advised His Excellency that, in my opinion, a dissolution of Parliament was necessary, . . . I had been Prime Minister throughout the whole of the preceding Parliament.(1) For four years and a half, in a very difficult period of our country's history, I had held that high office and never once as Prime Minister had I encountered defeat."(2) On November 6, 1873, during the debate on a vote of censure moved by Mr. Mackenzie on October 27, Sir John A. Macdonald became convinced that he had lost the confidence of the House and resigned. But suppose he had, instead, felt sure that he could survive the vote, but that neither he nor Mr. Mackenzie could carry on in that Parliament "in a manner befitting . . ." etc., and had accordingly advised the Governor-General to dissolve Parliament. He could have said that he had been Prime Minister, not, indeed, "throughout the whole of the session then near its close" (for the session was just beginning), but throughout the whole of the preceding session and "throughout the whole of the preceding Parliament". He could have said, truthfully, that for over <u>six</u> years, "in a very difficult period of our country's history", he had "held that high office and never once as Prime Minister encountered defeat". He could have added, as Mr. King could not, that at the election (held, as in Mr. King's case, under his own auspices), barely more than a year before, he had won a decisive majority. Would he have been entitled to a dissolution?

He himself evidently thought not. He declared that the House

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(1) How long Mr. King had held office during the preceding Parliament is wholly irrelevant.

(2) "The Liberal Case"; quoted in Dawson, "Constitutional Issues", p. 88.

from whose censure he escaped by resigning was not "a fair jury" because members had pledged themselves by round robin to vote against him.(1) "I had not a fair court. It was a court that was packed. . . .Not only had the jury been packed, but many had been approached by means most degrading. . . . Those who had volunteered to support me in the morning, had been sold before the afternoon."(2) Macdonald loved power. He was certainly ready to use any legitimate means to get and keep it. He thought, or professed to think, that the "jury" was "packed", that members had been virtually or even literally bribed to vote against him. Yet he did not ask for a dissolution. It is difficult to escape the conclusion that he refrained because he knew that such a request would be a flagrant violation of the Constitution, and that if he dared to make it the Governor-General would refuse.

On the principle involved we are fortunate enough to have a clear and emphatic pronouncement from one of the greatest constitutional authorities Canada has ever produced, Edward Blake. On August 13, 1873, the Canadian Parliament, which had adjourned some months before, met and was at once prorogued. This action prevented Mr. Mackenzie, the Liberal leader, from moving a vote of censure. When the new session opened, in November, the Liberals made a strong attack on this use of the prerogative, denouncing it as an invasion of the rights of Parliament and the people. Sir John A. Macdonald replied that the rights of Parliament and the people were in no danger because the prerogative was wielded on the advice of responsible Ministers. Blake's answer is noteworthy: "It made no difference to a free people whether their rights were invaded by the Crown or by the Cabinet.

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(1) Speech in the House of Commons, November 7, 1873, reported in the Toronto Globe of November 8.

(2) Speech at banquet at Ottawa, reported in Toronto Mail of November 17, 1873.

What was material was to secure that their rights should not be invaded at all, and the more they determined that the prerogative was the property of the Executive, the more they were bound to guard against that new form of increased and increasing power which presented itself in these modern days. . . . Hallam adverted to the danger by insidious degrees of the increase of Executive power in the Cabinet, and the importance of the people and their representatives preventing that increase. It was very well to tell the people that they were all-powerful, but if they handed over to a Cabinet inordinate powers, not susceptible of being kept under control, they might be deprived of the free expression of the popular will which was necessary to popular government. The honourable gentleman said that the prerogative could not be used against the people under the advice of responsible Ministers. They alleged that it had been used against the people under the advice of responsible Ministers -- <u>in order to prevent the action of the people's representatives, in order to withdraw from the cognizance of their representatives the great cause pending between Ministers and their accusers.</u>(1) In this very case they found an instance of the evil which the honourable gentleman had ridiculed as a fancy of the imagination, and an instance of the necessity of preserving to the uttermost the forms and principles of the Constitution and the rights of a popular body which our ancestors had handed down to us. The most dangerous doctrine which a Parliament could listen to was that it was to part with some of its ancient liberties."(2)

What Blake said of the prorogation which silenced the House of

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(1) Italics mine.

(2) Toronto Mail, November 6, 1873. The report in the Globe differs only in insignificant details. There was at the time no official report of debates.

Commons of 1873 for less than three months applies with infinitely more force to the proposed dissolution which would have silenced the House of Commons of 1926 forever. Macdonald's prorogation merely postponed the action of the people's representatives. Mr. King's dissolution would have absolutely prevented it. Blake's condemnation is decisive.(1)

Before we leave the question of Mr. King's right to dissolution on June 28, 1926, in his supposed capacity as an "undefeated" Prime Minister, it may be worth while to point out one consequence of that assumed right which would make the next section of our discussion almost, if not quite, superfluous. If a Prime Minister is entitled to get a dissolution while a motion of censure is under debate, he can hardly be denied the

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(1) Sir Richard Cartwright, in his "Reminiscences" (Briggs, 1912), p. 118, says that if Macdonald had <u>waited</u> for the vote, and <u>won</u> it, and then made way for his own colleague, Tupper, <u>Tupper</u> could, on a later <u>defeat</u> in the House, have secured a dissolution. But he was careful to add that the right to choose a Prime Minister and "the right to grant or refuse a dissolution before the end of the Parliamentary term are . . . in <u>practice</u> (italics mine) . . . about the only ones which remain to [the Crown]." On the specific question discussed above, Cartwright says nothing.

Note also Burke's objection to dissolution while a select committee was inquiring into the East India Company's accounts ("Works" (Little, Brown edition, 1901), p. 558), and his words quoted above at pp. Of the dangers against which Burke then uttered his warnings, that "the House of Commons will sink into a mere appendage of administration, and will lose [its] independent character" the Canadian crisis of 1926 offers almost a perfect example.

right to get one while a vote of want of confidence or an important Government bill is under debate. At this rate no Prime Minister need ever "encounter defeat" in the House. Whenever he scents the faintest danger of it, he has only to betake himself to Buckingham Palace or Government House, get a dissolution, and then present himself to the electorate pointing with modest pride to his unbroken record of parliamentary successes.

Grant and Refusal of Dissolution to a Government Defeated in the House

What was Mr. King's position as a Prime Minister who had been defeated on the Woodsworth sub-emendment, or what would his position have been if he had waited for the division on the Stevens amendment and been defeated on it? Would he then have been entitled to a dissolution?

He says that "under British constitutional practice" he would. But would he? Nine times since 1783 British Prime Ministers defeated in the Commons have secured dissolution. In only one of these cases, however, had the same Prime Minister (or one of the same party) secured the previous dissolution. In only one case, therefore, was he seeking to appeal from the adverse vote of a Parliament elected under his own auspices or those of his party. The one exception was Melbourne, in 1841. He had had the previous dissolution, in 1837. Four years had elapsed, and there was a great new issue of public policy at stake between the two parties.(1) Mr. King in 1926 was seeking to appeal from an adverse vote in a Parliament elected under his own auspices less than ten months before, and there was no great new issue of public policy at stake. He was therefore in a position in which no United Kingdom Prime Minister ever asked for, let alone got, a dissolution.

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(1) Peel later said that there was no great question of public policy at stake; but the debates in 1841 show that he was wrong. See above, pp. 124-127.

"British constitutional practice", however, is a term which may well be used to cover much more than precedent. To point out, therefore, that Mr. King's request was without precedent in the history of the United Kingdom does not dispose of the matter.

Mr. Meighen, near the beginning of the crisis, said that when "a prime minister, having asked for and obtained a dissolution, has failed to secure a majority", but continues in office, "it is indisputable that he is not entitled, during the ordinary course of parliament, to demand a second dissolution merely on the ground that he is unable to command a majority in the House of Commons. This principle is of special force in the early stages of a new Parliament."(1)

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(1) Quoted in Ewart, op. cit., pp. 186-188. Mr. Meighen quoted Mr. Asquith's statement of December 18, 1923.

Mr. Ewart, in his answer to this part of Mr. Meighen's statement, makes one highly original contribution to constitutional theory. He admits that if a Government has been defeated in the Commons and has asked for and obtained a dissolution, and then, still in a minority in the Commons, asks for a second dissolution, the King might refuse. He correctly points out that Mr. King, on June 28, 1926, was not in this position, as the dissolution of September 5, 1925, did not follow upon a defeat in the Commons. But he must have recognized that this did not meet Mr. Meighen's point, for he puts his own in these terms: "The Canadian election of October 1925 was one which occurred in the usual course of things, namely, by the approaching effluxion of four years of the legal five year limit. It was not in the least abnormal. And Mr. King, therefore, was not asking for a second dissolution." (Op. cit., pp. 188, 218-219, 221.) This pearl needs no setting. But it may be noted in passing that Mr. Ewart considers the dissolution

"Indisputable" is perhaps putting it too strongly. Mr. King disputed it, the Liberal party disputed it, Keith and Dawson have subsequently declared over and over again that Lord Byng's action was unconstitutional. But that, down to 1926 at any rate, the weight of authority was overwhelmingly in favour of Mr. Meighen's contention admits of no reasonable doubt. Peel, Russell and Gladstone declared in the clearest terms that a Cabinet defeated in the House was not entitled to dissolution unless there is some great question of public policy at issue. Of the contrary doctrine Russell said, "I can conceive of nothing more likely to damage the constitution." Gladstone insisted that unless there was some adequate cause of public policy,

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of the Canadian Parliament on September 5, 1925, when it had one year, four months and nine days of its five year term still to run, "usual" and "normal", but considers the dissolution of the British Parliament on September 25, 1900, when it had one year, ten months and seventeen days of a seven year term still to run, special or abnormal. He does not, however, suggest that the British dissolution of 1900 should not have been granted.

In any case, Mr. King himself, in his speech announcing dissolution in 1925, made a good deal of the point that he might have let the then Parliament go on for some considerable time, but that he was dissolving when he did for quite specific reasons, which he stated at some length. The whole tenor of his speech refutes the idea that he thought he was merely announcing a routine dissolution, such as, for example, those of 1896 or 1935. (For this speech, see above, p. 236). Nor did Mr. King ever contend that a dissolution granted to him on June 28, 1926 would not have been a "second dissolution".

a defeated Government had no right to dissolve even a Parliament elected under the auspices of its opponents. Nothing could be plainer than his "I entirely question this title of Governments, as Governments, to put the country as a matter of course to the cost, the delay and the trouble of a dissolution to determine the question of their own existence."(1) In Canada, on June 28, 1926, there was no question of public policy at issue; nothing but a question of administration, good or bad, honest or dishonest. Mr. King was claiming a "right" which Peel denied, than which Russell could conceive "nothing more likely to damage the Constitution", a "right" which Gladstone "entirely questioned": a "right" "to put the country to the cost, the delay and the trouble of a dissolution to determine the question of his Government's own existence". Nor do the declarations of Peel, Russell and Gladstone stand alone. The constitutional doctrine they affirmed has (as we have seen(2)) been reaffirmed repeatedly: by Mr. Asquith(with the endorsation of Mr. Lloyd George and Sir John Simon), by Todd, Muir and Marriott. It is noteworthy that all these authorities go even beyond what Mr. Meighen was claiming. They do not qualify their statements by any proviso about the Cabinet having already obtained one dissolution. Mr. Meighen might therefore have made a far more sweeping claim than he did and still have quoted in its support the opinions of five British Prime Ministers (four of them Liberals) and three distinguished writers on the Constitution (one an ex-Chairman

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(1) For full quotations, see above, pp. 132-133.

(2) See above, pp. 141, 146-147.

of the British National Liberal Federation).(1)

Not all British statesmen or writers on the Constitution have agreed with the Peel-Russell-Gladstone-Asquith doctrine on this subject. But most of them, explicitly or implicitly, have supported views which tell equally strongly against Mr. King's contention and in favour of Mr. Meighen's. Disraeli considered that Russell in 1852 had had no right to dissolution not (as Russell said) because there was no great question of public policy at issue, but because Russell had been defeated in a Parliament elected under his own auspices after six years in office and after he had resigned on a previous defeat and been recalled. It can hardly be contended that Russell's claim to dissolution would have been stronger if the period since the previous dissolution had been shorter, or if he had not resigned on a previous defeat in the House. If Russell (on Disraeli's theory) was not entitled to a dissolution in 1852, a fortiori Mr. King, who had had his previous dissolution less than ten months before, and who had not resigned and been recalled after a previous defeat, was not entitled to one either.

The debates preceding the dissolution of 1841 show a wide variety of opinion as to the circumstances in which a Cabinet is entitled to a dissolution. But it is at least clear that no one of any standing thought that a Cabinet which had had one dissolution was entitled, on a subsequent defeat in the House, to a second dissolution unless there was

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(1) In Mr. MacDonald's case in 1924 it may be argued that the motion of censure on the Campbell case raised no great issue of public policy. But it may also be argued that in fact it did, implicitly, raise just such an issue: the Government's whole policy on Russia and Communism. Whether or no, Mr. MacDonald's position was fundamentally different from Mr. King's.

some great question of public policy directly at issue between the parties. It seems clear also that the length of time which had elapsed since the preceding dissolution was considered an important factor. Lord Morpeth noted that Peel, in 1835, had resigned instead of dissolving, but noted that Peel had resorted to dissolution "only a short time before", and described his action in resigning instead of advising dissolution as "in the spirit of the constitution". Dr. Lushington noted that Walpole at the time of his resignation was under "a moral impossibility of dissolving Parliament. . . .The Minister had just met a Parliament assembled by himself . . . and being defeated within a few months of its assembling, it would have been in vain for him to have again appealed to the people." The force of this is, indeed, somewhat weakened by the qualifying phrase that these events took place "at a time when the influence of the Crown was almost predominant in the House". But that Dr. Lushington thought the question of the time which had elapsed still important is evident from his reference to the fact that the Parliament in existence in 1841 had been in existence for four years, and from his careful explanation that in 1807 the Government had a right to appeal from anticipated defeat in a newly elected Parliament "because the new Parliament had been called into existence by [its] political opponents." It is noteworthy also that Lord John Russell felt it necessary to assert that no effective alternative Government in the existing House of Commons was really possible because parties were so evenly divided. The correctness of the assertion is dubious; what is interesting is that Russell made it at all. Even if he was correct, it does not follow that Mr. King could have said the same in 1926. A majority which would not be considered satisfactory in the British House of Commons might well be thought sufficient in a Canadian House not much more than a third as large. In any case Mr. King, who had carried on for six months with a majority which had twice fallen to

one and once, on a most critical division, to three, was the last person in the world in a position to suggest that his opponents would not be able to command a large enough majority to carry on effectively. There is therefore not a single opinion expressed by any person of authority in 1841 which can be said to provide any support for Mr. King's claim to a dissolution on June 28, 1926.

In 1851, when Lord John Russell's Government was defeated and the Queen asked him what he thought she should do if Lord Stanley were willing to accept office only on condition of being allowed to dissolve, Russell replied that he thought the "responsibility too great for the Crown to refuse", but added significantly that he thought "a decision on that point ought to depend on the peculiar circumstances of the case". Stanley himself believed that the Queen could refuse. He asked no pledge on "a question with respect to which no Sovereign ought to give a pledge. On the other hand, I am confident that her Majesty knows too well, and respects too highly, the mutual obligations . . . which subsist between a Constitutional Sovereign and her responsible advisers to refuse . . . the ordinary powers entrusted to a minister, or to depart from the ordinary understanding of being guided by his advice." Clearly he did not think he had a dissolution in his pocket; and in fact, when he broached the subject to the Queen, saying that he would have no chance if it were thought the Queen would refuse him a dissolution, she declined to give even a "contingent positive promise", though she gave him permission to deny, if necessary, that she would <u>not</u> consent. Even assuming, however, that, as is probable, the Queen would have granted dissolution to Stanley if he had taken office in 1851 and been defeated in the Commons, the opinions expressed on this occasion also provide no support for Mr. King. For Stanley's position would have been in every respect far stronger than Mr. King's. Stanley had not had the previous dissolution; that dissolu-

tion had taken place some four years before; the existing House would, in the circumstances supposed, have been one which had rejected both the possible Governments. There would have been no further expedient to be tried before resorting to another election. Yet even in these circumstances, Russell, Stanley and the Queen alike seem to have felt that Stanley's right to a dissolution was not absolute. If the Queen in these circumstances could have refused Stanley, Lord Byng could with far more reason have refused Mr. King. And even if the Queen could not have refused Stanley, it does not follow that Lord Byng could not have refused Mr. King, whose claim was in so many ways immeasurably weaker.

In 1852 the Queen was willing to grant a dissolution to Lord John Russell, despite the fact that the Parliament from whose adverse verdict he would have been appealing had been elected under his own auspices. But that Parliament had been in existence for five years, not, as in Canada in June 1926, for less than seven months; also, it had supported Russell for four years, then defeated him, and then, when Stanley proved unable to form a Government, had supported Russell again for a year more: a situation which found no parallel in Canada in June 1926.

In 1858, when Lord Derby asked the Queen's permission to announce that if he were defeated he had her sanction for a dissolution, she refused to give any such sanction, or any pledge. "The Queen said . . . she must be left quite free to act as she thought the good of the country might require at the time when the Government should have been beat; there had been a Dissolution within the year, and if a Reform Bill was passed there must be another immediately upon it." Lord Aberdeen, appealed to for his advice, said, "There was no doubt of the power and prerogative of the Sovereign to refuse a dissolution", though of course she would have to find another Prime Minister who would accept responsibility for the refusal and defend it in Parliament. On the other hand he believed that if Derby

were defeated and then advised dissolution, the Queen would grant it. "The Sovereign was bound to suppose that the . . . Minister was a gentleman and an honest man, and that he would not advise her Majesty to take such a step unless he thought it was for the good of the country." This opinion seems to speak with two voices. But it must of course be read in its context. If the motion of censure had carried, towards the end of May, 1858, Derby's position would have been this: he had not had the previous dissolution; that dissolution had, indeed, taken place only about nine months before; and there was an important new issue at stake, the Government's Indian policy. His position would therefore have been in almost every respect very much stronger than Mr. King's in 1926, and there were excellent reasons why Queen Victoria should agree, as in fact she did, to grant him a dissolution if the vote of censure should pass, reasons which were not present in Mr. King's case.

On June 18, 1866, on the defeat of the Liberal Government's Reform Bill, no one seems to have had any doubt that the Cabinet was entitled to a dissolution, though it had had the previous dissolution, eleven and a half months before. But, as both Russell and Gladstone emphasized, a great question of public policy was unquestionably at issue.

Lord John Russell in 1866, and Disraeli in 1868 both made clear their view that the Queen could refuse dissolution. Disraeli contended, however, that his claim to dissolution after his defeat in the Commons in 1868 was well founded because he had <u>not</u> had the previous dissolution, and because the Government, when it took office in 1866, had "waived" its "constitutional right" to an immediate dissolution because the House was newly elected and for "other reasons of gravity and principle". He might have added that a great new issue of public policy, the Irish Church question, was now at stake. Mr. King, on the other hand, <u>had</u> had the previous dissolution, and less than ten months before; he had most certainly

"waived" no "constitutional right" to dissolution at some earlier date (his assertion of a "right" to dissolve on November 5, 1925 is of course wholly inadmissible, and receives no support even from Keith); and there was no great question of public policy at stake.

Hardy, in 1873, appears to have stated the opinion of the Conservative leaders generally: "If we dissolve now, and are beaten . . ., we cannot dissolve again for three or four years. If we leave Gladstone to dissolve in July, . . . accidents may give us power to turn them out within a year or so; and then we can dissolve." As already noted, this seems clearly to mean that if the Conservatives took office and dissolved, they would not be entitled, at least in the early stages of the new Parliament, to secure a second dissolution on defeat in the Commons; and that if the Liberals dissolved and were beaten in the new Parliament "within a year or so", they would not be entitled to a second dissolution either. If the English Conservatives of that day, having had one dissolution, would not have been entitled to a second on defeat in the new House "within three or four years", there seems no reason why the Canadian Liberals of 1926, having had one dissolution, would have been entitled to a second, on defeat in the new House, within less than ten months.

The general agreement that Disraeli, if he had taken office in 1873, would have been entitled to at least one dissolution, even though the existing House had been elected under his own auspices, may seem to strengthen Mr. King's position. In fact it does nothing of the sort. The Parliament in existence in 1873 had indeed been elected under Disraeli's auspices; but it had meanwhile defeated his opponents, whom it had supported for over four years; so that, if he had taken office and been defeated in that House, there would have been no further expedient to be tried before resorting to another election. The Canadian Parliament of 1926 had not defeated a Government made up of Mr. King's opponents; it

had had no chance of doing so; and there therefore was a further expedient to be tried before resorting to another election. Moreover, that Parliament had been elected less than ten months before.

Lord Salisbury, in 1886, considered the Queen perfectly entitled to refuse dissolution to Mr. Gladstone, even though Gladstone would be seeking to appeal from defeat in a House elected under his opponents' auspices (which was not Mr. King's position). He advised the Queen to grant a dissolution, however, because it was the "natural and ordinary course", "the usual practice", to grant it when asked for by a Government which had <u>not</u> had the previous dissolution. He might also have added that a new and vital issue had arisen since the previous dissolution.

Had Gladstone resigned in 1886 instead of dissolving, it is quite clear that everyone thought an incoming Conservative Government would have been entitled to a dissolution if it wanted it. Lord Salisbury had had the previous dissolution, November 11, 1885; but meanwhile the new House had defeated both his Government and Gladstone's, and a vitally important new issue, involving a complete realignment of parties, had arisen. Nothing of the sort had occurred in Canada on June 28, 1926.

Mr. Chamberlain, in October 1887, evidently had no doubt that if the Conservative Government resigned and Gladstone resumed office, he would be entitled to a dissolution. Gladstone had had the previous dissolution, June 27, 1886; he had resigned without meeting the new House. If Salisbury had resigned at the end of 1887 or the beginning of 1888, it would have been a confession on his part that he could no longer carry on the government with that House of Commons. It would then have been clear that neither party could carry on in that House. There would have been no further expedients to be tried before resorting to another election. Again there is no parallel between this situation and that in Canada on June 28, 1926.

In January 1894, Gladstone tried to persuade his colleagues to dissolve because the Lords had mutilated the Employers' Liability Bill and the English Local Government Bill. Lord Salisbury had had the previous dissolution, a year and seven months before, and a great new issue, the relations between the two Houses, had arisen. There can be no doubt that Gladstone was right in thinking he could have got a dissolution. But Mr. King's position on June 28, 1926 was again wholly different.

In 1895, Lord Salisbury considered that it would be the constitutional course for Lord Rosebery to advise dissolution, and it was only after Rosebery had declined to avail himself of his constitutional right to do so that Salisbury took office and advised dissolution himself. The Parliament had been elected under his own auspices; but it had meanwhile defeated both his Government (in 1892) and Rosebery's, and there was plainly no further expedient to be tried before resorting to another election. This was not the case in Canada on June 28, 1926.

Mr. Balfour, on July 20, 1905, suffered a defeat in Committee of Supply. He finished the session, but resigned early in December. It seems to have been generally agreed that he could have had a dissolution if he had asked for it. His party had had the previous dissolution. But in every other respect there was all the difference in the world between his position and Mr. King's. For one thing, Mr. Balfour, after his defeat, remained in unquestioned control of the House of Commons, as he showed by securing, in sixty-one subsequent divisions, majorities ranging from 24 to 132 (an average of over 82). For another, the dissolution of 1900 had taken place more than five years before; and, as Sir Henry Campbell-Bannerman's action in requesting dissolution immediately after taking office showed, there was no serious chance that an alternative Government could have carried on with the existing House.

May says that "Unless [the right] of Ministers to appeal from

the House of Commons to the people has been already exercised, the alternatives of resigning office or dissolving Parliament have been left, --- by general consent --- to the judgment of Ministers who cannot command the confidence of the House of Commons." In the context, this seems to refer to cases where a Ministry defeated in the House has received a dissolution and is defeated also in the new House; but the phrasing is not entirely clear, and might be taken as denying Mr. King's right, as a defeated Minister, to a second dissolution. (May does not discuss the question of a Minister who asks dissolution while a motion of censure against him is under debate.)

Bagehot thought that the Crown could "hardly" refuse a dissolution. But he admitted that there were "vestiges of doubt whether in all cases a sovereign is bound to dissolve parliament when the cabinet asks him to do so"; and both passages were presumably meant to be read in conjunction with the very positive statements that "The ultimate authority in the English Constitution is a newly-elected House of Commons. . . . A new House of Commons can despotically and finally resolve."(1) The terms "new" and "newly-elected" are not, of course, perfectly precise. But Disraeli called the House of Commons in June 1866, eleven months after the preceding dissolution, newly elected, so it is clear that Bagehot's words could reasonably be applied to the Canadian House on June 28, 1926.

Bryce's brief and very general statement does not explicitly impose any limitations on the right of either a United Kingdom or a Dominion Cabinet (he makes no distinction), defeated in the Commons,

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(1) These statements are, of course, clearly subject to the provisoes

(a) that the new House is at least able to elect a Speaker, and

(b) that it has not rejected successively both, or all, alternative Governments, as the Canadian House had done by July 2.

to dissolve Parliament: the normal procedure for a Cabinet which has been censured is to resign, but it may dissolve Parliament, though "this course is infrequent". In other words, dissolution is an exceptional procedure. Bryce had been brought up in the Gladstonian tradition; he was a member of Gladstone's last Cabinet. It is altogether likely that he intended his words to be simply a concise summary of the Peel-Russell-Gladstone doctrine on the subject.

Todd thought that the Crown ought clearly to refuse dissolution if there were no probability of the vote of the House being reversed by the electorate, and that even a Cabinet defeated in a House elected under its opponents' auspices had no absolute right to appeal to the people: there had to be some great question of public policy directly at issue between the contending parties. A fortiori a Cabinet defeated in a House elected under its own auspices would have no absolute right to dissolution. There can be no doubt at all that Todd's views run directly counter to Mr. King's contentions.

Anson's doctrine that a request cannot constitutionally be refused but cannot always constitutionally be made amounts to saying that the Crown cannot constitutionally refuse an unconstitutional request. This is perilously close to nonsense, and calls for no further comment.

It is not clear whether Dicey meant his rule against granting a second dissolution to a Cabinet defeated in the Commons to apply to any Cabinet which has had one dissolution and is defeated in the new House, or only to one whose first dissolution was granted after defeat in the House. If the former, the rule applies directly and disastrously to Mr. King's claim. Whether the statement that "A Ministry outvoted on a <u>vital question</u>(1) may appeal once" to the electorate was meant

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(1) Italics mine.

to be a statement of the Peel-Russell-Gladstone theory is not clear. If it was, it would tell against Mr. King.

It is perhaps significant that Lowell's reason for thinking refusal of dissolution improbable in Britain is "because the rules of political fair play are so thoroughly understood among English statesmen that the power is not likely to be misused for party purposes."

Mr. Asquith's view, (supported by Mr. Lloyd George and Sir John Simon and by Muir and Marriott) that a Cabinet which cannot command a majority in the Commons is not invested with the right to demand a dissolution, and that the Crown is not bound to take the advice of such a Cabinet to put its subjects to the tumult and turmoil of a series of general elections so long as it can find other Ministers prepared to give it a trial, would clearly be fatal to Mr. King's contention.

Emden's view that a minority Government defeated in the Commons "may, in exceptional circumstances", be entitled to a dissolution at least throws on Mr. King the onus of proving that his case was, in any relevant sense, "exceptional". Exceptional it undoubtedly was; but in a sense which points to refusal rather than grant of dissolution as the proper and constitutional course.

Jenks' view of British conventions on the subject is very tentatively put but decidedly adverse to Mr. King's claim. The Crown may refuse if the existing House of Commons was elected since the formation of the Ministry which has suffered defeat (and this "appears" to be one of the two "well-known cases" in which the Crown may refuse advice). This was precisely the situation of Mr. King's Cabinet on June 28, 1926.

Lord Courtney, who explicitly declared that in the Dominions "the Governor bears the same relation to his Ministers as the Crown bears to its Ministers at home", noted that in the Dominions Governors had refused dissolutions "where the Assembly has been very recently elected"

nd "where [they have found] other men ready to undertake the ministerial unctions"; and he said that in similar circumstances in the United Kingdom the Crown might be found acting as its vice-regents have acted". The anadian Parliament on June 28, 1926, could certainly be called "very ecently elected", considering that its maximum term was five years; and ord Byng had no difficulty in finding "other men ready to undertake the inisterial functions".

Laski says that a minority Government defeated in the Commons ould be certain to get a dissolution on demand because refusal would ltimately involve granting dissolution to a rival party, which would be iscrimination. This opinion certainly favours Mr. King's claim. But, as e have already seen,(1) Laski's argument is valid only if the dissolution s granted to the rival party <u>immediately</u> after the refusal, <u>without any ttempt to carry on with the existing House</u>. This did not happen in Canada n 1926.

Wade and Phillips asserted in 1931 that it had long been a con- ention that the King would not refuse dissolution, but added that it ight be that he would refuse, should the occasion arise, to grant dis- olution at the request of a Prime Minister who had never had a clear ajority in the Commons. In 1935 they added that this view was not gener- lly accepted, and that it was improbable that any course other than that aken in 1924 would be taken in the future for fear of involving the King n political controversy. As far as it goes, this opinion gives a rather esitating support to Mr. King's contention.

Jennings is not very decisive either way. He notes the "persist- nt tradition" that the Crown may refuse, but finds it "difficult to see" hat the appropriate circumstances would be. In "normal times" the King

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1) See above, pp. 192-193.

could not refuse a defeated Government's request. With three parties, the King would be "more reluctant" to grant a dissolution. Mr. MacDonald's case did not prove that the Crown could not refuse; but it showed that refusal would occur "only in very exceptional circumstances" (undefined). These remarks, especially in view of Jennings' own statement that text-writers are not "persons of authority for this purpose", can hardly be considered as giving Mr. King any very solid support.

Keith opposes Mr. Asquith's doctrine, but his own view of British practice on this point is not free from ambiguity. In 1924, in the latest of his works available at the time of the Canadian crisis, he said: "It is obvious that the Crown could not constitutionally grant a Prime Minister, who had obtained one dissolution and had been defeated, a second dissolution if any other means of carrying on the government could be found". Mr. King "had obtained one dissolution and been defeated", and other "means of carrying on the government could be found". The logical conclusion of Keith's argument is that under British constitutional practice Mr. King was not entitled to a dissolution, and that Lord Byng was in fact <u>bound</u> to refuse. Yet Keith rejects this conclusion, without explaining why.

In 1929 Keith added: "It is clear that if a Ministry who had obtained a dissolution were then defeated, and none the less asked for another, the King would be compelled, in the interests of the maintenance of the Constitution, to refuse." The request would be "a violation of the Constitution by neglect of the fundamental rules of responsible government". Mr. King had "obtained one dissolution", had been "defeated", and "none the less asked for another". Why was not Lord Byng "in the interests of the maintenance of the Constitution, compelled to refuse"?

In 1931, as if to make assurance triply sure, Keith asserted that, if a "defeated" government which had had "one dissolution and had failed to obtain a majority thereat asked for a second . . . it would

be impossible to accede to its request, as that would be to defy the popular verdict and to prevent the functioning of the Parliament which the electorate had returned". It would be hard to find a more exact description of Mr. King's position on June 28, 1926. On Keith's version of British practice as set forth in this passage, therefore, it would seem to follow that it was "impossible" for Lord Byng to "accede" to Mr. King's request, as that would have been "to defy the popular verdict and to prevent the functioning of the Parliament which the electorate had returned". Yet Keith persists in saying that Lord Byng's action was unconstitutional.

In 1939 Keith said that "under modern British conditions . . . if a three-party system of a serious and lasting character came into being, . . . it would . . . be possible to argue" as Mr. Asquith had argued in 1923. What he meant by "a serious and lasting character", or whether there was a three-party system of that kind in Canada in 1926, he did not say. He went on to say, however, that a refusal would "normally" (undefined) be possible only if there were "general agreement" in and out of the House that an election should be postponed. As this amounts to saying that refusal could "normally" only take place by consent of the government which asked for it, it seems hardly worth while to try to apply the principle to any concrete case.

In the same work Keith added that "Mr. Asquith forgot that a dissolution is an appeal to the political sovereign, and that when it is asked for every consideration of constitutional propriety demands that it be conceded." This passage, and some others of like tenor,(1) can obviously be quoted in support of Mr. King's claims in 1926; but as they contradict others in the same work, let alone Keith's other works, the support is not very impressive.

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1) See above,pp. 157-158.

Nor does Keith's 1940 pronouncement on the subject help matters, ven though he explicitly applies it to the Canadian case. "There is a ride agreement that the right [to a dissolution] does not exist in the ase of a ministry which already has had one unsuccessful dissolution, and hortly thereafter is defeated in the Commons and asks for another, in the opeof success at the hands of an electorate weary of political strife. But any such case would have to be judged by the King on its merits, and o rule of general application could be laid down. It was partly on this ifficult question that Lord Byng in 1926 refused a dissolution to Mr. Mackenzie King, who at the general election of 1925 had failed to secure an effective majority, and who therefore sought a new dissolution in order o test the question. . . . Normally, it may be held, the electorate should e allowed to decide, for it may be held that it must take the consequences f returning a dubious verdict at the preceding contest."

The difficulties and ambiguities of this passage as a general roposition have already been pointed out.(1) Keith's application of it o the Canadian case is open to several further objections. First, Mr. King at the election of 1925 had not only "failed to secure an effective majority"; he had failed to secure any kind of majority. Second, what 'question" was Mr. King seeking to "test" by the new dissolution? Whether e had a right to a dissolution in circumstances in which there is "a wide greement" that that right does not exist? Whether his first dissolution ad been "unsuccessful"? Whether he had been "defeated in the Commons"? Whether his defeat there had come "shortly after" the dissolution of September 5, 1925? Whether the electorate was or was not "weary of olitical strife"? Or what? Third, Keith leaves us uncertain whether e thinks that June 28, 1926, was or was not "shortly" after September 5, 925, or whether this consideration was outweighed by some undisclosed

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1) See above, pp. 189-191.

"merits" of Mr. King's request. The only inkling of what these could have been is conveyed by remarks about Mr. Meighen's subsequent inability to carry on for more than a few days without a dissolution, a point whose irrelevance has already been proved. The general proposition certainly could be interpreted in a sense favourable to Lord Byng, and it cannot be said that Keith has given any adequate reason for interpreting it in the opposite sense.

It is important to note also the numerous limitations Keith places on the right of even an undefeated Cabinet to obtain a dissolution. It seems plain that (apart from the case of a Cabinet which has never been defeated in the House only because it is trying to prevent---in both the Prayer Book and the modern sense---a possible adverse vote by a prior dissolution) the rights of an undefeated Cabinet would be greater than those of one which had met defeat in the House. If a Cabinet which has had one dissolution and is "barely sustained" in the House is not entitled to another "at an early date", and may be refused, what of a Cabinet which has had one dissolution, is defeated in the House "at an early date", and asks for a second dissolution? If a Cabinet which has had a dissolution "without materially strengthening its position" and which "shortly" afterwards asks for a second dissolution may be refused, what about a Cabinet which has had a dissolution materially weakening its position, is defeated in the House "shortly" afterwards, and asks for a second dissolution? Again, any Cabinet, even (apparently) if undefeated in the House, can have only one dissolution "within a limited period". What about a Cabinet which has had a dissolution, is defeated in the House "within a limited period", and thereupon asks for a second? Still further, "If a Ministry at an election secures only a slight majority and after a substantial period seeks again a dissolution", its right to get one is not absolute, even if it has not been defeated in the House; it can hardly

be argued that it becomes absolute if the Ministry has been defeated in the House. Finally, "it is clear that a ministry which has had one dissolution and has been unsuccessful in securing a majority therein cannot at once have another; but if it is able to carry on for a time, delicate questions may arise as to when and whether another dissolution was due." But if, after carrying on "for a time", it is defeated, the "questions" which arise can scarcely be less "delicate", nor its right to dissolution more nearly absolute. Surely in all these cases the right of a Cabinet defeated in the House would be less than that of an undefeated Cabinet? If so, on this reading of British practice, Mr. King's contention that, if he had been defeated on the Stevens amendment before asking for dissolution, he would still, under British practice, have been entitled to get it, is wrong; unless either Keith's interpretation of British practice in respect of undefeated Governments is faulty, or the terms "early date", "shortly", and so forth, are to be taken in a sense which makes them inapplicable to the period September 5, 1925 - June 28, 1926.

The difficulties of interpreting and applying Keith's dicta would be considerably less if he had stated clearly which of them are to be considered as superseding which others, and which are to be taken, even after the publication of subsequent statements on the same subject, as still in full vigour and effect.

Evatt's view of British practice is stated rather cautiously and, as a rule, by implication. But there seems little doubt that he thinks Mr. Asquith's doctrine justified.

Where precedent is not conclusive and authorities differ, it becomes necessary to consider carefully the reason for any particular view of constitutional practice. Here, mutatis mutandis, the arguments of the New Statesman article of July 31, 1926, are in point.(1) It seems

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(1) See above, p. 275.

obviously undesirable to allow a Prime Minister to play a game of constitutional ping-pong in which, rejected by the electors, he appeals to the House, rejected by the House he appeals to the electorate again, and so on indefinitely; and this argument would seem to have special force if the appeals took place at frequent intervals. A Prime Minister who gets a dissolution, carries on for three or four years, is then defeated in the House and asks for a dissolution, seems, as a matter of public policy, to have a stronger case for getting it than one who has had a dissolution, carries on with the new House for less than a year, and then, on defeat in the House, asks for a second dissolution. Both precedent and authority provide strong ground for the view that a Prime Minister who has had one dissolution and is defeated in the new House within a year is not entitled to a second dissolution unless (a) meanwhile his opponents have either formed a Government and been defeated and resigned (declining to avail themselves of their right to a dissolution), or have had a chance to form a Government and have declared themselves unable to carry on with the existing House, or (b) some great new issue of public policy has arisen,(1) or (c) some major change has taken place in position of parties, or (d) an effective alternative Government is clearly impossible.(2)

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(1) Cf. the hypothetical case which might have arisen if Lord Salisbury, in 1885 or 1895, had tried to carry on with the existing House and had been defeated.

It must be noted that the argument in the text applies only to a Government which has already had one dissolution.

(2) Both conditions (c) and (d) appear to have been present in New Brunswich in 1857. (See above, pp. 76-77, and below, p. 327). None of the conditions (a), (b), (c) or (d) was present in Canada on June 28, 1926.

We have been considering, in the light of British practice, Mr. King's position as a Prime Minister defeated in the House of Commons. But it must be emphasized that he was not simply a defeated Prime Minister. He was a defeated Prime Minister seeking a dissolution which would have prevented the House of Commons from pronouncing judgment on a motion of censure. No British Prime Minister has ever occupied such a position. No authority on British constitutional practice has ever even discussed whether a British Prime Minister in such a position would have a right to a dissolution.

To say that, under British constitutional practice, Mr. King's claim to a dissolution upon defeat in a House elected under his own auspices less than nine months before, when no great new question of public policy had arisen, and when a motion of censure was under debate, was weak, is putting it mildly. Under the practice in the Dominions, colonies, Australian States and Canadian provinces it was even weaker. In those jurisdictions there are many cases of refusal of dissolution to Governments with a far stronger claim than Mr. King's: Governments enjoying the undoubted confidence of the Commons (which Mr. King's did not), Governments defeated in a House elected under their opponents' auspices, recently or even some considerable time before (which was decidedly not Mr. King's case), Governments (defeated or undefeated) against which no motion of censure was under debate (which again was not Mr. King's case). Even apart from the vital consideration of the pending vote of censure, there appear to be no cases anywhere in the Empire in which a Government in the position of Mr. King's asked for and obtained dissolution.

There have apparently(1) been some seven grants of dissolution

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(1) I say "apparently" because not all the Australian or South African records have been available to me; see above, pp. 29, 105.

in the overseas Empire to Governments whose position (apart from the pending vote of censure) bore some resemblance to Mr. King's, but in every case critical examination discloses important differences.

The first case is that of the Province of Canada in 1854. The Hincks-Morin Government had obtained a dissolution on November 6, 1851. In the session of 1852-1853, it had passed a Redistribution Act (c.152) and a new Franchise Act (c. 153). The second session opened June 13, 1854. The Government announced that it proposed to pass a Reciprocity Bill and a further Franchise Bill, to introduce a Clergy Reserves Bill, and then to dissolve. On June 20, an amendment and sub-amendment to the Address, condemning the Government for not introducing a Seignorial Tenure Bill and for not secularizing the Clergy Reserves, carried 42-29. On June 23, Parliament was dissolved.

The Hincks-Morin Government, like Mr. King's had had one dissolution and had been defeated in a House elected under its own auspices. But there the resemblance ends. Parliament was in its second session, not its first; two years and seven months of a four year term, not ten months of a five year term, had elapsed since the previous dissolution; there had been important changes in the franchise and redistribution of the constituencies, factors which, as Anson points out,(1) are ordinarily held to render dissolution proper; there were two great questions of public policy at issue; and, as the motion of want of confidence had been carried by a combination of Conservatives and extreme Reformers, there was no possibility of an effective alternative Government in that Parliament. Clearly, this case is about as different from Mr. King's as anything could be.

The second case is that of Tasmania in 1872. Mr. Wilson's Government had obtained a dissolution on August 7, 1871. The second session of the new Legislature opened June 25, 1872. On July 20, the

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(1) See above, p. 142.

Government was defeated, 16-14, on a motion of want of confidence declaring that it had "no financial policy". On August 7, a motion to rescind this vote was lost, 15-14. On August 19, the Government secured a second dissolution.

Mr. Wilson's Government, like Mr. King's, had had one dissolution and had been defeated in a House elected under its own auspices. But in Mr. Wilson's case, unlike Mr. King's, Parliament was in its second session, not its first; more than a year had elapsed since the previous dissolution; and it could be argued that there was a great question of public policy at issue.

The third case is also a Tasmanian one, 1912. The Lewis Government had obtained a dissolution, April 4. On June 14, before the meeting of the new Parliament, Sir Elliott Lewis gave way to a successor from his own party, Mr. A. E. Solomon. The state of parties was: Government 15, Labour 14, Independent 1. During the session Mr. Solomon suffered several minor defeats and was repeatedly sustained only by the Speaker's casting vote or by a majority of one. On December 13, when the session was almost over, the Independent member deserted the Government, and the Labour leader, Mr. Earle, gave notice of a vote of want of confidence. The Speaker then undertook to resign, and the Independent proved unable to come to terms with the Labour party after all. The motion of want of confidence was withdrawn, and Mr. Solomon got dissolution, December 27.

In this case the Government had had the previous dissolution and less than nine months before, and there seems to have been no great question of public policy at issue. But Mr. Solomon's was the largest single party, and its strength was exactly half the House; and any alternative Government would at best have been dependent on the Speaker's casting vote. This was certainly not the case in Canada in 1926.

The fourth case is that of Victoria in 1921. The Lawson Govern-

ment had obtained a dissolution, September 20, 1920. The election gave the Government (Nationalist) 31, the Labour party 20 and the Farmers' Union 13. Early in the second session of the new Parliament, July 27, 1921, the Government was defeated on an amendment to the Address expressing lack of confidence in its wheat, redistribution, land settlement and hydro-electric policies. On August 2 it obtained a second dissolution.

Here also was a Government which had had one dissolution, only ten months before, and had been defeated in a House elected under its own auspices. But Parliament was in its second session, not its first; there were great issues of public policy at stake, notably the question of a wheat guarantee; and it seems probable, in view of the strong mutual antagonism of the Labour and Farmers' parties that no alternative Government was possible in that Parliament.

The fifth case is that of Manitoba in 1922. The Norris (Liberal) Government had obtained a dissolution on March 27, 1920. The elections returned 21 Liberals, 9 Conservatives, 13 Farmers' party and 11 Labour. The Government was able to survive the first session, but during the second, on March 14, 1922, it was censured, 27-23, for failing to carry out the Legislature's instruction of the previous session to abolish the Public Utilities Commission. The Government thereupon resigned, not asking for a dissolution. The Conservative leader was reported to be willing to form a Government, but as the Labour party was also reported to be ready to support Mr. Norris in order to finish the session's business, no one seems to have taken this seriously. The Lieutenant-Governor, himself formerly an active Conservative, requested Mr. Norris to withdraw his resignation and complete the session's work. In a letter read to the Assembly March 20, His Honour said that the views of the various groups were "fundamentally divergent", that there had been and would be "no cohesion or continuity of co-operation; and that no Opposition group had any mandate from the electors.

He therefore asked Mr. Norris to carry on till an "early election", adding, "I will accept your recommendation, subject to Supply being granted, that the electorate be consulted as soon as the antecedent necessary steps are taken." Mr. Norris agreed to withdraw his resignation on these terms, and the other parties accepted the arrangement. Prorogation took place April 6, and dissolution June 24.

The Norris Government, like Mr. King 's, had had the previous dissolution and had been defeated in a House elected under its own auspices. But two years had elapsed since the previous dissolution; the Legislature was in its second session, not its first; the Government did not ask for dissolution till after it had resigned and then withdrawn its resignation at the express request of the Lieutenant-Governor; an alternative Government was clearly impossible; and the Government ultimately secured unanimous consent to finish the business of the session and then dissolve. There is certainly no precedent here for Mr. King's claims in 1926.

The sixth case is that of the Australian Commonwealth in 1929. The Bruce Government had obtained a dissolution, October 9, 1928. In September 1929 its Maritime Industries Bill (which had been declared by Parliament to be an urgent measure) was amended in committee so that it would not come into force till after a referendum on the subject. The Government then obtained a second dissolution, September 16, 1929.

Mr. Bruce had had one dissolution, eleven months before, and had been defeated in a House elected under his own auspices. But, as there was no constitutional provision for a referendum on the Maritime Industries Bill, the House, by passing the amendment it did, virtually invited dissolution, and for the express purpose of deciding a great question of public policy. Moreover Evatt at least considers it highly improbable that Mr. Scullin, the Leader of the Opposition, could have formed a Government which could have carried on in that Parliament.(1)

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(1) The references for all these cases will be found in Chapter II.

This case also, therefore, provides no support for Mr. King.

A seventh case, that of New Brunswick in 1857, comes nearest to providing any ground for Mr. King's claim in 1926. The Fisher Government (Liberal) had been dismissed, and a forced dissolution had taken place under the auspices of its successor, the Gray-Wilmot Government, on May 30, 1856. The issue of the election was the repeal of prohibition, an issue which to a considerable degree cut across party lines. The Government was victorious, and in a short special session of the new Legislature it carried repeal by an overwhelming majority. Almost at once, however, its majority began to crumble.

At the opening of the second session, February 23, 1857, it became clear that the Liberals had returned to their party allegiance. Apart from the Speaker, the numbers of Government and Opposition members were equal: 20. On a want of confidence amendment to the Address the Government was sustained only by the Speaker's casting vote. On March 12, a motion for an Address on an appointment to the Upper House was carried against the Government by 22-18, but the two Government supporters who on this occasion voted with the Opposition appear to have made it clear that in general they continued to support the Government. On an Election Bill the Government won by 21-19, but only because the Speaker had vacated the chair, appointed an Opposition member to it pro tem., and had then voted with the Government as an ordinary member. On March 21, an amendment to a Government Railway Bill was carried against the Government by 19-17; but the Government accepted the amendment and carried on. Within a few days, however, the desertion of a Government supporter made it evident

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above. By way of further contrast to Mr. King's position in 1926, note the South African case of 1920 (pp. ~~--------~~ above), and the Manitoba case of 1879, (pp. 88, 102, above).

that Ministers could not hope to carry on in the existing House. On March 26, immediately after the reading of the Journals, Mr. Gray announced that the Government had advised immediate prorogation with a view to dissolution. The Opposition (which had as early as February 24, declared that "it was time for the Government to advise a dissolution") thereupon moved a resolution calling on the Government to resign because it had "declared . . . its inability to carry on the business of the country". After some hours, further debate on this motion was interrupted by prorogation, and on April 1 the Legislature was dissolved.

As in Mr. King's case, this Government had had the previous dissolution, only ten months before. There was a motion of want of confidence under debate when prorogation took place. But the Legislature was in its second session, not its first; during most of the session the Government had been able to count only on being sustained by the Speaker's vote; an alternative Government would certainly have had to elect a new Speaker, and would then have been dependent on his casting vote; there was no third party; the Legislature had been elected, by a forced dissolution, to deal with a single question, and with the carrying of repeal its "mandate" might be considered to be "exhausted";(1) the motion of want of confidence of March 26 was not a motion censuring the Government for misconduct, but in effect merely a protest that dissolution was unnecessary; the request for dissolution was made <u>before</u> the motion of want of confidence was moved, not <u>while</u> it was <u>under debate;</u> the Opposition had urged the Government to dissolve; and the return to party lines in the House meant a major change in the political situation, on which it might be held that it was desirable to take the verdict of the electorate.(2)

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(1) See Evatt's words, quoted above at pp. 170-171.

(2) Cf. General Smuts' reasons for advising dissolution on December 31, 1920; see above, p. 102.

Obviously these factors in the New Brunswick situation in 1857 were not present in Canada on June 28, 1926. But even if the two situations could be held to have been substantially the same, it can hardly be claimed that because a Lieutenant-Governor of New Brunswick in 1857 granted a dissolution in certain circumstances, therefore all Governors and Governors-General throughout the Empire are bound to follow his example forever after. As Jennings says, a single precedent does not create a rule, it must be generally accepted as creating a rule; a fortiori, a single, early and perhaps objectionable, precedent cannot be taken as outweighing a long course of precedents and authoritative opinions in a contrary sense.

It may be noted that the Lieutenant-Governor who granted this dissolution in New Brunswick in 1857 certainly did not consider his action as binding him to grant dissolutions automatically, for as Governor of Victoria, in 1872, he refused dissolution to the Duffy Government, whose claim was certainly in many respects far stronger than that of the Gray-Wilmot Government in 1857.(1)

In all these cases, also, it must again be emphasized that there was no motion of censure under debate when the respective Governments asked for dissolution.

The Report of the Imperial Conference of 1926, that in all essential respects the relationship between the Governor-General and his Ministers is the same as that between the King and his Ministers, might

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(1) See above, pp. 33-34, 76.

With regard to the want of confidence motion of March 26, 1857, it may be noted that if the Opposition had wished to delay prorogation long enough to bring it to a vote, it could presumably have taken the same action as the Opposition in Newfoundland on April 14, 1894, moving and carrying a motion that Black Rod be not admitted.

seem to have rendered all but United Kingdom precedents inapplicable at least from that date. But, as we have seen, neither Keith nor Evatt takes this view; and Keith seems still to think that Dominion practice can vary from that of the United Kingdom. In support of this view he could of course adduce the fact that the phrase "in all essential respects" may be open to a variety of interpretations, and that the variations from British usage which, at least as late as 1928 (and perhaps even down to 1933) he considered existed in the Dominions, were not variations in "essential respects": they left the structure of responsible government <u>essentially</u> the same in the Dominions as in Britain.

Anyhow, on Keith's version of Dominion usage, as set forth in the 1928 edition of "Responsible Government in the Dominions", and even in "The Constitutional Law of the British Dominions" (1933), the logical conclusion is that when Mr. King, after suffering defeat in the House, asked for his second dissolution in ten months, Lord Byng's refusal was constitutional and proper. "The normal case of refusal of ministerial advice is when a Ministry defeated in the Lower House . . . asks for a dissolution." The Governor can refuse if he can find another Cabinet which will accept the responsibility. "There may be an alternative Government which could carry on for the rest of the life of the Parliament." That this possibility could not have been excluded in Canada on June 28, 1926, we have already seen. Whether Supply has been voted, Keith says, is a relevant point, though not a sine qua non. In Canada on June 28, 1926, Supply had not been voted. The length of time to go before a dissolution would come anyway was long: this "vital element" would have strengthened the case for refusal. The House had not been elected under the aegis of Mr. Meighen but under that of Mr. King himself. This point, according to Keith, is "doubtless of importance".

Evatt also provides strong ground for saying that the refusal

was proper. He insists again and again, as we have seen, on the importance of the "parliamentary situation"; he declares explicitly that on June 28 there was ground for believing that Mr. Meighen could form an effective alternative Government and carry on with the existing House; he does not suggest that the "mandate" of the existing House was exhausted, that Mr. Meighen's Government would have had "little or no popular backing", or that it "proposed to act", or would have been "dependent on the support of members who were proposing to act, in flagrant disregard of pledges to the electors". He makes it quite clear that in his opinion, it was only when Lord Byng, having refused dissolution to Mr. King, granted it to Mr. Meighen so soon afterwards, that his action ceased to be justified on accepted constitutional practice.(1)

Again we may derive some enlightenment from considering hypothetical cases.

Mr. King, Mr. Ewart and Keith have all, inexplicably, referred to the Ramsay MacDonald dissolution of 1924 as a "precedent" for Mr. King. It was not.(2) But something at least very close to a precedent for Mr. King's request would have occurred in Britain in 1924 if Mr. Baldwin, on his defeat in the Commons in January, had asked for dissolution instead of resigning. The cases would not have been precisely the same, for Mr. Baldwin's defeat came at the very outset of the session, Mr. King's only after the session had lasted nearly six months. But Mr. Baldwin, like Mr. King, would have been appealing from defeat in the first session of a House elected under his own auspices. Will anyone pretend for one moment that he would have got a dissolution? Marriott, the only authority who has discussed this particular hypothetical case, says flatly that the King "might certainly have declined"; and no one has ventured to question this

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(1) "The King and His Dominion Governors", p. 62. On Evatt's criticism of Lord Byng's subsequent actions, see below, pp. 380-381.

(2) See above, pp. 265-266, 273-274, 294-295.

opinion. Keith, indeed, indirectly endorses it and even goes beyond it: "If after one dissolution a government which had failed to obtain a majority thereat asked for a second . . . it would be impossible to accede to its request, as that would be to defy the popular verdict and to prevent the functioning of the Parliament which the electorate had returned." Mr. King's position differed from Mr. Baldwin's only in the length of time which elapsed between the opening of the session and the defeat. Why does Keith consider this single difference decisive?

To take a second hypothetical case: Suppose that in 1873 Sir John A. Macdonald had not resigned but had waited for the vote on the motion of censure, and had been defeated. Would he then have been entitled to a dissolution? His claim would certainly have been stronger than Mr. King's. For, apart altogether from the fact that he would not have been trying to prevent the House of Commons from pronouncing its verdict, an appreciably longer time would have elapsed since the previous dissolution: Parliament was in its second session, not its first. But Sir Richard Cartwright, in an elaborate discussion of various things which might have happened, did not even mention any notion that Sir John, if defeated on the vote of censure, could have got a dissolution. Cartwright in 1912 was no parliamentary novice. He was a statesman with more than forty years' experience of Parliament and twenty years' experience of Cabinet office. Does anyone seriously believe that Cartwright, Blake, or Mackenzie, or any other Liberal statesman of that period, would have admitted that Macdonald, if defeated in November 1873, could have got a dissolution?

Mackenzie's opinion at least is not in doubt, for he made it perfectly clear in his discussion of the Ontario crisis of 1871. The Sandfield Macdonald Government, which had held office in Ontario from 1867, obtained a dissolution on February 25, 1871. The new Legislature met December 7. On December 11 Blake moved what he described as a motion

of want of confidence: an amendment to the Address calling on the Government to bring certain railway aid grants before the Assembly. Next day the Provincial Treasurer declared that it "made no difference" to the Government whether or no the amendment carried; the Government could accept it. On the same day, however, Dr. McCall moved a sub-amendment, that it was inexpedient to consider the matter till certain contested elections had been decided. On the motion to adjourn, the Government was defeated, 35-33. On December 13 the sub-amendment was defeated, 40-32. On December 14 Blake's motion was carried, 40-33. As the Government showed signs of considering this less than decisive, Mackenzie, insisting that the vote on Blake's motion showed want of confidence, nevertheless moved a straight want of confidence amendment to the Address. On December 15 Blake said that the Government had been defeated in three divisions, and had been defeated on a vital matter of public policy. He therefore demanded its resignation. Sandfield Macdonald replied that as so many seats were still vacant he would take no step of any kind. The Provincial Treasurer resigned, but the rest of the Ministers retained their offices. Mackenzie's motion carried, 37-36. On December 18 the Lieutenant-Governor, replying to the resolution of no confidence which had been communicated to him, said that the terms of the resolution were beside the point. His Ministers had not attempted, in their use of the railway aid fund, to carry out a "usurpation fraught with danger to public liberty and constitutional government". They had taken no action except in accordance with the Act passed by the Legislature. Blake thereupon moved a further motion of want of confidence: "That the continuance in office of the remaining Ministers is under existing circumstances at variance with the spirit of the constitution". Sandfield Macdonald moved in amendment that when the House adjourned it stand adjourned to January 9, 1872; then, when the seats were all filled, he would test the feeling of the House, and, if defeated, would resign.

A certain Dr. Clark, protesting against this, declared that the Government had no choice but to resign or dissolve Parliament. Mackenzie thereupon intervened. He admitted that a defeated Government "had a right to, under certain circumstances,(1) advise a dissolution of the House. But in the present case the Premier did not dare to advise a dissolution, and the Lieutenant-Governor would not dare to carry it out if he had been so advised."(2)

The resemblances between Sandfield Macdonald's position on December 18, 1871, and Mr. King's on June 28, 1926, are close. Each had had the preceding dissolution, after three years and eight months of office. The time which had elapsed since that dissolution was in each case almost ten months. Each had suffered defeats in a House fresh from the electors and elected under his own auspices. The differences between the two cases are: (a) Macdonald was defeated within a few days of the opening of the first session of the new House; Mr. King had succeeded in maintaining himself for nearly six months. (b) Macdonald had suffered four defeats, Mr. King only two (or three, if the vote on the Speaker's ruling is counted).(3) (c)Macdonald had been defeated on a vote or votes of want of confidence, Mr. King had not. (d) Macdonald, after his defeats, had not succeeded in scoring a single victory; Mr. King, after his two or three defeats, had succeeded in carrying the adjournment of the debate

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(1) The caution of this phrase is noteworthy.

(2) Ontario Debates, Second Parliament, First Session, pp. 5-26. Mackenzie's statement is on p. 26.

(3) Mr. King's Government had also been defeated 74-41, in Committee of Supply, on a motion that the Chairman do leave the Chair, March 18, 1926. (Commons Debates (Canada), 1926, p. 1685.) But this was a "snap vote".

by a majority of one. (e) Macdonald had allowed the House to pronounce its verdict, Mr. King had not. (f) In Macdonald's case there were a considerable number of contested seats vacant, in Mr. King's there were not. The second and fourth points can hardly be regarded as of much importance. The fifth at least cancels out the third. The sixth seems to tell as heavily in Macdonald's favour as the first in Mr. King's. In short, Sandfield Macdonald's claim to a dissolution on December 18, 1871 seems to have been at least as strong as Mr. King's on June 28, 1926; yet Alexander Mackenzie said that Sandfield Macdonald "did not dare" to ask for a dissolution, and the Lieutenant-Governor would not have "dared" to grant it if he had asked.

The Opinions of Keith and Dawson on the Refusal of Dissolution in Canada, June 28, 1926.

On the Canadian case itself, Keith's verdict in 1928 was: "It must have been clear from the first that Mr. Meighen could not carry on without a dissolution and must exact a promise of one. That fact condemns utterly Lord Byng's action, for, by accepting as a Prime Minister one who must equally have a dissolution, he converted himself into an out-and-out partisan of the Conservative party, and degraded the office of representative of the Crown by perverting it for party purposes."(1) The "fact" on which Keith bases this very serious and strongly worded charge is, we have seen, not a fact at all, but an assumption, not only unsupported by evidence but contrary to the evidence. The charge of partisanship assorts strangely with Keith's other charge, six pages farther on in the same book, that Lord Byng considered the Governor-General of a Dominion "an umpire

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(1) "Responsible Government in the Dominions", 1928 ed., pp. 147-148.

between parties" (for which also there is no evidence whatever).(1)

Ten years later Keith had become a great deal milder: "To Lord Byng the situation presented itself in the light of an effort to avoid a decision on a motion of censure, and he had regard also to the fact that the normal dissolution in 1925 had failed to give the Liberal party a clear lead.(2) . . . It seemed to him, therefore, just to give the Opposition the opportunity of dissolving Parliament. . . . In his action he clearly went beyond any relevant precedent."(3) The suggestion that Lord Byng refused dissolution to Mr. King in order to grant it to Mr. Meighen is, again as we have seen, unwarranted. What the "relevant" precedents are Keith states elsewhere. The Ramsay MacDonald case, which bore no resemblance whatever to Mr. King's, he considers for some unknown reason not only relevant but "conclusive". "Colonial" precedents are irrelevant. This convenient generalization, as we have already shown, is almost completely unjustified.(4) Precedents drawn from Newfoundland, the Australian States or Canadian provinces are also irrelevant.(5) Why this should

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(1) Ibid., p. 154, note 2.

(2) A delightful euphemism.

(3) "The Dominions as Sovereign States", pp. 220-221.

(4) See above, pp. 104-105, 111-112.

(5) "Lord Byng's action is, of course, perfectly constitutional . . . if Canada has the same status as the states of Australia or her own provinces." (Manchester Guardian, July 8, 1926.) "Colonial precedents would have justified the refusal to Mr. King had Mr. Meighen been able to form a Government and command a majority in the Commons." (Scotsman, May 11, 1927.) "In the opinion of Lord Byng, . . . Canada was in constitutional usage as in law no more than a Colony, subject to the rules applicable to Newfoundland or an Australian State." ("Responsible

be so, Keith does not explain. The 1926 Imperial Conference included Newfoundland in its list of Dominions, in which the relationship between the Governor and his Ministers was declared to be the same in all essential respects as that between the King and his Ministers. Evatt declines to recognize the validity of any distinction in this context between the Australian States and the Commonwealth, and there seems no reason to dissent from his view. Nor does there seem to be any reason for excluding precedents from the Canadian provinces, unless it can be shown that in any given case the Lieutenant-Governor was acting specifically as a Dominion officer.(1) Keith does not say whether he considers Australian Commonwealth precedents relevant; as there had been three cases of refusal there, one as late as 1909, the omission is curious. Presumably he felt that the grant of "double dissolution" in 1914 rendered the precedents of earlier refusals obsolete: a highly doubtful proposition, as Evatt has shown.

In his latest works (1939 and 1940) Keith appears to have abandoned the whole "status" argument, for he there introduces the Canadian case of 1926 in the context of British practice, and the sweeping assertions and violent denunciations of the earlier works give way to temperate statements that Lord Byng's action was "erroneous", "an unfortunate error of judgment". He is now careful to say that the refusal to Mr. King, followed by the grant to Mr. Meighen, "looked like political partisanship, though in fact it was not." The effect of this last statement, presumably a belated attempt to make amends for the aspersions on Lord Byng's public

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Government in the Dominions", 1928 ed., p. 146.) Whether Lord Byng's actions really showed that he thought anything of the sort is discussed below, pp. 390-399.

(1) See above, pp. 5-8.

character in 1928, is unfortunately somewhat marred by the footnote reference which accompanies it:"Responsible Government in the Dominions", 1928 edition, pp. 146-152; precisely the passage in which the unbridled accusations of partisanship occur!

MacGregor Dawson says that Lord Byng should have granted the dissolution, whether Mr. King made his request while the motion of censure was under debate, or waited till it had been passed. As to the former he observes: "It seems to the present writer that [Mr. King's] advice was indeed bad advice. For as the Premier was at least in difficulties with Parliament, the Leader of the Opposition had a right to see whether he could carry on an alternative government. . . . It was proper that he should have an opportunity to try, in order to save the need for another general election"; but the Governor-General should none the less have granted the dissolution.(1) There is a manifest contradiction here. If Mr. Meighen "had a right to see whether he could carry on an alternative government", then the Governor-General was bound to refuse to let Mr. King deprive him of that right. Constitutional rights are not enjoyed simply by grace of the Prime Minister and during his pleasure. To suggest anything of the sort is to betray a fundamental incomprehendion of the very nature of constitutional government.

Yet elsewhere Dawson actually declares that Lord Byng's refusal of dissolution, though "dictated beyond doubt by the worthiest of motives", showed "an ignorance of constitutional usage which is almost impossible to credit", and that "The whole incident furnished an excellent illustration of the folly of placing an undue reliance upon precedent alone, particularly if it was to be interpreted by one who did not understand what it all really signified."(2) As the situation Lord Byng had to deal

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(1) Dalhousie Review, vol. 6, pp. 334-335.

(2) "Constitutional Issues", p. 66.

with was without precedent, it is a little hard to understand the first part of the last sentence. Presumably it is intended to suggest that Lord Byng based his action on the fact that there had been refusals elsewhere, without considering the differing circumstances in which they took place. This assumption is not necessary; there is no evidence that Lord Byng "relied upon precedent alone"; and the implied charge that he "did not understand what it all really signified", like the charge of "ignorance of constitutional usage", recoils upon the head of the accuser.

Whether, then, we consider Mr. King on June 28, 1926, a defeated or an undefeated Prime Minister, and whether we consider United Kingdom or Dominion conventions applicable (assuming that they were, or are, different), there is the strongest ground for saying that, in the circumstances of June 28, 1926, refusal of dissolution was perfectly constitutional, and indeed that to grant dissolution in such circumstances would have represented "a triumph over, not a triumph of, the electorate", a dereliction of duty on the part of the Governor-General, and a perversion of his office for partisan purposes.

There were, in fact, at least two plain and cogent reasons for refusal. (a) Mr. King was asking for dissolution while a motion of censure against his Government was under debate in the Commons. The effect would have been to "choke and strangle Parliament" and prevent it from pronouncing the judgment to which the country had an absolute right. (b) Mr. King was seeking to appeal from defeat in a newly elected House, elected under his own auspices,(1) and despite the fact that there was no great issue of public policy at stake. Either of these reasons alone(2) would have been sufficient to justify refusal, on any theory of a <u>parliamentary</u> Constitution, any theory which would not reduce Parliament to impotence. Together they were irresistible.

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(1) And in response to his appeal for the decisive majority which, as of September 5, 1925, he considered indispensable.
(2) And, as we have seen, there were plenty of others.

CHAPTER VI

The Canadian Constitutional Crisis of 1926 (II)

(a) The Constitutionality of the Refusal in Relation to Mr. Meighen's Ability to Carry on with the Existing House

The second main question raised by the events of June 1926 is, did the constitutionality of the refusal of dissolution depend on Mr. Meighen's ability to carry on with the existing House of Commons? This question must be carefully distinguished from the other, which we have already considered: did the constitutionality of the refusal depend on whether there was a chance of Mr. Meighen's being able to carry on with the existing House? What we have to deal with here is rather a theory propounded by Mr. King in his policy speech of July 23: "I am prepared to say that there may be circumstances in which a Governor-General might find subsequent justification(1) 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 of the refusal of dissolution, 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. Clearly, any such possibility was not the case in the present instance."(2)

The phrase about "compliance with all constitutional obligations" was no doubt intended to refer to the Government of Ministers without portfolio, and will be dealt with presently. The rest of the passage need not detain us long. It seems to imply that a refusal which was unconstitutional could acquire a sort of posthumous constitutionality if it turned out later that the leader of another party could actually carry on with

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(1) Italics mine.

(2) Quoted in Keith, "Speeches and Documents on the British Dominions", pp. 153-154.

the existing House, but that if it turned out he could not, the unconstitutionality of the refusal would remain unpurged. As this is not a self-evident proposition, and Mr. King offers in its support neither authority nor argument, it seems unnecessary to discuss it further. It is, of course, quite another matter to argue, as distinguished authorities do, that when it turned out that Mr. Meighen could not carry on with the existing House, then he was not entitled to a dissolution, and the Governor-General should have recalled Mr. King.(1)

(b) The Constitutionality of the Refusal in Relation to the Constitutionality of the Government of Ministers without Portfolio.

The third main question is, did the constitutionality of the refusal depend on the constitutionality of the Government of Ministers without portfolio? This is not quite so simple. Mr. King, in the House of Commons, contended that if the responsibility for the refusal could be assumed only by a Government which was unconstitutional (as he contended Mr. Meighen's was), then the refusal itself was unconstitutional ab initio. The argument might be stated thus: The Government could not take office till it had been officially approved by the Governor-General; if, when the list of Ministers was presented to him, he saw that the arrangements it embodied were unconstitutional, that the Government proposed was, constitutionally speaking, no Government at all, and if Mr. Meighen said that he could form no other kind of Government, then it would have been clear that there was no chance of forming an alternative Government able to carry on with

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(1) See below, pp. 380-381. It is also another matter to argue that Mr. Meighen's subsequent inability to carry on without a dissolution proved that, on June 28, there was no possibility that he could so carry on. With this confusion of thought we have already dealt.

the existing House, and most, if not all, of the justification which could otherwise be advanced for the refusal would disappear; Mr. Meighen would, in effect, have been confessing that he could not carry on government in the existing House of Commons.

But both the conditions are essential to the argument. If Mr. Meighen could have formed a Government in the ordinary way (and there is little, if any, doubt that he could),(1) then the whole argument falls to the ground. On the other hand, even if he could not have formed a Government in the ordinary way, if the Government of Ministers without portfolio was constitutional, again the whole argument collapses.

(c) The Constitutionality of the Government of Ministers without Portfolio

This brings us to the fourth main question: was the Government of Ministers without portfolio constitutional?

It was by no means unprecedented. In Prince Edward Island, from 1859 to 1863, all office-holders were by law excluded from the Legislature, so that the Cabinet consisted exclusively of Ministers without portfolio. In the same province on April 23, 1872, Mr. R. P. Haythorne, M.L.C., formed a Cabinet consisting exclusively of Ministers without portfolio, which held office for the rest of the session, a period of more than two months. The Premier himself held no departmental office,(2) and two non-members of the Legislature were appointed Colonial Secretary and Attorney-General pro tem. The latter at least was still in office on March 6, 1873, when the Haythorne Government obtained a dissolution.(3)

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(1) See the Progressive Memorandum of June 29 and Mr. Garland's statement of July 5; Dawson, "Constitutional Issues", pp. 85-88.

(2) The office of President of the Executive Council was not recognized by law until 1916 (6 George V, c. 1.)

(3) Journals of the Legislative Assembly of Prince Edward Island, 1872, pp. 9, 19-25, 153-154.

In Newfoundland, when the Kent Government was dismissed, early in 1861, Mr. Hoyles took office as Premier without portfolio, and it was not till October 9, more than seven months later, that he accepted the portfolio of Attorney-General. All his Ministers in the Assembly appear to have been Ministers without portfolio at least till the dissolution which followed the almost immediate defeat of the Hoyles Government in the Assembly; and the various departments, as in Mr. Meighen's temporary Government, appear to have been administered by acting Ministers of departments for some time. Mr. Carter was still only "acting Colonial Secretary" as late as February 14, 1862; there was still an "acting Receiver-General" on February 10, 1862, and an "acting Financial Secretary" as late as December 31, 1861.(1)

In Newfoundland again, in 1874, all the Ministers in the Assembly, including the Premier, were without portfolio throughout the session, and where they administered departments they did so only as acting Ministers.(2)

Again, in 1894, in the same colony, Mr. Goodridge's Government, which took office April 14, consisted of the Premier and six other Ministers, all without portfolio, with five of the six as "acting Ministers" of the various departments. This situation continued till after the second session of the year (August 2-9), during which this Government got Supply and procured the passing of several other bills.(3)

On December 13, 1894, the Goodridge Government gave place to Mr. D. J. Greene's Government, which held office till February 8, 1895. This Government consisted of the Premier and four other Ministers, all without portfolio, with the four as "acting Ministers" of the various departments.

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(1) Journals of the Legislative Council of Newfoundland, 1861, passim; information from an unpublished History of Newfoundland by Sir Alfred Morine, K.C.
(2) Journals of the Legislative Assembly of Newfoundland, 1874, passim.
(3) Journals of the Legislative Assembly of Newfoundland, 1894, first session, pp. 53-54; second session, passim; Royal Gazette, 1894-1895, vol. LXXXVII, no. 16.

Between the opening of the session, December 15, 1894, and the Government's resignation, the Legislature passed a Loan Act, a Currency Act, Acts winding up the colony's two banks, Acts assuming the notes of these two banks, a Seal Fisheries Act, a St. John's Municipal Act (Amendment) Act, an Inland Fisheries Act, and an Act respecting the Election Act of 1889.(1)

Again, in Newfoundland in 1909, the Morris Government, which assumed office March 3, consisted (till April 10) of the Premier and six other Ministers, all without portfolio, with the six as "acting Ministers" of the various departments.(2) During this period the Legislature met for one day, March 30.

In Queensland, on July 20, 1866, Mr. Herbert's entire Government appeared in Parliament simply as Executive Councillors, without portfolio, for the express purpose of avoiding by-elections till after the passing of urgent financial legislation. On July 24, Mr. Herbert's colleagues accepted portfolios and vacated their seats. He himself remained as Premier, without portfolio, till August 7, when he retired.(3)

In New Zealand, from Saturday, October 13, to Monday, October 15, 1877, Sir George Grey and his three colleagues occupied no departmental offices.(4)

In all these cases,(5) the Prime Minister, as well as his colleagues, was without portfolio; so that if there were any ground for considering Mr. Meighen's temporary Cabinet unconstitutional, these other temporary Cabinets(most of which lasted much longer than Mr. Meighen's)

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(1) Journals of the Legislative Assembly of Newfoundland, 1894-1895, pp. 1-49; Royal Gazette, vol. LXXXVII, "Extraordinary" issue.
(2) Royal Gazette, vol. CII, no. 10 and subsequent issues.
(3) Parliamentary Debates (Queensland), 1866, vol.III, pp. 533-572; G.W. Rusden, "Australia", vol.III, p. 599.
(4) Parliamentary Debates (New Zealand), 1877, vol. XXVII, p.iii.
(5) The list is not necessarily exhaustive. Many of the Newfoundland and Australian documents are not available in Montreal, Ottawa or Toronto.

would be even more unconstitutional.

Cabinets in which only a minority, often only a small minority, of the Ministers held portfolios, have been even commoner. In Prince Edward Island, from the establishment of responsible government till 1859, and again from 1863 to 1873, the typical Cabinet was one of three Ministers with, and six without, portfolio,(1) In Mr. Owens' Cabinet (1873 -1876), the Premier and five others held no portfolios, and there were three Ministers with portfolio. The same was true of Mr. Warburton's Cabinet (1897-1898) and Mr. Farquharson's (1898-1901). In Mr. Haszard's Cabinet, from February 1 till November 18, 1908, the Premier and five other Ministers held no portfolios, there were two Ministers with portfolio, and the Attorney-General was outside the House altogether. From November 18, 1908 till May 16, 1911, Mr. Haszard was Attorney-General, and his Cabinet consisted of three Ministers with, and six without, portfolio. The Cabinets of Mr. Davies (1876-1879), Mr. Sullivan (1879-1889), Mr. Palmer (May 16-December 5, 1911), Mr. Mathieson (1911-1917), Mr. Arseneault (1917-1919), Mr. Stewart (1923-1927), Mr. Saunders (1927-1930) and Mr. MacMillan (1933-1935), consisted of three Ministers with, and six without, portfolio, Mr. MacLeod's Cabinet (1889-1891) had three with, and four without, portfolio; Mr. A. Peters' (1901-1908), three with, and five without; Mr. Bell's (1919-1923) four with, and five without; Mr. Lea's (1930-1931) three with, and six or seven without; Mr. Stewart's (1931-1933) four with, and four or five without. It seems to have been only since 1923 that any Prince Edward Island Cabinet has had more Ministers with than without portfolio.(2)

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(1) Journals and Debates of the Legislative Assembly of Prince Edward Island, passim.

(2) Canada Year Book, 1924, pp.75-76; Journals of the Legislative Assembly of Prince Edward Island, 1874, 1877, 1879 (p. 17), 1890, 1891, 1898, 1899, 1902, 1908, 1909, 1912 (pp. 13-14), 1918 (p.2), 1920 (p.10), 1924, 1928, 1930, 1932, 1934, 1936; Royal Gazette, vol. I, no. 19, p.5, and no.22, p.5; vol. IV, no.37; vol. 38, no. 21, p. 77.

In Nova Scotia, the Annand Government (1868-1875) appears to have consisted of three Ministers with, and four without, portfolio; the Hill Government (1875-1878) and the Holmes Government (1878-1882) of three with, and six without; the Pipes Government (August 1882-July 1884) of three with, and five without (including the Premier); the Murray Government (1896-1923) of three with, and five without; the Armstrong Government (1923-1925) of four with, and six without.(1)

In Newfoundland, in 1898, Sir James Winter's Cabinet had three Ministers with portfolio, and four without; in 1899, two with, and four without. In 1901 and 1902, Sir Robert Bond's Cabinet had three with, and six without; in 1903, two with, and five without. In 1928, Sir Richard Squires' Cabinet had four with, and six without, and this seems to have lasted till 1932.(2)

There have also been plenty of Cabinets in which, while most of the Ministers held portfolios, the Premier himself did not; for example, in Tasmania, Mr. Weston (April 25-May 12, 1857 and November 1, 1860-July 22, 1861); Mr. Kennerly (July 30, 1873-1876); Mr. Dobson (August 17, 1891-April 12, 1894); Sir E. N. C. Braddon (April 12, 1894 till at least the end of 1896); Mr. Ogilvie (June 22, 1934-1938); and Mr. Dwyer-Gray (1938-); in New South Wales, Sir Henry Parkes, in January 1887; Sir William Lyne for a short time in 1899; in Ontario, Mr. Blake (December 20-December 30, 1871); in New Brunswick, Mr. Clarke (1915-1916); in Newfoundland, Sir Edward Morris (apparently from 1909 till his retirement, January 3, 1918); in the Australian Commonwealth, Mr. Deakin

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(1) Debates and Journals of the Nova Scotia Legislative Assembly and Legislative Council, 1868 and 1874, passim; Royal Gazette, vol. LXXXIV, no. 19, p.238; vol. LXXXVII, no. 43, p.446; vol. XCI, no.22, p. 214 and no. 32, p. 316; vol. CV, no. 30, p. 332; Canada Year Books, 1924, pp. 76-77; 1932, p. 81 and 1936, p. 90.

(2) Year Books of Newfoundland, 1898 (pp. 18-18B), 1899(p. 18), 1901 (p. 18), 1902 (p. 18), 1903 (p. 17), 1932 (p. 18); Canadian Annual Review, 1928-1929 (p. 98).

(June 8, 1909-April 29, 1910).(1)

A Cabinet of Ministers without portfolio was, however, certainly unprecedented in Britain(2) or in the Dominion of Canada (as distinct from the provinces). But so were a great many other things in this annus mirabilis: Mr. King's claim that he was entitled to a second dissolution on November 5, 1925; his request for dissolution in the circumstances of June 28, 1926; Lord Byng's refusal; Mr. King's abrupt resignation, leaving the country, in his own words, with "no Prime Minister" and "no Government"; his failure to make any arrangements for the completion of the session's business; the circumstances of that failure.(3)

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(1) Journals of the Legislative Assembly of Tasmania, passim; Australian Year Books; Parliamentary Debates (New South Wales), 1899, vol. C, p. 1312; Ontario Gazette, vol. IV, no.51, p. 1491, and no. 52, p. 1521; Ontario Parliamentary Debates, 1871, p. 30; Journals of the Legislative Assembly of Ontario, 1871, pp. 39-42; New Brunswick Gazette, vol. 72, p. 295; Canadian Annual Review, 1909, p. 36; 1917, p. 188; 1918, p. 208.

(2) But note the Duke of Wellington's temporary Government in 1834, and Mr. Balfour's proposed temporary Government in 1913; see below, pp. 376-377.

(3) Todd says that on the resignation or dismissal (italics mine) of Ministers in Britain, the outgoing Cabinet is bound to conduct the ordinary business of the House until its successor is appointed. ("Parliamentary Government in England", 1st. ed., vol. II, pp. 414-416.) Pitt, in 1801, after his resignation, actually moved the House into Supply, and also presented his Budget. In other cases where a change of Government took place during a session, only routine business was transacted in the interval between the resignation or dismissal of one Cabinet and the assumption of office by its successor, but this routine business was dealt with by the outgoing Ministers. In every case where the change took place near the end of a session, the former Cabinet and its supporters facilitated the winding up of the session's business. The precedents of 1885 and 1895 are especially notable, though in these cases an early dissolution was anticipated. When Mr. Cahan taxed Mr. King with having behaved in a manner unprecedented in Britain, Mr. King did not deny it. He merely replied that no British Cabinet had resigned in consequence of a refusal of dissolution. (Commons Debates (Canada), 1926, pp. 5217, 5230-5231.) Such a resignation, however, may be considered equivalent to a dismissal, which is covered by Todd's words. In all the cases of refusal of dissolution in the overseas Empire, the outgoing Ministers appear to have held office till their successors were appointed.
Mr. King (Commons Debates (Canada) 1926, p. 5223) said he was not asked to carry on.

The Legality of the Government of Ministers without Portfolio

The next point is, was the Government of Ministers without portfolio illegal? Mr. King charged that it was, because (he said) the members of the Government had not been validly appointed, were merely "a group of gentlemen not one of whom is a minister of the crown".(1) He declared that "There is not a single contract signed by honourable gentlemen opposite which will stand for an hour in a court of law", that no acts of the Government were "valid in any particular".(2) He insisted: "There are no Ministers opposite."(3) Mr. Garland gave it as the opinion of the Progressives that the Conservative Government of Ministers without portfolio "was not legally capable of functioning either as to the introduction of money bills or estimates or in the letting of necessary contracts."(4) But it is difficult to take these charges seriously.

In the first place, Mr. King's charge runs directly counter to the charge of his own ex-Minister of Justice, that the Ministers without portfolio had automatically vacated their seats by accepting offices of profit under the Crown.(5) Obviously if their appointments were invalid, they were not occupying offices of profit under the Crown and had therefore not vacated their seats; if they had vacated their seats, then ipso facto their appointments must have been valid.

Second, the Liberal motion condemning the Government of Ministers without portfolio is very carefully worded so that it does not commit its authors to any assertion that the Government was illegal: the six members in question have vacated their seats "<u>if</u> they legally hold office as administrators of the various departments"; "<u>if</u> they do not hold such office legally, they have no right to control the business of Government in this House and

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(1) Commons Debates (Canada), 1926, p. 5218. On this, note particularly p. 229, footnote 4.
(2) Ibid., pp. 5228, 5253.
(3) Ibid., p. 5235.
(4) Statement of July 5; Dawson, "Constitutional Issues", p. 87.
(5) Commons Debates (Canada), 1926, p. 5238.

ask for supply".(1) The motion asserts neither that the six members have actually vacated their seats, nor that they do not hold their offices legally. It was presumably meant to suggest that one of the two charges must be true (which, as we shall see, does not necessarily follow);(2) but whatever the intention, it most certainly does not suggest a serene confidence in the charge that the Government was illegal.

Third, the Liberals did not even raise the question of the new Government's legality till after they had moved a new sub-amendment to the Stevens amendment (a sub-amendment which was defeated), and a further sub-amendment had been passed, and the Stevens amendment as amended had been passed, and the main Customs motion as amended had been passed, and a Liberal motion of want of confidence in the Government's fiscal policy had been defeated. The charge of illegality appears to have been an after-thought, produced only after some 98 pages of Hansard had been occupied with other matters.(3)

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(1) Italics mine.
(2) See below, pp. 372-373.
(3) Two statements in the House might be quoted against this generalization. Mr. Robb, speaking on Mr. Rinfret's proposed sub-amendment to the Stevens amendment, June 29, p. 5138 of Hansard, questioned whether a Government "with only one member properly sworn in, the others all acting ministers . . . have any right to make appointments of any kind until they are approv by the people." But this does not seem to be a challenge to the Government legality, only to its constitutionality (in the sense of whether it was in accord with the conventions of the Constitution); and Mr. Robb's words seem clearly to contemplate the possibility that this Government of Ministers without portfolio could acquire the right to make appointments by going before the people and securing their approval. But no lawyer will venture to assert that the mere holding of by-elections, all the other circumstance remaining the same, would confer legality on what would otherwise have been illegal. If Mr. Robb's words are to be strictly construed, therefore, it is impossible to take them as a challenge to the Government's legality. The second statement is Mr. King's. At p. 5138 of Hansard, speaking on the vote of want of confidence in the Government's fiscal policy, he quoted an inaccurate statement of Sir Henry Drayton's that "the government . . . is not yet formed", and described it as "the strongest reason" for voting no confidence. But, Sir Henry to the contrary notwithstanding, the Government had been formed; the ground of Mr. King's argument (whose logical fallacy is discussed below) therefore disappears; and it is at least questionable whether by using this quotation he was committing himself to the proposition that the Government was illegal.

Fourth, the Liberals on June 30 moved a vote of want of confidence in the new Government's fiscal policy. If the Government had no legal existence, it is hard to see how it could have a policy. If it had a policy in which it was possible to declare want of confidence, it must have existed. It is a sheer logical impossibility to vote lack of confidence in the non-existent policy of a non-existent Government.

Fifth, the Liberals, through Mr. Cannon, reserved the right to challenge the votes of the five Ministers who voted in the final division of the session,(1) though they had not raised this question on the preceding divisions since the change of Government. This suggests a greater degree of confidence in Mr. Lapointe's charge that the Ministers were validly appointed and had vacated their seats than in Mr. King's that they were not validly appointed.

Sixth, the opinions of the Deputy Minister of Justice and the Clerk of the Privy Council that each Minister's appointment was perfectly legal and regular(2) have never been seriously challenged.

Seventh, not even Keith, who, as we shall see, denounces in the strongest terms the device of appointing a Government of Ministers without portfolio, acting Ministers of the various departments, suggests that there was anything illegal about it.(3)

Eighth, neither the Liberals nor anyone else attempted to challenge the Government's legality in the Courts. This is the acid test. When George Brown, in 1858, attacked the legality of the "double shuffle", he did not hesitate to carry his attack to the Courts. If Mr. King, in 1926, had as much confidence in the correctness of his charge that the Government of Ministers without portfolio was illegal, why did he not carry the question to the Courts, as Mr. Meighen challenged him to do? (4)

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(1) Commons Debates (Canada), 1926, p.5311.
(2) Ibid., pp. 5227-5228, 5240-5244; for quotations, see below, pp. 354-355.
(3) "Responsible Government in the Dominions", 1928 ed., p. 148.
(4) The challenge is quoted in Ewart, op.cit., p. 198.

The Constitutionality of the Temporary Government

But the Government of Ministers without portfolio may have been legal without being constitutional. The main burden of the attacks upon it is that it was contrary to the conventions of the Constitution. Mr. King called it "a group of gentlemen with no responsibility whatever", "Ministers not one of whom has taken an oath of office".(1) He said that it was unable to "carry on the business of government . . . in the way that it should be carried on, . . . in the manner the country will think right and proper, . . . in a manner befitting the honour and dignity . . . of parliament, . . . in accordance with British traditions, in a manner that would accord with the recognized principles of responsible government."(2) He asked in the House whether "honourable gentlemen opposite pretend to be a responsible ministry?"(3) If this Government could get Supply, "what guarantee have we of future liberty and right in this country?"(4) "If at the instance of one individual a prime minister can be put into office and with a ministry which is not yet formed(5) be permitted to vote all the supplies necessary to carry on the government of Canada for a year, we have reached a condition in this country that threatens constitutional liberty, freedom and right in all parts of the world."(6) In his policy speech of July 23, he asked: "What Prime Minister, what individual in Great Britain, however exalted, or however arrogant, would venture to constitute himself the sole adviser of the Crown, the sole government of the country, for a single day, let alone for a period of two weeks! I will not ask what Prime Minister in England, or anywhere else in the world

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(1) Commons Debates (Canada), 1926, pp. 5216, 5225.
(2) Ibid., pp. 5189-5225.
(3) Ibid., p. 5219.
(4) Ibid., p. 5227.
(5) The sole foundation for this remark is some incautious and inaccurate statements of Sir Henry Drayton's and Dr. Manion's.
(6) Commons Debates (Canada), 1926, p. 5221.

would dare so to offend the sense of honour and dignity of a nation."(1) In his statement of "The Liberal Case", September 1, he added: "Serious as is the issue with respect to the relations of Prime Minister to Governor-General, it pales into relative insignificance when compared with the issue of the relations of Prime Minister to Parliament raised by the actions of Mr. Meighen himself. The supremacy of Parliament, the rights, the dignities, the existence of Parliament have been challenged by the present Prime Minister in a manner that surpasses all belief. Mr. Meighen, when he accepted the office of Prime Minister, undertook, notwithstanding Parliament was in session at the time, to carry on the government of Canada by a ministry that in no sense of the word was a responsible ministry, and by his advice, knowingly, made the Crown, through its representative, a party to this unconstitutional course of procedure. For a period of two weeks including three days during which Parliament was in session, Mr. Meighen did not hesitate to advise His Excellency with respect to all Canada's domestic, inter-imperial and international affairs and to administer all the departments of the Government of Canada without a single Minister sworn to office save himself. He alone was the Government of Canada over that period of time. If that is not anarchy or absolutism in government I should like to know to what category political philosophy would assign government carried on under such conditions. Surely it will not be termed responsible self-government under the British parliamentary system."(2)

After this, Keith's description of the position is almost an anti-climax: "a farcical Ministry, a departure from constitutional usage", "a wholly discreditable piece of tactics, . . . the most deplorable piece

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(1) Quoted in Keith, "Speeches and Documents on the British Dominions", pp. 156-157.
(2) Quoted in Dawson, "Constitutional Issues", pp. 89-90.

of jugglery yet recorded as regards a Dominion Constitution".(1)

Whether in the form presented by Mr. King, or in the rather milder form of Keith, however, these are serious charges. How much substance is there in them?

The Canadian Cabinet has no legal existence as such. It is in law only a committee of the King's Privy Council for Canada, a body created by the British North America Act, section 11; and Orders-in-Council always refer to the Cabinet as "the committee of the Privy Council". Every Cabinet Minister, therefore, whether with or without portfolio, must be a member of the Privy Council. In practice, normally, most of the Ministers are Ministers with portfolios, heads of the departments of government. In law it is not necessary that a Minister should be a member of either House of Parliament; in practice, he must either have a seat in one of the two Houses or obtain a seat within a short time after his appointment.

The differences between the Cabinet formed by Mr. Meighen on June 28-29, 1926, and other Canadian (Dominion) Cabinets prior to that date were six:

1. It was about half the normal size. Instead of 15 or 16 members, it had seven (and the officially announced intention was to increase this to eight as soon as Mr. Bennett, who had been away in Alberta, returned to Ottawa).

2. It had no Minister in the Senate. Early Canadian Cabinets usually had two or three, but for some years before 1926 the normal practice had been to have only one (and that one a Minister without portfolio).

3. All its members except one (the Prime Minister) were Ministers without portfolio, acting Ministers of the various departments.(2)

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(1) "Responsible Government in the Dominions", 1928 ed., p. 148.
(2) During the discussions of this question much confusion was caused

Ordinarily only one or two Ministers are without portfolio. These sometimes serve as acting Ministers of departments during the temporary absence of the Minister of the Department concerned, and occasionally when a department is without a Minister.(1)

4. None of its members except the Prime Minister took any oath of office as Minister of a department.

5. None of its members except the Prime Minister received any salary.

6. None of its members except the Prime Minister vacated his seat in the House of Commons and prepared to fight a by-election.

There was also some question about the validity of the Orders-in-Council appointing the Ministers without portfolio acting Ministers of the various departments, but this is subsidiary to point 4 above and will be discussed in connection with it.

As neither the first nor the second point seems to have been made the ground for suggesting that the Government was unconstitutional, neither calls for discussion here.

The third point, except in its relation to the fourth, fifth and sixth, did not figure prominently in the debate, though the Liberals seem to have felt that it contributed in some way to the alleged unconstitutionality. No one, however, made any attempt to say what precise proportion of Ministers without, to Ministers with, portfolio would be unconstitutional, and what proportion would be constitutional. In view of the precedents already noted, any such attempt would have been doomed to failure.

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by failure to distinguish between the terms "Minister" and "Minister of a department". Mr. Meighen's Ministers without portfolio were "Ministers", not "acting Ministers"; they were not "Ministers of departments", but "acting Ministers of departments". See below, pp. 354, 362,
(1) For examples, see below, pp. 362, 364. /366, 370, 372-373.

The fourth point bulked large in the debate. In Canada every Cabinet Minister, with or without portfolio, must be a Privy Councillor. It follows that every Cabinet Minister must take an oath as a Privy Councillor. This oath is required by law. Appointment to the Privy Council is for life. It is therefore not necessary for an ex-Minister, on appointment to a new Cabinet, to take his Privy Councillor's oath a second time. A Minister with portfolio takes also a second oath, as Minister of the department concerned, and this oath of course is taken afresh each time a Minister with portfolio assumes office as such. This oath, however, is not required by any Act, regulation or order. It is purely customary. No Minister without portfolio, naturally, is required either by law or custom to take an oath as Minister of a department, for the simple and sufficient reason that he is not Minister of any department; and for at least the thirty-five years prior to 1926 the Clerk of the Privy Council could find no record of any Minister without portfolio taking any oath whatever except his Privy Councillor's oath, and no record of any Minister appointed acting Minister of a department taking any oath whatever in respect of that department.(1)

All of Mr. Meighen's Ministers without portfolio except Mr. W. A. Black had taken their Privy Councillors' oaths years before and had no need to take them again. Mr. Black was sworn of the Privy Council in the same way as all other new Privy Councillors.(2) None of Mr. Meighen's Ministers without portfolio, all of whom were also acting Ministers of departments, took any oath as Minister of a department because none of them was Minister of a department. They were only acting Ministers of departments; hence neither law nor custom required them to take any oaths

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(1) Commons Debates (Canada), 1926, pp. 5240-5241; Mr. Guthrie, acting Minister of Justice, quoting the Clerk of the Privy Council. His statements were not disputed.
(2) This also is not disputed.

but those of Privy Councillors, which all of them had taken. The Clerk of the Privy Council assured Sir George Perley that all the appointments had been made in exactly the same way as had been the custom in such cases for years past.(1)

A subsidiary point arises here. How were the six Ministers without portfolio appointed acting Ministers of the various departments? By Order-in-Council. To pass an Order-in-Council, a quorum of four Privy Councillors is required. Mr. King contended that the four must all be Ministers who had taken oaths of office as Ministers of departments.(2) But neither in law nor practice does there appear to be any foundation for this contention.

As to the law, we have the statement of the Deputy Minister of Justice: "With regard to the question whether a meeting of members of the Privy Council, summoned upon the advice of the Prime Minister, has power to appoint acting ministers of departments, I am of opinion that this question should be answered in the affirmative. It is a well-known principle of constitutional government in Canada that the Governor-General may act upon the advice of or with the advice and consent of or in conjunction with the Privy Council of Canada or any members thereof. I know of no provision which creates any limitation upon the exercise of this power in connexion with the appointment of acting ministers, and I am of opinion that the orders in council in question were validly passed and are as effective as if made upon the recommendation of any committee of council."(3) Even on the point of law, of course, the word of the Deputy Minister of Justice is not conclusive. It is not a judicial decision. But (a) Mr. King's own ex-Minister of Justice treated the Orders-

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(1) Commons Debates (Canada), 1926, pp. 5227-5228.
(2) Ibid., pp. 5225, 5228.
(3) Ibid., p. 5244; Mr. Guthrie, quoting the Deputy Minister.

in-Council as valid;(1) (b) no lawyer in the House challenged the Deputy Minister's opinion; (c) Mr. King did not carry the matter to the Courts. The Deputy Minister's opinion must therefore be regarded as very nearly conclusive on the point of law.

As to practice, Mr. King asked several times whether the members of the temporary Government thought that any four members of the Privy Council (for example, Mr. King himself and three of his ex-Ministers) could walk into the Council Chamber and pass Orders-in-Council?(2) The answer is of course, no. For one thing, such Orders would not receive the approval of the Governor-General, and would therefore be null, void and of no effect. More important, the decisive factor as a matter of constitutional practice (as Mr. Guthrie, Dr. Manion and Mr. Cahan all pointed out in reply to Mr. King(3)), is whether the Privy Councillors who undertake to transact the business of Council have been invited by the Prime Minister to enter the Council Chamber. In <u>law</u>, any Privy Councillor, even one who has never been a member of any Cabinet, is entitled to enter the Council Chamber and take part in the deliberations; in <u>practice</u>, only those Privy Councillors may enter whom the Prime Minister has invited. To be invited it has never been necessary to hold a portfolio nor to have taken the customary oath of Ministers who hold portfolios.(4)

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(1) Ibid., p. 5238; Mr. Lapointe.
(2) Ibid., p. 5226.
(3) Ibid,, pp. 5215, 5226-5227.
(4) It may be added that neither in Britain nor in Canada does a particular office necessarily carry Cabinet rank. In Britain the First Commissioner of Works and the Chancellor of the Duchy of Lancaster are usually (but not always) in the Cabinet; the Postmaster-General and the Minister of Transport are usually not in the Cabinet; the Attorney-General is occawionally in the Cabinet. In Canada, from 1892 to 1895 the Controllers of Customs and Inland Revenue were not in the Cabinet; from December 17, 1895, to the fall of the Tupper Government in July 1896 they were in the Cabinet; from July 13, 1896 to June 20, 1897, they were not in the Cabinet. The Solicitor-General of Canada was not in the Cabinet from 1892 to 1915; he was in the Cabinet from October 2, 1915 till August 25, 1917; he was not in the Cabinet from October 4, 1917

Mr. King was very emphatic that when he formed his Government, "not one member . . . walked into the council chamber until he had taken the oath of office".(1) If this refers to the Privy Councillor's oath, it is of course equally true of the members of Mr. Meighen's temporary Cabinet. If it refers to the customary oath taken by a Minister of a department, it is a slip of the tongue, for Mr. King's three Ministers without portfolio could have taken no such oath, and according to the then Clerk of the Privy Council can have taken no oath of any kind except their Privy Councillors' oaths, exactly as with Mr. Meighen's Ministers. If the rest of Mr. King's Cabinet were sworn in as Ministers of departments and then entered the Council Chamber and proceeded to pass Orders-in-Council advising "that a commission do issue appointing"(2) each of them Minister of the department of which he had already been sworn Minister, the procedure was certainly extraordinary, and probably unique in Canadian political history.

In the case of the first Dominion Cabinet the offices were constituted(3) and the appointments made by a single Order-in-Council, P.C. 2 of July 1, 1867, passed on the advice of "the Committee" of the

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to July 5, 1919; he appears to have been in the Cabinet from July 5, 1919 till Jan. 24, 1920; he was not in the Cabinet from September 5, 1925 till June 28, 1926; he was not in the Cabinet from August 23, 1926, till the resignation of the Meighen Government, September 1926; he was in the Cabinet from September 25, 1926 till the office was left vacant. In short, in both Britain and Canada, whether the holder of a particular office is in the Cabinet depends on whether the Prime Minister invites him. If he is summoned to the Cabinet, he must be sworn of the Privy Council. But, as in the case of Hon. G. A. Fauteux, Solicitor-General of Canada in 1926, a man may hold an office which has sometimes carried Cabinet rank, may also be a Privy Councillor, and still not be a member of the Cabinet. It is the Prime Minister's summons which is decisive.

(1) Commons Debates (Canada), 1926, p. 5228.
(2) For the form of appointment used in 1921, see below, p. 360.
(3) In virtue of the authority conferred by the British North America Act, section 131.

Privy Council on the recommendation of "the Senior Member of the Privy Council". Clearly this Order must have been passed by a committee not one of whose members had taken any oath as Minister of a department. The departments did not come into existence till the Order was passed. In 1873 and 1878 there were apparently no Orders-in-Council appointing Ministers to departments.(1) In 1896, when Sir Wilfred Laurier formed his Cabinet, the Order-in-Council appointing him President of the Privy Council, dated July 11, said in part: "The committee of the Privy Council, on the recommendation of the Honourable Wilfred Laurier, the Prime Minister, advise that a commission do issue appointing the Honourable Wilfred Laurier . . . to be President of the Privy Council, and that, upon the said Honourable Wilfred Laurier taking the prescribed oath or oaths of office,(2) he do assume the functions of President of the Privy Council."(3) Plainly, then, at the time this Order-in-Council was passed, Sir Wilfred had not taken any oath as President of the Privy Council. Furthermore, none of his colleagues took any oath as Minister of a department till July 13; and on July 11 the only members of Sir Wilfred's Cabinet-to-be who were Privy Councillors were the Prime Minister himself, Sir Richard Cartwright and Sir Richard Scott.(4) The Order appointing Sir Wilfred President of the Privy Council would therefore appear to have been passed by a committee of not more than three Privy Councillors, not one of whom had taken any oath as Minister of a department. The Orders appointing Mr. Meighen President of the Privy Council and Secretary of State for External Affairs and appointing the other Ministers acting Ministers of various departments were passed by a committee of seven Privy Councillors, not one of whom had taken any oath as Minister of a department. If the

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(1) It appears that Orders-in-Council are not legally necessary for these appointments; Mr. Guthrie, in Commons Debates (Canada), 1926, p. 5242. This statement was not challenged.

(2) Italics mine.

(3) Quoted by Mr. Guthrie, Commons Debates (Canada), 1926, p.5242.

(4) Canada Gazette, 1896, vol. 30, pp. 103-104, 157, 435.

Orders-in-Council appointing Mr. Meighen to his portfolios and his Ministers acting Ministers of departments were unconstitutional, so also, and for the same reason, was the Order appointing Sir Wilfred President of the Privy Council in 1896.(1)

Indeed, if Mr. King's views on this matter are correct, all the subsequent Orders-in-Council passed by Sir Wilfred's Government during its whole fifteen years of office, including the Order appointing Mr. King Minister of Labour, were also unconstitutional. For the Orders appointing the other Ministers in 1896 were in the same form as the one appointing Sir Wilfred President of the Privy Council; all of them set forth that, upon the Privy Councillor in question taking the prescribed oath or oaths as Minister of the department concerned, he would assume the functions of Minister of that department. In other words, every one of Sir Wilfred's original Ministers with portfolio must have been appointed by a committee of Council of which only one member, the Prime Minister, had previously taken any oath except his Privy Councillor's oath.(2) Subsequent Orders-in-Council passed by a Cabinet of whose members with portfolio only the Prime Minister had been "constitutionally" appointed (and even he only as Prime Minister, not as President of the Privy Council) could not be "constitutional" either. The logical consequences of Mr. King's theory on this point are therefore a good deal more far-reaching than he can have realized when he propounded it.

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(1) As a quorum of the Privy Council was the same in 1896 as in 1926, it would seem that Sir Wilfred's appointment as President of the Privy Council was, on Mr. King's theory, even more unconstitutional.

(2) P.C.'s 2697 et seq., 2712, 2723 of 1896. Sir Wilfred Laurier, Sir Richard Cartwright and Sir Richard Scott had presumably taken oaths as Ministers of departments when they were members of Mr. Mackenzie's Cabinet; but that of course is not relevant here. Sir Henry Drayton, Mr. Guthrie, Mr. Stevens and Dr. Manion had also taken oaths as Ministers of departments when they were members of earlier Cabinets.

The manner of appointment in 1911 was as follows. By P.C. 2419, October 10, 1911, Mr. Borden advised his own appointment to the Privy Council. By P. C. 2420 he advised the appointment to the Privy Council of such other members of his prospective Cabinet as were not already Privy Councillors. By P. C.'s 2421-2435, "the Committee of the Privy Council" thus constituted advised "that a Commission do issue appointing" each of the new Ministers to whatever department Mr. Borden had assigned to him. In these Orders there is no mention of oaths of any kind. Clearly P.C.'s 2421-2435 were passed by a committee not one of whose members had taken any oath as Minister of a department.

On December 29, 1921, by PC. 4703, Mr. King advised the appointment to the Privy Council of such Ministers-designate as were not already Privy Councillors. By P.C.'s 4704-4719, "the Committee of the Privy Council" advised "that a commission do issue" and so forth, in exactly the words used in 1911.

On July 13, 1926, when Mr. Meighen's Ministers were appointed to departments, the same form of words was used.

On September 25, 1926, by P.C. 1449, Mr. King advised the appointment to the Privy Council of such Ministers-designate as were not already Privy Councillors. By P.C.'s 1450 and 1452-1466, "the Committee of the Privy Council" advised the appointments to departments in the form of words used in 1896. In this case, therefore, as in 1896, the Orders were passed by a committee not one of whose members had taken any oath as Minister of a department.

On August 7, 1930, by P.C.'s 1926-1928, Mr. Bennett advised the appointment to the Privy Council of all such Ministers-designate as were not already Privy Councillors, and of himself as President of the Privy Council, Secretary of State for External Affairs, and Minister of Finance. By P.C. 1929, he then proceeded to advise "that a commission

do issue" appointing all the other Ministers to their departments. There is no mention of oaths or of "the committee of the Privy Council".

On October 23, 1935, by P.C. 3371, Mr. King advised "that a commission do issue appointing the Right Honourable W. L. Mackenzie King President of the Privy Council and Secretary of State for External Affairs." There is no mention of the "committee" or of any oath or oaths. By P.C. 3372 he then advised the appointment to the Privy Council of such Ministers-designate as were not already Privy Councillors. By P.C. 3373 he then advised "that a commission do issue" appointing the various Ministers to the departments assigned to them, "and that upon the above-mentioned gentlemen having taken the prescribed oath or oaths of office, they do assume the functions of their respective offices". There is no mention of "the committee of the Privy Council".

In neither 1930 nor 1935, therefore, would there appear to have been a quorum of Council present to pass the Orders appointing Ministers to departments; the appointments were apparently made on the advice of the Prime Minister alone.(1)

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(1) Appointment to departmental office by a Council of whose members at most only one holds departmental office appears to be the usual practice in the provinces also. In Prince Edward Island in 1876, 1911 (twice), 1923 and 1936, in Nova Scotia in 1878, 1882 (twice) and 1896, in Manitoba in 1887, 1888 and 1900 (twice), in British Columbia in 1900, 1902 and 1915, and in New Brunswick in 1914, 1917 (twice) and 1923, the appointments to departmental office were made by Cabinets not one of whose members held any departmental office. In Prince Edward Island in 1891, 1927, 1931 and 1933, and in British Columbia in 1916, only the Premier held departmental office when the other portfolios were assigned. In British Columbia in 1903, the Cabinet was appointed piecemeal. The Premier, Mr. McBride, was appointed Member of the Executive Council on June 1, and Captain Tatlow on June 2. The two then proceeded to appoint Mr. McBride Commissioner of Lands and Works and Captain Tatlow President of the Executive Council, June 2. Other Ministers were appointed June 4 and 8. See Journals of the Legislative Assembly of Prince Edward Island, 1891, 1912, 1924, 1928, 1932, 1934, 1936; Royal Gazette (Prince Edward Island), vol. IV, no. 37, and vol. 38, no. 21; Royal Gazette (Nova Scotia), vol. LXXXVII, no. 43, p. 446; vol. XCI, no. 22, p. 214, and no. 32, p. 316; and vol. CV, no. 30, p. 332; Manitoba Gazette,

Mr. King, as we have seen, also contended, if only by implication, that a Minister without portfolio, acting Minister of a department, had no right to ask for Supply. But in 1900, Hon. J. C. Sutherland, Minister without portfolio in Sir Wilfred Laurier's Cabinet, and acting Minister of the Interior, asked and obtained Supply, on June 1, 4, 8, 11 and 12. (1) True, there was at that time a Minister of the Interior, who was absent because of illness. But in Mr. King's own Cabinet, from April 28 to August 16 or 17, 1923, Hon. E. M. MacDonald, Minister without portfolio, and never up to that time Minister of any department, was acting Minister of National Defence, and on June 29, 1923, he asked and obtained Supply.(2) It is not recorded that "liberty and right" in Canada, or "constitutional liberty, freedom and right in all parts of the world" suffered any injury.

The fact is, of course, that an acting Minister of a department has all the powers and all the obligations of a Minister of that department while he is so acting (save only, in 1926, that he did not, by accepting the position of acting Minister, vacate his seat), and can ask for Supply with the same authority. In fact a man who is not a Minister of a department at all, nor acting Minister of a department, can conduct the estimates of that department in the House, and on different occasions has done so.

Nor is this true only in the Dominion of Canada. In the old Province of Canada, indeed, in 1848, just after the formation of the

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vol. XVI, no. 53, pp. 1883-1884; vol. XVII, pp. 48-49; vol. XXIX, no 2, pp. 17-18, and no. 44, pp. 537-538; British Columbia Gazette, vol. XL, no. 9, p. 384; vol. XLII, extra, October 25, 1902, p. 2165; vol. LV, no. 50, p. 3403; and vol. LVI, no. 48, p. 2498; New Brunswick Gazette, vol. 72, p. 295; vol. 75, pp. 24 and 67; and vol. 81, p. 29.

(1) Commons Debates (Canada), 1900, pp. 6512, 6535-6536, 6682-6691, 7058-7077, 7199, 7281-7303.

(2) Commons Debates (Canada), 1923, vol. I, p. iii, and pp. 4635-4638; Canada Gazette, 1923, vol. LVI, p. 4612.

Baldwin-Lafontaine Government, when all the Ministers were absent from the House seeking re-election, Mr. Boulton, who was not a Minister at all, asked and obtained Supply.(1) The same thing happened in 1862, when Mr. Loranger asked and obtained Supply for the Sandfield Macdonald-Sicotte Government, and furthermore conducted Government business in Committee of Ways and Means.(2) In Prince Edward Island, in 1872, Mr. Haythorne's Government, without a single Minister with portfolio, asked and obtained Supply, and conducted Government business in Committee of Ways and Means.(3) (Necessarily, also, the same had been true throughout the period 1859-1863, when all Ministers with portfolio were excluded from the House.) In Victoria, in 1868, on the formation of a new Government in the midst of a session, Mr. Higinbotham, vice-president of the Board of Lands and Works, without salary, asked and obtained Supply while the Ministers with portfolio were absent seeking re-election.(4) In 1887 and Henry Parkes and Sir New South Wales, in 1899, Sir William Lyne, vice-presidents of the Executive Council and Prime Ministers, without salary, asked for and obtained Supply.(5) In Newfoundland in 1874 a Government consisting exclusively of Ministers without portfolio, with only acting Ministers of departments, had no difficulty in obtaining Supply and conducting all other Government business throughout the session.(6) In 1894, Mr. Goodridge's Government, consisting exclusively of Ministers without portfolio, with only acting Ministers of departments, secured Supply and conducted several bills safely through the House in the session of August 2-9.(7)

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(1) Journals of the Legislative Assembly, 1848, March 16, 20, 21; pp. 52, 67 and 69.
(2) Journals of the Legislative Assembly, 1862, May 30, June 3 and 5; pp. 113, 140-144, 150-152, etc.
(3) Journals of the Legislative Assembly, 1872, April 27 and 29; pp. 19-25.
(4) Parliamentary Debates (Victoria), Vol. 6, pp. 601, 610.
(5) Parliamentary Debates (New South Wales), vol. C, pp. 1312, 1345.
(6) Journals of the Legislative Assembly, passim, and above, pp. 28-29.
(7) Ibid, passim.

In the session of 1894-1895, a Government without a single Minister with portfolio conducted through the House four money bills and six other important bills.(1) In Ontario, in 1871, Mr. Blake, Prime Minister without portfolio, asked for Supply for the Christmas holiday period and got it.(2) In British Columbia, in 1903, Mr. Tatlow, President of the Executive Council (evidently without salary), took office June 2, and obtained Supply June 3 and 4, with no Ministers with portfolio in the House.(3)

No one in the debates in 1926 seems to have mentioned any of these cases. Members of the Government did point out, however, that Senator Dandurand, Minister without portfolio in Mr. King's Government, had been appointed acting Minister of Justice, August 27, 1923, in the temporary absence of the Minister; that Hon. H. B. McGiverin, Minister without portfolio in Mr. King's Government, had been appointed acting Secretary of State, November 26, 1924, in the temporary absence of the Minister; and that Mr. MacDonald had been a Minister without portfolio, acting Minister of a department which had at the time no Minister.(4) Mr. Cannon, ex-Solicitor-General, replied: "We had at that time in Canada a regularly constituted government. . . . When Senator Dandurand was acting Minister, when Mr. MacDonald was acting Minister . . . their colleagues in the then government were in the House of Commons to answer for their acts."(5) The theory seems to be that Ministers without portfolio, acting Ministers of departments, are in some way constitutionally inferior to Ministers with portfolio; that Ministers without portfolio

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(1) Ibid., pp. 16-20, 23-24, 26-27, 31, 35-36, 40, 42, 43, 47.
(2) Journals of the Legislative Assembly, pp. 39-42.
(3) British Columbia Gazette, vol. XLIII, no. 23, p. 1148; no. 24, pp. 1201, 1208; Journals of the Legislative Assembly, 1903, pp. 69-82, 83-86.
(4) Commons Debates (Canada), 1926, pp. 5240-5241.
(5) Ibid., p. 5247.

are not responsible Ministers and cannot answer for their acts; that Ministers with portfolio must assume a sort of vicarious responsibility and answer for their inferior colleagues. It is a theory which has at least the virtue of novelty; but no one has attempted to suggest that there is any warrant for it in the procedure of either Cabinets or Parliaments. None the less, this is one of the theories which appear to underlie Mr. King's repeated charges that Mr. Meighen's temporary Government was not "responsible".

Mr. Cannon's theory would in fact prove a great deal too much. For there was, in his sense, no "regularly constituted government", there were no Ministers with portfolio in the Commons, in Prince Edward Island from 1859 to 1863, or for most of 1872; in Newfoundland for most of 1861 and 1874, for ten months in 1894-1895, and for more than 5 weeks in 1909; in Queensland for three days in 1866; and in New Zealand for two or three days in 1877. Again, on Mr. Cannon's showing, the Prince Edward Island Cabinet for the first eighty years of its history was rarely more than one-third responsible, and apparently never until 1935 as much as half responsible; the Nova Scotia Cabinet from 1868 to 1925 was less than half responsible except for a few months in 1882 and from 1884 to 1896; and Newfoundland Cabinets have been at various times only two-sevenths, three-sevenths, one-third and two-fifths responsible. Most extraordinary of all, it would follow from Mr. Cannon's theory that in a large number of cases the Prime Minister himself was not responsible, though his junior colleagues were; that his colleagues with portfolio had to "answer for [his] acts".

The whole notion has been decisively repudiated at least twice (apart from anything said in the course of the 1926 controversy): by Mr. Herbert in Queensland in 1866, and by Blake in Ontario in 1871. Mr. Herbert (formerly Gladstone's private secretary, and later permanent

Under-Secretary of State for the Colonies) insisted that his Government (in which, be it remembered, not one member held any office whatsoever) was "a thoroughly responsible Government. When His Excellency has his responsible advisers in the Council they are responsible to him and to the country."(1) Todd endorsed this view.(2) Blake was even more explicit: "It was argued that he was not responsible because he did not hold a Departmental office. That was a confusion of ideas. His responsibility as a Minister of His Excellency depended not upon his holding any Departmental office, but upon his being a member of His Excellency's Council."(3)

The other theory which underlies the charges that the temporary Government was not "responsible" has to do with points 5 and 6 above. As we have already noted, under the law as it then stood, any member of the House of Commons accepting a portfolio automatically vacated his seat, not because he had become a Minister, but because he had accepted "an office of profit(4) under the Crown". Before he could return to the House, he had to submit to a by-election. Mr. Meighen's Ministers, being Ministers without portfolio, had not accepted offices of profit under the Crown,(5) for Ministers without portfolio never receive any salary. Hence their seats were not vacant and no by-elections were necessary. Mr. King, however, contended that as they had not submitted to by-elections, they could not constitutionally conduct the business of government in the

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(1) Parliamentary Debates (Queensland), 1866, vol. III, p. 563.
(2) "Parliamentary Government in the British Colonies", 2nd. ed., pp.60-61.
(3) Ontario Parliamentary Debates, 1871, p. 31. Italics mine.
(4) Italics mine.
(5) The suggestion that they were receiving, or entitled to, salaries, belongs to Mr. Lapointe's argument that they were validly appointed Ministers of departments, and had therefore vacated their seats. If this is correct, most of Mr. King's argument collapses: the Ministers were Ministers with portfolio, and the Cabinet differed from other Cabinets only in having about half the usual number of members, in each Minister having several portfolios, and in all but one of its members not having taken the customary oath required of Ministers

House. This view he sets forth in two passages, both deserving of careful examination.

First: "I venture to say that my honourable friend (Mr. Cahan) will never be able to quote a precedent in British history where a minister pretending to administer a department of government ever came into parliament while parliament was in session without having resigned his office of emolument under the crown (1) in order to go back to the people for re-election. If he takes an office of profit under the crown he must obtain the approval of the people. . . . He has got to go back to the people and receive endorsation, and if he does not get that endorsation he is not able to act as a member of the ministry."(2)

As none of Mr. Meighen's Ministers had taken an office of emolument under the Crown, the whole of this argument is irrelevant. But the challenge to quote a precedent from British history "where a minister pretending to administer a department of government ever came into parliament while parliament was in session without" having vacated his seat"in order to go back to the people for re-election" was a rash one. Mr. Cahan might have quoted several dozen such precedents. Mr. King was apparently unaware of the British Re-election of Ministers Acts, 1915 and 1919. Under the former, all ministerial by-elections were abolished for the duration of the war; under the latter, members taking office within nine months of the issue of the Proclamation summoning a new Parliament did not vacate their seats. Accordingly, there were no ministerial by-elections when the first Coalition was formed, in 1915; when the second Coalition was formed, in 1916; when Mr. Baldwin's first Government was formed, in 1923; when Mr. MacDonald's first Government was formed, in 1924; nor when Mr. Baldwin's

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with portfolio.

(1) This is a slip of the tongue for "without having vacated his seat".

(2) Commons Debates (Canada), 1926, p. 5233. The final statement presumably means "not able to act as a member of the ministry in the House".

second Government was formed, in 1924. In all these cases, the new Ministers did not "go back to the people for re-election"; administering departments, they "came into parliament while parliament was in session" without having vacated their seats or submitted to by-elections.

These instances are not, of course, relevant to the actual situation in Canada in 1926, for the legal position was different. But they are every bit as relevant as Mr. King's challenge, and they are certainly relevant to that challenge itself, and to the quite unqualified assertion that in Britain a member of Parliament accepting a ministerial office of profit under the Crown vacated his seat and must submit to a by-election.

By a curious irony of history, at the very moment Mr. King was speaking (June 30), ministerial by-elections were in process of being completely abolished in Britain. The Re-election of Ministers Act (Amendment) Act, 1926, 16-17 George V, c. 19, passed the Commons June 11, nineteen days before Mr. King's speech; received second reading in the Lords June 22, eight days before Mr. King's speech; received third reading in the Lords July 13, and royal assent July 15.(1)

The second passage in which Mr. King sets forth his theory is a good deal clearer, and avoids the unlucky reference to British precedent: "No minister is entitled to put through estimates or to attempt to do anything in this House who, after assuming responsibility as a minister, has not resigned his seat,(2) gone back to the people for re-election, been re-elected and returned to this House. . . . Does any honourable member think that the constitution ever contemplated a subterfuge which

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(1) Parliamentary Debates, Fifth Series; Commons, vol. 196, p. 1933; Lords, vol. 64, pp. 530 and 1052.
(2) The seat became vacant automatically, under the Act. The member did not have to resign.

would allow acting Ministers to do these things without complying with the qualifications laid down for ministers?"(1)

Whatever any honourable member may have thought, there can be no doubt that the Constitution contemplated the possibility of having a member of Parliament aasume office as a responsible Minister, and a Minister with portfolio at that, without vacating his seat and being re-elected, for the Statutes plainly said so. By an Act of 1884, embodied in the Revised Statutes of Canada, 1927, as section 11 of chapter 147, Parliament provided that no member accepting a ministerial office should vacate his seat "if, by his commission or other instrument of appointment, it is declared or provided" that he does so "without any salary, fees, wages, allowances, emolument or other profit of any kind attached thereto". If Mr. Meighen had taken advantage of this section, his Ministers' position would have been absolutely unassailable. No one in the world could have questioned their right "to put through estimates or to attempt to do anything in this House" without resigning their seats or going back to the people for re-election. Mr. King's statement is therefore incorrect.(2)

If it be answered that in fact Mr. Meighen did not take advantage of this section, and that his Ministers were simply acting Ministers of departments, the question then arises: what about Mr. E. M. MacDonald, Mr. King's own colleague, acting Minister of National Defence in 1923? He "put through estimates" and performed all the other functions of a Minister in the House from April 28, 1923, till the end of the session. He did not vacate, or resign, his seat. He did not go "back to the people for re-election" until after the session was over and he had accepted

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(1) Commons Debates (Canada), 1926, p. 5253.
(2) Curiously enough, Mr. Lapointe made this section of the Senate and House of Commons Act the basis of an elaborate argument in this very debate (Commons Debates (Canada), 1926, p. 5238); but no one seems to have noticed its bearing on this particular contention of Mr. King's.

office as Minister (not acting Minister) of National Defence. He was not, therefore, "re-elected" during the session of 1923; he did not "return" to the House during that session, because he never left it. Throughout that session Mr. King himself was Prime Minister. He appointed Mr. MacDonald. Mr. MacDonald performed all his ministerial functions during the session under the eye of the Prime Minister, "without complying with the qualifications laid down for ministers". If there is any "subterfuge" in these proceedings, Mr. MacDonald was as guilty as any of Mr. Meighen's Ministers, and Mr. King was a party to his guilt. Presumably this is where Mr. Cannon's theory comes in: Mr. MacDonald, we must suppose, did not, on April 28, 1923, "assume responsibility as a Minister".(1) Hence the rest of Mr. King's paragraph would not apply to him. But it is safe to say that at the time Mr. MacDonald was acting Minister of National Defence neither he nor anyone else thought that he had not "assumed responsibility as a minister", and that his colleagues with portfolio must "answer for his acts". Indeed probably no one would have been more surprised and indignant than Mr. MacDonald and Mr. King if anyone had suggested such a thing. Their indignation would have been fully justified. For Mr. Cannon's theory is not only absolutely without foundation: it is destructive of the whole principle of collective responsibility of the Cabinet, a principle which is basic to responsible government.

Mr. King's words would appear to suggest that ministerial by-elections not only were a legal necessity under the law of Canada as it then stood but an essential of responsible government. But such by-elections

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(1) Note that Mr. King says "as a minister", not "as a minister of a department". It would follow that no Minister without portfolio in Canadian history had ever been "entitled to attempt to do anything" in the House of Commons: a very remarkable theory indeed. Mr. E. M. MacDonald was certainly a "minister"; so were Mr. Meighen's Ministers. Mr. MacDonald was certainly not, from April 28 to August 16 or 17, 1923, a "minister of a department", nor were Mr. Meighen's Ministers in the temporary Cabinet.

were never necessary in the Australian Commonwealth, New Zealand, the Union of South Africa, the Irish Free State, South Australia, the Cape of Good Hope, Natal, Southern Rhodesia, Northern Ireland, or Malta during its period of responsible government. They were abolished in Queensland on December 23, 1884, in New South Wales in 1906, in Victoria on February 10, 1915, and in Tasmania and Western Australia at other dates prior to 1926.(1) They did not exist in the Dominion of Canada till after the passing of the Independence of Parliament Act of May 22, 1868 (31 Victoria, c. 23), and were abolished in 1931 (21-22 George V, c. 52). They did not exist in Manitoba till after December 16, 1874,(2) and were abolished in 1937 (by I George VI, c. 27, section 13). They did not exist in Alberta till February 25, 1909,(3) and were abolished April 8, 1926 (by 16-17 George V, c. 3, sections 4 and 6). They did not exist in Quebec till April 5, 1869(4) and were abolished in 1927 (by 17 George V, c. 13, sections 3-5). They were abolished in New Brunswick in 1927 (by 17 George V, c. 13), in British Columbia in 1929 (by 19 George V, c. 14), in Prince Edward Island in 1932 (by 22 George V, c. 3, section 27), in Saskatchewan in 1936 (by I Edward VIII, c. 2), and in Nova Scotia in 1937 (by I George VI, c. 2, sections 14 and 16). In Ontario, on April 8, 1926, they were rendered unnecessary within three months after the general election, provided the Ministers took office before the opening of the first session of the new Legislature.(5)

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(1) Keith, "Responsible Government in the Dominions", 1928 ed., pp. 229-230, 407, 411; Parliamentary Debates (Commons), 1926, Firth Series, vol. 191, p. 1422; Queensland Statutes, 1884; Victoria Statutes, 1915; "Law and Custom of the South African Constitution", by W. P. M. Kennedy and H. J. Schlosberg (Oxford, 1935), p. 26.

(2) 35 Victoria, c. 9, assented to February 21, 1872, but to come into force only after the dissolution of the first Legislature. The Girard Cabinet, all appointed to departments July 8, 1874 (Manitoba Gazette, vol. III, French edition, p. 14), came into the House without by-elections (Journals of the Legislative Assembly, 1874, pp. 31-32).

(3) 9 Edward VII, c. 2.

(4) 32 Victoria, c. 3,

(5) 16 George V, c. 5, section 4.

They were, as we have seen abolished for the duration of the war in Great Britain, partially abolished in 1919, and completely abolished in 1926. They were abolished from August 8, 1917 till April 30, 1919, in Newfoundland.(1) At the moment Mr. King was speaking, ministerial by-elections existed fully only in the Dominion of Canada, seven of its provinces, and Newfoundland; and partly in Great Britain and Ontario. They now exist nowhere in the British Empire except in Ontario, and only in a limited form there. If they were an essential of responsible government, then large parts of the British Commonwealth never enjoyed responsible government at all, though they thought they did; most of the rest had lost it, without being aware of the fact, at the time Mr. King was speaking; and responsible government has now disappeared from the whole Empire except (in part) Ontario, without anyone suspecting it.

We are now in a position to appreciate fully the exquisite ambiguities of the Liberal motion of July 1 against the temporary Government. If Mr. Meighen's Ministers legally held office "as administrators of the various departments", said the first part of the motion, they had no right to sit in the House. This phraseology carefully avoids either the term "Ministers of the various departments" or the term "acting Ministers of the various departments", thus evading one of the questions at issue. For it should now be clear that if Mr. Meighen's Ministers were Ministers of departments, Ministers with portfolio, then they had vacated their seats; if they were only acting Ministers of the various departments, then they were Ministers without portfolio, receiving no salary, had accepted no office of profit under the Crown, and had not vacated their seats, On the other hand, if they did not "hold such office" (that is, the ambiguous "office" of "administrators of the various departments") "legally", they had "no right to control the business of Government in the

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(1) By c. 19 of 1917 and c. 2 of 1918.

House and ask for supply for the departments of which they state they are acting Ministers". But if they did legally hold office as acting Ministers of the various departments, they had, as far as this motion is concerned, the same right to control the business of Government in the House and to ask for Supply as had Mr. Sutherland in 1900 and Mr. MacDonald in 1923.

Apart from these subtleties, however, what reason is there for suggesting that a Government all of whose members except one are Ministers without portfolio and acting Ministers of departments is any less "responsible" than one made up almost entirely of Ministers with portfolio? What does "responsible" mean? Responsible to whom? To the House of Commons and to the people. In what way was the temporary Government any less responsible, answerable, accountable, to the House of Commons than any other Government? Was it impossible to ask questions of its members? No. Mr. King subjected them to a veritable cross-examination.(1) Did they refuse to answer? No. Was it impossible to move a vote of want of confidence? No. The Liberals did it. Was it impossible to refuse Supply? Not at all. Almost at the very beginning of his cross-examination of Sir Henry Drayton, Mr. King himself said: "If my honourable friend hesitates to give an answer to any of the questions I am asking I will see to it that we do not proceed with supply",(2) and somewhat later the Opposition moved that the chairman of the Committee of Supply do leave the chair.(3) Was it impossible to move a vote of censure? No. The Liberals moved and carried what Mr. King, Keith and Evatt describe as "censure". Was the vote on this motion ineffective? By no means. The Government promptly dissolved Parliament. Indeed the only means of enforcing responsibility

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(1) Commons Debates (Canada), 1926, pp. 5211-5215.
(2) Ibid., pp. 5212, 5228.
(3) Ibid., p. 5228.

to the House which the House normally possesses and did not possess fully in this instance seems to be a motion to reduce the salary of a Minister. It could do this with regard to the Prime Minister, but not the others. Does the whole of responsible government hang on this one motion?

As Sir Henry Drayton said: "We are just as much subject to the House and the House has just as much control over us as if we had been sworn a dozen times. We are just as much responsible to the House as if we were drawing salaries. . . . We are responsible to the House, as the conduct of the present opposition shows beyond doubt. Honourable gentlemen opposite are continually trying to get a vote against us in the House, and they know that we are responsible to parliament. It is simply idle to talk about there being no responsible government when by their very actions honourable gentlemen show that they believe there is."(1)

Was the temporary Government then not responsible, answerable, accountable, to the electorate? Of course it was, as it showed by dissolving Parliament immediately after its defeat on the Robb motion, and appealing to the electorate.

To surmount the difficulties created by the law on ministerial by-elections as it then stood, the device of a Government of Ministers without portfolio, acting Ministers of departments, was not the only one open to Mr. Meighen. There were at least two others.

The first was to form a temporary Government consisting mainly of Senators, who would be sworn in in the ordinary way as Ministers of departments, would receive salaries, and fulfil all the formalities anyone could think of; a Government which would be represented in the Commons solely by Ministers without portfolio, who would be nothing but Ministers without portfolio. This also would have been unprecedented. But it would

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(1) Commons Debates (Canada), 1926, pp. 5249, 5251.

have been impossible to urge against it most of the other arguments Mr. King and his colleagues advanced against the Government which actually was formed. Would it have been constitutional? Or would it have been a "subterfuge", a "piece of jugglery", and so forth?

The second alternative device, as we have seen, was to form a Government in the ordinary way, with one exception: that the Orders-in-Council and commissions appointing the Ministers to departments would contain a clause explicitly stating that they were to receive no salaries.

There can be little question that either of the types of Government suggested would have been free from most of the objections brought against Mr. Meighen's plan. But it is difficult to see how either would have been more "responsible" than the Government which was actually appointed.

It should now be clear that it is impossible to substantiate Mr. King's charge that the temporary Government was "a group of gentlemen with no responsibility whatever". That the Ministers had taken no oaths of office is, we have seen, a statement so incomplete as to be seriously misleading, and, to the extent that it is true, irrelevant. Neither Mr. King nor anyone else has supplied a shred of proof that the temporary Government was not "able to carry on the business of government in the way that it should be carried on" or "in a manner befitting the honour and dignity of parliament" or "in accordance with British traditions" or "in a manner that would accord with the recognized principles of responsible government".

Acceptance of Mr. King's view would involve the consequence that Mr. Meighen would not have been justified in taking office unless his Government could carry on in the Commons with fifteen or sixteen of its supporters absent seeking re-election. On the same theory, even a Government completely defeated at the polls could carry on indefinitely

unless the Opposition had a dependable majority of over sixteen or seventeen; without such a majority a new Government could not get an adjournment for the time necessary for ministerial by-elections. It could take office only on the understanding that it was to receive a dissolution forthwith. This theory, subversive of the whole authority of Parliament, Mr. Meighen naturally could not countenance for a moment.

The rhetorical shafts of the policy speech and "The Liberal Case" miss their mark. It is simply not true to say that during the temporary Government's period of office Mr. Meighen "alone was the Government of Canada", or to suggest that he constituted himself "the sole adviser of the Crown, the sole government of the country". Subject only to the normal primacy of the First Minister, his Ministers without portfolio were as much advisers of the Crown as he, and as much a part of the Government of the country. It may be pointed out in passing that "anarchy" (the absence of all government) and "absolutism" (the concentration of all government in one person) are mutually exclusive terms. It is unnecessary to answer the question "to what category political philosophy would assign government carried on under" conditions which in fact did not exist. As for the question, "what Prime Minister in England would dare to offend the honour and dignity of a nation" by constituting himself "the sole government of the country for a single day, let alone a period of two weeks": in 1834, the Duke of Wellington, pending Peel's return from Rome, had himself sworn in as Secretary of State for the Home Department(1) and First Lord of the Treasury, and placed the Great Seal in commission, with Lord Lyndhurst as First Commissioner, and this temporary Cabinet of two members, both peers, constituted itself "the sole government" of the British Empire

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(1) Any one Secretary of State can of course act for all the others.

for a period of three weeks and one day. Furthermore, Todd remarks that "regarded as a temporary expedient" this "could not be pronounced unconstitutional".(1) Mr. Meighen's Cabinet had six properly constituted Ministers besides himself as Prime Minister, President of the Privy Council and Secretary of State for External Affairs.

The question, "What Prime Minister, what individual in Great Britain, however exalted, or however arrogant, would venture to constitute himself the sole adviser of the Crown, the sole government of the country, for a single day, let alone for a period of two weeks!" is, however, susceptible of an even more precise, and more modern, answer. For in 1913, when the controversy over the Home Rule Bill was at its height, Mr. Balfour wrote: "Were I in his [the King's] place, I should be disposed to consider the propriety of sending for Rosebery or myself, <u>not to form a Government in the ordinary sense</u>, but to dissolve and act as his advisers until the new Parliament was returned, but no longer. There would be no difficulty in carrying on the routine work of the Offices <u>during these few weeks</u> without any paraphernalia of Parliamentary Secretaries and Under-Secretaries. . . . The exceptional character of the crisis would be emphasized by the exceptional character of <u>the temporary Ministry</u>. . . . If Rosebery refused to act, either <u>alone</u> or with me, I should not hesitate, in the circumstances I have indicated, to become <u>sole Minister</u>."(2)

"The supremacy of Parliament, the rights, the dignities, the existence of Parliament", says Mr. King, were challenged by Mr. Meighen "in a manner which surpasses all belief". The answer to this statement

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(1) Todd, "Parliamentary Government in England", 1st. ed., vol. II, pp. 122-124, 170; Thursfield, "Peel", pp. 131-132; Brialmont and Gleig, "Life of Wellington" (Longmans, Green, 1860), vol. IV, pp. 74-76. See also Philip Guedalla, "The Duke" (Hodder and Stoughton, 1931), pp. 431-432, which shows how Wellington was accused of constituting himself the sole Government of the Empire.

(2) Dugdale, "Life of Balfour", vol. II, pp. 100-101; italics mine.

is a simple comparison. If Parliament is "supreme", if it has any "rights" and "dignities", it must surely have the right to pronounce judgment on the conduct of whatever Prime Minister and Government may be in office. Mr. King, on June 28, tried to prevent it from doing so. Mr. Meighen did not. He waited for both the motion of want of confidence of June 30 and the Robb motion of July 1 to come to a vote. Mr. King, on June 28, tried to end "the existence" of the Parliament then in being, by dissolving it before it could pronounce judgment. Mr. Meighen did not seek dissolution till after Parliament had pronounced judgment on both his Government and Mr. King's.

"The supremacy of Parliament, the rights, the dignities, the existence of Parliament" were indeed "challenged" in 1925-1926, "in a manner which surpasses all belief"; but not by Mr. Meighen. They were challenged by Mr. King. By his statement of November 5, 1925, by his request for dissolution on June 28, 1926, by his policy speech of July 23, 1926, Mr. King asserted a theory of the Constitution which would utterly destroy "the supremacy of Parliament", and place "the rights, the dignities, the existence of Parliament" at the mercy of the Prime Minister. Only Lord Byng's refusal of dissolution and Mr. Meighen's acceptance of responsibility for that refusal kept the challenge from succeeding, and preserved, for the time being at any rate, the parliamentary character of the Canadian Constitution.(1)

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(1) It has sometimes been suggested that Mr. Meighen's acceptance of office was tactically unwise, politically inexpedient, showed "poor judgment". Such comments betray a very strange idea of political ethics. If Mr. Meighen believed, as he repeatedly stated in emphatic terms, that Lord Byng's action was not only constitutional but essential to the preservation of the Constitution, then he had no choice but to accept office. It was not a matter of tactics, expediency or "judgment". It was a matter of honour and public duty. To have refused to form a Government would have been to side with Mr. King against the Governor-General on a vital constitutional issue on which, in Mr. Meighen's opinion, Mr. King was clearly wrong and the Governor-General clearly right. It would have been to become an insincere and cowardly accomplice in what Mr. Meighen regarded as an attempt to subvert the Constitution.

The charge that the temporary Government was unconstitutional rests in fact upon no foundation at all. Not one of the arguments adduced in support of that charge will bear critical examination.

(d) The Constitutionality of the Grant of Dissolution to Mr. Meighen

The next main question is: was the grant of dissolution to Mr. Meighen constitutional?

Prima facie, the answer would seem to be, yes. Mr. Meighen's request was in perfect accord with seven or eight British precedents. He did not ask for dissolution while the Robb motion was under debate. He waited for Parliament to pronounce its verdict. He had not had the previous dissolution, and was therefore not seeking to appeal from the verdict of a House of Commons elected under his own auspices. As the House had deliberately rejected both his Government and Mr. King's there was no longer any possibility of an alternative Government which could carry on with the existing House. He could quote Dicey's "A Cabinet, when outvoted on any vital question, may appeal once to the country by means of a dissolution", Keith's "Dissolution . . . is proper . . . when a Ministry comes into power after the formation of a new House of Commons and finds that it has not an effective majority therein, as in 1924" and his "[whether] the existing House of Commons had been elected under the auspices of [the Government's] rivals is a relevant point".

Indeed, everyone seems to agree that, as Jennings says of the British Parliament of 1859, "a House of Commons which had rejected both a Liberal and a Conservative Government needed to be dissolved". Mr. Garland, it is true, says that even after the final vote, "It was still possible for [Mr. Meighen] to seek the necessary adjournment and properly establish his Ministry when the session's work could have been concluded",(1)

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(1) Statement of July 5; Dawson, "Constitutional Issues", p. 87.

but the context makes it pretty clear that he did not think that dissolution could be avoided, but only postponed till the work of the session had been finished. That dissolution within a few weeks at most had become inevitable no one, apparently, questioned.

But Mr. King, Keith and Evatt all contend that, though the dissolution was inevitable, it should have been granted not to Mr. Meighen but to Mr. King. Mr. King, in his policy speech of July 23, declared himself "unable to admit that . . . the granting of dissolution . . . to Mr. Meighen was a constitutional course of action"(1) and in the House of Commons, during the debate which preceded the final vote, he said that if the Government were defeated, it should resign (or, if it refused to do so, the Governor-General should dismiss it), whereupon he would resume office, procure the royal assent to bills awaiting it, prorogue Parliament and dissolve it.(2)

Keith says: "The just censure of the House was followed by a further departure from constitutional usage by Mr. Meighen. Not daring to face the House of Commons, the Ministry obtained an immediate dissolution."(3) He contends that Mr. Meighen should have resigned at once when he found the Progressives would not support him,(4) should have advised Lord Byng to recall Mr. King on the understanding that he would receive a dissolution. Mr. Meighen's failure to do so, he contends, put Lord Byng "in a most unfortunate position and one without any real colonial parallel".(5) The last phrase is true enough, but hardly to the point; for if Mr. Meighen had advised the recall of Mr. King he would still have put Lord Byng in a position "without any real colonial parallel", and the Governor's position would have been, to say the least, far more "unfortunate".(6)

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(1) Quoted in Keith, "Speeches and Documents on the British Dominions", p. 153.
(2) Commons Debates (Canada), 1926, pp. 5224, 5252, 5261.
(3) "Responsible Government in the Dominions", 1928 ed., p. 149.
(4) "Responsible Government in the Dominions", 1928 ed., p. 129, footnote.
(5) "Letters on Imperial Relations", etc., p. 69.
(6) See below, p. 385.

Evatt goes farther. He contends that the Governor-General should have refused Mr. Meighen's request for dissolution, recalled Mr. King, and given him a dissolution if he asked for it.

"By accepting office after the refusal of a dissolution to Mr. King", he argues,"Mr. Meighen had to be regarded as accepting full responsibility for the Governor-General's refusal. But responsibility was meaningless, unless it involved his definite acceptance of the opinion that, in the interests of Canada, it was not desirable that Parliament should be dissolved. And yet, before three sitting days had elapsed, Mr. Meighen placed himself in the position of advising in favour of the very course which he had, by taking office, advised against, but which his predecessor had favoured. The change of front on the part of Mr. Meighen must have satisfied Lord Byng that a dissolution was inevitable, in other words, that Mr. King's original advice was sound and should be acted upon. The question which remained, whether Mr. King or Mr. Meighen should obtain the dissolution and face the country as Prime Minister, presented no difficulty. Not only did the balance of convenience and justice point strongly in favour of Mr. King, but Mr. Meighen's failure to form a stable government suggested that it was the advice and opinion of Mr. King which had to be adopted. Therefore, Lord Byng should have refused Mr. Meighen's request for 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. Neither in England nor in any of the self-governing Dominions, States or Provinces, would constitutional practice warrant the Sovereign or his representative in granting a dissolution to one party, almost immediately after refusing it to another, in circumstances analogous to those of 1926."(1)

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(1) "The King and His Dominion Governors", pp. 62-64.

This whole passage is open to the same criticism which Evatt makes of Keith's comments on the Australian "double dissolution" of 1914: it "gives too little attention to the particular facts of the case and the facts are of supreme significance."(1) It is accordingly necessary to examine the passage sentence by sentence.

"By accepting office . . . Mr. Meighen had to be regarded as accepting full responsibility for the Governor-General's refusal." Unquestionably. "But responsibility was meaningless, unless it involved his definite acceptance of the opinion that . . . it was not desirable that Parliament should be dissolved." Not at all. What was the advice Mr. King gave and Lord Byng refused? Simply, "That Parliament should be dissolved"? No. That Parliament should be dissolved before it had a chance to pronounce on the Stevens amendment, and without giving an alternative Government a chance to carry on with the existing House. Lord Byng did not say: "I think there should not be another election." He said: "All reasonable expedients should be tried before resorting to another election."(2) This is not the same thing at all; but it was for this opinion, not the other, that Mr. Meighen accepted responsibility. Hence, when, on July 2, he advised dissolution, he was not repeating Mr. King's advice; he had made no "change of front"; he had not "placed himself in the position of advising in favour of the very course which he had, by taking office, advised against." Mr. Meighen did not simply advise the Governor-General that dissolution was necessary. In effect what he said was: "Now that the House of Commons has pronounced on Mr. King's Government and mine, and rejected them both; now that it has been shown that neither Mr. King nor I can carry on with the existing House; now that it is clear that there are no further expedi-

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(1) Ibid., p. 46.
(2) Letter to Mr. King, June 29, 1926, quoted in Dawson, "Constitutional Issues", p. 73.

ents to be tried before resorting to another election; in these new circumstances I advise Your Excellency to dissolve Parliament." This was not the course which Mr. Meighen's "predecessor had favoured" but a totally different course. That a dissolution was inevitable on July 2, after the events of June 29 - July 1, does not go one centimetre towards "satisfying Lord Byng" or anyone else that "Mr. King's original advice", to dissolve before those events could take place, was "sound". By July 2 it had become a sheer impossibility to "adopt" or "act upon" Mr. King's "advice and opinion"; for, it must be repeated, that advice and opinion were that a dissolution was necessary before the vote on the Stevens amendment and before Mr. Meighen was given a chance to try to carry on with the existing House. For the same reason it would have been sheer impossibility for Mr. King to "repeat his former advice":

"The moving finger writes; and having writ
"Moves on: nor all thy piety nor wit
"Can lure it back to cancel half a line."

With Mr. Meighen's "failure to form a stable government", if that phrase refers to the constitution of the Government of Ministers without portfolio, we have already dealt. If it refers merely to the inability of the Government to retain its majority in the House, it is of course simply another way of saying that the Government had been defeated, and introduces no new point.

To say that the question "whether Mr. King or Mr. Meighen should obtain the dissolution presented no difficulty" may be true enough. But to say that "the balance of convenience and justice pointed strongly in favour of Mr. King" is a really amazing statement. There are the strongest grounds for saying just the opposite. Mr. King had flouted Parliament by trying to dissolve it before it could pronounce on the conduct of himself and his Government. Mr. Meighen had waited for Parliament to pronounce judgment on both Mr. King's Government and his own. Furthermore, Keith

notes that "It must be recognized that in the Dominions practice shows that it is a distinct advantage to be the party which dissolves and under whose auspices an election is held."(1) Mr. King had had the previous dissolution. He had enjoyed this "advantage" once. His protest, in his letter to Lord Byng, July 3, 1926, against the suggestion that he had advised that "there should be another election with the present machinery"(2) may not be without significance.

What considerations of "convenience" pointed in Mr. King's favour Evatt does not say; nor is it easy to surmise, unless it be that the Liberals had already appointed all the election officials and dissolution would therefore involve appointment of a new set, of Conservative leanings.(3) But why should this be regarded as a consideration of "convenience" in any but a party sense? And why should the Governor-General be expected to show greater consideration for the convenience of the Liberals, who had already had one dissolution with their own "machinery", than for that of the Conservatives, who had not? Evatt can hardly have meant anything like this. What did he mean?

The only remaining ground for Evatt's doctrine seems to be the shortness of the time which intervened between refusal of dissolution to Mr. King and grant of dissolution to Mr. Meighen. But is this relevant? The reasons for refusing dissolution to Mr. King were: (a) he was trying to prevent the House from pronouncing judgment on his Government; (b) he was seeking to appeal from a new Parliament elected under his own auspices;

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(1) "Responsible Government in the Dominions", 1928 ed., p. 265.
(2) Quoted in Dawson, "Constitutional Issues", p. 74; italics mine.
(3) This was the customary procedure in Canada at the time, though Keith seems to imply the contrary: "An electoral contest of great severity was begun by the new Administration ejecting from office the incumbents of the posts of Returning Officer in the hope of thus winning seats." ("Responsible Government in the Dominions", 1928 ed., p. 150.)

(c) there was a possibility that another Government could be formed which could carry on with the existing House. None of these reasons applied to Mr. Meighen on July 2, and the House had meanwhile defeated both Governments. How can these facts be affected by the length of time which elapsed between the existence of the one set of conditions and of the other?

Evatt says that the Governor-General should have "recommissioned Mr. King". He appears to have overlooked two points of crucial importance: (a) Mr. King's Government had on June 28 been guilty of a flagrant violation of the Constitution, by seeking to "withdraw from the cognizance of the people's representatives the great cause pending between ministers and their accusers"; (b) Mr. King's Government had on June 29 been solemnly and emphatically censured by the House of Commons, by a majority of 10, for misconduct in the administration of a great department of state.(1)

One consequence of Evatt's doctrine, and a most important consequence, seems not to have occurred to him. If Lord Byng's refusal of dissolution to Mr. King on June 28 was constitutional, as Evatt agrees it was, it follows that on that date Mr. King had no right to a dissolution. He had only the right to carry on till the House had voted on the Stevens amendment, or to resign forthwith. If he had simply resigned, without asking for a dissolution, and if Mr. Meighen had taken office in these circumstances and been defeated, Mr. Meighen would then have had an incon-

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(1) Mr. Meighen's position differed markedly from Mr. Philp's in the Queensland crisis of 1907. Mr. Philp had never been able to command a majority; Mr. Meighen had. Mr. Philp's opponents enjoyed the confidence of the existing House; Mr. Meighen's did not. Mr. Philp's opponents had not been censured by the House; Mr. Meighen's had. Mr. Philp's opponents were undoubtedly well able to carry on with the existing House; Mr. Meighen's were not. Lord Chelmsford could have avoided an election by recalling the ex-Prime Minister; Lord Byng could not. Above all, Mr. Philp's opponents had not violated the Constitution; Mr. Meighen's had. Even, therefore, if we accept Evatt's theory on the Queensland case (and there is, we have seen, strong reason for rejecting it), it has no application to the Canadian case of 1926.

testable right to dissolution. To suggest that Mr. King could deprive him of that right by making a prior unconstitutional request for dissolution is once again to place the whole Constitution at the mercy of any Prime Minister's caprice, or lack of scruple, or ignorance of constitutional usage.(1)

(e) The Constitutionality of the Refusal of June 28 in Relation to the Grant of Dissolution on July 2.

Was the constitutionality of refusing dissolution to Mr. King on June 28 affected by the granting of dissolution to Mr. Meighen on July 2?

It would be possible to discuss this question in a number of forms, but it seems necessary to deal only with the particular forms in which it actually arose in discussions of the crisis, notably Mr. King's and Keith's.

Mr. King, in a passage already quoted in abbreviated form, speaks of being "unable to admit that either the refusal to myself of a dissolution or the granting of a dissolution immediately thereafter to Mr. Meighen was a constitutional course of action."(2) Actually the grant to Mr. Meighen was not "immediately" after the refusal to Mr. King. Vitally

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(1) Lord Canterbury, in Victoria in 1872, recognized "that it would not not conduce to the present or future efficiency of Administrations or Legislatures if" his refusal of the Duffy Government's request "were to be followed immediately, or closely, by his acceptance of a similar recommendation based on similar grounds from their successors", as this would give rise to unfounded charges of partisanship and "would not have removed or even materially palliated existing difficulties". But he made it very clear that he had inserted the provisoes purposely. Mr. Meighen's request on July 2 was not "similar" to Mr. King's or "based on similar grounds". It was entirely different, and based on entirely different grounds.
Note also Lord Stanley's admission, in 1851, that if the Queen refused him dissolution (to which his claim would have been infinitely stronger than Mr. King's on June 28, 1926), and he resigned, his opponents would have had a right to dissolve.

(2) Policy speech of July 23, 1926, quoted in Keith, "Speeches and Documents on the British Dominions", p. 153.

important events intervened. But Mr. King seems to suggest that even the grant of dissolution to Mr. Meighen soon after the refusal to him at least added to what he considered the unconstitutionality of the refusal. It is surely not too much to read into the words a feeling that he had been discriminated against. Keith, at any rate, seems to have put this construction on Mr. King's attitude, for he says: "Mr. King . . . naturally could not see how it could be fair to refuse to an undefeated Prime Minister a dissolution and to give it to a new Prime Minister who was unable to avoid a hostile vote in the Commons."(1) Also, in his reply to Mr. Cahan, Keith says that his condemnation of Lord Byng's action was based not only on the refusal to Mr. King but on that refusal "coupled with" the grant to Mr. Meighen.

After what has already been said here on the first five main constitutional questions raised by the crisis, it is needless to deal with this question at much length. If the refusal to Mr. King was constitutional, it is hard to see how it could have been rendered subsequently unconstitutional by a grant to Mr. Meighen, whatever the status of the latter action. if the refusal was unconstitutional in the first place, an unconstitutional grant to Mr. Meighen would make Lord Byng guilty of two constitutional misdemeanours instead of one, and therefore doubly worthy of reprobation, which may have been all that Keith meant.

(f) <u>The Constitutionality of the Manner of Dissolution on July 2</u>

Was the manner of Mr. Meighen's dissolution of Parliament constitutional? Keith and MacGregor Dawson both disapprove of it, though

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(1) "The Dominions as Sovereign States", p. 221. Keith is not always so positive that Mr. King was "undefeated". Nor does it seem to have struck him that Mr. Meighen also could certainly have been an "undefeated" Prime Minister when he asked for dissolution, if he had been willing to ask while a motion of censure was under debate.

neither goes so far as to say outright that it was unconstitutional. Keith notes that the news "was at one p.m. intimated to members by messengers as they prepared to reassemble on 2 July"; that Mr. King would have advised prorogation and royal assent to bills before his proposed dissolution of June 28; that "by the informal procedure adopted, contrary to all British and Canadian usage, the Bills already passed by the Houses, including the divorce bills of private persons, were wasted"; that "the whole work of the session was wasted"; that "the intimation of dissolution . . . was a deplorable act of discourtesy to the House of Commons, and one of which it is quite inconceivable that the King would be guilty as regards the British House of Commons".(1) MacGregor Dawson says: "Parliament was adjourned and never met again; for it was summarily dissolved without the usual attendance of the Governor-General in person to announce the termination of the session. Members of Parliament learnt of the dissolution in the corridors from messengers and clerks, and Mr. Bourassa alleged that he first received the news from 'a wandering Asiatic consul'."(2)

Keith is in error on certain points here, and both his and MacGregor Dawson's accounts need to be supplemented.

First, "the whole work of the session was" not "wasted", and only a few bills passed by the two Houses failed to become law. Royal assent had already been given to four Appropriation Bills and thirteen other Public and General Bills, and to 131 Private Bills (including 124 Divorce Bills).(3) The bills actually awaiting assent on July 2 were those to amend the Special War Revenue Act and the Canada Evidence Act, the Long Term Farm Mortgage Credit Bill, the Montreal Harbour Commission Loan Bill, thirteen divorce bills and

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(1) "Responsible Government in the Dominions", 1928 ed., pp. 149-150; "Sovereignty of the British Dominions", p. 244.
(2) "Constitutional Issues", p. 85.
(3) Statutes of Canada, 1926.

ten other private bills.(1)

Second: In 1911, when Sir Wilfred Laurier was in power, the Government negotiated a Reciprocity Agreement with the United States. The Conservatives opposed it. When the Government moved to go into Committee of Ways and Means, the Conservatives moved votes of want of confidence, July 18 and 28, and of censure, July 26 and 27. All were defeated. Debate proceeded in committee. The Senate had adjourned on May 19, till August 9.(2) There were no bills awaiting assent. The Commons adjourned on July 28 and never met again, for on July 29 Parliament was "summarily dissolved without the usual attendance of the Governor-General in person", but after a formal Proclamation of Prorogation.(3) In 1926 the Senate had not adjourned for more than a few hours, and there were bills awaiting royal assent.

Third: Mr. King said repeatedly that he had intended, on June 28, not to dissolve without prorogation and royal assent to bills. The published correspondence between him and Lord Byng provides no evidence of this. It does not even mention prorogation or royal assent to bills. In view of Mr. King's subsequent statements, this is a curious omission. What renders it still more curious is that if a Prime Minister intends to request first a prorogation and then a dissolution, the natural course is to ask for prorogation first and dissolution second. Mr. King, on his own showing, appears to have contemplated the reverse procedure: asking for dissolution first and prorogation second.

Be that as it may, Mr. King never said that he intended, if dissolution had been granted him, to proceed with any other business; indeed, if he had, there was no necessity for him to precipitate a crisis by asking

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(1) Journals of the Senate and the House of Commons of Canada, 1926.
(2) Journals of the House of Commons, 1911, pp. 543, 553, 555, 556, 558; Senate Debates, 1911, pp. 750-751.
(3) Journals of the House of Commons (Canada), 1911. pp. 561-562.

for dissolution when he did. His proposed dissolution would therefore presumably have taken place on June 28. Dissolution at that date would have killed at least the Long Term Farm Mortgage Credit Bill, the Montreal Harbour Commission Loan Bill and the two private bills which afterwards passed both Houses. Mr. Meighen's manner of dissolution killed these and also the two other public bills, thirteen divorce bills and eight other private bills which had been ready for assent on June 28. In other words, at least the two most important bills awaiting assent on July 2 would have been lost anyhow if dissolution had taken place on June 28.

It may be added that when Mr. King dissolved Parliament on January 25, 1940, after a session of three hours, he did not prorogue it. Members learnt of the dissolution, casually, during the dinner recess, as they were preparing to reassemble for the evening sitting.

(g) The Crisis and Canada's Status

The final question raised by the crisis is one of Canada's status. Is Keith right in asserting that Lord Byng's action "relegated Canada decisively to the colonial status which we believed she had outgrown",(1) a status inferior to that of Britain?

The charge that it did may take three forms: (a) that the King would have acted differently in the same circumstances;(2) (b) that Lord Byng violated the principles of responsible government, and, as Britain enjoys responsible government, that this relegated Canada to an inferior status; and (c) that Lord Byng acted as the agent of the British Government.

The first charge is supported by nothing but the bald assertions of Messrs. King, Keith, Dawson, Ewart and Mr. King's supporters. There

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(1) Manchester Guardian, July 8, 1926. In his latest works (1939 and 1940) Keith does not mention this point.
(2) This seems to be all that Keith meant.

are, as we have seen, the strongest possible reasons for believing that in the same circumstances the King would have acted precisely as Lord Byng did.

But even if it could be proved that the King would have acted otherwise in the same circumstances, it would not follow that Lord Byng had relegated Canada to a status inferior to that of Britain, or violated the principles of responsible government. Kennedy protested energetically in November 1926 against the idea that "equality of status" meant that "the Governor General should always do what the King does, and that, as the general rule in England appeared to be that a dissolution was granted as a matter of course, so it ought to be in Canada." What the King would have done, he contended, was "quite immaterial for Canadians. . . . It is none of our business how or why or when the prerogative of dissolution is exercised in the United Kingdom. 'Equality of status' . .. cannot mean that Canada has been given power limited to imitation. In other words, all the noise and tumult over 'the exercise of powers in a manner which the King of England does not follow' were so much inexcusable misrepresentation. In inter-State comity, the British Empire and Cuba are equal, . . . but no one would demand identity of institutional content. So, weak though the analogy may be, in the comity of the British Commonwealth the nations composing it are equal, but that equality cannot mean that their institutional life must ex necessitate toe the identical line of uniformity."(1)

Putting it another way: Britain is not the only country in the world where responsible government exists or has existed, and the form which exists in the United Kingdom is not the only form of responsible government. France under the Third Republic unquestionably enjoyed responsible government. But under its then Constitution, the President could dissolve Parliament only with the consent of the Senate, a provision quite unlike anything to be found anywhere in the British Empire; and in

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(1) Contemporary Review, vol. 130, November 1926, p. 556.

fact this power was used only once, in 1877.(1) In practice, French Governments were made and unmade by Parliament. They could not, when defeated in the Chamber of Deputies, or when they thought it convenient, appeal to the electorate. No one seems ever to have suggested that this made France inferior in status to Great Britain.

Nor is there any reason why the conventions of the Constitution must be the same even throughout the British Commonwealth, nor why, if they are different, differences from the United Kingdom should be held necessarily to indicate inferiority. The Irish Free State regulated the whole matter of dissolution by law, a law which made it virtually impossible to dissolve the Chamber of Deputies without its own consent.(2) No one seems ever to have suggested that this particular provision of the Free State Constitution made it inferior to Britain. The Australian Commonwealth has statutory provision for dissolution of both Houses in certain circumstances, something for which there is no counterpart in the United Kingdom; but again, no one seems ever to have suggested that this makes Australia inferior in status. Surely Canada may enjoy responsible government equally with the United Kingdom without either the law or the conventions of the Canadian and British Constitutions being identical, on this or other points?(3)

Mr. King himself does not seem to have felt any great confidence in the charge that Lord Byng's refusal of dissolution relegated Canada to a status inferior to that of Britain. For in the debate in the House he said: "For one 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

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(1) W. B. Munro, "The Governments of Europe" (Macmillan, 1926), pp. 409, 442.
(2) Article 53 of the Constitution.
(3) The conventions on the "federalization" of the Canadian Cabinet have no counterpart in Britain; and Kennedy, loc. cit. (p. 557), notes the special relationship between the Labour caucus and a Labour Cabinet in Australia.

Prime Minister has advised a dissolution and been refused it.(1) . . . The issue . . . is one which affects all parts of the British Empire. . . . The British Empire rests upon the corner-stone of responsible self-government in each of the Dominions and in the Mother Country. . . . We have at heart the interests not only of Canada, but of South Africa, of Australia, of New Zealand, of Newfoundland, of the Irish Free State, of India, yes, and of the British Isles themselves."(2) It is hard to attach to the statements about "all parts of the British Empire" and "the British Isles themselves" any meaning except that Lord Byng's action might constitute a precedent for the United Kingdom. If so, what becomes of the charge of inferiority of status?

It may be argued that the Imperial Conference of 1926 settled this whole matter, and established the United Kingdom practice, whatever it is, in all the Dominions. This is not strictly accurate. In the first place, the Report could not override the provisions of the Irish Free State Constitution, which on this point were very different indeed from British practice. Second, the Report at most only established the British practice "in all essential respects". What are and what are not "essential respects" is a question on which there may be wide differences of opinion. Keith, for example, as late as 1928, appeared to think that the Report left room for very considerable variations between United Kingdom and Dominion practice on this very question. Third, it is possible to interpret the Report not as establishing United Kingdom practice in the Dominions but as asserting simply that in all essential respects the practice in Britain and the Dominions is the same, a position already taken for granted by Lord Courtney as early as 1901. If this is the true interpretation, then United Kingdom practice might be affected by Dominion practice (as in fact

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(1) On these statements, see above, pp. 236-237.

(2) Commons Debates (Canada), 1926; p. 5224; italics mine. Mr. King did not draw Keith's distinction between the status of Canada and that of Newfoundland.

Lord Courtney suggested), or vice versa. That this is the true interpretation, and that Kennedy's thesis is therefore as valid as when he wrote, is at least highly probable; for any other interpretation would limit the Dominions to mere imitation, and would therefore be inconsistent with the Report's main principle of "equality of status".

The third charge, that Lord Byng acted as the agent of the British Government is just not true. On the contrary he refused even to consult the British Government,(1) in spite of repeated urgings from Mr. King. Mr. King, in his letter of June 28, 1926, says: "Your Excellency will recall that in our recent conversations relative to dissolution I have on each occasion suggested to Your Excellency, as I have again urged this morning, that having regard to the possible very serious consequences of a refusal of the advice of your First Minister to dissolve Parliament you should, before definitely deciding on this step, cable the Secretary of State for the Dominions asking the British Government, from whom you have come to Canada under instructions, what, in the opinion of the Secretary of State for the Dominions, your course should be in the event of the Prime Minister presenting you with an Order in Council having reference to a dissolution. . . . .I . .. shall be pleased to have my resignation withheld at Your Excellency's request pending the time it may be necessary for Your Excellency to communicate with the Secretary of State for the Dominions."(2)

It is worth noting here that Mr. King was not simply suggesting that Lord Byng should seek the expert opinion of the Secretary of State for the Dominions. He was suggesting "asking the British Government, from whom you have come to Canada under instructions, what, in the opinion of the Secretary of State . . ., your course should be". To be sure, it was

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(1) See Mr. Amery's statement in Parliamentary Debates (Commons), 1926, Fifth Series, vol. 198, p. 1425.
(2) Quoted in Dawson, "Constitutional Issues", p. 73; italics mine.

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 . . . to ask the Secretary of State what the royal instructions really meant." (1)

This seems to mean that Lord Byng was bound to act, in a purely internal matter, as an Imperial officer under "royal instructions conveyed through the Secretary of State". But if so, Canada was clearly inferior in status to Great Britain.(2) 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).

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(1) P. 67; italics mine.
(2) This passage suggests that it is Keith's views, not Lord Byng's, which would "relegate" Canada to an inferior status!

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 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 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", no 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 undignified" in Lord Byng's cabling 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 "constitutional".

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 his department was "officially charged with recording" were not United Kingdom precedents but only those of the most of Dominions, which Keith seems to have considered inapplicable.

Lord Byng, in declining Mr. King's advice to cable the Secretary of State seems certainly to have shown a more scrupulous regard for Canadian autonomy than Mr. King in proffering it. True, Mr. King has explained that he "did not say that His Excellency was bound to act upon" the opinion of the Secretary of State.(1) But this explanation raises more questions than it answers. If (which is most improbable) the Secretary of State had been foolish enough to give an opinion at all, any one of three consequences might have followed. (a) The opinion might have been that refusal was unconstitutional. (In view of what has already been said in these pages, such a reply was highly unlikely, but the possibility cannot be altogether excluded.) Lord Byng might have acted on this opinion and granted the dissolution. In this case, Mr. King would no doubt have been perfectly

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(1) Commons Debates (Canada), 1926-27, p. 1652.

satisfied, and as far as he was concerned, there would have been no further controversy. (b) The opinion might have been that refusal was unconstitutional, and Lord Byng might have refused to act on it. Mr. King would then have been in a position to say that a very high authority, none other than the Secretary of State for the Dominions (he might have said, the whole British Cabinet), had declared that he was entitled to dissolution, but that Lord Byng, whose political experience was far inferior, had persisted in following a course which that great authority had pronounced unconstitutional. (c) The opinion might have been that refusal was the constitutional and proper course; if Lord Byng had then refused dissolution, Mr. King would have been in a position to say that he had done so on the advice of a British Minister (or Ministers), and that Downing Street was interfering in a purely Canadian affair.

If the Secretary of State had declined to give an opinion, Mr. King would at least have been no worse off. If he had given an opinion, the advantages to Mr. King of case (a) are obvious, those of case (b) scarcely less so. In case (c), Mr. King would have been presented with yet another "constitutional issue" with electoral possibilities on which it is unnecessary to enlarge. He might easily have concealed from the public till the campaign was over the fact that the "interference" was the result of his own "suggestion" to the Governor-General. In fact, in the campaign which took place, though the air was thick with allegations of "Downing Street interference" which Mr. King well knew to be false, he never so much as hinted that he had repeatedly suggested that the Governor-General should consult Downing Street and that Lord Byng had refused. That fact came out only in the first session of the new House, when the Conservatives asked for the correspondence. But if, in the hypothetical case we are supposing, he had, voluntarily or otherwise, divulged his own "suggestion" during the campaign, he could still have proffered the same explanation as

he did later: that he had not said that Lord Byng was bound to act upon the opinion. Therefore, he could have said, the responsibility for acting upon the opinion was not his (Mr. King's), but Lord Byng's (or, more correctly, Mr. Meighen's). In short, in case (a), Mr. King would have got precisely what he wanted; in the other cases he would inevitably have placed the Governor-General in a false position. Presumably this did not occur to Mr. King when he made his "suggestion". If it had, he would hardly have described the "suggestion" as he did: "a chivalrous action, designed to prevent His Excellency from making the mistake he did make".(1)

Conclusion

Many would contend that the question whether Lord Byng's actions were constitutional is no longer debatable; that, regardless of the merits or demerits of the case, the matter has been settled, and in Mr. King's favour, by (a) the election,(2) and (b) the Report of the Imperial Conference of 1926.

But has it?

In the first place, by no means all constitutional authorities agree that a single election result settles disputed points of constitutional practice. Evatt, for example, repeatedly dissents;(3) and Jennings' remarks on conventions and precedents are in point.(4) Mr. King himself recognized that the constitutional practice on this very point could not be settled by a mere election result.(5)

Second, the constitutionality of Lord Byng's action was not

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(1) Commons Debates (Canada), 1926-27, p. 1652.
(2) Mr. King claimed this himself; but he coupled it with the statement that if the election had gone the other way the question would have been "very far from settled". (Commons Debates (Canada), 1926-27, p. 1652.)
(3) "The King and His Dominion Governors", pp. 59, 105, 165, 173, 232, 245, 253.
(4) See above, pp.
(5) See ~~above, p.~~ footnote (2), above.

the sole issue at the 1926 election. Mr. King himself said that it "paled into relative insignificance" compared with the issue (or issues) raised by the formation of the temporary Government. Even if a single election result could settle constitutional practice, therefore, it is impossible to say which of the two constitutional points at issue, the major (of the temporary Government) or the minor (of Lord Byng's refusal) Mr. King's victory settled. Indeed it is possible that neither point was what the electors believed themselves to be deciding. They may have been (who shall say?) far more concerned with the Customs issue, old age pensions, rural credits, or the tariff.

Third, and more important: in spite of a widespread assumption to the contrary, the Imperial Conference Report did not endorse Mr. King's view either of the constitutionality of Lord Byng's action or of British constitutional practice. 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 notes, Mr. Meighen's position was that the King would have acted exactly as Lord Byng did. After what has been set forth here, it should be clear that there are no substantial grounds for Mr. King's view of British practice, but that there are numerous and very substantial grounds for Mr. Meighen's. In other words, there is excellent reason for considering the Report not as endorsing but as repudiating Mr. King's view, and as a vindication of Lord Byng and Mr. Meighen. There can be no question that the Report cancels the effect (if any) of any prior verdict of the Canadian electorate contrary to its terms.

There are four reasons why it has been necessary to dwell on the Canadian crisis of 1926 at what may seem disproportionate length. In the first place, it raised fundamental issues. What is the Cabinet? To whom is

it responsible? Is it the master or the servant of Parliament? In what circumstances may it appeal from Parliament to the electorate? What are the powers of the Crown in this context? Second, none of the authorities who have commented on the case has given anything like a complete and accurate account of the facts. This is in most instances quite understandable, for the complete official records are not always easily accessible in Britain or Australia. But it has had unfortunate consequences, for it has led a large number of people, including some of the authorities themselves, to conclusions which are in some cases unfounded and in others contrary to the evidence. That is the third reason for devoting so much space to the subject. Fourth, the doctrines of the Constitution expounded or countenanced by some authorities in their discussion of this case are not merely erroneous but subversive of parliamentary government; and frequent repetition by eminent persons has secured for these doctrines, as the debates in the South African Parliament in February and April 1940 showed, wide acceptance.(1)

Just how unfounded, erroneous and mischievous are the doctrines to which some learned writers have lent their names can perhaps best be illustrated by a brief analysis of Mr. King's policy speech of July 23, 1926, whose statement of constitutional principles has been highly recommended to us by Keith, and by Kennedy and Schlosberg in their work on the South African Constitution.

Mr. King begins by speaking of "the refusal to myself of a dissolution" and "the granting of a dissolution immediately thereafter to Mr. Meighen". This is not accurate. Dissolution was not granted to Mr. Meighen "immediately" after the refusal to Mr. King. Vitally important events intervened.(2)

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(1) See below, pp. 410-411.
(2) See above, pp. 382-383.

Mr. King proceeds: "Not for over a hundred years in Great Britain" has a dissolution been refused. This is of dubious accuracy, and completely overlooks the fact that Mr. King's request also was, as far as we can discover, unprecedented, not only in Great Britain but in the overseas Empire as well.(1)

"Never since Confederation in Canada", adds Mr. King, has a dissolution been refused. Of the Dominion, though not of the provinces, this is true; but, again, "never since Confederation in Canada" has a request for dissolution been made in the circumstances in which Mr. King made his.(2)

The sovereign, says Mr. King, "would have to be very certain of finding a Prime Minister who would not only be willing, but also would be able to take the responsibility for his refusal, . . . able to demonstrate his ability when Parliament was in session to carry on its proceedings". Mr. Meighen, he adds, was unable to do this for the space of three days. This is strictly accurate, but omits the vital question of what happened in those three days.(3)

Mr. King asserts that his right to a dissolution on June 28 "could not be challenged". This is obviously not so.(4)

"If ever there was any doubt as to the soundness of the advice tendered and of my right to have it accepted, that doubt was resolved in no uncertain manner by what took place within the three ensuing days." This is a confusion of thought.(5)

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

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(1) See above, pp. 236-237.
(2) See above, pp. 236-237.
(3) See above, pp. 229, 264, 382-383.
(4) See above, pp. 241-334.
(5) See above, pp. 260-264, 382-383.

requested." This is not so.(1)

"Assuming . . . that the Stevens amendment constituted a censure of the administration and that it had been carried while the late Liberal Government was in office, I would still under British constitutional practice have been entitled to . . . dissolution." This is irrelevant to the question Mr. King was here discussing, the right to dissolution while a motion of censure is under debate, and is probably also incorrect in itself.(2)

Mr. King then cites Mr. MacDonald's dissolution in 1924 and Mr. Meighen's on July 2, 1926. Both are irrelevant to the question of dissolution while censure is under debate; and even apart from that, neither bears any resemblance to Mr. King's case.(3)

The next passage in the speech deals with the relation of the crisis to Canada's status, a question which was not really at issue at all.(4)

"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 . . . where the leader of another party having accepted the responsibility of the refusal . . . demonstrates after compliance with all constitutional obligations that he is able to carry on . . . in the House of Commons. Clearly, any such possibility was not the case in the present instance." To this passage as it stands it is hard to attach any intelligible meaning whatever.(5)

Mr. King then charges Mr. Meighen with having "become Prime Minister . . . knowing at the time, as Mr. Meighen full well did, that he could not hope constitutionally to carry on, and that, as he himself later admitted, dissolution was necessary and inevitable". Mr. Meighen did not know on June 28 that he "could not hope constitutionally to carry on". The majorities he received on June 29 and 30 are clear proof that neither he nor anyone else

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(1)See above, pp. 238-241.
(2) See above, pp. 272-275, 279-280, 299-334.
(3) See above, pp. 330, 384-385.
(4) See above, pp. 390-399.
(5) See above, pp. 339-340.

on June 28 could have known anything of the sort.(1) The word "constitutionally", like the expression "compliance with all constitutional obligations" in the previous passage, was no doubt meant to refer to the temporary Government, and to imply that it was unconstitutional. This is incorrect.(2) Mr. Meighen never "admitted" that "dissolution was necessary and inevitable" on June 28. To admit that it was necessary and inevitable on July 2, after the vitally important changes which had meanwhile taken place, is a wholly different matter.(3)

Mr. Meighen, says Mr. King, dared "to ignore, defy and insult the entire membership of both Houses of Parliament". In the context this charge appears to refer to the constitution of the temporary Government, and is accordingly meaningless.(4) It comes particularly ill from one who did in fact try "to ignore, defy and insult" Parliament on June 28 by seeking to "withdraw from the cognizance of the people's representatives the great cause pending between Ministers and their accusers".

Much the same comments apply to the charge that "the supremacy of Parliament, the rights, the dignities, the existence of Parliament have been challenged by [Mr. Meighen] in a manner that surpasses all belief." "The supremacy of Parliament, the rights, the dignities, the existence of Parliament" were challenged by Mr. King on November 5, 1925, when he asserted that an "immediate" second dissolution was "open" to him, and hinted that a second dissolution would still be "open" to him even after Parliament had "disclosed its attitude".(5) They were again challenged when he requested dissolution on June 28, 1926, when a motion of censure against his Government was under debate.(6) They were preserved when Lord Byng refused that

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(1) See above, pp. 229, 264.
(2) See above, pp. 341-379.
(3) See above, pp. 382-383.
(4) See above, pp. 341-379.
(5) See above, pp. 282-284.
(6) See above, pp. 267-299.

request and Mr. Meighen accepted responsibility for the refusal.(1)

Mr. King goes on to assert that for two weeks Mr. Meighen conducted the government of the country "without a single Minister sworn to office save himself", which is completely misleading;(2) and that "He alone was the Government of Canada over that period of time", which is simply not true.(3)

"What Prime Minister", exclaims Mr. King, "what individual in Great Britain, however exalted or however arrogant, would venture to constitute himself the sole adviser of the Crown, the sole government of the country, for a single day, let alone a period of two weeks!" The Duke of Wellington did very nearly this for a period of three weeks and one day, Mr. Balfour proposed to do it for a "few weeks", Mr. Meighen did not do it at all.(4)

Mr. King speaks also of Parliament being brought to a "precipitate close without prorogation", on July 2, 1926. This is true, but even Mr. King can hardly have thought it of any real importance, for he himself, on January 25, 1940, brought the then Parliament to a "precipitate close without prorogation", after a session of three hours.(5)

The next passage in the speech appears to be an objection to Mr. Meighen's having formed a Cabinet in the ordinary way on July 13. Unless Mr. Meighen's previous proceedings were unconstitutional, this charge is worse than nonsense.

"We are the custodians", Mr. King proceeds, "of the honour of the British Crown and of the sanctity of the British Constitution not for Canada alone, but for Australia, for New Zealand, for Africa, for Newfoundland, for the Irish Free State, for India, yes, and for the British Isles themselves. The violation of its usages, its practices, its law in one

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(1) See above, p. 378.
(2) See above, pp. 354-361.
(3) See above, p. 376.
(4) See above, pp. 376-377.
(5) See above, pp. 276-277, 390.

part of the Empire cannot fail to have far-reaching reactions in every other part. Free representative institutions cannot be threatened in Canada without their being everywhere threatened. If Mr. Meighen's unconstitutional course is permitted to go unchallenged by the people of this country, then may we question on behalf of all self-governing British communities whether the British constitution may not become a phantom to delude to destruction, instead of being, as we believe it is, the day-star of our dearest liberties."

On this passage three comments are in order. First, the first three sentences dispose pretty effectively of Mr. King's charge that Lord Byng's action relegated Canada to a status inferior to that of Britain.(1) Second, it may be true that "The violation of [constitutional] usages, practices, law in one part of the Empire cannot fail to have far-reaching consequences in every other part"; that "Free representative institutions cannot be threatened in Canada without their being everywhere threatened." But no one has yet offered any serious evidence, let alone proof, that Lord Byng's or Mr. Meighen's actions in any way violated the Constitution or threatened "free representative institutions". "Free representative institutions" were indeed threatened in Canada" in 1925-1926. But they were threatened by Mr. King, (a) on November 5, 1925, when he claimed a right to an "immediate" second dissolution, and (b) on June 28, 1926, when he sought to "withdraw from the cognizance of the people's representatives the great cause pending between Ministers and their accusers".(2) Third, to describe Mr. Meighen's course as "unconstitutional" is, to say the least, begging the question.

Mr. King goes on: "When after the last general elections I advised His Excellency to let Parliament decide . . . who should head the administration, . . .I was endeavouring to follow a strictly constitutional course

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(1) See above, pp. 390-393.
(2) See above, pp. 282-284, 267-299.

in a manner which would help to preserve the high and noble traditions of Parliament and above all to maintain its supremacy. When I saw those traditions threatened, when I found the course becoming too difficult for any Prime Minister and so advised His Excellency, and thereupon sought a dissolution of Parliament, I was again not seeking to retain office at any price or to escape from office under embarrassing circumstances. I was endeavouring to follow the constitutional course of appealing from Parliament to the people in a manner which would give to the people the right which is theirs at all times of saying how they shall be represented in Parliament and by whom they shall be governed. On each occasion I was upholding the Constitution. . . . The present Prime Minister, I contend, has proven that for the sake of office, he is prepared to tear that constitution into shreds."

This passage calls for no less than seven comments.

First: Mr. King's advice to the Governor after the election of 1925 was evidently not couched in the unconstitutional language of his manifesto of November 5, 1925, in which he said nothing about letting Parliament decide.(1)

Second: the November advice "to let Parliament decide", which, as Mr. King correctly says would have "maintained its supremacy", is in flat contradiction to the June advice, which would have destroyed that supremacy.(2)

Third: Mr. King says he advised dissolution when he "saw the high and noble traditions of Parliament threatened". What had actually happened when Mr. King asked for dissolution? The House of Commons had defeated Mr. King's Government on the Woodsworth sub-amendment, and there was a possibility, or probability, that it would very soon pass a vote of censure. "The high and noble traditions of Parliament" were not threatened in the

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(1) See above, pp. 282-284.
(2) See above, pp. 267-299, 283.

slightest degree. What was threatened was Mr. King's Government.

Fourth: Mr. King says he advised dissolution when he "found the course becoming too difficult for any Prime Minister". What could Mr. King know of the difficulties which an alternative Prime Minister might or might not encounter? What business had he to answer for Mr. Meighen as well as for himself? What becomes of the principle that a Governor-General may refuse dissolution when an alternative Government appears possible, if the Prime Minister who requests dissolution is conceded the right to veto an alternative Government by his mere assertion that it is impossible? (1)

Fifth: "When I . . . sought a dissolution", says Mr. King, "I was . .. not seeking . . . to escape from office". Quite so. But this answers a point which no one made. The charge was that Mr. King was seeking to escape from the judgment of Parliament.

Sixth: "I was endeavouring to follow the constitutional course", etc. This again begs the whole question.

Seventh: "The present Prime Minister, I contend, has proven that for the sake of office he is prepared to tear [the] constitution into shreds!" After what has already been said, no impartial reader will have any difficulty in deciding to whom this charge is properly applicable.

The policy speech, as quoted in Keith, concludes with a page and a half of irrelevant rhetoric on "the link of Empire", and an appeal "in the name of our King and of our Country . . . to vindicate [the] might and majesty [of the British Constitution] at the polls" by voting for Mr. King's candidates.(2)

Yet this speech is the single document on the crisis of 1926 which Keith sees fit to include in his "Speeches and Documents on the

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(1) See above, pp. 162, 164, 169-172.
(2) "Speeches and Documents on the British Dominions", pp. 150-158. The use of the King's name in an appeal for votes is of course grossly improper.

British Dominions". This is the "exposition of constitutional doctrine" which he says was "justly admired",(1) "the case against Mr. Meighen . . . admirably put",(2) "the complete case against Lord Byng's action";(3) these are the "arguments" to which he says "there is no answer".(4) This is what Kennedy and Schlosberg call "an important and convincing exposition of the issues".(5)

The Canadian case of 1926 is, as all these writers recognize, a precedent of first-rate importance. But, critically examined, it is a precedent which supports conclusions the reverse of those which they have drawn from it.

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(1) "Constitutional Law of the British Dominions", p. 149.
(2) "Responsible Government in the Dominions", 1928 ed., p. 150.
(3) "Letters on Imperial Relations", etc., p. 60.
(4) Ibid., p. 147.
(5) Mr. H. J. Schlosberg, in "The King's Republics" (Stevens and Sons, 1929), p. 77, says that Mr. Meighen "on becoming Prime Minister also advised a dissolution". This is of course contrary to the facts; but it is repeated at p. 138 of Kennedy and Schlosberg's "Law and Custom of the South African Constitution".

Mr. Schlosberg, also on p. 77 of "The King's Republics", observes that Lord Byng "appears to have thought that His Majesty would have refused a dissolution in similar circumstances", adding, in a footnote: "This is where Lord Byng went wrong. His Majesty never refuses a dissolution of Parliament when so advised, except in the rare instance where a Government had appealed to the people and came (sic) back in a minority. For in such a case it is the obvious duty of the Government to retire from office." Mr. Schlosberg is evidently imperfectly acquainted with the results of the Canadian election of 1925 and Mr. King's subsequent statements and actions.

CHAPTER VII

The South African Crisis of 1939

The outbreak of war between Great Britain and Germany in September 1939 produced a constitutional crisis in South Africa. The Prime Minister, General Hertzog, with just less than half the Cabinet and a minority of the Government party, favoured neutrality. General Smuts, Minister of Justice, with the majority of the Cabinet and its supporters, favoured a declaration of war, though not the despatch of troops overseas. The Prime Minister moved in the Assembly a resolution embodying his policy; the Minister of Justice moved an amendment embodying his. On September 4 the amendment was passed, 80-67, and the motion as amended carried on the same division. General Hertzog then appears to have made, with the support of course of only a minority of his Cabinet, a somewhat informal request for dissolution. The Governor-General, Sir Patrick Duncan, refused. General Hertzog thereupon resigned. The Governor-General sent for General Smuts, who agreed to form a Government and carry on with the existing Parliament, which he was able to do without difficulty.(1)

Some months later a lively controversy broke out on the subject of the constitutionality or unconstitutionality of Sir Patrick Duncan's action. On February 21, 1940, Mr. J. H. Viljoen (Opposition) attacked the refusal in the Assembly. He quoted F. W. Maitland's "Constitutional History of England" (Cambridge, 1931), pp. 404-405; "A defeated Minister has the choice between resigning and counselling a dissolution of Parliament. As to when he may counsel a dissolution no very precise rule can be laid down." He also quoted the familiar passage from Bagehot, that the Queen could "hardly refuse", and a passage from Keith's "The Dominions as Sovereign

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(1) Parliamentary Debates (South Africa), 1940, vol. 37, pp. 2225, 4613; Round Table, vol. XXX, no. 117, pp. 205-209.

States", pp. 165-166, on the Canadian case of 1926. He condemned Lord Byng for having sought the advice of the British Government as to the course he should pursue, and charged Sir Patrick Duncan with having acted unconstitutionally.(1)

Mr. Hofmeyr, replying for the Government, also condemned Lord Byng for having asked the advice of the British Government, and for refusing dissolution "when it was perfectly evident that no other Ministry could be formed in the existing Parliament which could carry on the Government of the country".(2) On the first point both he and Mr. Viljoen were under a misapprehension, which was later brought to Mr. Viljoen's notice by a letter from Professor Keith, from which he quoted in the House.(3) On the second point also Mr. Hofmeyr was mistaken, though the mistake was natural and excusable in view of Keith's statements on the subject. The distinction which the Minister drew between Lord Byng's position and Sir Patrick Duncan's on these two heads was therefore not well founded. Mr. Hofmeyr also pointed out, however, that General Hertzog had made his request without the support of even a majority of his Cabinet, and that the dissolution would have come at a very dangerous time. As to British practice, he asserted that "If the King refuses to accept the advice of his Ministry he simply compels the Ministry to resign and a new Ministry has then to be formed. If the Ministry cannot get the majority of Parliament to support it, the Ministry will then recommend the dissolution of Parliament."(4)

Dr. Malan (Opposition) noted that when, in 1920 and 1933, there was a fusion of parties, producing a major change in the political situation,

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(1) Parliamentary Debates (South Africa), 1940, vol. 37, pp. 2007-2012.
(2) Ibid., p. 2225.
(3) Ibid., p. 4588.
(4) Ibid., pp. 2225-2226, 2398. It will be noted that the last statement runs counter to the Keith-Evatt view that in Canada in 1926, after Mr. Meighen's defeat in the Commons, Lord Byng should have recalled Mr. King and granted him the dissolution.

General Smuts in the first case and General Hertzog in the second had both thought it necessary to dissolve in order to take the verdict of the electorate. But in this case, though General Smuts' union with various other parties in the House, and the fusion of General Hertzog's followers with the official Opposition had most certainly produced a major change in the political situation, no dissolution had taken place.(1)

General Smuts, in reply to the attacks, said simply that General Hertzog had been defeated in the House; that the majority of his own party had been against him, and the Cabinet had been hopelessly broken up. His request for dissolution had therefore not been the request of the Cabinet. If, he added, General Hertzog had formed a new Government willing to support his request for dissolution, then the situation would have been similar to "other instances" quoted in the debate. As it was, the precedents and opinions quoted did not apply.(2)

Keith defends Sir Patrick Duncan's action on three grounds.

First, the dissolution was not advised by the Cabinet, in which there was a majority of one against it, but only by the Prime Minister with the support of a minority of the Cabinet (as in the New South Wales case of 1927). In Britain, at least until very recently, the constitutional usage has been that it is the Cabinet, not the Prime Minister alone, which makes the request for dissolution. Whether this has been so in the most recent cases is a disputed point, but of the practice in the nineteenth and early twentieth centuries there is no question. "In the Dominions still less is there any tradition of the right of the Prime Minister to obtain a dissolution against the will of a majority of the Cabinet; if he desires to dissolve and the Governor is willing, the correct course is to reconstruct the Cabinet, so that it may give the desired advice."(3) But, he adds, if

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(1) Parliamentary Debates (South Africa), 1940, p. 4554.
(2) Ibid., pp. 4613-4615.
(3) Modern Law Review, vol. IV, no. 1, p. 6; Journal of Comparative Legislation, Third Series, vol. XXII, p. 210.

General Hertzog had formed a new Government, it would have been defeated in the Assembly, "and could not legitimately have claimed a dissolution in the circumstances".(1)

Second, an election would have been the cause of "much bitterness and contention, involving even the risk of civil war. The Governor General patently had the right to take this consideration into account." But, he adds, if General Smuts had intended to introduce conscription for service outside the Union, "the claim for a general election would have been overwhelming".(2)

Third, "as General Smuts was ready and able to form a ministry if asked to do so, Sir Patrick Duncan was fully entitled to decline a dissolution."(3)

Keith's first point would seem to be well taken. To allow the Prime Minister alone to advise dissolution would certainly be contrary to the general trend of constitutional tradition, both in Britain and overseas; it would also be objectionable on grounds of public policy as tending to increase unduly the Prime Minister's personal power.

But it is a pity that Keith does not explain his addendum, that if General Hertzog had formed a new Government and been defeated in the House, he "could not legitimately have claimed a dissolution in the circumstances". For it would not be hard to construct a powerful argument for the opposite conclusion, especially on the basis of South African precedents. In the first place, while a Cabinet headed by General Hertzog had had the previous dissolution, it would not, in the circumstances supposed, have been the same Cabinet but a very different one; not a Hertzog-Smuts Cabinet but a Hertzog-Malan Cabinet. Second, the previous dissolution had been granted

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(1) Journal of Comparative Legislation, loc. cit.
(2) Modern Law Review, loc. cit.
(3) 18 Canadian Bar Review, no. 7, p. 588.

almost a year and five months before. Third, there was indisputably a great question of public policy at issue. Fourth, there had been as in 1920 and 1933, a major change in the political situation. Fifth, it might well have been held that the "mandate" of the existing Parliament had been exhausted by the change in the situation. Certainly in all these respects General Hertzog's claim would have been very much stronger than Mr. King's in Canada in 1926. Yet Keith considers Mr. King was entitled to a dissolution but General Hertzog would not have been(1)

Presumably Keith would reply that in the South African case an effective alternative Government would have been possible, while in Canada it was not. This argument, however, as we have seen, rests on a misapprehension of the facts of the Canadian case.

Keith would probably also point out that in Canada in 1926 there was no risk of civil war. But this part of his comments on the South African case is itself open to serious question. It might well be argued that the risk of civil war was increased by refusal of dissolution. Which is more likely to revolt: a party which has had an opportunity to place its policy before the people, and has seen that policy rejected; or a party which has been denied such an opportunity, and believes that the country is being dragged into war against its will? It may be answered that the real risk was that General Hertzog might win the election. But if the South African people were really in favour of neutrality, then on democratic principles they were entitled to say so, and to install in power a Government which would give effect to their will; and if Sir Patrick Duncan's action frustrated their will, again the chance of civil war was increased, not lessened. There is, of course, the possibility that General Hertzog would have won the election and that the pro-war South Africans would then have revolted; but if the Governor-General is to use his power to maintain in office a Government which the majority of the electorate disapproves simply because a minor-

(1) Furthermore, General Hertzog had allowed Parliament to pronounce judgment, which Mr. King tried to prevent.

ity threatens to revolt against any other Government, then we are faced with, to say the least, a very serious breach with British constitutional tradition.

Keith's position is made still more difficult to explain by his remark in this context that if General Smuts had intended to introduce conscription for service outside the Union, "the claim for a general election would have been overwhelming". If an election on the issue of neutrality versus a policy of war without the despatch of an expeditionary force would have involved the risk of civil war, surely an election on the issue of conscription for overseas service would have involved an even greater risk?

Keith'sthird point calls for no comment except that it is, when the facts of the Canadian case of 1926 are known, wholly inconsistent with his attitude towards Lord Byng's action.

These criticisms do not, of course, necessarily involve any suggestion that Sir Patrick Duncan's action was in fact unconstitutional. That action was certainly open to objection of the grounds indicated; but it was defensible on Keith's first ground, and on Evatt's doctrine of "the parliamentary situation", especially as the Parliament had been comparatively recently elected, and at a time when the possibilities of war may well have been present to the minds of many electors and a factor in their choice of representatives. It is also defensible on the ground that General Hertzog's request seems to have been only a half-hearted one, and that he himself raised no serious objection to the Governor-General's action until some months after it had taken place. In other words, it may be argued that he did not really believe that the electorate would support him, did not really believe that there was any reasonable probability of the country reversing the decision of the House; that his request was therefore, in spite of the importance of the issue at stake, really made on "inadequate grounds".

CHAPTER VIII

CONCLUSIONS

Any attempt to formulate the conventions of the Constitution must start from the basic fact that the British Constitution is essentially parliamentary. The Cabinet is responsible to Parliament, and through Parliament to the people. "The House of Commons is prima facie the exponent of the national will", (1) "the recognized organ of public opinion".(2) In nineteenth century England the struggle for the rights of Parliament was still recent enough, the parliamentary tradition strong enough, that this basic fact was never for a moment forgotten. It was taken for granted. Hence, in part, the looseness, vagueness and apparent contradictions of many of the "authoritative" opinions on the conventions regulating the power of dissolution. What everyone in public life acknowledged and understood, comparatively few thought it necessary to state in precise terms. But the principle was explicitly set forth by Burke, Fox and Peel, and is at least implicit in the dicta of Russell, Gladstone, Bagehot and Mr. Asquith, to mention no others. (3)

More recently, however, and especially in the Dominions, there has been a tendency to assume that the whole of responsible government can be summed up in two simple rules of thumb: (a) that the Crown must always act on the advice of the Cabinet for the time being, and (b) that an appeal to "the people" is always proper. (4) From this view, of course, it follows that the Cabinet always has a dissolution in its pocket.

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(1) See above, p. 43.
(2) See above, p. 124.
(3) Note also the statement of the Governor of New Zealand in 1872 and the Governor of Victoria in 1881; see above, pp. 68, 38.
(4) See above, pp. 10, 158, 161, 241, 407.

In the British parliamentary system, on the other hand, dissolution is "always an exceptional remedy". Normally, "if the Ministry does not possess the confidence of the House of Commons, it ought to resign. Far from having an inherent personal right to dissolve, a Minister must always show why he does not resign and why he dissolves. He must show that there are special reasons why immediate recourse should be had to an extraordinary and irregular manifestation of the national will. Either he must show that the national will has not been declared in the existing Parliament; or else he must state that on some great question the national will is not really expressed by the existing Parliament, and to the best of his belief, a new Parliament would take a very different view, and represent the nation far more adequately." (1) In the British parliamentary Constitution, Parliament is not a mere creature of the Cabinet, deliberating only when, for so long, and under such conditions as the Cabinet thinks fit; pronouncing or not pronouncing judgment as the Cabinet may choose; subject to dissolution at any moment which suits the Cabinet's convenience. It is not "in the choice" of the Cabinet "to resort [to Parliament or the electorate] as may best suit the purposes of their sinister ambition". (2) It is not in the power of the Cabinet "at their own mere pleasure, to acknowledge [the opinion of the House of Commons] with respect or to reject it with scorn". It is the duty of the House of Commons "to offer salutary, which is not always pleasing counsel". "We are to inquire and to accuse; and the objects of our inquiry will be for the

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(1) See above, pp. 43-44.
(2) Burke, quoted above at p. 12.

most part persons of wealth, power and extensive connections; we are to make rigid laws for the preservation of the revenue ..... Whilst ultimately we are serving [the people], and in the first instance whilst we are serving his Majesty, it will be hard indeed, if we should see a House of Commons the victim of its zeal and fidelity, sacrificed by his minister to those very popular discontents which shall be excited by our dutiful endeavours for the security and greatness of his throne. No other consequence can result..... but, in future, the House of Commons, consulting its safety at the expense of its duties, and suffering the whole energy of the state to be relaxed, will shrink from every service which ..... is of a great and arduous nature, -- or that, ... they will exchange independence for protection, and will court a subservient existence through the favour of those ministers .... who ought themselves to stand in awe of the Commons of this realm ..... If our authority is to be held up when we coincide in opinion with his Majesty's ministers, but is to be set at nought the moment it differs from them, the House of Commons will shrink into a mere appendage of administration ..... The whole can end in nothing else than the destruction of the dearest rights and liberties of the nation". (1)

Burke, when he spoke those words, was of course thinking partly of the danger of royal encroachments upon the power and liberties of the Commons and royal invasions of the Constitution. But it is perfectly clear that he was thinking also of encroachments and invasions by the

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(1) Burke, quoted above at pp. 12-14.

Cabinet; and in any case, as Blake said in 1873, "It makes no difference to a free people whether their rights are invaded by the Crown or by the Cabinet. What is material is to ensure that they shall not be invaded at all..... It is very well to tell the people that they are all-powerful, but if they hand over to a Cabinet inordinate powers, not susceptible of being kept under control, they may be deprived of the free expression of the popular will which is necessary to popular government. The prerogative [can] be used against the people under the advice of .... Ministers -- [used] in order to prevent the action of the people's representatives, in order to withdraw from [their] cognizance [a] great cause pending between Ministers and their accusers." (1)

The danger of royal absolutism is past; but the danger of Cabinet absolutism, even of Prime Ministerial absolutism, is present and growing. Against that danger the reserve power of the Crown, and especially the reserve power to force or refuse dissolution, is in some instances the only constitutional safeguard. The Crown, in the British parliamentary system, is more than a quaint survival, a social ornament, a symbol, "an automaton, with no public will of its own". It is an absolutely essential part of the system. In certain circumstances, the Crown alone can preserve the Constitution, (2) or ensure that if it is to be changed it shall be only by the deliberate will of the people. "Within the ambit of the discretion residing still in the Crown, there is a responsibility as great as falls to any estate of the realm or to any House of Parliament.....

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(1) Quoted above, pp. 296-297.
(2) Cf. Sir Richard Acland, "Unser Kampf" (Penguin Books, 1940) pp. 115-117.

Within the sphere of that discretion the plain duty of the [Crown] ... is to make sure that responsible government is maintained, that the rights of parliament are respected, that the still higher rights of the people are held sacred. It is [its] duty to make sure that parliament is not stifled by government, but that every government is held responsible to parliament, and every parliament held responsible to the people". (1)

It is in the light of these basic principles that the question of the conventions regulating the reserve power to refuse or force dissolution must be considered.

(a) Grant and Refusal of Dissolution

(i) To Governments Undefeated in the Commons

In the first place, it may be laid down with some assurance that a Government which has had a dissolution cannot have another until the new Parliament has been allowed to meet and to make at least an attempt to transact business. No Government in the history of the British Empire seems ever to have tried to secure a second dissolution before the new Parliament could even meet, though Mr. Mackenzie King, on November 5, 1925, claimed a right to do so. Sir Robert Bond, in Newfoundland in 1909, advised the Governor to "convene Parliament and immediately dissolve it", without allowing it even to try to elect a Speaker. The Governor refused even this, and his refusal was unquestionably correct.

The only possible exception to this rule would seem to be a case in which an Opposition party had secured a majority by flagrant and notorious fraud, corruption, terrorism, or some combination of such methods.

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(1) Mr. Meighen, quoted above, p. 269.

It may be argued that even in such a case, the constitutional course would be for the Crown to allow the leader of the majority to form a Government, and then to force him to dissolve Parliament and hold a new election under proper conditions, or else make way for a new Government which would do so. But this would involve a more "violent exercise of the prerogative" than an immediate grant of a second dissolution to the old Government, and would risk placing the election machinery in the hands of the culprits and a second election conducted under even worse conditions than the first. On the other hand, if the old Government secures an immediate second dissolution, it is not likely to be any better able than before to prevent the fraud, corruption or terrorism. It may be that the best solution of the difficulty would be that suggested by Mr. Balfour in 1913 for a different contingency: a temporary Government of some independent "elder statesman" or statesmen, to hold office only for the period of the elections and for the single purpose of seeing that they are conducted properly. Fortunately, such cases are in the highest degree improbable. It is rather more likely that the fraud, corruption or terrorism will come from the Government than from the Opposition, for the simple reason that a Government's facilities for such purposes are normally very much greater. In any case, the Crown would be justified in departing from the ordinary course (that of allowing the new Parliament to meet and attempt to transact business) only if the fraud, corruption or terrorism employed by the Opposition were very flagrant and very notorious. (1)

In the second place, it may be laid down with almost equal assurance that if a Government secures a dissolution and the new Parliament

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(Cf. Lord Mulgrave's course in Nova Scotia in 1860 (though in that case fraud, corruption and terrorism were of course not involved).

proves unable even to elect a Speaker, the Government is entitled to another dissolution immediately afterwards. The action of the Lieutenant-Governor of Prince Edward Island is granting the dissolution of 1859 seems to be the only precedent, but there seems no substantial reason for thinking that his course was anything but proper. The only alternative would have been to refuse, which would have involved accepting the resignation of the existing Government and granting an immediate dissolution to its successor. The only argument for this course of action would be that the old Government's control of the election machinery had biased the election in its favour, and that accordingly control of the machinery by the opposing party would be more likely to produce a decisive result and break the deadlock. This factor in the situation, however, is becoming less and less important as the election machinery comes everywhere more and more under non-partisan control; and for the Crown to refuse dissolution to one party in such circumstances and then immediately to grant it to another, might lead to accusations of partisanship, which, however unfounded, it is desirable to avoid unless there is some overwhelming reason which makes the risk worth running.

But a new Parliament must not only be allowed to meet and to elect a Speaker. It must also be allowed to proceed to the transaction of the ordinary business of the session. Neither the Government which has had the previous dissolution, nor a new Government, called to office by the retirement (voluntary or involuntary) of its predecessor, has a right to dissolve a new Parliament immediately after the election of the Speaker. A new Parliament has a right to do more than merely elect a

Speaker. Similarly, the Government would not have a right to a dissolution immediately upon the adoption of the Address in Reply to the Speech from the Throne. Even if the Government is dependent in critical divisions(1) on the Speaker's casting vote, or has a majority of only one vote, or a somewhat larger majority faced by an Opposition so skilful, so militant and morally in so strong a position as to be able to hold up essential public business almost indefinitely; even then the Government is not entitled to dissolution unless it has made a serious attempt to get Supply voted and to deal with other urgent business, as Mr. Bennett did in Newfoundland in 1874, Mr. Kidston in Queensland in 1909, and Mr. Taschereau in Quebec in 1936.

It would seem also that a Government which has had a majority of more than one on critical divisions is not entitled to a dissolution during the first session of a new Parliament unless (a) an alternative Government is impossible; or (b) some great new issue of public policy (such as a dispute between the two Houses, (2) extension or limitation of the franchise, a proposal to prolong life of Parliament otherwise than by general consent, a major change in trade policy, a question of peace or war or other major change in foreign policy) has arisen; or (c) the

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(1) A "critical division" means, for these purposes, a division on a vote of censure or want of confidence, including, of course, a vote on a motion to go into Supply, or a vote on the Budget. It would ordinarily include a division on the Address in Reply to the Speech from the Throne, or on an amendment thereto. But there may be rare occasions when such a division is not "critical"; cf. the amendment to the Address in the United Kingdom in 1894, carried against the Government, on a "snap vote", by a majority of two. (See A.G.Gardiner, "Life of Sir William Harcourt" (Constable, 1923), vol. II, p. 278).

(2) The United Kingdom precedent of November 1910 suggests, however, that the Crown may properly insist on proof that the dispute can be settled only by a general election.

Opposition has explicitly invited, or agreed to, dissolution; or (d) essential public business has been brought to a standstill and no alternative Government is possible. (1) Even where a great new issue of public policy has arisen, the Crown would be justified in refusing dissolution if Supply had not been voted, or a redistribution or franchise Act had not yet had time to come into operation, provided an alternative Government could be found, or provided the issue was not one which brooked no delay. Of the last, the idea embodied in Mr. Meighen's Hamilton speech of 1925 furnishes an example: if war had broken out during the first session of a new Parliament, and the Government was seeking a mandate for the despatch of troops overseas, every moment would be precious and delay would be criminal.

Whether an alternative Government is possible may not always be clear at a glance. In Quebec in 1936, obviously none was possible. But with a multiple-party system it might be necessary for the Crown to refuse dissolution, and to consult the leaders of the various Opposition parties, or even prominent private members, or to call on such personages, successively, to form Governments. If all possible alternative Prime Ministers declined the task, there would clearly be no course open but to retain the existing Government in office (or, if the Government to which dissolution had been refused had resigned forthwith, as Mr. King did in 1926, to recall it), and grant its request for dissolution. If, on the other hand, an alternative Government assumed office and asked for an immediate dissolution, or was at once defeated on a critical division, it would be the duty of the Crown to recall the former

Government and grant it dissolution. (1)

It must be emphasized, however, that a Government is not in any case entitled to a dissolution as "undefeated on critical divisions", merely because an impending critical division has not taken place. If a motion of censure or want of confidence is under debate but has not yet been voted on, and the Cabinet tries to forestall defeat by asking for a dissolution, then, for reasons fully set forth in an earlier chapter, it is clearly the Crown's duty to refuse. Any other course would reduce the House of Commons to "a mere appendage of administration". (2)

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(1) On the question of a new Government which proved able to carry on for a time, long or short, surviving a critical division or divisions, and was then defeated, see below, p. 432.

(2) By way of illustration of the three preceding paragraphs, it may be well to call attention to certain actual or hypothetical cases.

(a) If Mr. Ramsay MacDonald had asked for dissolution in 1924 before his defeat in October, with no great new question of public policy at issue, and Supply not voted, it follows, if the arguments here presented are correct, that the Crown could certainly have refused.

(b) The argument of the second paragraph, that if an alternative Government were at once defeated on a critical division it would be the duty of the Crown to recall the former Government and grant it dissolution, applies only to a new Government which has taken office as a result of refusal of dissolution to a predecessor undefeated in any critical division. It therefore does not apply to Mr. Philp's case in Queensland in 1907.

(c) The same argument of the second paragraph does not apply to Mr. Meighen's Government in Canada in 1926. In the first place, that Government was not defeated on a critical division immediately after assuming office. On the contrary, it was sustained on at least three critical divisions, and would have been sustained on a fourth if Mr. Meighen's seat had not been vacant and Mr. Bird had not broken his pair. In the second place, Mr. King's Government had tried to forestall defeat by asking for dissolution while a motion of censure was under debate. In the third place, before Mr. Meighen's Government suffered defeat on the Robb motion, the House had censured Mr. King's Government. To recall this censured Government and grant it dissolution would have been fantastic; see above, p. 385.

(d) In New Brunswick in 1857, the motion of want of confidence was not under debate when dissolution was asked for. It was moved only after the grant of dissolution had been announced. In this case, also, the Opposition had explicitly invited dissolution.

Is a new Government taking office on the defeat of its predecessor during the first session of a new Parliament entitled to an immediate dissolution? If the change occurs at the very outset of the session, as in the United Kingdom in 1924, the answer would seem to be, no, for reasons already given; (1) and Marriott's statement on a hypothetical request of Mr. MacDonald in that year supports this view. If the change occurs later, the answer is not so easy. Disraeli, in 1868, claimed that Lord Derby had had a constitutional right to dissolution on taking office in 1866; but the fact that he conceded that the Queen might refuse his own request, made on at least as strong, though different, grounds in 1868, suggests that he would have admitted that the Queen might have refused Derby in 1866. If an alternative Government is possible (as it probably was in 1866, for the Liberal Cabinet had been in two minds about resigning), and if there is no great issue of public policy at stake, there seems no reason why a Government which has just taken office on the defeat of its predecessor in the first session of a new Parliament should be granted dissolution. The Crown would seem to have a clear right to refuse to put the country to the tumult and turmoil of a fresh general election merely because the new Government thinks the proceeding may prolong its own tenure of office.

If a Government is dismissed during the first session of a new Parliament, it seems proper that it should at least try to carry on with the existing House, unless the attempt is obviously impossible, or unless the dismissal took place for the express purpose of bringing about a dissolution. In New Brunswick in 1866 both these conditions were present.

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(1) See above, p. 423.

On the other hand, in Britain in 1807, the new Government carried on for only a very short time before asking and obtaining dissolution, though the existing House had not defeated it. In this case, however, the chances of carrying on for any appreciable time were probably small. The same principles would presumably apply even when the dismissal took place at some later period of the Parliament's existence, as in New Brunswick in 1856, Newfoundland in 1861, Quebec in 1878 and 1891, British Columbia in 1900 and 1903, and New South Wales in 1932.

If a Government survives the first session of a new Parliament,(1) the United Kingdom precedent of 1923 suggests that it is entitled to a dissolution in the recess if some great new issue of public policy has arisen, even if a Government of the same party has had the previous dissolution barely a year before. The South African case of 1920 suggests that a Government which has had one dissolution and has survived the first session may secure a second even within the year if there has been a major change in the political situation, and if no alternative Government is possible. On the other hand, the Australian case of 1909 suggests that a major change in the political situation is not in itself enough, even when the previous dissolution has been granted to the Government's opponents and the Parliament is within a few months of expiry through efflux of time, provided an alternative Government is possible. In this case, it is true, the Fisher Government had been defeated; but there seems no reason to suppose that if it had asked for dissolution before the opening of the session, when it was still undefeated, it would have got it. The propriety of the refusal in such a case would, however, have been doubtful, for the reasons indicated.

(1) Provided, of course, that the session is not abruptly cut short by prorogation, for the purpose of allowing the Government to make this claim.

If during the second or subsequent session, a Government is sustained on critical divisions only by the Speaker's casting vote or by a majority of one, then it would seem to be entitled to dissolution, provided it has made a genuine effort to secure Supply and to finish other essential business, and provided no alternative Government is possible. In New Zealand in 1877, Sir George Grey's first request for dissolution took place during the second session of the Parliament, and he had been sustained on a critical division only by the Speaker's casting vote. But Supply had not been granted, and it is not by any means clear that an alternative Government was impossible. The Governor gave several other reasons for refusal; but if an alternative Government had really been impossible, he could scarcely have persisted in his refusal, as in fact he did, even after prorogation: the other reasons for refusal would have had to go by the board. In Victoria in 1875, an alternative Government was clearly possible; in Queensland, in 1904, the Governor refused dissolution but subsequently granted it when an alternative Government proved impossible. In New South Wales in 1874 and 1891, the deciding factor seems to have been that the Parliament was nearing expiry through efflux of time.

Apart from the question of Supply, the second refusal in New Zealand in 1877 suggests that the same considerations apply if a Government, during the second or a later session, has been sustained only by the Speaker's casting vote or a majority of one, and then, during the recess, asks for a dissolution.

A Government which has had on critical divisions a majority of more than one has, during the second or any subsequent session, a better

claim than during the first session, though the same considerations apply. The longer the time since previous dissolution, and the larger the majority, the stronger the claim. If the majority is really large, and dependable, no alternative Government is possible and the claim to a dissolution on demand is irresistible. The claim is, of course, further strengthened if the previous dissolution was granted to the Government's opponents, or to a Government largely different from the one making the request for dissolution.

A new Government taking office on the resignation of its predecessor during the recess after the first session, or during any subsequent session or recess, and genuinely undefeated on any critical division, has certainly a right to dissolution if there is a great issue of public policy at stake, or if no alternative Government is possible, provided every effort has been made to secure Supply and deal with other essential business of the year. The British cases of 1852 (where the Government, even before defeat, announced its intention to dissolve as soon as necessary business had been dealt with) and 1931, and the Manitoba case of 1915, illustrate the point.

If a new Government assumes office as a result of refusal of dissolution to a former Government, at any date subsequent to the first session of a Parliament, the same considerations hold good as during the first session.

(11) To Governments Defeated (1) in the Commons

For reasons already set forth, (2) it may be confidently asserted that no Government defeated on the Address, or before, (3) at

(1) Defeated, that is, on a critical division.
(2) See above, pp. 422-423.
(3) It is, of course, always possible for Parliament to consider other important business before the Address; cf. Canada 1926, and Victoria, 1880.

the beginning of the first session of a new Parliament, is entitled to a dissolution. (1)

If a Government has been defeated in the Commons, has secured a dissolution, meets the new House, survives the vote on the Address, and is then defeated at a later peiod of the first session, it seems clear that it is not entitled to a second dissolution, unless there is some great new issue of public policy, or unless an alternative Government is impossible.

If such a Government survives the first session, but is defeated in a later session, its claim is certainly stronger, though not necessarily irresistible. If Supply has not been voted, the Crown is certainly entitled to insist that every reasonable means of securing it should be exhausted before dissolution takes place. If an alternative Government is possible, it would seem that the Crown is entitled to refuse dissolution, unless there is some great issue of public policy at stake, or unless the Parliament is approaching expiry through efflux of time. If, of course, the Government which had the previous dissolution has meanwhile resigned, all possible alternative Governments have in turn taken office and resigned, and the first Government has then resumed office and been defeated, then its claim to a second dissolution seems to be incontestable.

There appear to have been no cases of the kind described in the two preceding paragraphs. There have, however, been cases in which a Government has secured a dissolution in the ordinary course, or because of the retirement (voluntary or involuntary) of its predecessor, has met

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(1) Marriott's statement about a hypothetical request by Mr. Baldwin immediately following his defeat in January 1924 applies in terms only to a Government which had just had a dissolution; but there is no reason for restricting its application to such cases, and no reason to think that Marriott himself would so restrict it.

the new House and survived the vote on the Address, and has then been defeated at some later period of the first session. It seems clear that in such circumstances there is no valid claim to a second dissolution unless there is some great new issue of public policy at stake, or unless an alternative Government is impossible, and even then the Crown is entitled to insist on exhausting every reasonable means of getting Supply voted. If the defeat takes place during a later session, the claim to dissolution is again stronger, and if the Parliament is approaching dissolution by efflux of time, very strong indeed (as the New Zealand case of 1884 shows); but the same considerations apply as during the first session. The Tasmanian case of 1872, however, is a warning against dogmatism on the subject; for it is not clear that there was in that case any great new issue of public policy or that an alternative Government was impossible, and Parliament was near the beginning, not the end, of its term. If, of course, the Government which had the previous dissolution has meanwhile resigned and all possible alternatives have been exhausted, then again the claim to dissolution is incontestable.

We have now to consider the case of a Government which has not had the previous dissolution, has taken office since, has been defeated in the Commons, and asks for dissolution.

If such a Government is in office as the result of the dismissal of its predecessor, then (Evatt to the contrary notwithstanding (1)) there seems excellent reason for granting dissolution. If it has taken office as a result of the resignation of its predecessor, and no alternative Government is possible, refusal would seem to be impossible.

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(1) See above, p. 177. The constitutionality of the dismissal is a question which does not concern us here.

If Parliament is approaching the end of its term, the case for granting dissolution is almost irresistible, but perhaps not quite (as the Australian case of 1909 suggests (1)). If there is some great new question of public policy at issue, the claim to dissolution would seem to be absolute. If there has been a major change in the political situation, the claim to dissolution is again very strong, but, if the Australian precedent of 1909 is admissible, not absolute.

If the Crown has constitutionally refused dissolution to one Government, and a new Government takes office as a result, survives one or more critical divisions, is then defeated on a critical division and asks for dissolution, its claim would seem to be irresistible, unless some third alternative Government is possible. The recall of the previous Government would seem to be out of the question, especially, of course, if (as in Canada in 1926) the previous Government has meanwhile been censured for misconduct.

(iii) General Conclusions on Grant and Refusal

Before we leave the question of grant and refusal of dissolution certain general observations are in order.

First, in any case, the Crown is entitled to insist on every reasonable effort being made to secure Supply, unless the issue at stake is so urgent as to permit of no delay. If the existing Government demurs, and an alternative Government seems possible, then the Crown is entitled to call on whoever seems likely to be able to secure Supply.

Second, the fact that the previous dissolution was granted to

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(1) See above, p. 64.

the Government's opponents, though it strengthens any claim for dissolution, is not decisive, either by itself or in combination with the fact that an appreciable time has since elapsed.

Third, it is clear that, as Evatt says, the Crown cannot persist in refusing dissolution to a Government assured of the support of the Commons, as the possibility of an alternative Government is then excluded.

Fourth, Evatt's suggestions about the "popular mandate" of the House,(1) and the traditional doctrine that the Crown is not obliged to grant dissolution unless it is satisfied that there is a reasonable probability that the appeal will be successful, would seem to be very difficult of application.

Fifth, any Government would seem to be entitled to a dissolution if the Opposition has explicitly invited or agreed to that step, as in New Brunswick in 1857, British Columbia in 1878, Australia in 1929 and Quebec in 1936.

Sixth, the cases of Mr. Lang in New South Wales in 1927 and General Hertzog in South Africa in 1939, as well as the opinions of Keith and Laski, suggest that the Crown is not obliged to grant dissolution at the request of a minority of a Cabinet. This view is, moreover, based on sound reasons of public policy. The power of the Prime Minister is already great enough without conceding to him a right to dissolve Parliament even against the wishes of a majority of his colleagues.

Seventh, if a Government asks for dissolution while a motion of censure or want of confidence is under debate, it is clearly the Crown's duty to refuse.

Eighth, to say that in this, that or the other set of circumstances

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(1) See above, p. 171.

a Cabinet is not entitled to a dissolution, or that the Crown is entitled to refuse, does not mean that the Crown must refuse. It may, for special reasons, grant dissolution even where there are strong grounds for refusal. If, for example, an alternative Government was possible in Britain in 1924 (a point on which we are not yet in a position to speak positively), then the King could properly have refused Mr. MacDonald's request for dissolution. But he might nevertheless have granted it because of the extreme undesirability of giving colour to any impression, however unfounded, that the Crown was moved by class bias, and was refusing to Labour what it would have granted to a capitalist Government.

(b) Forced Dissolutions

It is probably safe to say that under modern conditions forced dissolutions will take place only if the Crown considers them necessary to protect the Constitution or to ensure that major changes in the economic structure of society shall take place only by the deliberate will of the people. In other words, the power to force dissolution is now likely to be used only negatively, preventively; never as a means of bringing about some positive and desired by the King himself or his representative. (1)

In the first place, if a Government won an election by means of flagrant and notorious fraud, corruption, violence or terrorism, or some combination of these, the Crown could properly dismiss such a Government and call to office a new Government which would hold new elections under proper conditions.

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(1) It is now scarcely, if at all, conceivable, that the Crown or any of its representatives would force a dissolution on such grounds as were given in New Brunswick in 1856.

Second, if the Crown were asked to "swamp" the Upper House (in jurisdictions where such a power exists), or to assent to some major change in the electoral system, a widening or narrowing of the franchise, abolition of the ballot, abolition of the Upper House or of the monarchy, prolongation of the life of Parliament otherwise than by general consent, a change from private to social ownership of the means of production (or vice versa), (1) then it might well insist that any such drastic change should first be submitted to the judgment of the electors. In any doubtful cases it would be safer for the Crown to refrain from forcing dissolution, as the "inarticulate major premise" in the monarch's mind is likely to be on the side of conservatism; and Keith is unquestionably correct in saying that the right to force a dissolution is not the right to force a series of dissolutions on each separate item of a programme to which the electorate has already deliberately given its support. If the people have explicitly pronounced in favour of the socialization or desocialization of industry generally, for example, then the Crown could certainly not insist on a fresh election on the issue of the socialization or desocialization of each particular industry.

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(1) For further examples, see above, p. 206.

Neither on grant and refusal, nor on forced dissolutions, is it possible to lay down rules which will cover every conceivable case. Gaps are bound to remain, gaps which only the future development of constitutional practice in particular cases can fill. Nor is it possible to be as precise as one could wish about past or present usage. Least of all is it possible to be positive on all points, even on all important points. The British Constitution and the Dominion Constitutions which have sprung from it are not the same yesterday, to-day and forever. Their flexibility, their capacity to adjust themselves to new circumstances, are among their greatest virtues. But there are certain principles which, historically, are fundamental to the British parliamentary system. These it is possible to state and to apply with reasonable precision. It is not only possible; it is imperative, for the preservation of the very essence of our constitutional system; and nowhere is the task more imperative than in relation to the power of dissolution of Parliament.

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