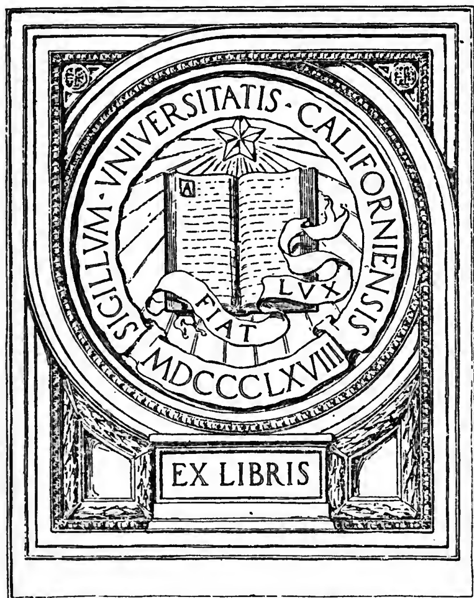
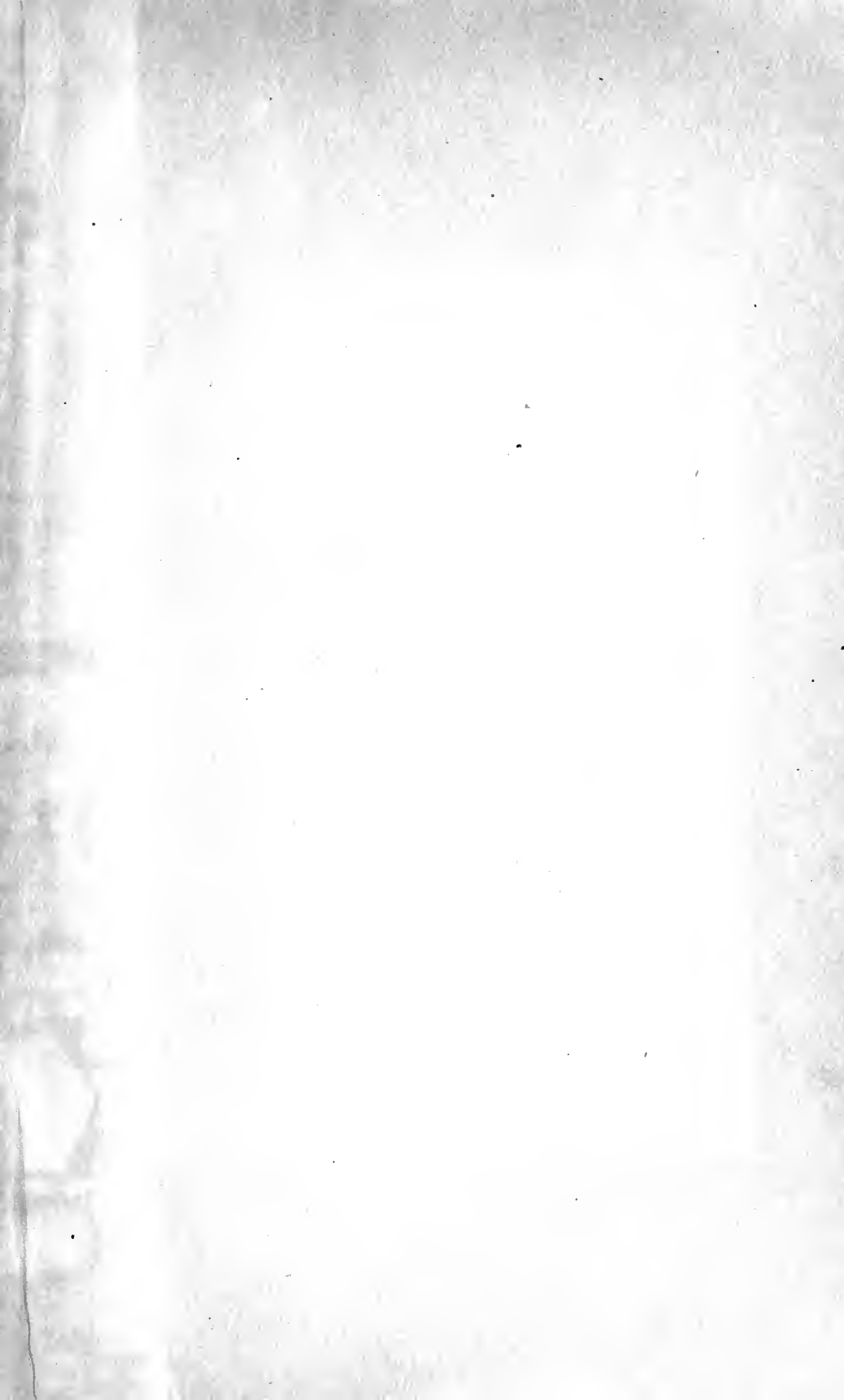
EXCHANGE





Digitized by the Internet Archive
in 2007 with funding from
Microsoft Corporation

http://www.archive.org/details/principleofficia00dawsrich

STUDIES IN ECONOMICS AND POLITICAL SCIENCE

No. 64 in the series of Monographs by writers connected with the London School of Economics and Political Science

# THE PRINCIPLE OF OFFICIAL INDEPENDENCE

# THE PRINCIPLE OF OFFICIAL INDEPENDENCE

With particular reference to the political history of Canada

BY

ROBERT MACGREGOR DAWSON, M.A., D.Sc. (Econ.)

With an Introduction by

GRAHAM WALLAS, M.A.,

Professor of Political Science in the University of London.

LONDON: P. S. KING & SON, LTD.
ORCHARD HOUSE, WESTMINSTER.

TORONTO: S. B. GUNDY

1922

JL65
D3

Exchange

TO

MY MOTHER AND FATHER

# CONTENTS

PAGE

PREFACE . . . . . . . . . . ix

INTRODUCTION BY PROFESSOR GRAHAM WALLAS . . xiii

CHAPTER I

THE PRINCIPLE OF OFFICIAL INDEPENDENCE . . . 1

CHAPTER II

THE JUDGE . . . . . . . . . 28

CHAPTER III

THE CIVIL SERVANT . . . . . . . . 73

CHAPTER IV

THE PERMANENT COMMISSIONER . . . . . . 110

CHAPTER V

THE ROYAL COMMISSIONER . . . . . . 169

CHAPTER VI

THE GOVERNOR-GENERAL . . . . . . . 184

CHAPTER VII

THE MEMBER OF PARLIAMENT . . . . . . 220

CHAPTER VIII

THE SENATOR . . . . . . . . . 240

CHAPTER IX

CONCLUSION . . . . . . . . . 253

# PREFACE

THIS book is an attempt to analyse the conception of independence in the modern state—an idea which, though it finds expression in a multitude of practical forms, has been ignored by the majority of writers on politics. In order to make the discussion more concrete, I have thought it wiser to confine myself to Canadian government, and have only enlarged this sphere when comparison with some other country demanded it.

While writing those chapters dealing with the officials of the Canadian state, I have often feared that the text might not accurately portray the actual conditions which exist—a fear based largely on the method of analysis that has been used in discovering the position and powers which the officials occupy and exercise. A quotation from Mr. G. K. Chesterton may make this point more clear :

" It is the one great weakness of journalism as a picture of our modern existence, that it must be a picture made up entirely of exceptions. We announce on flaring posters that a man has fallen off a scaffolding. We do not announce on flaring posters that a man has not fallen off a scaffolding. . . . That a man has not fallen off a scaffolding is really more sensational ; and it is also some thousand times more common. But journalism cannot reasonably be expected thus to insist upon the permanent miracles. Busy editors cannot be expected to put on their posters ' Mr. Wilkinson Still Safe ' or ' Mr. Jones, of Worthing, Not Dead Yet.' They cannot

announce the happiness of mankind to all. They cannot describe all the forks that are not stolen or all the marriages that are not judiciously dissolved. Hence the complete picture they give of life is of necessity fallacious; they can only represent what is unusual."

How accurate a parallel this is to the study of political science may be seen by the alteration of a few words:

"It is one great weakness of political science as a picture of our modern state, that it must be a picture made up entirely of exceptions. It announces in a conspicuous paragraph that a judge has been removed for corruption. It does not announce in a conspicuous paragraph that a judge has not been removed for corruption. . . . That a judge has not been removed for corruption is really more noteworthy; and it is also some thousand times more common. But political science cannot reasonably be expected thus to insist upon the permanent miracles. Students cannot be expected to head their paragraphs 'No judge has as yet been removed for improbity,' or '30,000 civil servants still retain office.' They cannot announce the virtues of the state to all. They cannot describe all the judges who are not removed, or all the Commissions which function without friction. Hence the complete picture they give of the state is of necessity fallacious; they can only represent what is unusual."

In short, the study of the institutions and the officials of a state must be largely pathological; it must be concerned with illness rather than health, with weakness rather than strength. I therefore make my apology for perhaps unduly stressing this aspect of Canadian government—an apology which is the more sincere because made by a Canadian who would desire to present his own country in a favourable light.

My thanks for aid in the writing of this book

are due above all to Professor Graham Wallas, whose advice, experience and time were constantly at my disposal. Only those who have come in contact with his delightful personality and stimulating mind can judge of the assistance I have received from him. I am also greatly indebted to members of the Canadian House of Commons, to members of the Canadian Civil Service, and to other public officials at Ottawa for a clearer insight into the actual working of the Canadian governmental system, and I can only regret that inasmuch as their information was given in confidence, I am unable to be more explicit in my thanks. I wish to express my appreciation of the courtesy and help rendered by the library staff at the Parliamentary Library, Ottawa, the British Library of Political Science, the Royal Colonial Institute, and the British Museum.

Finally, I am much obliged to my colleague, Professor George E. Wilson, for his careful and painstaking work in the revision of proof.

R. MacG. DAWSON.

DALHOUSIE UNIVERSITY,
HALIFAX, N.S.
*October* 20, 1921.

# INTRODUCTION

I HAVE, as professor and examiner, seen a good deal of this book at the various stages of its production. Now I have again read it through in proof, and will try to indicate what I believe to be its value, both to the general reader and to the special student.

In the first place it is a contribution drawn from first-hand sources to the history of Canada since confederation. Freeman said that history is "past politics." We are beginning to include in our history-books economic and cultural facts which do not come under Freeman's definition; but meanwhile political history retains its predominance, and itself suffers from too narrow a conception of "politics." A conventional "political" history of Canada during the last seventy years will deal with the formation of the confederation, the electoral victories and defeats of races, parties, and churches, the contests over education, railways and tariffs, the changing constitutional relations between the provinces and the confederation, or between Canada and the British Empire. Dr. Dawson, however, shows that in the true political history of Canada the evolution of various Boards and Commissions for dealing with the Civil Service and railways and harbours, was often as influential as more conspicuous parliamentary events, and that one of the most important political processes is to be found in the attempts to keep certain administrative functions "out of politics."

But Dr. Dawson's book will be found useful and interesting not only by the reader and student of Canadian history, but also by the working politician, and by the student of political science, in any modern state. The most striking political tendency of our time is a movement away from the simple optimism of nineteenth-century parliamentarism. Now that we have made the world safe for democracy we

are asking ourselves what democracy is, and whether (as Nurse Cavell said of patriotism) it is "enough." Since the armistice of 1918 we have watched with growing distrust the actual working of our political systems. The tactics of parliamentary majorities and parliamentary elections seem utterly inadequate to provide wise and progressive direction for the organised co-operation of great industrial societies. If we read history, we see for how short a period men have accepted from thinkers like Bentham, and Jefferson, and Gambetta, the doctrine of the all-sufficiency of representative government. In the long past of human civilisation men have mainly trusted for political guidance to the thinking and willing of kings, or nobles, or landowners, or the leaders of organised guilds, or of professions, or of churches; and those leaders, in so far as their guidance has been good, have been impelled not by the fear of losing votes or parliamentary salaries, but by the sense of responsibility arising out of a relation to their fellows less mechanical than that which is created by victory in a modern election. Many students and writers on political science, and many disillusioned political reformers, are now asking whether this more subtle kind of relation cannot be used either as a substitute for or as a complement to parliamentary democracy. Hundreds of books and thousands of speeches and pamphlets have been produced by Bolshevists, and Syndicalists, and Guild Socialists, or Pluralists and Monarchists and ultramontanes. The material of their propaganda has been drawn in the main from idealised generalisations about mediæval society or from partisan rhetoric in praise or dispraise of revolutionary Russia. Hardly any use has been made of the expedients and experiences of a modern nation under normal conditions.

I know of no book which offers the student of politics a better body of material for judgment on this problem than Dr. Dawson's. He is a parliamentary democrat who yet believes that parliamentarism is "not enough." Instead of talking vaguely about the Florentine Guilds, or Gregory the Great, or the Investiture Controversy, or Lenin's latest manifesto, or the plans of Herr Stinnes, he shows us to what extent and for what reasons the Canadian Railway Commission, the Ottawa Improvement Commission, and the Montreal Harbour Commission, have succeeded, and the

Board of Commerce, or the Conservation Commission, have failed. He shows us how complex is the problem of "Civil Service principles," and how easy it is to go wrong by employing a body of professional experts to solve it on "business" lines. Canada took over from England and America the principle of the independence of judges. Dr. Dawson shows that the relation of that principle to parliamentary government still requires careful watching and hard thinking. The fathers of the Federation intended that the two main organs of independent political initiative in Canada should be the Governor-General and the Senate. Dr. Dawson shows how and why the Governor-General has lost all his initiative, and the Senate all its independence.

To me one of the most interesting of Dr. Dawson's points is his suggestion that the "principle of independence" is of special value in international relations. Among the institutions which he describes perhaps the most successful is the International Joint Commission for dealing with the problems of the American-Canadian frontier. The motives on which the Principle of Official Independence relies, and which it does so much to encourage, are not, indeed, primarily national. A judge sent to the International Court at the Hague feels the responsibility of his independence even more strongly than one who sits at Ottawa or Washington. Dr. Dawson proposes, therefore, that when two countries are sufficiently near to each in language and institutions to understand each other's problems, the practice of borrowing commissioners from each other (as was done in the case of the Drayton-Acworth Railway Commission of 1916) should be extended.

The Dominions which belong to the British Commonwealth of Nations have hitherto been fertile in political experiment and much less fertile in political thought. Dr. Dawson encourages me to hope that the weary Titans of Europe may some day receive intellectual guidance for the problems of civilisation from those eager communities that are now beginning to transfer the centre-point of human life from the Atlantic to the Pacific sea-board.

This work has been approved by the University of London as a thesis for the D.Sc. (Econ.) degree.

GRAHAM WALLAS.

London University.

UNIV. OF CALIFORNIA

# THE PRINCIPLE OF OFFICIAL INDEPENDENCE

## CHAPTER I.

## THE PRINCIPLE OF OFFICIAL INDEPENDENCE.

THE doctrine of parliamentary responsibility has long been accepted as a fundamental principle [1] of the British constitution and of those other constitutions which have owed their inspiration to the United Kingdom. The following passage by Sir Sidney Low may be taken as a typical expression of that doctrine as it is generally understood by writers on British government.

" Like the golden chain that Homer tells us binds heaven and earth and sea to the throne of Jove, this great official catena is supposed to join the highest and the lowest, and to stretch from the humblest messenger or door-porter to the exalted seats, where the statesmen who rule the Empire lie beside their thunder. Through one superior or another all grades of the service are responsible to the highly-placed gentlemen, titled and ribboned, who are the heads of the permanent staff ; they themselves, these accomplished under-secretaries, are responsible to the noble lords or eminent commoners who hold the ministerial seals ; while these ministers, in the fulness of their power, are liable at any moment to be arraigned, not merely for their own acts, but for the acts of their subordinates, before the Assembly, which again is itself responsible to the sovereign People."[2]

Such a statement of the doctrine of parliamentary responsibility is, however, far from accurate ; it is not in accord

[1] The word " principle " as used here and hereafter has no ethical connotation, but simply means an idea or device.

[2] Low, Sir Sidney, *The Governance of England* (1914 ed.), pp. 137–38.

with all the theory or all the facts. There are a number of officials [1] in the state who do not come under the doctrine, even in theory, and a still larger number who, though theoretically responsible to parliament, are in effect free from its control.

One example will suffice to show that the doctrine quoted above does not agree with other accepted theories on the British constitution. Sir Sidney Low would admit that it could not be reconciled with the position of the judge, who occupies the centre of a charmed circle whose circumference may not be violated by any government. The judge may be held accountable in only the rarest instances for decisions that are given by him within his jurisdiction. He may have committed an error of judgment, he may have had a slight lapse of memory, he may even have been animated by motives that were far from laudable—parliament will consider that he is politically irresponsible and will allow the decision to remain unchallenged. Such an office, therefore, knows no golden chain, and pays but nominal homage to the throne of Jove.

When we come to consider how the work of government is actually carried on, the exceptions to the doctrine of parliamentary responsibility are innumerable. Even in those offices which are nominally covered by the theory, there are a large number of facts left unexplained—a condition which is largely due to the growth of convention and custom in the direction of extending the irresponsible area, or, as I shall call it, the area of independence. Take, for example, a Royal Commissioner who is engaged upon any enquiry for the government. Theoretically he holds office at pleasure and may be removed at any time by the government, which is supposed to take full responsibility for the Commissioner's acts and decisions. In actual practice it is quite different. The custom has now become firmly established that his tenure is during good behaviour, and that no interference will be allowed to interrupt his

[1] The word "official" is used throughout the book in its widest and most comprehensive sense; it includes all those who are in the service of the state, members of parliament, judges, civil servants, etc.

investigations, even though his views and the results of his enquiry may prove very embarrassing to the ministry. A similar freedom is granted to a large number of other officials, who, though in nominal subservience to the government, are in reality independent and not held politically responsible for their actions.

Both examples cited have been extremely simple and will give little or no cause for dissent. But the relationship between the two parties to this political responsibility or irresponsibility is frequently much more subtle ; there are a large number of officials who occupy an intermediate position, and who enjoy a sort of quasi-independence. The responsibility may attach for certain functions or at certain times ; it may be enforced at the will of the government ; it may be allowed to lapse and be revived sporadically or capriciously. The uncertain element in this latter group renders any generalisation extremely difficult, and makes it impossible at times to state with certainty where responsibility ends and independence begins.

Inasmuch as the questions of official independence and responsibility are closely linked together, it will be advisable to state more explicitly what is meant by the term " responsibility." There are three kinds of responsibility which affect the official and determine his independence ; and some explanation of each is necessary.

### Criminal and Civil Responsibility.

The courts will hold any official responsible for acts done in violation of his duty, and they will enforce that responsibility by a fine, imprisonment, or the payment of damages. It is to these two responsibilities that Professor Dicey alludes in the following passage from *The Law of the Constitution* :—

" In England the idea of legal equality, or of the universal subjection of all classes to one law administered by the ordinary Courts, has been pushed to its utmost limit. With us every official from the Prime Minister down to a constable or collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen. The Reports

abound with cases in which officials have been brought before the Courts, and made, in their personal capacity, liable to punishment, or to the payment of damages, for acts done in their official character but in excess of their lawful authority. A colonial governor, a secretary of state, a military officer, and all subordinates, though carrying out the commands of their official superiors, are as responsible for any act which the law does not authorise as is any private and unofficial person."[1]

### Political or Administrative Responsibility.

In the majority of cases violation of an official duty leads to the enforcement of political rather than civil or criminal responsibility, and it is to this that Sir Sidney Low refers in the passage quoted at the beginning of the chapter. Such enforcement may take many forms, official displeasure, a fine, a loss of promotion, or, in extreme cases, loss of the position itself. The chief power of political responsibility lies in its immanence rather than its actual use; it is a threat that is always present, and may be made operative at the will of the superior.

In discussing the statement of Sir Sidney Low, I have said that the independent condition arises when the political responsibility is abandoned or suspended. But a civil or criminal irresponsibility is another form of independence; it is an immunity not from political interference, but from the power of the law and the courts. The member of parliament, for example, enjoys a civil and criminal irresponsibility for words spoken in the House of Commons: he cannot be prosecuted for libel or slander, even though his words may be false and may have inflicted serious damage. This form of independence, however, is comparatively rare; it allows the official such immense privileges and such opportunities for their abuse, that it is generally given with extreme caution.

How then does the principle of independence, whether arising from political, civil or criminal irresponsibility, manifest itself in official life? It may take a multitude

[1] Dicey, A. V., *Law of the Constitution* (6th ed.), p. 189.

of forms, each one different in some particular from the others. The judge, the most extreme case, is left independent in all his actions so long as he keeps within his jurisdiction. The Royal Commissioner is given *carte blanche* so far as the purpose of his investigation is concerned, and in preparing his report is only limited by the terms of his instructions. The ordinary civil servant enjoys an immunity from political interference and is assured of a permanent position if he but proves efficient. A civil servant engaged in some highly technical research work will enjoy the protection accorded to all his fellow employees, and in addition have full powers of initiative to carry on his research. The general in the field will have the whole battle front under his unquestioned direction and control so long as he is in command ; but, should he not achieve the results anticipated, his responsibility to parliament may be enforced at any moment and his command taken from him. A more complex relationship sometimes occurs where the government exercises financial control. In some cases, as the Harbour Commissions in Canada, all powers may be given save the spending of authorised loans over which the government retains the general supervision. In other instances, as the Ottawa Improvement Commission, the government may even interfere in a question of policy, although such intervention may be rarely exercised. The work of the independent official is often limited to the determination of questions of fact, the matter of policy being left to those who will take full political responsibility for it. Yet another form, though somewhat similar to the last, is that which occurs when the end is stated and this means is left to the official's judgment. Plato had a similar idea in mind when he wrote on the supervision of poets :—

> "The founders of a State ought to know the general forms in which poets should cast their tales, and the limits which must be observed by them, but to make the tales is not their business."[1]

These are typical instances of the diverse forms in which official independence appears, and it may be possible by

[1] *The Republic*, II. 379.

studying them more closely to arrive at a better understanding as to what "independence" really means. It is evident, in the first place, that the word implies a relationship; the official must be independent of some thing or person other than himself. Generally speaking, the other party to the relationship is the sovereign community, which has voluntarily abandoned its control within certain limits. In a few rare instances, the relationship is directly between the community and the official, as is the case with the member of parliament, though in most cases the community acts through its representatives, and it is between these and the official, sometimes directly, sometimes indirectly, that the independent association exists. The official may owe his independence to a single or double relationship; he may, like a judge, be free from outside interference, or he may, like some of the higher civil servants, add to this an independence within the organisation itself.

It will be seen that I am dealing with the independence of the individual and not with that of a corporate body. Corporate independence, as in the case of the judiciary or the civil service, may be a convenient way of stating that all the individuals in the group are independent; but it may mean on the other hand the independence of the group as such, as in the case of the Roman Catholic Church. In this book I am not studying corporate independence in the latter sense, except in so far as it may affect the personal independence of the individual.

In all the instances of independence that have been cited, there has been a substitution of freedom for unquestioned obedience, of undirected action for dictated action; the discretionary sphere has been widened as a consequence of the lessening of the civil, criminal or political responsibilities. There is given a freedom of choice, an initiative for action, an opportunity for forming and expressing a frank opinion, combined or not combined with the power to act and to make that opinion effective. In all cases an intense and sustained effort of mind is expected of the official who occupies the independent position; he is asked to do his work conscientiously and to the limit of his ability, and in

return he usually receives an assurance that he will not be subject to undue interference.

Independence is not a mystical formula that will solve all the problems which confront a modern government; but it does give scope for the development of the positive side of the official's character. Instead of the physical threat of loss of office, independence supplies the moral inducement to do well; in place of distrust, it gives confidence; it calls forth a host of qualities that otherwise might have remained dormant—the official's vanity, his conscience, his desire for applause, his zeal for the public good, his feeling of special fitness for his post, his craftsman's delight in his skill—any one or all of these are given freer play.

"There is," says M. Emile Faguet, "a moral as well as a technical efficiency, and in limiting the independence that is essential to moral efficiency, democracy neutralises the technical efficiency of its servants. . . . Formerly the magistracy . . . enjoyed an absolute independence. This gave, or rather preserved intact, its moral efficiency. For moral efficiency consists in an ability to act according to the dictates of conscience, and is equivalent to a sort of moral independence."[1]

An independent position gives the official not only an opportunity for using his peculiar skill but also an opening for self-expression—he will feel that he is more than a cog in a vast machine, and that he is an individual unit with the power of impressing himself on the direction of affairs. The independent position of the judge sprang originally from a demand for men who could not be bullied into obeying another's will. Courage is in some degree still necessary in a judge; but it has been thrust into the background, and efficiency, both technical and moral, is the quality most desired to-day. In short, what M. Faguet has termed moral efficiency is the direct result of the stimulation of moral consciousness.

Alexander Hamilton regarded permanence in office and security of salary as the two essential conditions of independence;[2] but although these may constitute the form, they

[1] *The Cult of Incompetence*, pp. 99–100.
[2] *The Federalist*, §§ 78, 79.

may fail to obtain the most important benefits of the independent position. The Canadian Senator, for example, possesses the historical formula of independence ; but he is the last person to dream of exercising any independent will or judgment. The purely negative means of independence and irresponsibility lose their virtue unless they are augmented by positive forces and inducements for good. Jeremy Bentham has pointed out with his customary shrewdness [1] that this positive side is in reality "dependence." So indeed it is ; but in relation to quite different factors. The official is made independent of certain undesirable influences by being made dependent on other influences which it is wished to encourage ; he must possess such traits of character and be provided with such stimuli and inspiration as to produce his best efforts and to permit public confidence being placed in him.

Any discussion of official independence must therefore include in its scope not only the negative factors which create the independent condition, but also the ethical and psychological forces which will make the independence valuable to the state. We must ensure that men of exceptional ability and character are selected for public office ; we must train them in a certain way ; we must give them our confidence and trust them to make an effort ; we must endeavour to surround their offices with the proper traditions ; we must give them honour, social position and adequate salaries. There must be, above everything else, an earnest endeavour to approach the ideal of Plato, of those "toiling also at politics and ruling for the public good, not as though they were performing some heroic action, but simply as a matter of unavoidable duty." [2]

The abstention from interference in the work of the official may take one of three general forms. He may only be allowed to think and speak for himself without the privilege of putting his ideas into practice. This is very

[1] "It is dependence, then, *dependence* in the true and absolute sense of the word, that is the cause and measure of that relative quality which has been so much magnified under the name of *independence*." *Works* (1843), IV. p. 362, *Judicial Establishment*, Chap. V. Tit. III.

[2] *The Republic*, VII. 540.

rare, and in its strict sense is only applicable to advisory bodies. Secondly, the forbearance may take the form of allowing the official to act as he pleases as well as to make his own decisions. This is comparatively common, and applies to all persons who hold office during good behaviour and to many who hold at pleasure. Lastly, the government may refuse to bind itself, and adopt the non-committal attitude of allowing the official to do as he pleases but at his own peril. He is permitted to stay in office and will not be removed unless he displeases the appointing power; in short, he holds his position strictly at pleasure. It is evident that no official is totally free from political responsibility; he may be made so within certain limits and for certain purposes, but if he exceeds his powers or violates any of the conditions under which they are granted he may be called to account. The lack of enforcement of political responsibility may be due to several causes. It may be a legal inability to enforce created by a statute which parliament has erected as a safeguard, or it may be a simple repugnance or voluntary abstention from interference which has arisen through custom or tacit understanding.

A striking divergence of opinion on this whole question arose a few years ago in the Canadian Parliament. The debate illustrates both the extent to which the political irresponsibility of judges may be stretched, and the manner in which custom may increase the protection that is given by the letter of the law.

"*Mr. Fielding.*—This responsibility of judges to parliament is very largely a dream, because we know that practically there is no responsibility. There are judges who are neglecting their duties, there are judges who are too old, there are judges who are ill, and there are judges who are not performing their duties, and every man in this parliament knows it.

"*Mr. Monk.*—The remedy is here.

"*Mr. Fielding.*—But it is not a practical remedy, it is not applied. . . .

"*Mr. Borden.*—I say that if the government know of judges who are neglecting their duty in that way, it is the duty of the government to present their case to parliament."[1]

[1] *Can. H. of C. Debates*, Sept. 15, 1903, p. 11316.

There can be no doubt but that the attitude of the Government as stated by Mr. Fielding was the usual and, in the long run, the correct one to adopt. Temporarily the administration of justice may suffer from an isolated instance of an inefficient judge; but the country gains more from the security of the judiciary than it would benefit were an occasional bad judge removed and the whole Bench rendered more insecure. Parliament has in almost every instance adopted this view, and has made the actual independence much wider than the precise wording of the statute can be made to cover.

It will be noted from the examples given, that independence is a quantitative term. As there is no complete irresponsibility, there can be no independence in the absolute sense of the word; the judge and the auditor-general exercise the closest approximation to it. The amount and form that the independence of an official may assume varies with every office, scaling down from the Chief Justice of the most exalted court to the lowliest door-keeper at the Houses of Parliament. The sole criterion as to the amount of independence or responsibility that is granted or enforced in any particular case must be the efficient performance of the work to be done—efficiency being used in its broadest and most comprehensive sense. The judge, for reasons that will appear later, demands more latitude for the execution of his work than any other official, the technically trained civil servant a good deal less, the ordinary civil servant still less, and the door-keeper virtually none at all.

The wise use of independence provides certain advantages which are not easily procurable by any other expedient. In the first place, it commands a confidence in the work done, not on the part of those who do it, but those who are intimately concerned with its performance—in most instances, the people. Political bodies are generally regarded with suspicion and often with hostility, for their motives are not always altruistic and almost one half of the people dislike intensely the government of the day or anything connected with it. But if these bodies are purged of their

political element and dissociated from any political party, the people will trust them to a far greater extent. Such was the opinion, for example, expressed by a member of the Canadian Parliament when the Board of Grain Commissioners was being created.

"I submit to the minister that he will succeed in re-establishing confidence in the mind of the grain growers if he makes his board as independent of the government, and as free in its action as it is possible to make it."[1]

It is a difficult matter to say how much of the respect given to the judiciary is due to one factor or another; but it cannot be denied that their independence as such gives them no small amount of prestige. It is realised that the judges have nothing to lose by doing what is right as well as nothing to gain by doing what is wrong. It is closely akin to the same feeling that one experiences on placing oneself in the hands of a competent physician. He may or may not be able to effect a cure, but there is a fair assurance that whatever powers he may have will be exercised to the fullest degree in the direction desired. The value of such a feeling of confidence on the part of the people in the state is very great, particularly in an age which is inclined to be distrustful.

In the second place, the condition of independence has the incidental result of producing a certain permanence, which in many offices is an immense advantage. It ensures more *expertise* to the specialist, who will hold his office irrespective of what government may be in power. He makes himself familiar with his work but once, and from that time onward his energies can be devoted entirely to their better exercise and to increasing his knowledge of the subject. A judge or commissioner will only reach the full height of efficiency after a long time spent in the actual work of adjudication or administration; his knowledge of details is enlarged and his mastery of general principles increases as the years elapse. Closely allied to this advantage is that of giving a continuity to policy

[1] *Can. H. of C. Debates*, Jan. 30, 1912, p. 2194.

and of establishing a tradition in the office. The Canadian Railway Commission is an excellent illustration of the manner in which both continuity of policy and a tradition may be secured—an example which is made more vivid by contrasting it with its predecessor, the Railway Committee of the Privy Council, which had neither tradition nor policy of any tangible kind.

Finally, independence is a security against corruption. The power of the press, the alliance of business and politics, and in some cases the union of all three, have created a serious need for officials who shall be both reliable and incorruptible. There is a growing demand for a judge whom the rich cannot bribe, for a commissioner whom the corporations cannot bully, and for a civil servant whom the politician cannot seduce. By slackening the political responsibility, the official is less apt to be corrupted from the political side; while by increasing his moral consciousness and providing him with the proper stimuli, he may be trusted to resist temptation either from within the government or from without.

I have now analysed the term "independence," have cited various forms in which it may appear, as well as the advantages which are obtained from its use. In the discussion of the different responsibilities some indication was also given as to the means whereby this independence could be obtained, and it now becomes necessary to consider those means in greater detail. The objects which they seek to achieve are two. In the first place, the expedients should be of such a kind as will obtain an official who can be trusted to act independently; one who promises to give that effort of mind and will that is desired, and who will not abuse the confidence that is placed in him. In the second place, care must be taken that those qualities, the germ of which we have obtained, will be encouraged and used to their fullest advantage.

The expedients that are used to create the independent condition therefore fall into two divisions: the first, which is confined to the methods of obtaining the official; the second, which includes the means that determine his inde-

pendence after his accession to office. It is also necessary, as has been suggested earlier in the chapter, to discuss those psychological influences which will determine to a large degree the manner in which the official will use his independence. The quantitative element must again be emphasised. The expedients used differ in almost every instance in order to obtain an amount of independence which is in accordance with the functions that are to be performed. In some offices two or three of such expedients may be used in conjunction with one another; in other offices, one alone may be sufficient.

In the first place, the relationship must be established between the official and his office. This may be done in a number of different ways.

(*a*) *Election.* This means of procuring an official can be used very extensively in a small state, but as the size and complexity of the state increases it becomes more cumbersome. The elections are then too numerous and the electorate have neither the time nor the inclination to participate in them. In many offices, such as those requiring high technical training, the electorate have not the requisite knowledge to discriminate between one candidate and another, and under modern conditions the tendency is to vote for the party and not for the individual. If they vote for the man, popularity will become the chief factor, if they vote for the party, any irrelevant issue may determine their choice; in any case efficiency is apt to be thrust into the background. In the modern state, therefore, there is a decided tendency to limit the process of election to members of parliament and to choose other officials by more indirect methods.

The possibilities for independence under an election system are very large; but they are not generally utilised to their full extent. There is always a day of judgment for any elected official, and the fact that he has passed one ordeal with success is no guarantee that he will be as fortunate in the next. Men of exceptional ability—Abraham Lincoln is perhaps the best example—may make the most of their opportunities and exhibit a degree of

independence that is even greater than that achieved under more favourable conditions. But for a large number "the flash of the day" will be given undue prominence, and their desire for retaining office will probably overcome their instinct of public service. In many cases they will lack the mental detachment and impersonality which is often necessary for independence and is rarely obtained by the elective process.[1]

(*b*) *Examination.* This method, though of comparatively recent adoption, is under many conditions unsurpassed. In such offices as those in the civil service, where appointment is apt to result in political favouritism, the competitive examination is often the best means of obtaining men who are efficient and who are likely to possess independence of mind and judgment. By a wise choice of subjects, by a strict limitation on the age of the candidates, and by other precautions which will be described in detail in a later chapter,[2] those having the greatest natural ability are sifted out and taken into the government service. Under the old system of party appointments merit was a secondary consideration, and the civil servant was inclined to place the welfare of the state second to that of his political party. A successful candidate in an examination is more likely to look at things in a different light. His intellectual ability has won him his place, he holds office irrespective of party changes, and his feeling of moral consciousness is increased as a consequence.[3]

(*c*) *Appointment.* The competitive written examination is quite unsuited for discovering technical knowledge or for testing a person of mature age. The best plan in many cases is to appoint the candidate who has the best past record; and if it be desired to obtain the men of greatest ability, the judges who decide on the merits of the candidates

[1] The experience of the United States with elective judges has been very unsatisfactory. Cf. Taft, W. H., *Popular Government*, pp. 194–96.

[2] Chapter III, *The Civil Servant.*

[3] The written examination may be supplemented in the future by a psychological test, and possibly an enquiry into the family history of the candidates, cf. Davenport, C. B. and Scudder, M. T., *Naval Officers, their Heredity and Development*, Carnegie Institution of Washington, Pub. 259, 1919.

should be impartial and unconnected with any political party. It is this function that a Civil Service Commission is often called upon to perform—a function for which the members are naturally suited by virtue of their aloofness from politics and their experience in weighing the qualifications of candidates. In some cases the government may retain the right of appointment in its own hands, even though the office may demand persons of exceptional ability and of an independent cast of mind. If this power is exercised wisely the results are by no means bad; but as the ministry frequently appoints for party service rather than for merit, the chances of obtaining a first-class man and one who is free from political prejudice are small. The incentives which are supplied by such other devices as tenure, tradition, salary, etc., will then be largely counteracted by both the official's narrowness of outlook and his lack of ability.

After the official has obtained his position, it must be safeguarded by the conditions of tenure so as to render him more or less independent of the power to which he owes his office.

> "All offices, whether limited as to tenure by a specified time or not so limited, are held subject to one of two conditions: they are held either 'at pleasure' or 'during good behaviour,' and unless it is otherwise stated their occupants hold 'at pleasure.'"[1]

This rule, so succinctly stated, would seem to admit of little variation; but the tenure may take a number of forms within the provisions of the rule. In the first place, very few offices are now held literally "at pleasure," these few being chiefly confined to those purely political offices, the incumbents of which change with the government. A great number of offices are held nominally "at pleasure"; but this has been extended for reasons of convenience and efficiency to mean "during good behaviour," though the privilege of removing at any time may be exercised if the

[1] Anson, Sir W., *The Law and Custom of the Constitution* (3rd ed.), II. p. 221.

government should choose to do so. All offices, whether "at pleasure" or "during good behaviour," may be held for a fixed or an indefinite term, and some may partake of the nature of both. The tenure of a Royal Commissioner is definite in that it is limited to the time necessary for the completion of his task, it is indefinite because it is difficult to estimate exactly how long that time will be. The term of the member of parliament has a definite limit as a maximum, but an election may occur before he has held his seat six months.

The question of tenure is of the greatest importance in determining independence: a precarious tenure has a tendency to work against independent action; a permanent tenure encourages it. Security in office may, however, lead to stagnation and indifference; and an attempt has been made (not without success) to combine permanency with an incentive for effort, by appointing officials for ten-year periods with a possible reappointment at the end of the term. Permanence of tenure also enables the state to compete more successfully with the business world in procuring new men, who may be willing to make a large financial sacrifice if it is compensated for by the greater security of the government office.

Inseparably linked with the question of tenure is that of removal, indeed they might almost be said to be one. For if an official holds office "during good behaviour" it would seem to mean that he is within certain limits irremovable, and if he holds office "at pleasure" that he may be removed at any time. The reason that these statements do not mean what they seem, points to the distinction that must be drawn between tenure and removal. Tenure is the conditions under which an office is held: removal is the process which must be gone through in order to vacate an office. A judge, for example, holds office during good behaviour. That does not mean that if he fails to discharge his duties faithfully, he thereby vacates his office; on the contrary he may continue as a judge until his death. Constitutional usage and statute insist that a certain procedure must be complied with before removal can take

effect. In this case there must be a searching investigation by a committee, a report to parliament, an address of both Houses, and the removal by the Governor-General (in Canada) before the judge loses his position.

Removal may vary from a mere formality and simple dismissal in some cases to a long and weary procedure in others, as necessitated by statute, constitutional custom, or both. Its effect on independence is obvious and may be expressed almost algebraically: the more involved and numerous are the formalities of removal, the greater are the opportunities for independence, and in proportion as the process becomes more simple the independence tends to diminish.

An adequate and secure salary was regarded by Alexander Hamilton as essential to the independence of the judiciary,[1] and it is scarcely less important in the case of other officials. Plato's ideal of those who "may not touch or handle silver or gold"[2] was indeed ideal, and even an approximation to it is quite impossible. Not only is an official unable to live without some silver and gold, but if he is to maintain his position and his independence he must have them in considerable quantities. The amount of the remuneration which is given to an official should be such as to attract the best men to the public service; in other words, the salaries offered in the business world should not have an undue advantage over those given by the government, when the secure tenure, honour, social position, and other advantages of the public service are taken into consideration. The idea that an official can be placed above the danger of corruption by the simple process of voting him a large salary, is a fallacious one[3]; and it is sufficiently rebutted by a brief reflection on the fabulous sums that would have to be paid to the judges, if the government and the unscrupulous corporations began a competitive bidding against judicial probity. Up to a certain point, somewhere above subsistence level, a salary may prevent bribery;

[1] *The Federalist*, § 79. [2] *The Republic*, III. 417.
[3] Cf. Leacock, Stephen, "Democracy and Social Progress," in *The New Era in Canada*, p. 30.

but the chief reliance must be placed on the character of the officials themselves. In all cases the remuneration should be such as to supply all reasonable wants and to allow the official to perform his duties without undue worry as to his personal affairs. In particular instances, where it is desired to give a special degree of security and independence, parliament may make the official's salary a primary lien on the country's assets and remove it from the annual vote of supply.

The foregoing expedients go to make up the independence of the official; the next few pages will be devoted to discussing several of the most important expedients which may be used to safeguard the interests of the community and to provide the right foundation for the official's motive in using that independence.

Before a position is given to any official it is customary to ascertain whether he has a good character. This is done in the civil service by certificate (which may only mean that the candidate has not a bad character), and in higher appointments by enquiry or by personal knowledge. It is the foundation stone of any official's success, for if it is not present the effect of all other influences will be largely negatived. Closely allied to this is the question of preliminary training, which is generally discovered by examination and the other means previously discussed. In some countries, in order that there may be no doubt as to the early training, special schools have been established to fit candidates for the colonial civil service.[1] The purpose in all cases is to obtain the good material out of which the best official can be made; he is to be chosen with the same object in view as were the soldiers in Plato's ideal state:—

> "We were contriving influences which would prepare them to take the dye of the laws in perfection, and the colour of their opinion about dangers and of every other opinion was to be indelibly fixed by their nurture and training, and not to be washed away by such potent lyes as pleasure—mightier agent

[1] Lowell, A. L., *Colonial Civil Service*, pp. 117–20, 175–97.

far in washing the soul than any soda or lye; or by sorrow, fear and desire, the mightiest of all other solvents."[1]

Tradition is a very powerful factor in the life of any public official, and particular care should be taken to ensure that it is of such a kind that will inspire and not hamper the official in his work. One of the most precious things that the British Colonies and Dominions have inherited from the Mother country is the tradition of a blameless judiciary. Another side of the same question is the detachment from politics which characterises the judiciary—a tradition which has been strictly maintained by both statute and convention. The titles and distinctions, which were sometimes conferred on the judges of Canada, had one redeeming advantage: they helped to emphasise the high honour in which the Bench was held. The problem of tradition is more difficult in other branches of public administration. The difficulty in the civil service, for example, is not to create a tradition but to obtain one of the right kind; the idea that the civil servant's chief end is to secure an easy position with a good salary, and which regards political "pull" as the surest means to that end, must be displaced by a tradition of public service and an *esprit de corps* which stimulates all its members.

There is a second tradition which also animates official bodies, viz., the tradition which exists between them and the public. There is the feeling that the people expect certain things of government officials and that the latter must realise the expectations of the public in the manner in which they discharge their functions; if they disappoint in this, they lose prestige. Mr. Justice Darling does more than violate the traditions of the English Bench when he indulges in unseemly levity, he also destroys the respect that is customarily given to that body. The dishonest customs officer and the door-keeper of the House in slovenly attire are guilty of the same fault in a humbler fashion.

This corporate tradition has its counterpart in the reputation of the individual. Every man irrespective of calling

[1] *The Republic*, IV. 430.

has a regard for his own reputation, and this is enhanced by his official position. The higher the place to which he is raised, the greater will be the official's concern to protect his good name and with it incidentally that of the office also. Bentham calls the loss of these "punishments belonging to the moral sanction," [1] and mentions amongst them loss of reputation, honour, character, good name, the incurring of the ill-will and aversion of the neighbourhood and of the public. All these are powerful forces for good, but their effect will depend upon the nature of the office, its publicity, its social position, the temperament of the official and the alertness of public opinion.

Vanity and its more aristocratic and pleasing sister ambition play an important part in public life by stimulating the energy and thus producing the best talents of their possessor.

> "The applause of ambition—which though I am ready to consent is not virtue, yet surely a generous ambition for applause for public services in life is one of the best counterfeits of virtue, and supplies its place in some degree; and it adds a lustre to real virtue when it exists as the substratum of it." [2]

If this ambition is to be used to encourage efficiency, there must be channels open to gratify it, and prizes held out as inducements in the proper direction. Such a prize is usually a sound system of promotion, one which rewards merit and discards seniority if unaccompanied by other good qualities. The judiciary is a possible exception; for the promotions must (under the present method) be carried out by the executive, and the gain resulting from the stimulation of legitimate ambition might be lost by a decrease in independence. In a partisan civil service promotions lost all their efficacy as incentives, for there was no assurance that the reward would go to the deserving. Under a "merit system," however, particular stress is laid on the fact that promotion is to be made for merit, irrespective of seniority or political affiliations.

[1] *Works* (1843), I. p. 455, *Principles of Penal Law*, Pt. II. Bk. III. Chap. II.

[2] Burke, Edmund, *Works* (1822), XIII. p. 438, *Warren Hastings: Speech on the Sixth Charge.*

It is also of cardinal importance that the official's position should be congenial to him and suited to his special capabilities; interest begets activity, and stimulates the imaginative powers on which the higher conception of official work and public trust may be built.

"When," said Jeremy Bentham, "you see a man marry a woman without a penny, say he loves the woman: when you see a man marry a woman with a fortune, say he loves either the woman or the fortune. For 'woman' read 'office,' 'commission' . . . what's the difference? . . . The better liking a man has to his business, the better the business is likely to be done."[1]

In our advocacy of official independence it is important to realise that it has very decided limitations and is not a panacea for all the ills of the body politic. In certain positions, notably that of a judge, control in any real sense would be a great mistake, as its advantages would not begin to outweigh the obvious disadvantages. But in a great many offices a partial control by one of the non-official world or of another part of the official world is not only desirable but necessary.

It is a regrettable fact, but an undoubted one, that officials tend to fossilise and become mere automatons. They lose contact with the facts of life, and are overcome by words and figures; they confuse means and ends, and regard habit and routine as ends in themselves. There is another sin also to be laid at the door of officialism though it is more inherent in specialisation and professionalism, viz., what Mr. Walter Lippman calls "the panacea habit of mind."

"You find engineers who don't see why you can't build society on the analogy of a steam engine; you find lawyers, like Taft, who see in the courts an intimation of heaven; sanitation experts who wish to treat the world as one vast sanatorium; lovers who wish to treat it as one happy family; education enthusiasts who wish to treat it as one vast nursery."[2]

[1] *Works* (1843), IV. p. 373, *Judicial Establishment*, Ch. V. Tit. III. Sec. 6. Cf. the case of Mr. A. W. Moore, whose success in the British Civil Service was largely due to his transference from uncongenial to congenial work. Churchill, Winston S., *Lord Randolph Churchill*, I. pp. 481–83.

[2] Lippman, Walter, *Drift and Mastery*, p. 185.

In short, they suffer from lack of perspective; they do not so much as confuse means with ends, but rather conceive of their own ends as the only ones worth achieving.

These are some of the evils that the introduction of the lay mind is meant to cure, or at least to minimise. If the official were made completely independent, two different and conflicting tendencies would be introduced. His freedom from control would present the opportunity for initiative and for self-expression, but that same freedom would in all probability develop an official whose outstanding characteristic would be conservatism; he would have the opportunity, but he would soon cease to utilise it. The object of the lay control is to steer midway between the two difficulties; to attain initiative and independent action on the one hand and to avoid the dangers of officialism on the other.[1] In many offices the mere presence of such an outsider may be sufficient, and the knowledge that there is another mind to be satisfied, technically ignorant though it may be, will itself freshen the mind of the official. But in other positions of the public service more than a nominal supervision may be required. Mention has been made of the benefit of tradition in official life; but that tradition may lose all sense of proportion to the public welfare, and may need the sharp jar of the lay mind to bring it down to the actual needs of the state. "The Master" in *The Poet at the Breakfast Table* compared society to a vast mosaic, "each man bringing his little bit and sticking it in its place, but so taken up with his petty fragment that he never thinks of looking at the picture the little bits make when they are put together." It is this view that the layman should endeavour to convey to the official: he should take away his microscope, for the moment at least, and give him a telescope in its place. Other cases of non-official control occur when the official is given a choice of means and the supervision of detail, but the direction of policy is taken out of his hands, or when the money that is to be spent is

[1] "The use of a fresh mind applied to the official mind is not only a corrective use, it is also an animating use." Bagehot, W., *The English Constitution*, Chap. VI., p. 200.

retained until the official has satisfied his superior as to the disbursements that are intended. In such cases the benefits derived are largely political, for the political responsibility is shouldered by the layman who exercises the control.

The most complex case of lay control appears in the relation between the non-expert and the expert official. The independence of the latter may or may not depend on statutory provision; but in either case it will also depend on the conception of trust which exists between him and his superior. This trust should be kept perpetually alive, and yet at the same time should be combined with an element of criticism: the non-expert may accept the opinion and countenance the acts of the expert; but he makes a mental reservation to the effect that possibly the expert is wrong, and that it may be advisable to interfere if the results are not satisfactory. A somewhat similar relationship occurs between a physician and his patient; the latter, while taking the skilled advice of the physician, always reserves the right to change his expert or to call in another for consultation. It is this unwillingness of the layman to interfere in the work of the expert combined with another unwillingness to allow the latter to have complete control, both essentially personal factors, that will largely determine the independence that is accorded to the expert.

The use and demand for official independence has increased enormously during the past fifty years. The growth of knowledge, the enlarged sphere over which such knowledge must operate, and the need for specialists, have led modern governments to rely to an increasing extent on the independent action of their officials. In the first place, while new departments have been created and the old ones extended beyond recognition, various officers in the departments have been delegated powers for which their superiors take little or no responsibility. The ministers and permanent heads of departments have been compelled to abandon the effort of keeping all the work under their immediate supervision, with the result that a large number of highly trained civil servants, though nominally under their chiefs, are in reality almost completely independent of them. This abandon-

ment of control has been found to be even more essential in the case of the technical specialist. Bacteriologists, statisticians, economists, chemists, draftsmen, librarians, and a host of others of equal diversity are almost as essential to a modern government as a Prime Minister. But it is useless to procure an expert, pay him a large salary for his technical skill, and then place him in a position where he must implicitly obey and take orders from a layman. The latter may exercise some control, the nature of which has been already mentioned, but the expert must and does have given to him an opportunity to use his exceptional knowledge to the best advantage.

The second method which governments have used to meet the new conditions of modern life has been the extension of permanent commissions. These bodies are often quite separate from any department, and in every case are given a wide discretion in the exercise of their powers. In short, the commissioners are independent officials, and the government accepts little responsibility or none at all for the acts committed within the jurisdiction of the commission.

These developments in government administration and the growth of official independence have been rendered even more necessary by changes which have taken place at the same time in the basis of democratic government, viz., the composition of the electorate. In the days of the squirearchy in England (and a somwhat similar condition prevailed in Canada before responsible government) the political power was in the hands of the educated minority. These divided the offices amongst themselves and performed the larger part of the functions of the state. It was in most cases the work of amateurs; but they were usually quite able to deal with the simple problems which confronted them. The extension of the franchise, however, completely altered some of the fundamental assumptions on which the government up to that time had been based. The final court of appeal was shifted from an educated minority to an uneducated majority—a change which made it necessary to substitute a more subtle and complex conception of democracy than obtained in the days of Burke and of Mill.

The direct government of the squirearchy was displaced by the indirect government of millions of voters who were supposed to control the state machinery. But the new electorate found that it had neither the time, the inclination nor the qualifications of its predecessors for the work in question, and the increased number of voters in itself made that work more arduous and more complex than before. The difficulty was intensified by the gradual emergence of the factors that have been already mentioned, the growth of knowledge, the increase in the scope over which it operated, and the demand for specialists. The natural result was that public officials assumed a growing importance, which was aided by the people's representatives delegating powers which they no longer felt competent to exercise. It is slowly being recognised that universal suffrage can no longer work efficiently under modern conditions without the aid of the professional official, and that if this official is to do his best work, he must be allowed to use his peculiar skill with some degree of independence.

While the principle of official independence is practically illustrated in many forms under modern democratic governments, it is a matter of the utmost importance that the community as a whole should more fully understand what the idea actually means and what it involves. For it is from the community itself that the delegation of power must first issue, and it is on the community also that the success of official independence must depend. It is likewise essential that there should be a clear realisation of the fact that official independence is in no way inconsistent with democracy and the principle of popular representation. The scheme which includes in its scope the independent official is not a whit less democratic than if there were no such inclusion. The labourer who insists on having a competent and independent engineer to build his transcontinental railway or an expert and independent statistician to produce his census is no less democratic than his fellow labourer who may want to see those positions thrown open to party patronage committees. The former recognises the fact that there are differences in human ability, and that if the

state is to be run efficiently, men with specialised skill must be chosen to do specialised work. The latter believes that, for purposes of government administration at least, men are nearly identical, and that it is better to give party supporters the good jobs and put up with a slight additional inconvenience and expense. Politics are usually regarded as the exception to the general rule that we must give way to competent authorities in matters with which we are ignorant and incompetent to deal. There must, however, be a greater recognition of the fact that officials, like other specialists in civil life, have expert knowledge on matters within their province, and that they should therefore be given power to use that knowledge for the benefit of the state. In the words of Mr. H. J. Laski: "The business of the modern citizen is not to ask, what shall I do? But rather, whom shall I trust?"[1]

"Indisputably enough," said Carlyle, "the meaning of all reform-movements, electing and electioneering, of popular agitation, parliamentary eloquence, and all political effort whatsoever, is that you may get the ten Ablest Men in England put to preside over your ten principal departments of affairs. To sift and riddle the Nation, so that you might extricate and sift out the true ten gold grains, or ablest men, and of these make your Governors or Public Officers; leaving the dross and common sandy or silty material safely aside, as the thing to be governed, not to govern; certainly all ballot-boxes, caucuses, Kennington-Common meetings, Parliamentary debatings, Red Republics, Russian Despotisms, and constitutional or unconstitutional methods of society among mankind, are intended to achieve this one end."[2]

The idea expressed by Carlyle, that the object of all governments is to place the best men in office, should be extended to the ten thousand or more public officials on whom the burden of administration must fall. But one important reservation must be made. Carlyle's "ten Ablest Men" meant the ten most Enlightened and Benevolent Despots—a conception which is diametrically opposed to any sound democratic theory. In advocating official independence it is not my intention to suggest a displace-

[1] *The New Republic*, July 16, 1919. [2] *Latter-day Pamphlets*, § 3.

ment of parliamentary government by a bureaucracy, however efficient or benevolent; but rather to make parliamentary government and democratic control more elastic, in order that the work of the professional official may be utilised to the fullest extent. This means that political responsibility must be lessened and that the simple method of arriving at all decisions by the counting of votes must be discarded. The election of representatives by universal suffrage must remain the centre of gravity of the political system, for on it the whole weight of government is unquestionably concentrated. But it must be constantly remembered that in order to have efficient government we must produce an intense and sustained effort of mind and will on the part of the officers of state. In certain posts, such as a seat in the Commons, this effort is best obtained by the elective process; but in many other offices the effort is secured by a more indirect relationship to the ultimate source of all power, the people. It is quite possible to combine with election certain other means of obtaining office, and to allow within certain limits a lapse of parliamentary responsibility, while preserving at the same time the essence of democracy.

Carlyle thought that he was pointing out the absurdity of democracy; instead of that he was merely showing, what modern experience has confirmed, that the use of skilled officials is an essential condition of a democracy's existence. It is clear that to ascertain the will of the people is not sufficient; there must also be the means to ensure that what they desire will be carried out in the best possible manner. The real democracy demands a subtle combination of election and appointment, of non-expert minds and expert minds, of control and trust, of responsibility and independence. The size of the modern state and the complexity of our civilisation may make it extremely difficult to attain this combination; but the survival of democratic government nevertheless depends on its attainment.

## CHAPTER II.

## THE JUDGE.

In a discussion of official independence in Canada it is natural to give the judge first consideration. His office presents the most absolute form of independence known to the Constitution, and is the oldest example that is explicitly recognised by the law. Above all, it is the ideal as it were of other forms of independence; it is the model from which they are more or less consciously copied and the standard to which they are invariably compared. Although it is the purpose of this book to trace the history of the different officers of government after the time of the Canadian Confederation, yet in some instances it will be necessary to mention the period immediately preceding 1867. The judge is a case in point. In order to understand the consolidation of the judge's position which has taken place since the formation of the Dominion, it is very important to touch on the earlier period of Canadian history when the independence of the judge was first established.

The judge's independence in Canada was developed at the same time as responsible government; but it was an outgrowth rather than an essential part of the new system. In the earlier days in British North America the judges held office during pleasure [1] and mixed freely in politics; they held seats in the executive and legislative councils and were occasionally elected to seats in the assemblies.[2] This was a far departure from British precedent, but was justified

[1] Case of Mr. Justice Thorpe, 1807. *Can. Law Jour.*, 1913, p. 297. Case of Mr. Justice Willis, 1827. *Amer. Jour. Crim. Law*, May 1, 1913. Read, D. B., *Lives of the Judges of Upper Canada.*

[2] *Canada and Its Provinces*, Vol. IV. pp. 461–63. *Ibid.*, Vol. XIII. pp. 159, 200. *Lord Durham's Report* (*Lucas*), I. p. 225.

on the ground that men of ability and education were rare in the colony—a statement which, though true, was naturally not admitted by the reformers who were demanding self-government largely on the grounds of their own intelligence. The judges invariably belonged to the Tory party, and it was only natural that their position should be regarded with distrust by all those who were fighting that party in the interests of responsible government. The assemblies therefore attempted to check the judiciary by controlling the salaries,[1] and they also made several efforts to impeach delinquent judges.[2] In no case were they successful. It is clear, however, that the independence of the judiciary was not an essential part of the movement for responsible government. The assemblies wished, it is true, to free the judges from the executive council; but this was only the necessary preparation for the substitution of an equal dependence on the assemblies themselves. The better element of the reformers, however, were more far-sighted, and they formulated their demands with the English judiciary as a model.[3] In 1811 the first step was taken to render the judges more independent of politics, when the Legislature of Lower Canada passed an Act declaring judges of the Court of King's Bench to be incapable of sitting in the House of Assembly.[4] At intervals during the next half century statutes were passed and usages were established which gradually built up the strength and independence of the judges in the different provinces. The disqualification of judges sitting in the legislative and executive councils and the legislative assemblies was generally the first to be made effective, this being followed by statutes which changed the tenure at pleasure to one during good behaviour.[5] Thus at the time of Confederation the Canadian judiciary had come into its long-delayed inheritance, and had assumed

[1] *Canada and Its Provinces,* Vol. IV. pp. 462–63.

[2] Cases of Jonathan Sewell, C.J., and James Monk, C.J., 1814. *Ibid.,* p. 479. Case of Mr. Justice Foucher, 1817. *Ibid.,* p. 480.

[3] Howe, Hon. J., *Speeches and Public Letters* (1858 ed.), I. pp. 95, 106.

[4] *Lower Can. Stat.,* 51 Geo. III. c. 4.

[5] *Upper Can. Stat.,* 4 Wm. IV. c. 2. *Ibid.,* 7 Wm. IV. c. 114. *Can. Stat.,* 7 Vic. c. 65. *Ibid.,* 8 Vic. c. 13. *Ibid.,* 12 Vic. c. 63. *Ibid.,* 20 Vic. c. 22. *Ibid.,* 31 Vic. c. 25.

a status similar to that of the judges of the United Kingdom. All that remained for the Fathers of Confederation to do was to consolidate that position so far as it was necessary in the new Constitution.

The *British North America Act,* 1867, recognised three distinct types of court in the new Dominion, viz :—

1. Superior Courts in each province.[1]
2. District and County Courts.[2]
3. Minor provincial courts.[3]

The latter group does not fall within the scope of this book, for the courts of which it is composed are purely provincial. The first and second of these groups are also provincial in a sense; but as they come for the most part under Dominion control they will be included in this chapter. Both of these groups may be looked upon as identical for the purposes of our enquiry, save in one respect, viz.: the process of removal, where it will be necessary to differentiate between the two grades of courts. Since 1867 the Dominion Supreme and Exchequer Courts have been created,[4] but these may be treated so far as official independence is concerned, precisely the same as the Superior Courts of the provinces.

The problem of the independence of the official is in its broadest sense bi-partite. The first endeavour should be to obtain those conditions which will secure an official who has or is apt to have those peculiar qualities of mind that have been stated in the introductory chapter as necessary to independent action. The second problem is to encourage those qualities and the opportunities for their exercise after the official has taken office. Both of these aspects are presented in the history of the judiciary. In the time of the Stuarts complaints against the Bench were focussed on their lack of independence in office; to-day the complaints both in Canada and in Great Britain are chiefly concerned with the way the appointments are being made. The emphasis has been shifted from the second part of the difficulty to the first.

[1] Sects. 96, 99, 100. [2] Sects. 96, 100.
[3] Sect. 92, sub. sect. 14.
[4] Provided for by *B. N. A. Act,* 1867, Sect. 101. Created in 1875. *Can. Stat.,* 38 Vic. c. 11.

The appointment of judges in Canada has followed the traditional British usage and has been made by the executive; the advent of responsible government merely shifted this responsibility from the Governor to his advisers. The system has not been an entire success, owing to the fact that political sympathies have been given an undue prominence in the appointments. Good men have undoubtedly been raised to the Bench; but their political views have almost invariably corresponded to those of the party in power. The general attitude towards these appointments may be gathered from the following editorial which occurred in *The Week*, an independent journal of genuine merit, upon the death of Sir William Ritchie, the Chief Justice of Canada:—

> "It is characteristic of our political system, or rather let us hope, of its faulty administration, that the occasion of his death has been the signal for much eager speculation as to who shall be his successor—speculation based, unhappily, not on differences of opinion as to who, of all those in the Dominion who may be considered eligible, is most worthy of being exalted to this responsible position, but as to what disposal of the vacancy will be deemed most likely to commend itself to the Government as subserving best the interests of the party."[1]

The most notorious case of appointment for party services was that of the Hon. J. A. Mousseau, ex-premier of Quebec. This gentlemen was raised to the Superior Court of that province at a time when he was charged before the same court with violations of the Election Law in respect to personal bribery and corruption.[2] The fact that he was later acquitted in no way detracts from the culpability of the government that appointed him,[3] and Mr. Laurier was not exaggerating when he characterised it as "an act of most indecent haste on the part of the Government to appoint Mr. Mousseau as long as he was liable to be tried, and before he had cleared his own character which was impugned in the Courts of Justice. . . . The gist of the

[1] Sept. 30, 1892, edit.
[2] *Morgan's Annual Register*, 1884, pp. 61–62.
[3] *The Week*, March 19, 1885, edit.

charge which I bring against the Government is, that they have appointed a man to be a Judge who is actually liable to be tried in the Court of which he is to be a Judge." [1]

Such cases as that of Mr. Mousseau are fortunately rare; but the general practice of making appointments for party reasons still persists.[2] As recently as 1918 the Canadian Bar Association felt it necessary to pass a resolution to protest against such a system:—

"Appointments to the Bench through political exigencies or financial necessities of the aspirants should be discouraged, and legal attainments and other judicial qualities should be sought in making such appointments. The present method, it is alleged, is the result of the patronage system, and it is strongly urged that these appointments should be independent of patronage control and that recommendations from the Bar Associations and Law Societies, as to the fitness of those available for such positions, should be solicited and should have weight."[3]

Another complaint which has sometimes been brought against this system of appointment is that men have been raised to the Bench because of their religious convictions. *The Week* regarded the appointment of Mr. John O'Connor to the Superior Court in 1884 as a political manœuvre to capture the Roman Catholic vote.[4]

"Amidst all the corruption and debasement of politics, we have hitherto enjoyed, in British Canada at least, the inestimable blessing of a respectable and trusted judiciary. . . . He (Sir John A. Macdonald) had even won the applause of all good citizens by promoting to the Bench an eminent lawyer of the opposite party. But now it seems the judiciary has gone with the Senate and every other part of the Minister's trust into the common fund of corruption. Judicial appointments are beginning to be used not merely as rewards for eminent partisans in the legal profession, which was endurable though not desirable, but directly for the purchase of votes. . . . The last appointment, the political motive of which is unmistakable, is pronounced by the whole profession, not excepting the warmest political friends of Sir John Macdonald, in itself improper and such as

[1] *Can. H. of C. Debates*, Feb. 6, 1884, pp. 133, 139.

[2] *Can. H. of C. Debates*, July 6, 1904, pp. 6117–18. *Ibid.*, Jan. 29, 1907, pp. 2212–15. *Ibid.*, Jan. 26, 1910, pp. 2439–40. *Can. Ann. Review*, 1910, pp. 346–47.

[3] *Can. Law Jour.*, 1918, p. 418.

[4] Sept. 18, 1884, edit.

cannot fail to diminish the respect of the people for the Bench and to shake their confidence in the administration of public justice."[1]

Religious denominations on their part have sometimes gone so far as to claim representation on the Bench[2]—a claim for which the *Canada Law Journal* can find no justification.

"The only admissible principle in the appointment of judges is the selection of the best available men from a professional standpoint. A man's fitness for the position no more depends upon his religious convictions than it does upon the colour of his hair." [3]

The accuracy of this position cannot be gainsaid if it be admitted that the only question that arises is the personal qualifications of the judge. But the success of the work done by the independent official hinges to a large degree on the confidence that is placed in him by the general public; and while a judge's religious convictions may not enter into his personal fitness for office any more than the colour of his hair, yet his efficiency as a judge, the efficacy of his work, and the confidence that he will create or destroy in the minds of the people may depend to a large degree on the religious tenets that he may hold. If a community were divided into sects according to the colour of their hair, then undoubtedly the appointing power would have to consider seriously whether a vacancy should go to a red or a black-haired judge. Substitute "skin" for "hair" and the point becomes quite obvious. If the Quebec Bench were filled with Protestant judges, or the Ontario Bench with Roman Catholic judges, the effect on the administration of justice in the two provinces would be disastrous. It is, however, generally true that the question of religion may be disregarded in the appointment of judges, save in certain parts of the Dominion where Protestant and Catholic jealousy is very pronounced and where a government would naturally exercise a certain amount of discretion.

[1] *The Week*, Oct. 2, 1884, cf. *Ibid.*, Oct. 16, 1884, edit.
[2] *Toronto Saturday Night*, Feb. 9, 1901.
[3] *Can. Law Jour.*, 1901, p. 332.

The law is silent for the most part in regard to technical or other qualifications for a judgeship—a minimum experience at the Bar or Bench being sometimes, though not always, required.[1] When the Supreme Court of Canada was constituted, a peculiar difficulty arose on account of the dissimilarity of Quebec law as compared to the law of the other provinces. It was claimed that as this new body was to hear appeals from the Superior Court of Quebec, that province should be guaranteed representation because of the special training and knowledge that French law required.[2] The Act of 1875 therefore stated that at least two out of the six judges of the Supreme Court of Canada should come from the Bench or Bar of Quebec.[3] Even this was not satisfactory to Quebec members, and for many years afterwards Bills were introduced to repeal or amend the Act on the ground that the Court was ignorant of French law.[4] This idea of geographical representation would have been carried still further if some members of the House had had their way. Mr. Bunster of British Columbia introduced an amendment to provide special representation on the Court for that province on the grounds that "the Judges of the other Provinces knew little about the management of Indian lands or of mining affairs".[5] Even to-day the geographical element is still considered when making appointments, and some balance is maintained between rival sections of the Dominion. In appointing judges of the County Courts, however, it has become a recognised custom to make the selection from barristers who have practised outside the county in which they are to sit as judges. It is a wise rule, as in most cases the judge, having been active in politics, would be regarded with distrust if he presided over a court in which he had once practised.[6]

[1] *B. N. A. Act*, 1867, sects. 97, 98. *Can. Stat.*, 38 Vic. c. 11, sect. 4. *Rev. Stat. N.S.* (1900), c. 156, sect. 6, c. 155, sect. 6.

[2] *Can. H. of C. Debates*, March 25, 1875, pp. 921–22. *Ibid.*, March 16, 1875, pp. 738–41.

[3] *Can. Stat.*, 38 Vic. c. 11, sect. 4.

[4] *Can. H. of C. Debates*, Feb. 26, 1880, pp. 234–67. *Ibid.*, Feb. 10, 1881, pp. 913–21. *Ibid.*, Apr. 17, 1882, p. 950. *Ibid.*, Apr. 3, 1883, p. 383. *Ibid.*, Jan. 24, 1884, p. 43, etc.

[5] *Ibid.*, Mar. 30, 1875, p. 974.

[6] *Ibid.*, Mar. 19, 1903, pp. 207–09.

The next question to be considered is that which is generally understood by "the independence of the judiciary," viz.: the laws and conventions which affect their tenure and removal, and make them virtually irresponsible in the exercise of their office. The tenure of the judges in all the courts under consideration is during good behaviour;[1] the means of their removal, however, is different according as the judge belongs to a County or to a Superior Court.

The judges of the Supreme and Exchequer Courts of Canada and the Superior Courts of the provinces may be removed by the Governor-General upon the address of the Senate and the House of Commons[2]; but the effectiveness of this provision depends to a large degree on the severity or lenity with which the statutes are interpreted by parliament. The formalities of procedure that have arisen in connection with the process of removal therefore become extremely important in determining the political irresponsibility of the judge, and it will be necessary to study in some detail the successive steps in the process.

1. Charges against a judge must be made by responsible parties and usually take the form of a petition to parliament praying for an investigation or for the judge's removal.[3] Such a petition will not be entertained unless the charges are of an extremely serious nature and are explicit in the matter of complaint. The typical attitude of a government under such circumstances was expressed by Sir John A. Macdonald in 1885 in the case of Judge Hughes.[4]

"It is the bounden duty of Parliament, and of every member of Parliament, to put down any insinuation or attack on any

[1] *B. N. A. Act,* 1867, sect. 99. *Can. Stat.,* 38 Vic. c. 11, sect. 5. *Ibid.,* 45 Vic. c. 12, sect. 2. The point may be noted that while the tenure of the judges of the Superior Courts of the provinces is provided for in the Constitution and can only be altered by Imperial statute, that of the judges of the Supreme and County Courts can be changed by simple Act of the Canadian Parliament.

[2] *B. N. A. Act,* 1867, sect. 99. *Can. Stat.,* 38 Vic. c. 11, sect. 5.

[3] *Can. H. of C. Journals,* 1867–68, pp. 26, 297. *Ibid.,* 1876, pp. 212, 243, 271, 289, 294, 295. *Ibid.,* 1880–81, p. 261. *Ibid.,* 1882, p. 176. *Can. H. of C. Debates,* May 8, 1901, p. 4646. *Ibid.,* June 2, 1899, pp. 4172–89, pp. 4201–17.

[4] Judge Hughes was a County Court judge; but the consideration of a petition was similar to that of a Superior Court judge.

judge, unless it is based on specific charges, showing that the judge is unfit to hold his position, and that it is contrary to the public interest he should do so; and the member who takes the responsibility of making that charge should state his belief that, from the respectability of the parties, or other circumstances, he has reason to believe there is a basis and foundation for the charges." [1]

2. The House next appoints a Select Committee to enquire into these charges, to consider evidence that may be submitted, to receive whatever statements the accused judge may be pleased to make, and to report the results of its investigation to the House.[2] The Commons is extremely careful not to appoint a Committee unless the charges are such as would, if proved, justify removal.[3] The responsibility for an investigation will be on the government and particularly on the Minister of Justice, and they have in all instances shown themselves extremely cautious about taking such a step, believing it wiser to interfere too little rather than too much.[4] It has been accepted as a general rule that errors in judgment, insufficient knowledge of the law, or misapplication of facts will not justify removal and therefore cannot be used as an excuse for an enquiry by a Select Committee. Mr. Blake, ex-Minister of Justice, stated this position in 1883 in the case of a County Court judge.

"The judge may have been right or wrong in refusing the recount. I purposely abstain from discussing a single word of the particulars. It is not because he was wrong in law that we would enquire into this case any more than we would enquire into the case of an erroneous judgment in the discharge of any

[1] *Can. H. of C. Debates*, Feb. 12, 1885, p. 98.

[2] *Can. H. of C. Journals*, 1867–68, pp. 344, 398. *Ibid.*, 1869, pp. 135, 247, Appendix § 5. *Ibid.*, 1877, pp. 36, 258, Appendix § 3. *Ibid.*, 1882, p. 355. *Can. Sess. Pap.*, 1882, § 106. Witnesses are examined under oath since 1875 (*Brit. Stat.*, 38–39 Vic. c. 38). Before that time committees of the Senate and House of Commons had no power to examine witnesses on oath, it being contrary to the *B. N. A. Act*, 1867, sect. 18. The first case to be examined on oath was that of Mr. Justice Loranger. *Can. H. of C. Journals*, 1877, p. 36.

[3] *Can. H. of C. Debates*, May 1, 1882, p. 1235 *et seq.* *Ibid.*, June 2, 1899, pp. 4173–74.

[4] *Ibid.*, July 12, 1894, pp. 5800–09. *Ibid.*, July 17, 1894, pp. 6212–20.

judicial function. . . . What was the cause, then, which could properly bring this Judge's action under our consideration? It was a charge of partiality, of malfeasance in office—not that the Judge erred, for all may err in judgment, but that he degraded his office, betrayed his trust, wilfully and knowingly did a wrong thing, perverted justice and judgment—that is the nature of a charge which would alone make it proper to have been brought here. Of that there is no allegation in the notice of motion." [1]

The House has not only carefully guarded the judges from the imprudent and ill-advised investigation of its own members, but it has refused to delegate its authority to enquire to any other body. In 1882 it was moved in amendment that a Commission be appointed to conduct the investigation on the conduct of Chief Justice Wood of Manitoba, and to report to the House; but the amendment was not carried.[2] In connection with the same case the appointment of a provincial Commission to enquire into the administration of justice in Manitoba was regarded with suspicion by both Government and Opposition. To quote Mr. Blake again:—

"I hold it to be of the highest consequence that, while we should keep this great inquisition open to all subjects of Her Majesty, for all well-grounded complaints, and take care that they are duly enquired into, we should not permit Judges who hold their position by that tenure to be exposed to other inquisitions, which cannot possibly be effective in removing them from their office, and which must have a tendency to degrade, and to impair the dignity of the office itself."[3]

It may be added that any interference by the House in a case *sub judice* is not allowed, no matter how grave the charge which may be alleged against the judge. In 1883 a motion was made that a Special Committee be appointed to examine and report on the conduct of a judge; but it was negatived on the ground that the case in which the

[1] *Can. H. of C. Debates*, April 9, 1883, p. 522.

[2] *Can. H. of C. Journals*, 1882, p. 355. See also *Can. H. of C. Debates*, May 1, 1882, p. 1235.

[3] *Can. H. of C. Debates*, Feb. 20, 1882, p. 54. Cf. Remarks of Sir John A. Macdonald, *Ibid.*, p. 54.

alleged misconduct had taken place was at that time still before the courts.[1]

3. Should the Select Committee report unfavourably on the conduct of the judge and the House adopt its report, the address asking the Governor-General to remove must be passed by both Houses. This stage in the proceedings has never been reached in the history of the Canadian judiciary. Most of the charges against judges have died in the petition stage[2]; several have reached the Select Committee[3]; but these either have been proved groundless or have been allowed to drop.[4] In one instance the judge conveniently died before the proceedings had advanced very far.[5] The sufficiency of evidence to justify removal and what actually constitutes misbehaviour are questions that are solely vested in the two Houses; they are the only arbiters as to whether such charges are proved, and their action is not subject to any examination, appeal or review in any of the courts of law.

4. It is a matter of doubt, because of the absence of any precedent, whether the Governor-General, in the event of a joint address from both Houses asking for the removal of a judge, would act strictly on the advice of his ministers or on his own responsibility. Sir John Bourinot, following the case of Judge Boothby in South Australia, claims that "the acts of misconduct which have occasioned the adoption thereof ought to be recapitulated, in order to enable the sovereign to exercise a constitutional discretion in acting upon the advice of parliament."[6] The more accurate view is unquestionably that expressed by Professor Keith:—

[1] *Can. H. of C. Journals*, 1883, pp. 191–92. *Can. H. of C. Debates*, April 9, 1883, pp. 517–18. The prohibition on press comment while a case is *sub judice* is quite a separate matter, though the grounds for the prohibition are the same.

[2] Chief Justice Young, *Can. H. of C. Journals*, 1867–68, p. 26.

[3] Mr. Justice Lafontaine, *Ibid.*, p. 344. Mr. Justice Loranger, *Ibid.*, 1877, p. 36.

[4] Mr. Justice Lafontaine, *Ibid.*, 1869, p. 247. Mr. Justice Loranger, *Can. H. of C. Debates*, 1878, pp. 369–72.

[5] Chief Justice Wood, *Morgan's Annual Register*, 1882, pp. 61–62.

[6] *Parliamentary Procedure* (1884 ed.), p. 103. In the Boothby case, however, it was the *Crown*, and not the *Governor* who was to remove. See Todd, A., *Parliamentary Government in the Colonies* (2nd ed.), pp. 846–56.

"The Governor . . . would undoubtedly act in his usual manner, which is to follow the advice of his ministers, unless some very clear Imperial interest were involved." [1]

Before the era of responsible government, removal of judges was carried out under *Burke's Act*,[2] whereby the Governor in Council might amove a judge for reasons which he might deem fit, the removal being subject to an appeal to His Majesty in Council.[3] This Act still applies in theory to the Supreme and Exchequer Courts of the Dominion and to the District and County Courts; but the Superior Courts of the provinces have been explicitly removed from its provisions by the *British North America Act*, which has substituted the removal by joint address.[4] Such amotion, however, will never be used again in Canada,[5] the provisions of the Imperial and local Acts being much more satisfactory from every point of view.

The means of removal for County Court judges differed in every province in Canada until 1882; but in that year a statute was passed which made the process uniform throughout the Dominion.[6] While it is unnecessary to trace the history of the different County Courts before 1882, an exception will be made of those of Ontario, which present some interesting and novel features not to be found elsewhere in Canada.

The judges of the County Courts of Upper Canada held office during pleasure until 1845, though no mention of tenure is to be found in the early statute.[7] The Act, 8 Vic. c. 13. sect. 2, made their tenure during good behaviour, removable by the Governor on a joint address of the Legislative Council and Assembly. This tenure was left intact by the Act of 1857,[8] which stated, however, that they might be removed by the Governor when inability or misbehaviour

[1] Keith, A. B., *Responsible Government in the Dominions*, III. p. 1343.
[2] *Brit. Stat.*, 22 Geo. III. c. 75.
[3] Case of Judge Willis (1829). Todd, A., *Parliamentary Government in the Colonies* (1894 ed.), p. 830.
[4] Keith, A. B., *Responsible Government in the Dominions*, III. p. 1338.
[5] *Ibid.*, III. p. 1342.
[6] *Can. Stat.*, 45 Vic. c. 12.
[7] *Upp. Can. Stat.*, 4–5 Vic. c. 8. See *Re Squier*, 46 U. C. Q. B. 474, at p. 489.
[8] *Can. Stat.*, 20 Vic. c. 58.

was proved to the satisfaction of a Court of Impeachment which the Act created. This Court, composed of the Chief Justice of Ontario, the Chancellor of Ontario and the Chief Justice of the Court of Common Pleas, was to hear evidence for and against the accused judge and submit its recommendations to the Governor.[1] After Confederation, the Ontario Legislature endeavoured to change the process of removal and to ignore the Court of Impeachment by passing a number of Acts [2] which were clearly *ultra vires*.[3] In the early part of 1882 there were (according to the dictum of Wilson, C. J. in *Re Squier*) no less than four modes of procedure that might be taken for the amotion of an Ontario County Court judge, viz. :—

1. By proceedings taken under *Brit. Stat.*, 22 Geo. III. c. 75, by and before the Governor in Council.
2. By proceedings by and before the Court of Impeachment under *Consol. Stat. Upp. Can.* (1859), c. 14.
3. By *scire facias* when the conditions and terms of the patent have been broken. *Comyn's Digest,* Officer, K 11, Bacon's Abr. M.
4. The Legislatures either of Ontario or of the Dominion can address Her Majesty to remove a judge, but such proceeding is the institution of an original cause before the Judicial Committee. *Brit. Stat.*, 3–4 Wm. IV. c. 41, sec. 4.[4]

These forms of removal as well as those in the other provinces were rendered either inoperative or obsolete by the Act passed in 1882 [5] by the Dominion Parliament. This Act establishes uniform tenure and removal procedure for all the County Court judges in Canada. They are to hold office during good behaviour, but may be removed from office "by Order of the Governor-General in Council for inability from old age, ill health, or any other cause, or for incapacity or misbehaviour, established to the satisfaction of the Governor-General in Council."

[1] *Can. Stat.* 20 Vic. c. 58, sects. 11, 12.
[2] *Ont. Stat.*, 32 Vic. c. 22. *Ibid.*, 33 Vic. c. 12. *Rev. Stat. Ont.* (1877), c. 42, sect. 2.
[3] *Re Squier*, 46 U. C. Q. B. 474, at p. 490. *Can. Law Jour.*, 1881, pp. 445–46.
[4] 46 U. C. Q. B. 474, at p. 491.
[5] *Can. Stat.*, 45 Vic. c. 12.

"Provided: 1. That the circumstances respecting the inability, incapacity or misbehaviour have first been enquired into by virtue of and under an Order of the Governor-General in Council.

"2. That the judge has been given reasonable notice of the time and place appointed for the enquiry and has been afforded an opportunity by himself or his counsel of being heard thereat, and of cross-examining the witnesses." In event of removal the Order in Council to this effect and all reports, evidence, and correspondence relating thereto "shall be laid before Parliament within the first fifteen days of the next ensuing Session."[1]

The Governor in Council may issue a Commission to one or more judges of the Supreme Court of Canada or of the Superior Courts of the provinces to make enquiry into any charges and to report thereon.[2] The Court of Impeachment of Ontario is abolished.[3]

It is still open to either House of Parliament to appoint a special committee to investigate charges against a County Court judge; but this procedure would probably be prevented by the government which, if it had wished an enquiry, would have directed one to be held under the Act of 1882.[4] The attempts that have been made to appoint a Select Committee have all been in election cases, and were treated as political questions. In no instance did the Opposition get the enquiry it demanded.[5]

Sir John Bourinot is responsible for the statement that:—

"The records of Canada do not present a single instance of the successful impeachment or removal of a judge for improper conduct on the Bench since the days of responsible government."[6]

But the written records do not present all the truth. Judge W. R. Squier of the County Court of Huron and Judge J. B. Wood of the County Court of Perth were allowed to retire in 1883 and 1897 respectively in order to avoid

[1] Sect. 3. [2] Sect. 4. [3] Sect. 9.

[4] Judge Prendergast, *Can. H. of C. Debates*, March 3, 1898, p. 1076.

[5] Judge Bell, *Can. H. of C. Journals*, 1883, pp. 192–93. *Can. H. of C. Debates*, April 9, 1883, p. 517 *et seq.* Judge Hughes, *Can. H. of C. Journals*, 1885, p. 66. *Can. H. of C. Debates*, Feb. 11, 1885, p. 77. *Ibid.*, Feb. 12, 1885, pp. 98, 99. Judge Elliot, *Can. H. of C. Journals*, 1892, p. 260. *Can. H. of C. Debates*, April 27, 1892, p. 1719 *et seq.* *Ibid.*, May 9, 1892, p. 2305 *et seq.*

[6] *Canada under British Rule*, p. 281.

the trouble and delay caused by the formalities of removal. A Commissioner was appointed on each occasion to investigate the charges, which were intemperance in both cases, with the additional charge of gross partiality against Judge Wood. The charges were well sustained; and if the judges had not consented to retire they would undoubtedly have been removed by the Governor in Council.

It will be observed that there is a great difference between the County Court judge and his more exalted brother of the Superior or Supreme Court. The tenure in both cases is during good behaviour; but the procedure and reasons for removal are quite different. A joint address by both Houses, weighted down as it is by its constitutional trappings, is so ponderous that it rarely produces any results. On the other hand, a removal by the Governor in Council, even with the enquiry that is insisted on, is a comparatively simple operation. Supreme and Superior Court judges will only be removed for gross malfeasance in office, i.e. the term "good behaviour" is given its strictest connotation. But with County Court judges the term is interpreted much more widely: they may be removed for malfeasance, misfeasance, inability or incapacity in the discharge of their duties.[1] County Court judges may also be compelled to retire if they have passed the age of efficient work, though the value of this provision lies as much in its possibilities as in its actual use. Even the Canadian Parliament has no power to compel the retirement of a Superior Court judge, for such a law would be a contravention of the *British North America Act*, which ensures tenure during good behaviour.[2] Judges of the Supreme Court of the Dominion, however, have no such protection, and they might be retired by an amendment of *The Supreme and Exchequer Court Act.*

The question of the retirement of judges has always been a serious one in Canada, and the efficiency of the Bench has been more impaired by judges clinging to office long

[1] Mr. Blake appears to limit the removal of County Court judges to cases of malfeasance (*see* pp. 36–7). But *Can. Stat.*, 45 Vic. c. 12, sect. 3, distinctly makes removal possible for misfeasance.

[2] *See* speech of the Minister of Justice, *Can. H. of C. Debates*, April 2, 1918, pp. 240–41.

after their powers have begun to decline than from any other single cause.[1] In 1868 one judge was said to have been so deaf that in an action for ten dollars he gave judgment for one hundred.[2] In Quebec, in 1873, five judges were in the vicinity of seventy-two years of age, some of whom were quite unfit to discharge their duties.[3] In that year the Montreal Bar unanimously refused to take any cases before the Quebec Court of Appeal, a step which resulted in the retirement of the Chief Justice whose resignation had been long overdue.[4] When the late J. W. Ritchie, Equity Judge of Nova Scotia, retired after a distinguished career on the Bench, he was asked why he had done so while in the full possession of his faculties.

"His reply," says the *Canada Law Journal*, "is worthy to be written in letters of gold over every judicial bench. 'True enough, I am, I believe, fully competent to discharge my judicial duties, but the time will surely come and cannot be far distant when I shall no longer be competent and may not have the discernment to be aware of my incapacity. I might then be tempted to continue in office when I could no longer perform its duties with satisfaction to the public.'"[5]

The chief reason why the judges have held so tenaciously to office has been that they suffer a loss in salary by retirement. In 1903 an Act was passed[6] giving judges of a certain age and term of service a full salary as a pension and compulsorily retiring County Court judges of eighty years or over. It was very useful as a temporary measure, and several judges availed themselves of the new pension and retired. But as a permanent enactment the Act was a failure, for it tended to keep a judge in office longer than before. If a judge retired when he discovered his infirmity he received a pension of two-thirds his salary; but if he could manage to stay a few years longer he received full

[1] *Can. H. of C. Debates*, May 5, 1879, p. 1755. *Ibid.*, May 20, 1901, p. 5586.
[2] *Ottawa Times*, March 31, 1868. [3] *Toronto Mail*, May 21, 1873.
[4] *Canadian Monthly*, Jan. 1874, p. 70. [5] 1912, p. 600.
[6] *Can. Stat.*, 3 Edw. VII. c. 29. The Act affected four Superior Court judges and eight County Court judges varying in age from seventy-five to eighty-four years. *Can. H. of C. Debates*, Aug. 5, 1903, p. 8106.

salary for a pension. He naturally preferred to remain.[1] The Act has therefore been recently amended so that no judges hereafter appointed can claim the full pension, and that those already appointed can only receive a pension equal to their salary before the recent increase.[2]

These questions of appointment, tenure and removal, contribute to form the political irresponsibility of the judge as well as a large part of his independence on its negative side. This latter aspect is not complete, however, without considering also the civil and criminal irresponsibility of the judge, which removes his actions not from parliamentary meddling but from review by the courts.

It is a principle of the common law of England, now over three hundred years old,[3] that a judge is not liable to civil or criminal action on any ground whatsoever for any wrong committed while acting on matters within his jurisdiction. The mantle of this protection has descended on the judges of the British Colonies and Dominions.[4] It is extremely strong and implies two separate propositions:—

*First.* The person injured by the judge's ruling may have suffered by an actual perversion of justice on the part of the judge—an act contrary to the law of the land.

"No action lies against a judge of the Supreme Court of a Colony in respect of any act done by him in his judicial capacity, even though he acted oppressively and maliciously to the prejudice of the plaintiff and to the perversion of justice."[5]

*Second.* The act complained of may be done maliciously or corruptly, the judge may be guilty of accepting a bribe or allowing personal considerations to influence his judgment.

"I need hardly say," said Lord Cranworth, "that the mere adding that it was done maliciously amounts to nothing at all."[6]

"It is a principle of our law that no action will lie against

[1] *Can. Law Jour.*, 1912, p. 600.

[2] *Can. Stat.*, 10–11 Geo. V. c. 56.

[3] *Floyd v. Barker* (1608), 12 Coke Rep. 23. *Kemp v. Neville*, 10 C. B. (N.S.), 549.

[4] *Haggard v. Pelicier Frères*, 1892 (A.C.), 61. Keith, A. B., *Responsible Government in the Dominions*, III. p. 1347.

[5] *Anderson v. Gorrie*, 1895, 1 Q. B. 668. This protection is much stronger than that granted to the public officials of France under the *droit administratif*, which, though giving exemption from trial in the ordinary courts, provides special administrative courts for the purpose.

[6] *Hamilton v. Anderson*, 3 Macq. 378.

a judge of one of the Superior courts for a judicial act, though it be alleged to have been done maliciously and corruptly."[1]

Lord Esher is reported to have said in the case of *Anderson v. Gorrie*:—

"If I were to order a barrister in court to sit down, and he did not, and I shot at him and killed him, I much doubt if proceedings for murder would lie against me."[2]

The essential condition that must be fulfilled is that the act was within the judge's jurisdiction, and the only difference between the protection accorded to a Superior Court judge and to other judges lies in the extent of that jurisdiction.[3] The necessity for such extreme protection has been well stated by Kelly, C. B., in *Scott v. Stansfield*.[4]

"It is essential in all courts that the judges who are appointed to administer the law should be permitted to administer it under the protection of the law independently and freely, without favour and without fear. This provision of the law is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest is that the judges should be at liberty to exercise their functions with independence and without fear of consequences. How could a judge so exercise his office if he were in daily and hourly fear of an action being brought against him, and of having the question submitted to a jury whether a matter on which he had commented judicially was or was not relevant to the case before him?"[5]

In short, were the law otherwise, the ninety and nine honest judges would be continually harassed by actions brought against them alleging want of integrity, in order that the hundredth judge, who might be a rogue, could be brought to justice. It is infinitely better that the entire hundred should be granted immunity from action, and trust to the political machinery to remove the corrupt judge when his unfitness for office is clearly demonstrated to parliament.

Two other forms of protection that the judges enjoy remain to be noted, viz., immunity from criticism in parlia-

[1] *Fray v. Blackburn*, 3 B. & S. 576, at p. 578.
[2] "Academic Freedom," *New York Nation*, Dec. 7, 1916.
[3] *Anderson v. Gorrie*, 1895, 1 Q. B. 668, at p. 671.
[4] 3 Excheq. Rep., 220. [5] P. 223.

ment and in the press. The Speakers of the Canadian Houses have followed the excellent precedent of the Mother country and have ruled out of order any attack on the conduct of a judge, pointing out that the proper method is to move an address for removal.[1] Inasmuch as this latter course is of an extremely serious nature and also because the House must be satisfied as to the gravity of the charge before such an address will be considered, criticism in parliament is kept within very strict limits.

The second exemption from criticism which the judges enjoy is that arising outside of parliament. One of these is relatively unimportant, viz., the misconduct of persons in open court, which can be punished summarily. There are also, however, "constructive contempts of court" which arise outside of the court itself, and take the form of speeches or articles in papers, which impute corrupt or improper motives on the part of the judges or seriously reflect on or impede the administration of justice.[2]

On November 7, 1887, the Moncton *Daily Transcript* attacked with excellent cause Mr. Justice Fraser, who had reversed his own decision in an election case. The paper drew an apt parallel between the vacillating judge and Pooh-Bah of *The Mikado* :—

> "This was the decision of Mr. Pooh-Bah in his capacity as Lord Chancellor, and in the Supreme Court of New Brunswick on Saturday the judicial Pooh-Bah, in his capacity as Lord High Executioner, reversed his former decision, and ruled the petition out on the very grounds which he formerly held were incorrect. Such is Mr. Justice Pooh-Bah Fraser's conception of law and justice. Mr. Justice Fraser to-day stands before the public gaze as a Judge whose judgment is self-condemned as unreliable, unstable and vacillating. He rules one way to-day and another way to-morrow. His construction of the law in this particular matter has been decided by the Supreme Court, *including himself*, to be incorrect."

This article, and one or two others of similar character, secured for the editor a fine and imprisonment for contempt

[1] *Can. H. of C. Debates*, May 11, 1887, p. 373. *Ibid.*, May 9, 1888, p. 1301. *Ibid.*, March 3, 1892, p. 69. *Ibid.*, May 13, 1918, p. 1896.

[2] Lord Fitzgerald, *Brit. H. of L. Debates*, April 6, 1883, pp. 1611–12.

of court, because it was supposed that he had imputed corrupt conduct to Judge Fraser. The judge undoubtedly deserved all the contempt that could be heaped upon him; but the Pooh-Bah metaphor had presumably implied bribery and constituted a reflection on the administration of justice. The editor was tried without a jury; his accusers were his judges; and the fine and imprisonment followed.[1] Although it is very desirable that the judiciary should be protected from criticism, there can be little doubt that the *Transcript* case pushed that protection too far. If such cases were at all common, public opinion would compel a more strict definition of the limits of immunity from criticism, and the facts would be left to a jury and not to a Bench of judges to decide.

The salary of a judge is not the least important factor in his independence; for the method of payment might make him dependent on the legislature for his subsistence, a circumstance that would lead to very disastrous results. The Parliament of Canada, recognising the truth in the words of Alexander Hamilton that "a power over a man's subsistence amounts to a power over his will,"[2] has removed the salaries of the judiciary out of the annual vote and has made them a charge on the Consolidated Revenue Fund. The Canadian Statute, 31 Vic. c. 33, sect. 2, reads:—

> "Inasmuch as it is not expedient that the payment of . . . the salaries and pensions of the Judges of the Courts hereinafter mentioned . . . should depend upon the annual vote of Parliament: therefore—there shall be payable yearly, and *pro rata* for any less period than a year, the salaries, allowances, grants and sums of money mentioned in the Schedules annexed to this Act, to the persons and for the purposes therein specified, and the same shall be payable out of any unappropriated monies forming part of the Consolidated Revenue Fund of Canada."

Another aspect of the same question is the immunity of the judge's salary from taxation. This was warmly debated in 1918[3] when the matter was raised in the House. The majority of the members called such exemption undemo-

[1] *Can. H. of C. Debates*, May 9, 1888, pp. 1299–331.
[2] *The Federalist*, § 79.
[3] *Can. H. of C. Debates*, May 17, 1918, pp. 2155–61.

cratic, others contended that there was a contractual obligation in the *Judges Act*[1] to leave salaries untouched, while the Leader of the Opposition held that the small amount of money that would result from a tax would be nothing compared to the disadvantage of tampering with the independence of the judiciary. In 1919 the *Act to Amend the Judges Act*[2] was passed, section 13 of which stated that the exemptions of the *Judges Act* in regard to taxes and deductions[3] should not apply to those whose salaries were increased by this Act more than $500. A like provision has been inserted in a later Act, and the option is given to any judge to receive the additional salary with the tax or retain the old salary without the tax.[4] All judges, therefore, are now liable to pay federal taxation by statute, and as it has been held in the courts that a County Court judge must pay municipal taxation under provincial legislation,[5] exemptions would seem to be a thing of the past. Inasmuch as a judge is taxed on his sugar and his cigars like anyone else, there would seem little reason why his income should escape.

Salary affects independence in another way: it may be the deciding factor in obtaining a good or a bad judge. The inadequacy of the salary of the Canadian judge[6] has often made it extremely difficult to procure the best legal talent in the country. In 1884 *The Week* claimed that the judiciary was steadily deteriorating as a result of the low remuneration that was being offered :—

"The desire of the leading members of the Bar is naturally to reach the highest honours of the profession; but the disproportion between the professional gains of leading Canadian

[1] *Rev. Stat. Can.* (1906), c. 138. [2] *Can. Stat.*, 9–10 Geo. V. c. 59.
[3] *Rev. Stat. Can.* (1906), c. 138, sect. 27, sub-sect. 3.
[4] *Can. Stat.*, 10–11 Geo. V. c. 56, sect. 11.
[5] *The City of Toronto v. Morson*, 38 D.L.R. (1917), 224.
[6] There are an immense number of statutes on the subject, the most important being: *Can. Stat.*, 31 Vic. c. 33. *Ibid.*, 36 Vic. c. 31. *Ibid.*, 4–5 Edw. VII. cc. 31, 47. *Ibid.*, 9–10 Geo. V. c. 59. *Ibid.*, 10–11 Geo. V. c. 56. Cf. *Can. Sess. Pap.*, 1874, § 45. The present salaries are: $5,000 a year for the County Court judges (which is all most of them are worth); $9,000 and $10,000 for the Superior Courts of the provinces and the Dominion Exchequer Court; $12,000 and $15,000 for the Supreme Court of Canada. *Can. Stat.*, 10–11 Geo. V. c. 56.

counsel and the salaries of the judges has now become so great that the best men cannot be induced to exchange the emoluments of the Bar for the higher dignity of the Bench. The situation is one that is full of evil. The Bench seems destined to become the refuge of second and even third-class lawyers. Recently, offers of judicial appointments have been rejected by several leading members of the Bar in succession; and it is well understood that not one of the great lights of the profession, whatever his wishes might be, could afford to accept such a salary as he would be obliged to take if he became a judge. Unless some change be made, we shall before long see the superior courts in possession of men greatly inferior in a knowledge of the law to the counsel who habitually plead before them: appeals, which have already become far too numerous, will become still more frequent; and respect for judicial decisions from which all certainty and stability have departed will suffer a serious decline." [1]

The same difficulty has been repeatedly encountered. In 1902 the Minister of Justice said that he had had great difficulty in finding men to accept judicial positions, and he implied that the small salary was the chief cause.[2] A year later the same Minister confessed that "the Bench has ceased to attract the best men at the Bar." [3] In 1912 the *Canada Law Journal* stated that the most distinguished barristers could not afford to make the financial sacrifice that was involved by the acceptance of a judgeship.[4] Since then, however, the judges' salaries have been much improved.

An experiment in flexible salaries was tried at the time of Confederation in the County Courts. The Act, 31 Vic. c. 33, stated that the salaries of the judges of the County Courts of Ontario and New Brunswick were to be from $1,800 to $2,600, the exact amount to be determined by the Governor in Council. This did not work well in practice: it was found that an increase in salary did not always reward the meritorious, and that some who did not deserve the increase received it. It was also open to the theoretical objection that the judges were made dependent on the government of the day.[5] The result was that the plan

[1] Sept. 18, 1884, edit.
[2] *Can. H. of C. Debates*, May 1, 1902, p. 3943.
[3] *Ibid.*, Aug. 5, 1903, p. 8089. [4] P. 607.
[5] *Can. H. of C. Debates*, March 2, 1875, p. 424.

was abandoned and one of regular automatic increases adopted,[1] though this in turn soon gave way to the fixed salary.[2]

Up to this point I have examined the past and present conditions that have contributed to the independence of the Canadian judge. There have been, however, certain influences that have operated in the opposite direction, and have seriously affected those positive qualities which it is the aim of independence to encourage. Some of these influences have arisen from the peculiar conditions of the country; others have been consciously created by imposing extra-judicial functions upon the judges; others have been occasioned by an insufficient realisation of the principles that underlie judicial independence.

Ultramontanism has at times powerfully affected the decisions of certain of the Quebec judges, who have been torn between their allegiance to the doctrines of their Church and their duty of interpreting the civil law. Judge Routhier, for example, held in the case of *Derouin v. Archambault* in 1874 that a priest or bishop in the assumed exercise of his ecclesiastical functions cannot be held liable in the civil courts, and that the only redress is an appeal to the bishop or to Rome.[3] This decision, however, was unanimously reversed by the Court of Review of Quebec,[4] which was presided over by a Roman Catholic. In 1876 the *Canadian Monthly* marked Judge Routhier out for special condemnation:—

> "The Bench (of Quebec) is largely Catholic and we mention it, not that the suggestion of conscious bias is by any means intended, but because church penchants will creep in and warp the soberness of judgment. No Judge, who is not too good a churchman, would quote the Syllabus as of authority in a British court of justice. Yet this has been done more than once by Judge Routhier and others." [5]

[1] *Rev. Stat. Can.* (1886), c. 138, sect. 11.

[2] *Can. Stat.*, 3–4 Geo. V. c. 28, sect. 5.

[3] *Canadian Monthly*, July, 1874, p. 64. *Toronto Mail*, July 16, 1874, edit.

[4] *Montreal Herald*, Oct. 1, 1874 (case fully reported). *Ibid.*, Oct. 2, 1874, edit. *Montreal Gazette*, Oct. 1, 1874. *Canadian Monthly*, November, 1874, p. 448.

[5] October, 1876, p. 357.

The same question was again thrust forward in 1876 when Judge Casault, a French Canadian and a Roman Catholic, declared two elections void on grounds of clerical interference.[1] The Bishop of Rimouski denounced the doctrines enunciated in the judgment as false and contrary to the teachings of the Church, and an appeal was made to Rome, though unsuccessfully, to remove Judge Casault from the directorate of Laval University.[2]

"The decision of Judge Casault," said the *Canadian Monthly*, "again drove them (the bishops in Quebec) into some outlandish doctrines about the unlawfulness of keeping certain oaths, including the oath of office. Their Lordships down in Quebec appear to regard every Roman Catholic judge as absolutely their own property, mind, soul, and conscience. He is to be a machine for recording the fiats of the church ; his own knowledge of the law, his own experience in administering, his solemn obligations to God and the State to decide according to his honest convictions, all go for nothing." [3]

These cases of ecclesiastical opposition to the civil courts and judges have fortunately been rare, though the Ne Temere decree in 1911 and 1912 [4] showed that the possibilities of conflict have not entirely disappeared. Such incidents, however, emphasise the necessity of exercising the greatest care in making appointments to the Bench, and of considering strength of character of equal importance with legal knowledge as a prerequisite for a judgeship.

One function of the judiciary that has plunged it constantly into political controversy and has made it the subject of frequent attacks is the trial of controverted elections. Before 1873 each province in the Dominion had its own statutes governing the trial of election cases. Ontario and Quebec had passed a series of Acts giving the examination of petitions first to the House,[5] later to a Select

[1] *Canadian Monthly*, January, 1877, pp. 96–97.
[2] *Ibid.*, November, 1877, p. 530. Siegfried, André, *The Race Question in Canada*, pp. 44–45.
[3] November, 1877, p. 530.
[4] *Ottawa Citizen*, Feb. 23, 1912, edit.
[5] *Lower Can. Stat.*, 48 Geo. III. c. 21. *Ibid.*, 58 Geo. III. c. 5. *Ibid.*, 5 Geo. IV. c. 32. *Ibid.*, 9 Geo. IV. c. 61. *Upper Can. Stat.*, 45 Geo. III. c. 3.

Committee chosen by lot,[1] and finally to a General Committee of Elections chosen from the House.[2] In Nova Scotia and New Brunswick election petitions were tried by Select Committees; [3] in Manitoba and British Columbia by judges of the Superior Court.[4] Inasmuch as many of these methods were found to be both clumsy and open to political influence, they were altered in 1873, and the trial of election petitions was placed in the hands of the judges of the Superior Courts.[5] The result has been that the fairness and impartiality of the decisions in election cases have improved immensely, though the judiciary has at the same time become the object of attack by the party newspapers, and has lost a certain amount of prestige.[6] A year after the passage of the above Act the *Canadian Monthly* observed with satisfaction that "the fear that the position of the judges would be lowered by their connection with election trials, though it was natural, has proved entirely unfounded." [7] But in the following year the *Monthly* was forced to take up arms in defence of the judges and denounce the party journals for their attacks on the Bench :—[8]

"In both these cases, the party journals have taken care to betray a want of the judicial spirit, by endeavouring to rehabilitate their own friend, and deepen the guilt of their opponent. That editors writing with avowed bias should venture to review the decisions of the Bench, and affect, with mock gravity, to expound law and weigh evidence, would surprise us, if we could any longer feel surprise at any of the freaks of party." [9]

Parliament has at times been equally bitter in direct and indirect attacks made upon judges who have heard

[1] *Upper Can. Stat.*, 4 Geo. IV. c. 4. *Ibid.*, 8 Geo. IV. c. 5. *Ibid.*, 3 Wm. IV. c. 11. *Ibid.*, 2 Vic. c. 8.

[2] *Can. Stat.*, 14–15 Vic. c. 1. *Ibid.*, 19–20 Vic. c. 140.

[3] *Rev. Stat. N. S.* (1864), c. 5. *Ibid.*, *N. B.* (1854), c. 98.

[4] *Man. Stat.*, 35 Vic. c. 10. *Rev. Stat. B. C.* (1871), c. 167.

[5] *Can. Stat.*, 36 Vic. c. 28. Election cases in Great Britain were given to the courts in 1868 by *Brit. Stat.*, 31–32 Vic. c. 125.

[6] The same difficulty has occurred in Great Britain. *See* Yarmouth Election Petition, *Brit. H. of C. Debates*, July 6, 1906, pp. 369–414, where all parties united in condemning the conduct of Mr. Justice Grantham.

[7] October, 1874, p. 358.

[8] February, 1875, pp. 173–74.

[9] June, 1875, p. 539.

election cases.[1] Here, as in the press, political prejudice underlies nine out of ten speeches that complain of faulty administration of justice, and the real fault is that the judge has unseated a candidate of the wrong party. For the most part, however, it is true that "the decisions of the judges in the most intensely critical questions of political warfare have been received by the people of this country as honestly and rightly made."[2]

In some instances there may have been grounds for the complaint that the judges acted in a partisan manner, though it does not necessarily follow that they deliberately perverted justice or acted corruptly. A man whose family has always supported the one party, who has himself been not only a voter but an actual worker for that party, who may even have been a member of parliament or a Minister of the Crown, cannot be expected to discard the political clothes of a lifetime at the same instant he puts on the judicial robe. He may have the best of motives, he may desire to deal justly between the parties, and yet there may remain an unconscious leaning towards the party of his old allegiance. The trial of election petitions must be regarded as the acid test of a judge's impartiality, particularly under a system where he owes his appointment to political influence.[3] He may have sold his soul to party, he may have merely an unconscious bias, or he may fulfil the ideal of an absolutely impartial judge: in any case, his true character will probably be revealed if he is called upon to decide the case of a controverted election. To return, however, to the old method of deciding such cases is very undesirable; and until some better plan is devised the work must be left in the hands of the judges. The remedy for unfair decisions must be sought at the source by appointing

[1] *Can. H. of C. Debates*, April 9, 1883, pp. 517–25. *Ibid.*, Feb. 12, 1885, pp. 98–99. *Ibid.*, April 27, 1892, pp. 1719–40. *Ibid.*, May 9, 1892, pp. 2305–62.

[2] The Minister of Justice, *Ibid.*, April 10, 1917, p. 6314. Cf. Willison, Sir John, *Reminiscences*, p. 279.

[3] "He is undoubtedly a partisan, and an outspoken and intemperate partisan. . . . He is so saturated with Party feeling and prejudice that he cannot help their coming out." Sir H. Campbell-Bannerman (on Mr. Justice Grantham), *Brit. H. of C. Debates*, July 6, 1906, p. 409.

judges on other than political grounds, so that they will not be handicapped in their judicial work by the political affiliations and predilections of a lifetime.

A third influence which has had a bad effect on the independence of the judges is the custom of appointing them as chairmen or members of Royal Commissions to investigate all kinds of subjects and charges. These judges have unquestionably enriched the work of the Commissions; but their participation has at the same time seriously menaced the independence of the Bench. Criticism has arisen on two points: first, the discharge of extra-judicial duties, which has subjected them to attack and lowered their prestige; second, the acceptance of additional remuneration to which, strictly speaking, they were not entitled.

The best, though in another sense the worst, example of the storm of criticism and abuse that may be roused against a judge sitting on a Royal Commission was that of Mr. Justice Galt, who conducted the Manitoba Agricultural College Enquiry in 1916. The *Winnipeg Telegram* during the course of the investigation devoted its most lurid headlines and its most virulent editorials to the agreeable task of reviling Mr. Justice Galt at every opportunity, or if the opportunity were lacking, the paper created one.[1] When the Hon. Robert Rogers gave evidence, he lectured the Commissioner on the folly of a judge accepting such a position, and concluded with the assertion that Mr. Justice Galt was a grafter because he was taking an addition to his regular salary.[2]

The other objection to a judge sitting as a Royal Commissioner was emphasised in 1903 by Mr. J. S. Ewart, K.C., when, on congratulating Mr. Justice Perdue on his accession to the Bench of Manitoba, he ventured to add a few exhortations as well:—

"My Lord, I see no justification for the employment of Judges in matters outside their office, and not covered by their salaries, in the assertion that it is the Governments of the day that are the employers and the paymasters. The 'Government of the

[1] Sept. 23, 26, 28, 30; Oct. 6, etc., 1916.
[2] *Winnipeg Telegram*, Sept. 22, Oct. 5, 1916.

day' is but a euphemistic alternative for the name of some political party. If employment is accepted . . . from the Government of the day whose members are deeply interested in much litigation, why not from the Canadian Pacific Railway, or the Hudson's Bay Company? Would it be sufficient reply to such employment to say that the Judges were too pure and too little human to be affected by such engagements?"[1]

The argument against additional emolument—never a very strong one—has had its sting removed by a recent Act,[2] which provides that no judge shall receive any salary as a Commissioner save his bare living and travelling expenses. The statute will naturally diminish the number of judges serving on commissions by removing the chief incentive to act—a result which is bound to be for the good of the judiciary. The more the judges sit upon commissions, the more will they be plunged into political controversy and the less will their isolation be preserved or their reputation for impartiality enhanced.[3] Though there is a slight advantage to the judge in the widening of his outlook and the stimulation of his mind when he sits as a member of a Commission, this is not enough to compensate for the drawbacks that result from such a practice.

Brief mention may be made of other financial attractions which have caused disputes regarding the Bench. Although no judge of any Superior Court in Canada may act as director in a company,[4] a judge has been known to hold both positions for a number of years.[5] It has been suggested[6] —for no penalty occurs in the statute—that a judge might be liable under the Criminal Code to one year's imprisonment for so violating the law;[7] but such a step has never been taken. The acceptance of railway transportation by

[1] *Can. Law Jour.*, 1903, p. 542. Cf. opinion of Sir Wilfrid Laurier, *Can. H. of C. Debates*, July 17, 1905, pp. 9752–53. Willison, Sir John, *Reminiscences*, pp. 279–80.

[2] *Can. Stat.*, 10–11 Geo. V. c. 56.

[3] *Can. H. of C. Debates*, March 1, 1892, p. 37. *Ibid.*, Sept. 11, 1903, pp. 11064–87. *Can. Law Jour.*, 1912, pp. 12, 97–98. *Ibid.*, 1917, p. 41. *Ibid.*, 1918, p. 199.

[4] *Rev. Stat. Can.* (1906), c. 138, sect. 33.

[5] *Can. H. of C. Debates*, April 27, 1899, pp. 2189–90. *Can. Law Jour.* 1909, pp. 736–37. *Ibid.*, 1910, p. 653.

[6] *Ibid.*, 1906, p. 267. [7] *Can. Criminal Code*, 1906, sect. 164.

judges is a similar question and it was also mentioned by Mr. J. S. Ewart in his exhortation to Mr. Justice Perdue :—

"My Lord, now that you are Mr. Justice Perdue, you will be approached by the railway companies, and will be offered free transportation over their lines of railway. It is my belief that you will refuse all such degrading offers. If it be asked whether I think that Government jobs and railway passes influence Judges, I reply that human nature is weak; that motive and mental influence work subtly, and their operations are much more easily discerned by onlookers than by the one affected; that such things usually do produce a frame of mind favourable to the donors, and that I myself, with all my innate and trained respect (reverence, I would almost say) for the Bench, cannot sometimes restrain the thought that elevation to the Bench is not equivalent to inoculation against the feelings of gratitude for past favours or pleasing anticipation of those to come. . . . If, my Lord, Judges may accept free transportation from the railway companies and be unaffected, why may they not also accept a cask of wine from Mr. Galt, a bale of silk from Mr. Stobart, or a bag of flour from the Ogilvie Milling Company?" [1]

A very recent instance that reflected very little credit on the Bench was the action of the Chief Justice of Canada in 1915-16 and 1916-17. In both these years Sir Charles Fitzpatrick was granted $2500 to cover "expenses in connection with the Judicial Committee of the Privy Council"—a departure from the usual wording of the vote which had formerly required attendance at the meetings of the Judicial Committee. The Chief Justice availed himself of this technicality, pocketed the $5000, and—stayed in Canada. The question was brought up in the House of Commons in 1918, but as the Chief Justice offered to return the money, the matter was dropped.[2] In 1919, however, on a question being asked in the Commons, it developed that Sir Charles Fitzpatrick still retained his hold on the money, and a resolution was introduced into the House stating that the $5000 should be "returned forthwith." [3] Three days later the money was returned,

[1] *Can. Law Jour.*, 1903, pp. 541–42. Cf. *Can. Sen. Debates*, June 18, 1903, pp. 398–418. *Ibid.*, July 15, 1903, pp. 608–23. *Ibid.*, July 21, 1903, pp. 654–75. [2] *Can. H. of C. Debates*, May 23, 1918, pp. 2478–79.
[3] *Ibid.*, March 26, 1919, pp. 850–78.

and the resolution was then withdrawn.[1] The incident is a trivial one, and yet it illustrates the danger that lurks in the relations of the judiciary to the money question. Sir Charles Fitzpatrick lost more of the respect and confidence of the people by this one incident than he had been able to build up during the years he adorned the Bench. It is impossible to say whether his acceptance of the post of Lieutenant-Governor of Quebec in the same year was a direct result of the above incident; the fact is probably not devoid of significance.

The duty of sitting on Royal Commissions has been placed on the judiciary by custom and it still remains optional for the judge to accept or decline the post. Another duty, however, has been imposed upon the Bench not by custom but by law. The executive of the Dominion or either House of Parliament may request the Supreme Court of Canada to pass its opinion on questions both of law or fact that are submitted to it,[2] and similar laws have been passed by the provinces in reference to their own Superior Courts.[3] The Supreme and Exchequer Courts of the Dominion may also be called upon to settle disputes arising between the provinces.[4]

There can be no doubt that advisory judgments are often very useful, particularly in a federal constitution; but an abuse of this power of consultation would seriously menace the independence of the judiciary.[5] In *The Attorney-General for Ontario v. The Attorney-General for Canada*,[6] the appellants contended[7] that it would be highly prejudicial to the administration of justice that the members

[1] *Can. H. of C. Debates*, March 31, 1919, p. 971. *See also* case of Judge Dugas, who had to be sued to recover money to which he had not been entitled. *Ibid.*, May 20, 1903, p. 3413.

[2] *Can. Stat.*, 38 Vic. c. 11, sects. 52, 53. *Ibid.*, 54–55 Vict. c. 25. *Ibid.*, 6 Edw. VII. c. 50. *Rev. Stat. Can.* (1906), c. 139, sects. 60, 61.

[3] *See Attorney-General for Ontario v. Attorney-General for Canada*, 1912 (A.C.), 571.

[4] *Can. Stat.*, 38 Vic. c. 11, sect. 54.

[5] The Supreme Court of the United States refused at the outset of its career to give a decision on a point of law except on a case actually brought before it. *See Annals of Amer. Acad. of Pol. and Soc. Science*, March, 1916, p. 5.

[6] 1912 (A.C.), 571.

[7] P. 576.

of the Supreme Court should have been previously required to express opinions upon such points before they had arisen for adjudication, the obligation being inconsistent with the primary function of the court, viz., the administration of law. Earl Loreburn in giving his judgment pointed out that the advisability of having such a law must rest on parliament, but admitted that, if it were abused, many evils might follow, "including undeserved suspicion of the course of justice and much embarrassment and anxiety to the judges themselves."[1] The remonstrance of Mr. Justice Idington in the court below has passed unheeded:

> "Can Parliament constitute this Court a tariff commission, a civil service commission, a conservation commission, a department for the management of any of the affairs of state, or an adjunct to any of the departments discharging such duties, or an advisory adjunct to the provincial Courts?"[2]

Before the Act of 1906[3] was passed the Supreme Court of Canada might refuse to answer questions because of their hypothetical character, as it had in fact done in 1905.[4] Such an excuse cannot now be offered,[5] and were the government to exercise its power of submitting questions very frequently, the Court would be greatly embarrassed and would be brought into political controversy. The Ne Temere Decree legislation of 1912 may be taken as an example. The constitutionality of a proposed uniform marriage law was the question at issue; it was one of cardinal importance and also one which caused a great deal of religious and political tension. The Government found itself in difficulties, and escaped by throwing the question first to the Supreme Court and then to the Judicial Committee.[6]

The close connection between politics and the judiciary that has already been noted in regard to appointments has also made itself evident in judicial promotions. It may be taken as a general rule that the promotion of an efficient

[1] P. 583. [2] 43 S. C. R. 581.
[3] *Can. Stat.*, 6 Edw. VII. c. 50. [4] 35 S. C. R. 581.
[5] Lefroy, A. E. F., *Canada's Federal System*, pp. 680–81.
[6] *Can. Sess. Pap.*, 1912, § 108. *Nineteenth Century Review*, Sept., 1912.

public official is an excellent thing for the man himself, his fellow officials, and the public service as a whole. The conspicuous exception to this rule is the judiciary. Promotion on the Bench has been regarded with disfavour for the reason that however excellent the judge's qualifications may be, his promotion exposes him to the charge of favouritism and possibly dependence on the government. This argument is given additional weight when it is remembered that the judge may have been sitting as a Royal Commissioner to investigate charges against the administration to whom he looks for promotion. It can readily be seen that should such a case arise, the government might be tempted to offer and the judge to accept a bribe in the innocent form of a Supreme Court judgeship. The same argument would also hold in the trial of election petitions or other cases in which the government was vitally interested. Regarded in this light it is very unfortunate that judicial promotions have been so common in Canada,[1] and although no cases have arisen to parallel the hypothetical ones given above, irresponsible critics have made such promotions an opportunity for slandering both the judiciary and the government of the country.[2]

Promotions from the Bench to politics and from politics to the Bench have also been fairly common. The politician allows himself to be persuaded that the judiciary urgently needs his services and he accordingly goes on the Bench; but having stayed there a few years, he changes his mind and becomes convinced that he is more indispensable to his country as a Minister of the Crown. He again enters political life, and receives as a reward for his conscientiousness a higher position than before. The two outstanding examples have been Sir Oliver Mowat and Sir John Thompson.[3] The former was Vice-Chancellor of Upper Canada

[1] Mr. Justice Killam, for example, was made successively a judge of the High Court of Manitoba, Chief Justice of Manitoba, a judge of the Supreme Court of Canada, and Chief Commissioner of the Railway Commission. *Can. H. of C. Debates*, Feb. 3, 1905, p. 496. Cf. *Ibid.*, pp. 512–13.

[2] Cf. *Can. Ann. Review*, 1910, pp. 346–47.

[3] Hon. Arthur Sifton successively occupied the offices of Premier of Alberta, Chief Justice of Alberta, and a Minister in the Dominion Government.

and Ontario until 1872, when he became Premier of that province. Sir John Thompson was Premier of Nova Scotia until 1882, then a member of the Supreme Court of Nova Scotia until 1885, when he became Minister of Justice for the Dominion and later its Prime Minister. Mr. J. Castell Hopkins endeavours to justify this agile adaptability by the question :—

> "Who indeed could be better fitted to administer justice for the nation ; to control the law-work of the Dominion ; to look after and abolish, modify, change, or amend its laws, than one who had previously possessed judicial experience ?" [1]

The argument is indisputable—if it is admitted that it is more important to have a good Minister of Justice than a good judiciary. Politics is undoubtedly improved by the entry of any first-rate man ; but it is a very doubtful expedient to take him from the Bench. The result of such a policy is that the politician is not only looked upon as a judge in embryo and the judge as a past politician, but the judge is regarded as a future politician as well, if he can but receive a tempting enough offer. The independence of the judge will soon exist only as a thing of the imagination if the leaders of the Bench keep a watchful eye on the progress of party politics, cherish ambitions to be Ministers or Premiers, and await the first opportunity to exchange the courts of law for the floor of parliament. In addition to promotion within the judiciary itself, there has been established promotion from politics to the Bench, from the Bench to politics, and so on in an ever-ascending spiral.

It has been stated in the opening chapter that the amount and kind of independence which it is expedient to grant to any official must be determined by the function in the state which that official is expected to discharge. The position of the judge must be decided by this test. The judiciary stands between order and anarchy ; it dispenses justice between man and man, and in Canada has the additional duty of interpreting the constitution. The cases that come before the Canadian judiciary fall into five

[1] *Life and Work of Sir John Thompson*, p. 76.

rough divisions—criminal, civil, and controverted election cases, constitutional questions, and hypothetical political questions referred to it by the executive. The last three classes are almost always political in nature, at times they are intensely so, and it is clear that if impartiality and openness of mind are to be preserved on these subjects, the judge must be kept as remote from politics as possible. He performs the most delicate work in the state, and particular care must be taken that this sensitive mechanism should suffer no disturbing jar caused by the action of outside influences. It should be like those delicate scales which are set on a concrete pillar embedded in the solid rock, and remain quite unconnected with the building in which they stand.

The judiciary exists primarily for the rendering of decisions—a function which requires for its success the free and untrammelled exercise of thought. Blackstone approximated to this idea when he said that the decisions of a judge were separate from his personality; they were as external to him as the bench on which he sat:—

> "The judgment, though pronounced or awarded by the judges, is not their determination or sentence, but the determination and sentence of *the law.* It is the conclusion that naturally and regularly follows from the premises of law and fact. . . . Which judgment or conclusion depends not therefore on the arbitrary caprice of the judge, but on the settled and invariable principles of justice. . . . The style of the judgment is, not that it is decreed or resolved by the court, for then the judgment might appear to be their own; but, 'it is considered,' *consideratum est par curiam* . . . which implies that the judgment is none of their own; but the act of law, pronounced and declared by the court, after due deliberation and enquiry." [1]

The dictum of Blackstone cannot be accepted without some qualification. It is true that the judge is an interpreter of what he calls "the settled and invariable principles of justice"; but we cannot lose sight of the fact that it is the personality of the judge that determines his decision as to what these principles really are. Alexander Hamilton succeeded in approaching the truth much more closely:—

[1] *Commentaries,* Book III. Chap. XXIV.

"It (the judiciary) may truly be said to have neither *force* nor *will*, but merely judgment. . . . The courts must declare the sense of the law; and if they should be disposed to exercise *will* instead of *judgment*, the consequence would . . . be the substitution of their pleasure to that of the Legislative body." [1]

The statement of Hamilton is correct if his definition of will be accepted; but to-day we admit *will* into the realm of judgment and hold that up to a certain point they are inseparable. There must be a will to judge if any results whatever are to be attained, and there should also be a will to deal justly, to lay bare the truth, and to follow the best of legal precedent. The will which endeavours to place personal predilections above justice, or seeks the victory of the debate rather than the truth of the discussion—which is more akin to the will that Hamilton meant and feared—is rightly to be discouraged. The vigorous play of mind and meticulous search for truth will be still further developed if the judge has the assurance that his conclusions will be carried into effect, subject of course to appeals to other judicial tribunals.

While discharging their primary function of dispensing justice, the judges also make law. The primary function demands for its proper exercise freedom from control, independence of mind and judgment, an emphasis on the moral consciousness rather than on the political responsibility. The secondary function does not need these qualities; it might conceivably be better performed if the political responsibility were increased. Being secondary, however, it becomes necessary to sacrifice it to the more important one, though the sacrifice need cause no anxiety. If the Bench is filled with judges of wide sympathy, with a knowledge of the principles of sociology, economics, and kindred subjects, coupled with a mastery of the fundamental principles of law, the law-making function can have no very bad results. Briefly, then, an analysis of the judge's function clearly points to independence in rather an extreme form; though to determine the exact expedients to be

[1] *The Federalist*, § 78.

adopted will require a more searching examination of the means that may be used to attain this end.

First, how are men of independent mind to be obtained? Election presents many difficulties, both theoretical and practical; it deprives the judge of both the qualities and the opportunity for independence. If he were elected by the people as a whole his technical and intellectual qualities would probably be outweighed by political considerations: men would be made judges not because they were impartial, but biased; not because they were of judicial temperament, but because they were violent partisans. Election by a legislature has the same faults, though in a lesser degree.[1]

The alternative method is appointment. The Canadian judge is appointed by the executive; and although this has many advantages, it has been the chief cause of the criticisms which have at times been raised against the Bench. The choice of judges has rested with the party leaders and appointments have usually been made for political reasons, with the result that the judge has been compelled to struggle against an imputation of partisanship, sometimes deserved but generally groundless. Is it not possible to alter the system of appointment so as to keep it with the executive but deprive it of its political tendencies? One scheme has been proposed whereby the appointment is completely divorced from the executive and placed in the hands of the judges themselves; in short, it is suggested that the Bench be made co-optive.[2] It is a tempting proposal: there could be no suspicion of politics, and the judiciary would be as independent as any body under our modern civilisation could be made. But the worship of independence must not lead one to abandon all other gods, though in regard to the judiciary it may justly demand the most fragrant incense and the most solemn rites. There are other points that must not be overlooked.

[1] For the unsatisfactory results of an elective judiciary in the United States, *see* Taft, W. H., *Popular Government*, pp. 194–96. Baldwin, S. E., *The American Judiciary*, pp. 313–23. Croly, Herbert, *The Promise of American Life*, p. 318. Preliminary Report to the National Economic League on *Efficiency in the Administration of Justice*, 1915.

[2] Sidgwick, H., *Elements of Politics*, pp. 488–89. Faguet, E., *The Cult of Incompetence*, p. 109.

Under co-option the Bar would, directly or indirectly, completely control the Bench. Professionalism, as has been pointed out in the first chapter, has sins peculiar to itself, and its greatest fault is conservatism and what amounts to a positive repugnance to change. Even under our present system the administration of law and justice is often accused of too fond a liking for precedent; but under the proposed scheme this fondness would become an unholy love. Add to this the objection of practical politics that no modern democracy could be induced to accept such a scheme, and the case for discarding it is complete.

It may be possible, however, after the true British fashion, to graft some changes on to the present system, which would improve it without sacrificing any of the essentials. One such proposal had been already mentioned,[1] whereby the government solicits recommendations as to the fitness of candidates from the Bar Associations and the Law Societies affected by the appointment. This is not totally free from objection. If the Bar Associations were given very much control in appointments, the scheme would have most of the disadvantages of the co-optive proposal; if they were not guaranteed control, their influence would probably be negligible and the government would make appointments as it pleased. The most feasible scheme would seem to be a Canadian equivalent to that suggested by the Royal Commission on the British Civil Service in 1915.[2] The appointment would be still vested in the Minister of Justice; but he would be advised by a Committee composed of such men as the Deputy Minister of Justice, a Civil Service Commissioner, and the President of the Canadian Bar Association. Political considerations would still have weight, but if publicity were given to the recommendations of the Committee, it is probable that the government would think well before it discarded the recommendation of a really first-class man in favour of a second-

[1] p. 32.
[2] *Sixth Report*, 1915 (Cd. 7832), pp. 15–16. Cf. *Report of Machinery of Government Committee*, 1918 (Cd. 9230), pp. 73–74.

rate political supporter. The Committee could make a close study of the men available, and perhaps even conduct a psychological examination to ascertain if the man desired had those qualities which would make the best judge. They would also be in a better position to choose the professional expert, one who would have the practical experience combined with a thorough mastery of "the lawless science of our law."[1]

The promotion of judges has been deemed inadvisable because of the political suspicions that accompany it; but if promotion were placed in other hands the argument against it would fall to the ground. If the judges of the Superior Courts were appointed as suggested it might be possible to make the Supreme and Exchequer Courts of Canada co-optive with the understanding that their new members must come from the lower courts. The co-opting judges, inasmuch as their whole life is taken up with appeal cases, would be in an excellent position to choose the best from the provincial courts. Nor could serious objection be taken to this method on the grounds that an excess of legalism might result; for if the Superior Court judges were appointed as suggested their quality would be ensured. Such a system of co-option with promotion can only be used, however, with the Supreme Court, for if it were applied to the Superior Courts it would suffer for lack of material. The average County Court judge is not fitted to act in a higher capacity—a failing that is partially due to the low salary that is offered and also to the inferior nature of the duties that they discharge.

One of the most effective ways to improve the quality of the Bench is to provide a better training for those from whom the judiciary is recruited. The political training

[1] The Government of Ontario has recently appointed a Committee for the nomination of King's Counsels in the provincial courts. The Attorney-General has abandoned his power of selection to a Committee composed of the Chief Justice of Ontario, the President of the High Court of Ontario and the Treasurer of the Law Society of Upper Canada. *See Halifax Morning Chronicle*, Dec. 22, 1920. This approaches a combination of the co-optive scheme and that proposed by the Canadian Bar Association; but it must be remembered that the objections on the grounds of professionalism do not apply to the nomination of King's Counsels.

of the British judges combined with a moderate knowledge of the law approaches in Lord Haldane's estimation very near the ideal :—

" They might say what they liked about the House of Commons; but it remained the finest school of affairs and the greatest representative institution in the world. . . . The judges had a training and a tradition which he thought brought them in contact with the concrete realities of life in a way which was not easy when the training of judges was different from what it is here. They learned by their very contact with public affairs to eliminate politics." [1]

Lord Haldane was unquestionably right in preferring the broad outlook of the British judges to the stiff legalism of the German judiciary; but in making the comparison he seemed to forget that the British system also had its faults. It may be doubted whether the House of Commons is the best training ground for the " concrete realities of life," whether judicial habits of mind are encouraged by *ex parte* debates, and whether it is at all possible to learn to eliminate politics by partaking in them. Conditions in Canada at any rate are quite different. One cannot be blamed for retaining the opinion, contrary to the evidence of Lord Haldane, that the high traditions of the British Bench have been maintained not because of the political training of the judges but in spite of it. There are other desirable qualifications in a judge beside experience in politics and practical affairs, among which first place must be given to a thorough professional training and a broad preliminary education. Ex-President Taft has stated his conception of the qualities and education required; and though it must be confessed that his judge is seen more often in a book than on the Bench, the training which he outlines might well serve as an ideal in Canada as well as in the United States :—

" Their coming duties call for a basic knowledge of general and sociological jurisprudence, an intimate familiarity with the law as a science, and with its history, an ability to distinguish the fundamental from the casual, and constructive talent to

[1] *Can. Law Jour.*, 1913, p. 435.

enable them to reconcile the practical aspirations of social reformers with the priceless lessons of experience from the history of government and of law in practical operation. How can this be brought about? Only by broadening the knowledge and studies of the members of the legal profession. . . .

"Every law school should require those who are to be admitted to its halls to have a general education furnishing a sufficiently broad foundation upon which to base a thorough legal education. That general education ought to include a study of economics and a study of sociology, and the curriculum of every law school should include a close study of the science of general and sociological jurisprudence as a basis for the study of the various branches of our law." [1]

But after the best men available have been secured, the question arises how their independence is to be fostered, encouraged and protected. This involves the question of tenure and removal. Tenure during good behaviour is the form most conducive to independence on the one hand and to security for good administration of law on the other. It has stood the test in Great Britain for centuries and has been no less successful in the Dominions for shorter periods. It compensates to some degree for a moderate salary, and makes the judges more efficient than would be the case under a tenure for a definite term of years. It would seem to be wiser, however, to interpret "good behaviour" more strictly than has been the custom: to allow misfeasance in office as well as malfeasance to terminate the tenure; but to protect by custom (as has been done with County Court judges in Canada) too wide an application to the term misfeasance. It might be claimed, for example, that a judge who is repeatedly overruled in his decisions by an appeal court should be removed because of his ignorance of the law. But this would be too severe an interpretation; for if one judge were so removed, the independence of every other member of the Bench would be shaken, and his personal judgment would suffer.

"Render a judge liable to answer, though it were with his fortune only, for a mere error in judgment, that is, for an opinion different from that of him who is to judge over him; no man,

[1] *Popular Government*, pp. 236–38.

unless perhaps a man of desperate fortune, would take upon him the office of a judge. The mere weakness of the intellectual faculties is what you can never punish: you can punish for no misconduct in which you cannot charge the will with having had in some way or other a share: you may punish for improbity; you may even punish, so it be lightly, for mere want of attention well demonstrated; but for mere want of natural talent you can never punish." [1]

The process of removal should be made sufficiently difficult that no judge could be deprived of his office without overwhelming proof against him. The joint address procedure with its accompaning conventions as recognised in Canada is excellent; it insists on a thorough investigation, but will only grant an enquiry when charges are of the utmost gravity. It is doubtful whether the simpler procedure for the removal of County Court judges is as good, though its history shows that it has not been abused; and it is the practical application of a law rather than its literal interpretation that must be accepted as evidence of its success or failure. The apparent assumption on which the law of 1882 was based was that County Court judges, owing to their inferior position in the judicial hierarchy, did not need as secure a tenure as their superiors—a distinction that has been almost disregarded in practice.

Is it advisable to have a fixed age at which judges should retire? Two important facts must be noted in this connection. First, a large number of judges continue in office long after their faculties have passed their prime, and many seem ignorant of the fact that they are no longer at their best. Second, if a definite age be fixed for compulsory retirement, a number of the most eminent judges will be compelled to go into obscurity, although they may still be capable of doing excellent work. Both difficulties might be met by providing for retirement at a certain age, with a possible extension of service if the judge is still mentally and physically fit. Permission for such exten-

[1] Bentham, Jeremy, *Works* (1843), IV. p. 340, *Judicial Establishment*, Chap. IV. Tit. II. For a practical application of this principle see the speech of Mr. Weldon in the case of Judge Elliott, *Can. H. of C. Debates*, May 9, 1892, p. 2343.

sion might be granted by the Minister of Justice; but if the Committee for recommending appointments were formed, it could discharge this further duty as well. As medical science advances, it may be possible to extend compulsory retirement still further to cover all those of whatever age who were shown by medical certificate to be unfitted for continuing their judicial duties.

We have seen the extent and strength of the judge's immunity from political interference and political responsibility, yet it is astonishing how reluctant both people and governments are to admit it. The logical corollary is apparently equally unpalatable, viz., that if a judge is not responsible to parliament, parliament cannot be responsible for the judges.[1] Take, for example, a quotation from an editorial in the *Canada Law Journal* (the italics are my own) :—

> "The spirit of discord and misrule which has been a characteristic of this court is somewhat remarkable where many of its members are models of courtesy and kindness. Every one knows perfectly well where the blame lies for this miserable condition of things. *The attention of the Government has been called to it time and again, and the Government, of course, must be held responsible.*"[2]

The responsibility was by no means as obvious as the *Canada Law Journal* would have one suppose. All governments since Confederation have united in making the judiciary quite independent of parliament save for appointment and removal. Certainly appointment could not cure the above complaint; nor could the judge be removed because of "discord and misrule," for the *British North America Act* forbade. Where then was the Government's responsibility? It could not even amend the *British North America Act* without the consent of the Imperial Government; and although that might have been obtained, it would scarcely have been advisable to change the tenure of the whole judiciary in order to get rid of one inefficient judge. The Government might have requested the honourable

[1] A notable exception is the remark of Mr. Fielding quoted above, p. 9.

[2] 1902, p. 62.

judge to retire, perhaps indeed it had already done this (it would not have been made public in any case), or it might, as was done in 1903, have held out inducements to retire by giving larger pensions. It could do no more; and, if it were unsuccessful in the attempt, no blame or responsibility could be justly attached to any members of the Ministry.

I once asked a Canadian Minister of the Crown why he considered that the government was bound to defend in parliament all the actions of the judges. His reply was that the government was responsible for all the judges' acts—clearly an untenable position. According to such a theory the decisions of the judges would be defended in parliament by the Minister of Justice, and if the judgment were sufficiently unpopular the government would be in danger of being turned out of office. Suppose, for instance, that a judge acted with an obvious partisan bias in an election case. Must the government accept responsibility? If it made the appointment, conceivably the sin might be laid to its charge; but if the previous government had appointed him, then it is both unfair and impossible to hold the present one responsible. Nor, according to the precedent of the Imperial Parliament in 1906, would such a violation of the judicial trust be sufficient grounds for removal.[1] As a matter of fact, all the administration can do in such a case is to refuse to allow captious and unwise criticism in parliament, which is a very different thing from defending the matter in question.

This situation of irresponsibility unquestionably contains an element of danger, and it is only justified by the fact that any other position would be still more hazardous. This danger, as has been pointed out in the first chapter, can be largely minimised by increasing the sense of moral consciousness which should form a component part of the judicial office. The very fact of independence breeds a self-respect and sense of duty; it is a mark of public confidence, and a challenge to the judge to see that the

[1] Case of Mr. Justice Grantham, *Brit. H. of C. Debates*, July 6, 1906, pp. 369–414.

trust is not abused. The greatest protection against abuse of power lies in the making of appointments, though this opportunity had been too often neglected. If every effort were made to secure the best and ablest men of the country, there would be little possibility of them changing their whole characters in a day or a decade. If a government is to obtain such a class of judges, it must be able to offer salaries which will both promise a fair reward for the services that are expected and bear a reasonable proportion to the financial sacrifice involved. Bentham has drawn up a formidable list of reasons which will justify a substantial salary :—

> "For what purposes may money be wanting, or supposed to be wanting, to a man in public service ? For *inducement*, for *education*, for *subsistence*, for *equipment*, for *dignity*, for a *preservation* against *corruption*, for a pledge of *responsibility*, for a fund of *indemnification*, and for a source of *alacrity*." [1]

The judge's conception of public duty may be increased and emphasised by many other factors, small in themselves, but collectively of considerable strength. All suspicion of political affiliations or sympathies ought to be eliminated, both in the vital matter of appointment and also by a severe limitation of extra-judicial work, such as on Royal Commissions, boards of directors, etc., for on this aloofness from politics depends the moral consciousness of the judge and the confidence that will be placed in him by the general public. The cloak of tradition in which the Bench is enveloped is perhaps the greatest of all forces in producing a keen sense of duty in the judges ; they inherit the proud traditions of the British judiciary of the past and feel also their importance in moulding the Canadian tradition of the future. Nor must the element of dignity be overlooked, not the dignity of wigs and gaudy robes, though perhaps they play their minor part, but that conception of the Bench which regards the judicial office as the crown of a career. It is this ambition of most members of the legal profession that has enabled Canada to obtain men of more than

[1] *Works* (1843), IV. p. 376, *Judicial Establishment*, Chap. V. Tit. III.

average ability for the judicial offices; though the high place which the judiciary once held in the estimation of the public and the Bar has declined in recent years. The Bench is no longer one of the few roads to social eminence; the salary in these days of excessive opulence has lost its old power of attraction; and the pomp and glory of the court room has visibly decreased. Though the judge still wields his power over men's bodies, his sway over their imaginations has almost disappeared. Our only salvation is that the Bar itself, to some extent at least, still regards the Bench with a yearning that has persevered in spite of changed conditions, and that the majority of those to whom the opportunity is given are willing to make the financial and other sacrifices which necessarily follow acceptance of judicial office.

Finally, if the judge is to fill his office to the best advantage, he must have the confidence of the public at large. Hence the importance of rendering him immune from civil and criminal suits, from illegitimate criticism in parliament and the press. If he wilfully errs, the remedy is available, and if the public confidence is to be maintained, the remedy must be used. The same reason that insists on his freedom from criticism and abuse when he acts legitimately demands his speedy expulsion when he abuses his trust. The judiciary must not only be just, but it must appear so; "it is not sufficient that the Bench should be pure, but it must also be above suspicion."[1]

[1] Sir Wilfrid Laurier, *Can. H. of C. Debates*, Feb. 6, 1884, p. 135.

## CHAPTER III.

## THE CIVIL SERVANT.

THE position of the civil servant in the Dominion has varied so greatly since the time of Confederation that a detailed account of the changes is quite impossible within the limited scope of this book. It will be necessary, therefore, to confine the discussion to the most important alterations which have worked for or against the independence of the civil servant, and to emphasise his present rather than his past position in the administration of the country. The double aspect of the problem of independence is more conspicuous in the case of the Civil Service than in any other office, though public attention has usually been fixed upon the first point, the procuring of the official with an independent mind, rather than the second one of encouraging the effort of independence after the official has entered upon his duties.

The most fundamental problem in the Civil Service is the method which is adopted to provide the officers and clerks who compose it, i.e., the question of entrance. All are agreed as to the object desired: it is to induce the best persons to apply, and to ensure that the best of these are secured. But the means whereby this is to be attained is not nearly so simple, and on this point there has always been and still is a wide diversity of opinion. This disagreement may be traced to an inexact knowledge of the qualities actually desired, as well as to an insufficient realisation of the variety of offices to be filled and to a consequent readiness to apply only one solution to all questions of entrance.

The old method of placing the Canadian civil servant in office was as simple as the duties which he had to perform.

He was appointed to his position by the executive, which consisted of the Governor and Family Compact groups under Crown Colony rule,[1] and of the ministry of the Colony after the granting of responsible government.[2] In 1857 the province of Canada passed a statute,[3] which made a pass examination necessary before a candidate could be appointed to certain offices, and in 1868 a similar provision was inserted in the first Civil Service Act of the Dominion.[4] The change was an important one: it marked the end of the period when a minister's recommendation was accepted as a sufficient proof of efficiency, and it formed the Canadian beginning of the examination system.[5] But the scheme was little more than a clause in a statute. The number of offices which it nominally covered was very small and included only a part of the Inside Service; [6] the examinations were of the simplest kind and were supervised by the deputy heads of the departments;[7] the government systematically violated the Act which the examining Board was unable to enforce.[8] Under Crown Colony rule the Governor had used the power of appointment to strengthen his position and his party in the country, and the ministries under responsible government were not slow to follow so convenient a precedent. The result was that from 1867 to 1882 appointments were almost invariably made on grounds of party service alone,[9] and the examining Board was so rarely used that in 1876 it ceased to function.[10]

The Civil Service Act of 1882,[11] as amended and consolidated by the Act of 1885,[12] made two important changes in the examination system. It provided for the appointment

[1] *Lord Durham's Report* (*Lucas*), II. pp. 21, 21 n., 34, 78, 148. Dispatch of Lord Glenelg to the Earl of Gosford, July 17, 1835. *H. of C. Papers* (*Great Britain*) (113), XXXIX., 1836, p. 47.

[2] Nominally by the Governor in Council.

[3] *Can. Stat.*, 20 Vic. c. 24.

[4] *Ibid.*, 31 Vic. c. 34.

[5] The examination idea for entrance to the Canadian Service originated with the Northcote-Trevelyan Report in Great Britain in 1853.

[6] *Can. Stat.*, 31 Vic. c. 34, sect. 15.

[7] *Can. H. of C. Journals*, 1877, Appendix § 7, p. 18.

[8] *Ibid.*

[9] *Canadian Monthly*, Nov. 1874, p. 455, May, 1875, p. 448, Nov., 1876, p. 443. *Can. H. of C. Journals*, 1877, Appendix § 7, pp. 53–54. *Can. Sess. Pap.*, 1880–81, § 113, pp. 16–17, 134–35.

[10] *Can. Sess. Pap.*, 1880–81, § 113, pp. 71–72.

[11] *Can. Stat.*, 45 Vic. c. 4.

[12] *Ibid.*, 48–49 Vic. c. 46.

of a Board of Examiners of three members, who received a salary and travelling expenses, and supervised all examinations.[1] Two examinations were to be held: a preliminary test for minor positions, and a qualifying examination for admittance to Third Class Clerkships in the Inside Service and to certain offices in the Outside Service. Some enumerated positions and others generically described as professional or technical were exempt from examination.[2]

This was a distinct advance on the older Act; but it had several very grave weaknesses. In the first place, the political head of the department could appoint whom he pleased from the list of successful candidates[3]—a provision which left the way for patronage almost as open as before. The examination was not competitive, and as it was an extremely simple one,[4] it merely succeeded in excluding the illiterate. Before the Act, a minister could appoint anyone of his supporters; after the Act, he was limited to those who could pass an elementary examination. The natural consequence was that party affiliations remained the primary qualification of a candidate, and his intellectual fitness for office was virtually not considered. For the next quarter of a century examinations were solemnly held throughout the Dominion; but their chief effect was to hide the nudity of the patronage system, and not to improve the efficiency of the Service.[5]

The Civil Service Act of 1908[6] was the first real beginning of the reform of the Canadian Service. This statute created a Board of Commissioners, with a secure tenure and a substantial salary, to oversee admission to the Service. All appointments to the Inside Division, with a few exceptions, were to be made by open competitive examinations, which were to be "of such a nature as will determine the qualifications of candidates for the particular positions to which they are to be appointed."[7] Selections for vacancies

[1] Sects. 8, 9. [2] Sect. 37.
[3] Sect. 29. [4] *Can. Sess. Pap.*, 1892, § 16 c., p. xix.
[5] Smith, Goldwin, *Canada and the Canadian Question*, p. 185. *The Week*, Nov. 22, 1888, edit., April 10, 1884. *Can. Sess. Pap.*, 1892, § 16 c., p. xix. *Ibid.*, 1907–08, § 29 A. pp. 15–16, 27–28.
[6] *Can. Stat.*, 7–8 Edw. VII. c. 15.
[7] Sect. 13. This clause was interpreted in practice as meaning a general

were to be made by the Commission in order of merit; but the Commission was empowered to select others who had shown special qualifications on a particular subject.[1] In cases where technical qualifications were desired, competitive examinations might be dispensed with, and upon the Commission granting a certificate (by examination or otherwise) the Governor in Council might appoint such candidate to the vacancy.[2] The Outside Service was left as before; but provision was made for its possible inclusion by Order in Council on the same conditions as the Inside Service.[3]

After 1908 general competitive examinations were the recognised means of entrance into the majority of offices in the Inside Service, though if some particular qualifications were desired, special tests were added. A large number of professional or technical posts were likewise filled by competition.[4] Political pressure did not disappear, but the new Commissioners were in a much stronger position to combat it than their predecessors had been.[5] The war, however, caused a great decline in the standard of those who entered the Service, and a large number of temporary clerks were admitted who did not come under the Act, took no examinations, and were paid directly out of war appropriations.[6]

On February 13, 1918, an Order in Council was passed which stated that, pending legislation, all future appointments to the Outside Service should be made only upon the recommendation and with the approval of the Civil Service Commission. All vacancies to the Outside Service were to be filled as far as possible by competitive examinations as provided in the Act of 1908 for the Inside Service.[7] Later in the same year a new Civil Service Act [8] was passed,

academic examination, unless the peculiar nature of the office demanded a special test. [1] Sect. 18. [2] Sect. 21. [3] Sect. 4, sub-sect. 3.

[4] *Can. Sess. Pap.*, 1912, § 31, pp. xi, xiii.

[5] *Ibid.*, 1914, § 31, pp. xiii–xvi. *The Civilian* (*Canada*), Feb. 21, 1913, p. 543.

[6] *Can. Stat.*, 5 Geo. V. c. 2. *Can. Sess. Pap.*, 1916, § 31, p. xiv. *Ibid.*, 1917, § 31, p. xv. *Ibid.*, 1918, § 31, pp. xii, xiii.

[7] 1918, P.C. § 358, *Can. Gazette*, 1918, pp. 2947–48, 2957.

[8] *Can. Stat.*, 8–9 Geo. V. c. 12.

which confirmed the Order in Council and extended the powers of the Commission. This Act definitely established the principle of competition, with or without examination, in almost every office in the Service. The inclusion of the Outside Division, however, brought new difficulties; and the Government decided that it was impossible to administer the examination system on the same basis that had been used in the Inside Service. The problem was entrusted to a body of American "experts," who reclassified the entire Service, abolished the general academic examination, and instituted a special examination for each of the 1,600 offices which they found in the Service.[1] In short, the whole aspect of the Civil Service was altered, and the fundamental principles by which it had been governed for years were abandoned. Pending sufficient experience of the actual working of the new classification, the questions as to whether the alteration was justified and what its results are likely to be, can best be answered by an analysis of the principles that underlie an examination system and by a closer scrutiny of the objects that it endeavours to achieve.

Entrance to the Civil Service is now usually made by one of four channels: a competitive general examination, a competitive special examination, a competitive test consisting of testimonials, past records, etc., or simple appointment without any open competition or examination.

The most obvious and easiest method of testing a candidate's qualifications is by means of a written examination, which may be of a general or special nature. In order to ensure that all who wish may enter, this examination should be open and widely advertised, and, if the best candidate is to be obtained, the simplest and most effective way is to make the test competitive. It has been frequently urged that such a system does not necessarily produce the best results, that it secures not the man with the greatest ability, but the one who is most expert in the art of "cramming." When the Royal Commission of 1880 on the Canadian Service reported in favour of competitive examinations,

[1] *The Report of Transmission. The Classification of the Civil Service of Canada. Can. Stat.*, 10 Geo. V. c. 10.

the minority dissented from the finding on this ground :—

"There is no need of very deep or laborious thinking to perceive that in the process of competitive examination, if anything, only the mnemonic acquirements of the candidate on the day of examination can be shown ; the discerning faculties, the aptitudes, the temperament, and general fitness for any given task, remain quite in the dark. There is but one mode of ascertaining the moral, intellectual and physical fitness of men, brought in connection with certain circumstances, labours and duties ; that is probation or trial at the work of the kind required." [1]

The report of the minority shows an inability to grasp the possibilities of competitive examinations. There is, it is true, some danger of "cramming," though even this may be largely overcome by the British system of deducting a proportion of the marks if the total is so low as to show slight knowledge of the subject ; [2] but to say that "the discerning faculties, the aptitudes, the temperament, and general fitness for any given task, remain quite in the dark" under a competitive examination is to mention the very points that such examinations emphasise and bring out most vividly. The probable explanation of this attitude is that the minority of the Commission never took a severe examination in their lives.

The best answer to such criticism is found by an inspection of some of the examination papers set for entrance to the Canadian Civil Service. Take, for example, the following question, set in 1914 for entrance to Subdivision B of the Second Division :—

"Write a paper on the *Sphere of the State*, indicating and discussing the chief theories as to what the State ought and ought not to do, and illustrate your answer by contrasting the policies adopted at different epochs : give your opinion, supported by facts, as to the prevailing tendencies of the present day in regard to State interference." [3]

It is quite safe to assert that to do well on such a question the candidate would have to display qualities other than

[1] *Can. Sess. Pap.*, 1882, § 32, p. 87.
[2] *Parl. Pap.* (*Great Britain*), 1917, Cd. 8657, p. 17.
[3] *Can. Sess. Pap.*, 1915, 31, p. 110.

those purely "mnemonic." Anyone might perhaps make an effort to answer it; but the brilliant examinee has excellent scope to show his greater originality, resource and maturity of mind over his duller rival. The effectiveness of the test will naturally increase with the difficulty of the examination.

The academic examination has also been criticised on the grounds that "it encourages the merely assimilative, unreflective, unoriginal type of mind at the expense of the more honest, more searching, more critical and creative types."[1] This is a much graver danger than that hinted at by the Minority Report of 1880. It is a fault more or less inherent in any examination; but it is generally overestimated, and a large amount of the evil may be eliminated by a more varied system. The written papers should be set with the idea of stimulating original powers, either by questions of an unusual nature, such as brief essays on some subject not entirely within the curriculum, or by the introduction of short theses, though the use of the latter must necessarily be somewhat limited. Written papers may be supplemented by the *viva voce*; armed with this, a Board of Examiners should not take long to discover if the candidate has a "merely assimilative, unreflective, unoriginal type of mind" or the reverse. The objection that a candidate through nervousness may not do himself justice in a *viva voce* is well met by the remark of the British Committee on the Class I. Examination, that such a lack of nervous control is in itself a serious defect and should be counted against the candidate.[2]

Competitive examinations, however, may be applied in two different and quite distinct ways: they may be used to ascertain ability of a general nature or ability of a special nature. Each rests on quite different principles, and the extent and occasion of their use will depend upon the nature of the office which the candidate is to fill.

The case for competitive examinations which have as their main object the ascertaining of general ability was

[1] Muir, R., *Peers and Bureaucrats*, p. 44.
[2] *Parl. Pap.* (*Great Britain*), 1917, Cd. 8657, p. 17.

stated by Lord Macaulay in the British House of Commons in 1833:—

"It is said, I know, that examinations in Latin, in Greek and in Mathematics are no tests of what men will prove to be in life. I am perfectly aware that they are not infallible tests; but that they are tests I confidently maintain. Look at every walk of life—at this House—at the other House—at the Bar—at the Bench—at the Church—and see whether it be not true that those who attain high distinction in the world are generally men who were distinguished in their academic career.

"Perhaps I may think that too much time is given to the ancient languages and to the abstract sciences. But what then? Whatever be the languages—whatever be the sciences, which it is in any age or country the fashion to teach, those who become the greatest proficients in those languages and those sciences, will generally be the flower of the youth—the most acute—the most industrious—the most ambitious of honourable distinctions." [1]

In other words, competitive academic examinations, provided that they coincide with the educational system of the country, are relied upon to discover, nine times out of ten, those candidates possessed of the greatest natural ability. It is quite impossible to predict what kind of a civil servant the candidate of to-day may be thirty years hence; but the presumption is that the clever young man who comes first in a competitive examination will usually be the best servant as the years elapse. He is examined on the subjects to which he has devoted his life so far as it has gone, and the probabilities are all in favour of a continuance of his intellectual leadership.

Since the time of Lord Macaulay, however, circumstances have so altered that many qualifications must now be made to his speech quoted above. At that time, and for a much later period, all candidates were on an equal footing in respect to education; a definite and fairly narrow curriculum of Mathematics or Classics was recognised as the standard university education for all. But to-day this aspect of education has been completely altered. Latin, Greek and Mathematics have lost their old pre-eminence and higher education now presents an immense range of subjects. The

[1] *British H. of C. Debates*, July 10, 1833, pp. 525–26.

man to-day who can write the best Greek verses is not necessarily the superior of other candidates who may not even know the meaning of a hexameter. The conclusion is obvious. The subjects for examination must be broadened and increased so as to include all those which find a place in the usual educational curriculum of the country.

Specialisation in many different subjects brings its attendant difficulties. Natural ability—the object to be sought after and secured—is more difficult to weigh and compare if the test is on subjects that are specialised, than if all wrote the same papers and had been educated on the same plan. It must also be remembered that a second-rate man well versed in one subject is not as valuable as a man of natural talent who has not mastered any subject in particular. The recent suggestions of the Committee on the Class I. Examination [1] in Great Britain surmount this difficulty to a large extent. They propose that in addition to the section of specialised knowledge, in which the subjects are optional and on an approximate equality, there should be another section which is compulsory, and which aims at ascertaining general knowledge and alertness of mind. This latter section is composed of an essay, a paper on English, one language, a paper on social, political and economic subjects, a paper on the general principles of Science, and a *viva voce*. Under such a scheme the specialist is not given an undue advantage, while the exceptionally clever young man has an excellent opportunity to make himself felt (and to acquire marks) in the section on general knowledge.

As a corollary to this it may be observed that while no subject or group of subjects should be given an overwhelming advantage over any other, it may be advisable to give a slight preference to those which will be more useful to the civil servant in his future work. A candidate who has entered the Service as an administrative clerk because of an exceptionally high mark in astronomy is clearly more poorly equipped than he who has been accepted because he made excellent marks in English literature. If the young

[1] *Parl. Pap.* (*Great Britain*), 1917, Cd. 8657.

man of natural ability can be obtained by means of a competitive examination on subjects which ensure a good intellectual background for his future work, he will be all the more useful to the state. Knowledge is not barren, and some branches will produce better fruit than others. In the words of the President of Harvard University:—

> "He (the student) must be prepared to solve the problems of the future, and these are as little known and foreseen by us as the questions now pressing were by our fathers, or theirs by an earlier generation. With that object before us we must lay a foundation large and solid. We must train our students to think clearly; to see facts as they are; to be broad and tolerant from the study of past experience, profound from communion with the thoughts of great men, and thereby to distinguish the superficial or ephemeral from the fundamental and enduring. This is the true meaning of the humanities—the study of what man has thought and done, not excluding what he is thinking and doing at the present time." [1]

One further precaution must be taken in regard to the subject matter of the examination if the best men are to be induced to compete. The subjects should include those which are generally pursued by the best minds in the schools and colleges, and also those which would be taken by the students in the natural course of events and hold opportunities other than in the Civil Service. No young man, unless he be possessed of supreme self-confidence, will study with the sole object of entering the Civil Service, if he believes that failure in those examinations will mean that his work has been entirely wasted so far as other professions are concerned. A mastery of any branch of knowledge, perhaps, is not entirely useless as an equipment for earning a livelihood; but some branches are much more valuable than others or may be used as stepping stones to a profession. It is on these latter subjects that the examinations should be held, so that in the event of failure, the candidates may continue with some career other than the Service. In other words, the examination must not be a blind alley with an exit only to the successful; a large number of candidates

[1] *Annual Report*, 1918–19.

must be induced to try, if selection is to have really good results.

To what extent have the Canadian examinations corresponded to the system that has just been outlined? The pass examinations which obtained until 1908 were obviously quite unsuited to discover anything save extreme ignorance. From 1908 to 1918 the examinations were more useful; but even during those years their main result was to select those candidates who were slightly better educated than the others. The only examinations which have ever approached a high standard were those prescribed in 1918 for Grade F. of the First Division; [1] but although the questions were more difficult than any that had been given before, they were not of sufficient severity to discover the best men. The result was that a very clever man had little advantage over one who was slightly above the average; the clever man was given questions which did not require his utmost efforts and failed to stimulate or disclose his powers of originality and thought. The examinations were calculated to secure good men, but there was no assurance or even likelihood that they would obtain the best—an aim which the British Service, for example, has always kept in the foreground. The optional subjects for Grade F. comprised all the important sciences and languages, a scheme which roughly corresponded to the educational system of the Dominion, where the universities give as a rule extensive rather than specialised courses. No questions, however, were of a general nature; no theses were required; and no *viva voce* was held. There has always been a lack of appreciation in Canada of the possibilities of a thorough examination system: the general belief has been that an examination could only test minimum qualifications; and the competitive element was introduced more as a negative check on patronage than as a positive means of ascertaining ability.

Since the new classification of 1919, however, general academic examinations have become largely a matter of history. The theory that the Service is to be recruited by

[1] Under *Can. Stat.*, 8–9 Geo. V. c. 12. *Ibid.*, 1919, pp. cxix–cxx.

young men of ability, who receive their training after they enter the department, has been displaced by the theory that all positions are special in character and that the entrance examination must test the peculiar requirements that may be necessary in the office. Each of the 1,600 positions is a compartment by itself, and entrance to it must be through a special aperture built for the purpose. This change in principle is fundamental, and it certainly is no improvement on the old. A special examination is not only advisable but necessary in many cases involving unusual knowledge ; but for the general purposes of administration no such knowledge is required. Immediately an examination on a limited number of subjects is established the field of recruiting is narrowed, the quality of the candidates is lowered, and the competition becomes less keen. There is, however, a further and more serious objection. Irrespective of the number of candidates, such an examination for administrative and executive positions emphasises the secondary qualifications and ignores the most important. What the candidate will become and what are his eventual capabilities are of much greater consequence than his momentary ability to write shorthand. The one test aims at discovering natural ability, the other merely ascertains premature technical knowledge. The chief characteristics desired are clearness of thought, initiative, a capacity for rapid assimilation and adaptation, coupled with a background of general information and culture. The difficult academic examination obtains these things to a much greater degree than any special or technical test that has yet been devised.

There are a large number of positions in the Service for which the general examination is both undesirable and useless. The academic test presupposes that the successful candidate will acquire the special knowledge for his position after he has entered the Service ; but there are a great many posts which demand some training before the candidate enters, or which do not demand those qualities which it is the aim of the academic test to discover. The uselessness of procuring lower grade clerks, stenographers, porters,

messengers, etc., by academic examinations is obvious, and it has been long recognized that these offices come under a separate category, and demand an examination based on the particular qualities desired.[1] In all such positions, even in those where minimum qualifications only are demanded, the examination should be competitive and open to all who wish to apply. In many cases it may be advisable to include those academic subjects which are deemed necessary to the office,[2] though the practical test will often be of much more importance than the written examination. When Theodore Roosevelt was a Civil Service Commissioner, he examined a customs inspector for the Texas border on the following subjects: saddling and riding an unbroken mustang, shooting at the gallop, reading cattle-brands, classifying live stock, speaking a little Spanish, and proving his courage and endurance by testimonials.[3] One of the few merits of the new classification in Canada is that it lays a greater stress on such practical tests than had been done before; [4] but the *Report of Transmission* makes a serious blunder when it assumes that the special examination or its equivalent can be successfully applied as a test for all entrances to the Service.

Appointments to positions of a technical or professional nature are usually made competitively for merit; but there are several reasons why this is rarely determined by a written examination. The qualifications of such candidates often rest on a technical skill, which has been acquired by years of practical experience and is not easily discovered by means of written questions and answers. In such cases there is the additional difficulty that the candidates are usually beyond the age when they can write a good examination. In the second place, it is almost impossible to procure examiners who will keep the technical papers sufficiently up to date so that the questions will form a fair test of the candidate's qualifications and his contact

[1] Cf. *Can. Sess. Pap.*, 1880–81, § 113, p. 274. *Ibid.*, 1906–07, § 31, p. 7.
[2] Cf. *Can. Stat.*, 1919, pp. cxviii–cxxix.
[3] *Atlantic Monthly*, February, 1914, p. 274.
[4] *Report of Transmission*, 1919, p. 42.

with recent developments in his science. Finally, there is the objection that a really first-rate man will not be prepared to spend his time in studying up an entire subject in order to qualify for a position in the Service. Professional or technical men are therefore usually exempted from written examinations; but their qualifications are determined competitively by their past record, by testimonials, or by private enquiry. In some cases, it may be advisable to examine the applicants, orally or by papers, as to their knowledge on certain subjects; but such examinations will play a minor part in determining the fitness of the candidate.

One of the greatest distinctions between the technical and other positions in the Service has been the mode of appointment. In Canada, until the Act of 1908, these positions were filled by the Governor in Council without any reference to the Board of Examiners,[1] the idea apparently being that the latter were not qualified to pass on the merits of professional or technical men. In 1908 these positions were still filled by the Governor in Council, although the person appointed was required to secure a certificate from the Commission to show that he possessed the minimum qualifications for the office.[2] The final step was taken in 1918 when the Commission was given the same power of appointment for these offices as it already possessed for the rest of the Service.[3] There is, of course, the difficulty that many positions are of such a nature that the Commissioners cannot be expected to be capable of pronouncing on the merits of the candidates. In such cases the Commission appoints special Boards which examine and report on the applications that are received. If technical knowledge is required, part at least of the Board will be technical men; if the duties are administrative, the Board will probably consist of an officer of the department and a business man from outside the Service.[4]

[1] *Rev. Stat. Can.* (1906), c. 17, sect. 37.
[2] *Can. Stat.*, 7–8 Edw. VII. c. 15, sect. 21; cf. *Can. Sess. Pap.*, 1910, § 31, p. 72.
[3] *Can. Stat.*, 8–9 Geo. V. c. 12, sect. 15.
[4] *Can. H. of C. Debates*, May 10, 1918, pp. 1760–61. *Ibid.*, March 19, 1919, p. 616.

The last class of cases are those appointments which do not come under the Civil Service Commission, but are made directly by the Governor in Council. These positions are very few in number, and are to be regarded as quite exceptional to the general rule. The two most conspicuous examples are the deputy heads of departments and the ministers' private secretaries.[1] It is regarded as essential that a minister should have the final decision when so important a post as that of a deputy head of a department falls vacant, and the same argument applies with even more force to his own private secretary.

Competitive examinations, however, no matter what kind they may be, are not infallible, and it is necessary to guard against mistakes that may occur. This is done by means of a term of probation, during which period the deputy head of a department has the opportunity of rejecting any successful candidate who may be appointed in his department.[2] A clause to this effect has always existed in the Canadian Civil Service Acts, the time allowed varying from six months to a year ; but the use of the provision has varied greatly in the different departments. In 1892, for example, several officials said that the power of rejection was not used in practice.[3] In 1907 it was stated that the Post Office Department rejected inefficient men unhesitatingly,[4] but that the Inland Revenue Department retained all the probationers unless their conduct was very bad.[5] Judging from the evidence and from the opinion expressed to me by civil servants themselves, it would appear that the Deputy Minister of Finance was the nearest to the truth when he said that once a man was employed on probation it was impossible to get rid of him.[6] I have had sad tales related to me as to the failure of academic examinations in particular instances ; but on asking why these exceptions were not promptly rejected, was informed that the probation clause was a dead letter. The examination system is

[1] *Can. Stat.*, 8–9 Geo. V. c. 12, sects. 46, 49.
[2] *Ibid.*, sect. 13.
[3] *Can. Sess., Pap.*, 1892, § 16 c., pp. 259, 545.
[4] *Ibid.*, 1907–08, § 29A, p. 776.
[5] *Ibid.*, p. 280. [6] *Ibid.*, p. 184.

not faultless; but the results might be made to approach perfection if the power of rejection were strictly applied. This weeding-out process, however, can only be used by the deputy heads themselves; it is on the officials and not on the statute that the blame must be laid.

There can be no doubt but that the examination and appointment of civil servants by the Commission has done much to improve the tone of the Canadian Service. The Royal Commission of 1880 fully realised that the substitution of a merit for a patronage system would increase the esteem in which the civil servant was held by the public, as well as give him an independence in thought and action which was virtually unattainable under the old method of appointment:—

"The Civil Servants would be saved from the imputation of partisanship which is periodically brought against them in times of political excitement. Men who had obtained their places by merit alone, and as the result of impartial examination, could not possibly be open to any imputation of political partisanship in office; nor would they be in any degree influenced in the discharge of their duties by political considerations. . . . The Service would win the respect of the public and of the Government; and . . . it would obtain and preserve a dignity in the eyes of the whole country, which it does not now possess." [1]

The evidence of Sir Richard Cartwright (though it is probably somewhat exaggerated) throws an interesting light on the state of the unreformed Civil Service in 1873–78:—

"Hardly a question could be discussed in Council, and certainly no resolution arrived at, which was not known to our opponents. Nay, it was quite a common case for us to find that measures which had not even been submitted to Council were known to our enemies long before they were considered by the majority of the Cabinet. The fact was that not only almost all the higher offices in the Civil Service, but practically all the subordinate places, were filled with more or less zealous partisans of our opponents. I do not mean to say that all, or even a majority, of these men deliberately betrayed our confidence, but they certainly took no interest in making our Government a success."

[1] *Can. Sess. Pap.*, 1880–81, § 113, pp. 20–21.

"One or two of us . . . made our intention known to the effect that if any secrets leaked out by fault of our officers and the culprit could not be discovered, we would make a clean sweep of every man who could possibly have known anything of the matter, a step which in these particular instances ensured a due measure of reticence."[1]

Sir Richard also claimed that a large number of the civil servants who were engaged in the census of 1891 made use of their position to falsify the records in favour of the Government.[2] He asserted that these men endeavoured to diminish as much as possible the number of emigrants from Canada, in order that the Government (to which they owed appointment) might not have to face the serious charge that their political policy had forced a great many Canadians to seek a livelihood elsewhere. It is a practical example along the lines supposed by Professor Graham Wallas when he suggests the evils that might result from a civil service which was completely under government control.[3]

This atmosphere of distrust and uncertainty which formerly characterised the Canadian Service has largely disappeared with the abolition of appointment by patronage. There is now some likelihood or even assurance, which was formerly lacking, that the civil servant will be impartial and will perform his duties conscientiously under any government. He may be expected to resent and to refuse to comply with any suggestion from his political superiors that he should use his official position for dishonest purposes or for hoodwinking the public with falsified reports. The civil servant no longer owes his position to a party because of his political past, but rather to himself because of his intellectual ability; he is chosen independently by competition, and owes allegiance to the state alone or to whatever government that represents it.

The independence of the civil servant has been encouraged by many other methods than that of appointment, the majority of such expedients being used to encourage his independence after he has assumed office. Several of these,

[1] Cartwright, Sir Richard, *Reminiscences*, pp. 128–30.
[2] *Ibid.*, pp. 325–27.
[3] *Human Nature in Politics*, pp. 246–48.

such as tenure, removal and salary, may attract the desirable men into the Service in the first instance; but their chief value lies in their stimulation of independence after the civil servant has been admitted. The tenure of the civil servant in the Dominion has always been during pleasure,[1] though this has meant in practice a tenure during good behaviour.[2] The removal rests with the Governor in Council,[3] and a very large part of the history of the Canadian Service has centred around the way in which the dismissal clause has been applied.

It was definitely established in the Colonies before Confederation that active political partisanship on the part of a civil servant would constitute "official misconduct" which would merit dismissal; [4] and this principle was accepted by the governments of the new Dominion. This rule, which appeared to make for political purity, in reality brought political corruption, and had the unintended result of producing a special Canadian type of the "spoils system." All appointments were made for political reasons and were approved by the party; but if the government were unsuccessful at the next election, the civil servant was usually rewarded for his faithfulness by summary dismissal. The American political maxim "to the victors belong the spoils" had a Canadian counterpart in the dictum of Mr. Sandfield Macdonald that "we must support our supporters"; but the latter precept was not applied with the same ruthlessness as obtained in the United States. The principles of Andrew Jackson not only demanded that the victorious government should be allowed to fill the civil service, but also claimed that "a long tenure of office is actually detrimental to good public service."[5] "Rotation in office" was adopted in the United States as a principle and a right,[6] but it never attained such a dignity in Canada; when removals from the Canadian

[1] *H. of C. Papers* (*Great Britain*), (211), XXXI., 1840, pp. 15–16.
[2] *Lord Durham's Report* (*Lucas*), II. p. 284. *H. of C. Papers* (*Great Britain*), (621), XLII., 1847–48, pp. 77–80.
[3] *Can. Stat.*, 8–9 Geo. V. c. 12, sect. 28.
[4] E.g., Case of Hon. E. B. Chandler, *N. B. Ass. Journals*, 1862, p. 194.
[5] Merriam, C. E., *American Political Theories*, p. 185.
[6] Bryce, Viscount, *The American Commonwealth* (1911 ed.) II., pp. 136–40.

Service did occur, they were made furtively, and the onus of proof always rested on the government to justify its action. Mr. Mackenzie, when Prime Minister, went so far as to say that the Government "endeavoured to act upon the principle that no person should be dismissed for political reasons, unless he was charged with something else that would afford a proper reason rather than an excuse for his dismissal."[1] It is hardly necessary to add that his opponents did not credit him with such forbearance; but the tradition of pre-Confederation days, that dismissals should only take place for "official misconduct," was on the whole well kept. Inasmuch as the term "misconduct" included both inefficiency and political activity, the government had many opportunities for exercising the power of removal; the chief fault of the system was that the new appointments were as partisan as their predecessors.

Dismissals from the Service for "political partisanship" naturally persisted as long as appointments continued to be made for party reasons from party supporters. The years 1873 and 1878 each saw a change of government, and dismissals followed as a matter of course.[2] In 1896 the Conservative Government was defeated after a continuous term of eighteen years, and the Liberals celebrated their victory by a slaughter of civil servants on a grand scale.[3] The next change in administration took place in 1911, when the Conservatives were again returned to power. It is generally believed that the dismissals in the Outside Service in 1911[4] eclipsed those of the Liberals in 1896—no mean achievement—but it was the more inexcusable because it took place fifteen years later when the country was supposed to have adopted a saner procedure. On the

[1] *Can. H. of C. Debates*, Feb. 16, 1877, p. 91.

[2] *Toronto Mail*, April 16, May 8, May 14, May 19, 1874. *Can. Sess. Pap.*, 1873, § 29. *Ibid.*, 1878, § 76. *Can. H. of C. Debates*, Feb. 16, 1877, pp. 88–93. *Ibid.*, Feb. 22, 1877, pp. 204–47. *Ibid.*, March 19 and 20, 1879, pp. 550–610.

[3] *Can. Sess. Pap.*, 1897, § 57T. *Ibid.*, 1898, § 31. *Ibid.*, 1900, § 64B. *Can. H. of C. Debates*, Aug. 28, 1896, pp. 318–401. *Ibid.*, Sept. 1. 1896, pp. 484–545. *Ibid.*, May 14, 1897, pp. 2301–37, 2348–407.

[4] *Ibid.*, Jan. 12, 1912, pp. 1076–1196. *Ibid.*, Feb. 16, 1912, pp. 3244–76. *Ibid.*, March 27, 1912, pp. 6280–304, etc. *Can. Ann. Review*, 1911, p. 299. *Can. Sess. Pap.*, 1913, § 61. *Ibid.*, 1914, § 44.

other hand, the Act of 1908 had removed the major part of the Inside Service from politics, and these officials were left almost untouched by the Conservative Government in 1911—a clear proof of the efficacy of reform. On March 18, 1918, an Order in Council was passed which profoundly affected the question of dismissals. It stated that the power to dismiss public officials on the ground of political partisanship should be sparingly exercised, and that henceforth no dismissal for such a cause should take place except after enquiry by and approval of the Civil Service Commission. In deciding such a case the Commission should have regard solely to the question of the public interest and the official's efficiency and length of service.[1] The greatest step, however, was the reform Act of 1918, which placed the Outside Service on the same non-political basis as the Inside Service had enjoyed since 1908. No change of government has occurred to test the efficacy of the Act in reference to dismissals ; but it is safe to predict that removals for political partisanship will now be as rare as they were common, owing to the fact that political appointments, the chief cause of the disease, have become a thing of the past.[2]

The question of the political activity of the civil servant is, as we have seen, closely connected with that of dismissal. Before the introduction of the ballot, disfranchisement of public officials was seriously considered in Canada ;[3] but since that time it has ceased to be a live issue.[4] The present Civil Service Act, however, makes it quite clear that while a

[1] *The Civilian* (*Canada*), March 29, 1918, p. 537.

[2] There has recently been a slight reaction against reform, and a Bill was introduced in May, 1921, to take the appointment of manual labourers, rural postmasters, and technical or professional employees from the Civil Service Commission and restore it to the government. *The Times* (*London*), May 3, 1921. Perhaps the greatest sin that the Reclassification of 1919 must answer for is that its failure will probably lead to reactionary measures. The faults will be attributed not to the Reclassification as such, but to the whole idea of a Service free from political interference—a clear case of the innocent suffering for the guilty.

[3] Two provinces disfranchised Dominion civil servants. *Quebec Stat.*, 38 Vic. c. 7, sect. 11. *N. S. Stat.*, 35 Vic. c. 15, sect. 1. The effect of these statutes on the Dominion franchise (cf. *Can. Stat.*, 37 Vic. c. 9, sect. 40) was overcome by creating a new Dominion franchise. *Can. Stat.*, 48–49 Vic. c. 40.

[4] Isolated references occur. Cf. *The Civilian* (*Canada*), Jan. 26, 1912, edit., p. 507. *Can. H. of C. Debates*, May 29, 1914, p. 4451.

civil servant may vote, his political activity must go no further than the mere marking of the ballot:—

"No deputy head, officer, clerk or employee in the civil service shall be debarred from voting at any Dominion or provincial election if, under the laws governing the said election, he has the right to vote; but no such deputy head, officer, clerk or employee shall engage in partisan work in connection with any such election, or contribute, receive or in any way deal with any money for any party funds.

"Any person violating any of the provisions of this section shall be dismissed from the civil service." [1]

Such a prohibition, imposing as it does the extreme penalty of dismissal for its violation, seems at first sight a hardship and an injustice. Every civil servant is bound to take an active interest in elections if for no other reason than it may mean a change of masters. But a very large number are men of more than average ability, with an excellent education and with unusual inducements and qualifications for forming judgments on the questions at issue. They are in daily contact with the business and administration of the country, some know the heads of the departments intimately, and a large number live at the seat of government. In short, there is probably no one class of a similar size in the Dominion so well qualified to take an active part in politics.

If the only consideration were the qualifications of the civil servant it would be highly desirable to encourage his political activities. But in addition to being a private citizen he is also a public official, and it is because of the latter position that his liberty must be curtailed. Before 1908 the Canadian public regarded the Civil Service as a partisan body; since that time, and particularly since 1918, the Service has assumed a non-partisan character. It is essential to the success of the public administration that this reputation and tradition of impartiality should be maintained in the eyes both of the public and of the civil servants themselves. The public official of to-day, appointed for merit by an independent Commission, stands in quite a

[1] *Can. Stat.*, 8–9 Geo. V. c. 12, sect. 32.

different light than his predecessor appointed for party services by the party in power. So far as political allegiance is concerned, he must content himself with neutrality; he is the servant of the public and must accept whatever master it chooses to elect. If the civil servant were allowed to take the platform on behalf of either political party, or to run as a candidate himself,[1] he would endanger the harmonious relationship that should exist between himself and other officers in his department as well as the confidence which the public should place in him.

Although every government has shown great eagerness to remove civil servants for political reasons, they have all been equally reluctant to dismiss their employees for inefficiency. In 1919, for example, a Special Committee of the House of Commons reported that "the method of dismissal . . . is too formal and difficult of accomplishment . . . and in consequence the efficiency of the Service is impaired."[2] The Committee also said that removals for inefficiency were practically never made, and that even when they were recommended they were rarely acted upon. The *Report of Transmission* of the same year considered the question to be extremely simple: "The process of removal may be considered as the reverse of the process of appointment and the same principles apply."[3] The *Report* therefore recommends that speedy dismissal should always be the fate of the inefficient employee,[4] a policy which finds expression in the present Act.[5]

This solution of the problem is really no solution at all; the act of dismissal still rests with the Governor in Council, who cannot be expected to discharge inefficient employees with the same energy and decision as the ideal business man whom the "experts" evidently chose as their model. It

[1] In 1921 three employees of the Canadian National Railways were dismissed because they had run as candidates in provincial elections. They were reinstated by a decision of a Board of Arbitration, which was accepted by the Chairman of the Canadian National Railways. These employees do not come under the provisions of the *Civil Service Act*, *The Times* (*London*), Feb. 3, 16, 1921.

[2] *Can. H. of C. Journals*, July 4, 1919, p. 518.

[3] P. 52, cf. p. 58.

[4] Pp. 52–55.

[5] *Can. Stat.*, 8–9 Geo. V. c. 12, sect. 28. *Ibid.*, 10 Geo. V. c. 10, sect. 5.

may be a regrettable fact, but it is none the less true, that a feeling exists in the popular mind that no government should arbitrarily dismiss an employee however incompetent; and this feeling is reflected in the acts of the public officials themselves. Few deputy heads of departments or their immediate subordinates are willing to take the responsibility of advising dismissal, and as a result (as the Committee Report of 1919 shows), they are willing to endure inefficiency rather than be the cause of making a man lose his position. The Civil Service has also the disadvantages of any large scale organisation in this respect. The person who decides upon discharge has no accurate means of discovering the inefficiency; he cannot acquaint himself with all the facts, and the one who advises dismissal may have a grudge against the employee. The usual result is that rather than make a possible mistake, the one in authority decides to keep the employee on the staff.

There can be no doubt, however, that there is an urgent need in the Service for a more thorough pruning of the dead wood, though how this is to be accomplished is a question which has not yet been satisfactorily solved. Those employees who are inefficient from the time of their entrance might be discharged under the probation clause before they establish a kind of vested right in their office. But the case of the old civil servant, who has developed "potterer's rot" (to use a phrase of Mr. Sidney Webb) and who has passed his days of usefulness, is by no means as simple. It may be possible to jar such men out of their slackness by placing them in a new office under a vigorous superior, and if they fail to respond to this stimulus, to discharge them. But even if this expedient were conscientiously used it would still be found that the difficulty of discharge would vary directly with every year of the employee's service.

Superannuation is a question closely linked with dismissal. It has occupied a prominent place in the reports of the various Royal Commissions on the Canadian Service [1] and

[1] *Can. Sess. Pap.*, 1882, § 32, pp. 13–84. *Ibid.*, 1892, § 16 c., pp. lxxiii–lxxviii. *Ibid.*, 1907–08, § 29A, pp. 21–23. *Ibid.*, 1913, § 57A, pp. 18–19.

has been the subject matter of a number of statutes. The present situation in this regard is somewhat complex. A *Superannuation Act* was passed in 1870 which granted retiring allowances to civil servants upon their fulfilling certain conditions, the most important of which was an annual contribution to the fund.[1] This Act was repealed in 1898 so far as it affected all future civil servants, and its place taken by a *Retirement Act*,[2] which reserved annually five per cent. of a civil servant's salary and placed it to his account. This is compounded twice a year at four per cent. interest and the total is payable to him on retirement or dismissal. In addition to these two Acts a statute was passed in 1893 [3] which provided for the insurance of civil servants, though this is of course quite separate from either of the above. All these statutes are still in force, though they do not all affect the same civil servants.

The case for some system of superannuation is easily proved. It enables the Service to keep more efficient in two ways: it provides a means for disposing of old officials who have passed their prime, and it retains the younger men by the inducement that it offers to remain in the Service

Mention has been made of the difficulty that has been experienced in inducing the deputy heads or other officers to get rid of inefficient men. But if these men have been long in the Service and their chief fault is an excess of grey hairs, the deputy heads will recommend retirement more readily if they realise that little hardship will be entailed and that the officer will retire on a pension. Such a scheme also acts as a strong inducement for able men to remain in the Service. The salaries in the higher posts of the Canadian Service are low compared to those given in the country itself, and this must be compensated for by other means. One of these is a secure tenure, another is a pension system. If an officer in the Service receives a tempting offer to leave it and enter some business, the prospect of a good pension will unquestionably weigh heavily in favour of his remaining

[1] *Can. Stat.*, 33 Vic. c. 4. *Ibid.*, 46 Vic. c. 8. *Rev. Stat. Can.* (1886), c. 18.

[2] *Ibid.*, 61 Vic. c. 17. *Rev. Stat. Can.* (1906), c. 17.

[3] *Ibid.*, 56 Vic. c. 13. *Rev. Stat. Can.* (1906), c. 18.

where he is rather than embarking on a more precarious, though perhaps more profitable venture in the commercial world. The same reason may also induce many young men to enter the Service in the first instance who might otherwise have remained outside.

Judged in this light, how far is the present *Retirement Act* a success ? It certainly will induce nobody to enter nor to remain in the Service, as all that the official gets at the conclusion of his term of service is the money that has been deducted from his salary with interest at four per cent. Many will think, and some at least rightly, that they could use it to a much better advantage if they had the investment in their own hands, particularly if they bought some kind of an annuity. The Retirement Fund does allow the Service to dispose of old servants more easily than if it did not exist ; but there are obvious disadvantages which attach to the payment of a lump sum which do not follow with a pension system. For these reasons the *Retirement Act* has been generally condemned both by Royal Commissions and by civil servants, and the desire has been often expressed that some scheme similar to that of the old *Superannuation Act* should be reintroduced.[1]

If superannuation were reintroduced it should be made compulsory at an age of sixty-five or seventy. The strict enforcement of such a rule would cause the occasional retirement of a very efficient officer, but the alternative of allowing civil servants to remain after the above ages is worse. There would be the tendency for inefficient men to be kept on, either because their feelings would be hurt, because they were not doing much harm where they were, or for some other reason equally unsatisfactory. Such a question must depend upon the average case, and judged on such a basis, the vast majority of men are past their prime at sixty-five or seventy. Certain exceptions might be made (as in England) if the official were engaged on a definite piece of work which he was particularly qualified to complete, or for some other special reason ; but in no case

[1] *Can. Sess. Pap.*, 1907–08, § 29A, pp. 21–23, 1341–43. *Ibid.*, 1913, § 57A, p. 18.

should such an extension be allowed to exceed a year. This provision might also work unfairly in some instances, but the whole efficacy of such a law depends on the strictness with which it is administered.

The gradation of the Service is another point of great importance in the determination of the independence of the civil servant after he has attained office. Gradation is linked up with both the entrance examination and the system of promotion; it determines the standing to which a successful candidate is entitled on entrance as well as the promotion that is later open to him. Before 1919 the Canadian Service consisted of two chief classes, one doing intellectual and the higher administrative work, the other the routine and more mechanical tasks. Each class had its own examination for entrance. This system was founded on the assumption, long recognised in Britain, that the officer class must not be recruited from those who have had their initiative and intelligence deadened by years of routine, but must be admitted directly to the higher grade of work. It implied also that promotions from the lower classes of the Service to the high executive posts would be very rare, so rare indeed as to be exceptional. Sir George Murray in his report of 1912 drew attention to this distinction and strongly urged its continuance in the Canadian Service:—

"It is in my opinion of great importance that this distinction between the work of the two Divisions should be preserved. The essential difference between them is that the work of the two higher Divisions requires the exercise of discretion and the possession of altogether higher qualifications, whether professional, technical or administrative, than that of the Third.

"For routine work, under direct supervision, all that is required is punctuality, accuracy and precision. The copying of accounts, the compilation of statistics, the filling up of forms, and even the drafting of simple letters, are all matters in which there is no room for the exercise of discretion. The qualifications required for the work of the higher classes are essentially different from those required for the routine duties of the lower classes; and are not usually developed from them. There will always be a large number of persons who, while quite capable of routine work, will never be able to rise to duties of a higher character

requiring a higher standard of education and the higher qualities required for successful administration." [1]

Sir George Murray somewhat overstated his case, though his reasoning and conclusion is, in the main, sound. Even routine work such as the "drafting of simple letters" may reveal natural capacity in a man who is in a lower division. The dividing line, therefore, should not be too rigid; promotion from the lower grades should be allowed in exceptional cases, but the chief source of supply should be the higher division. It must also be remembered that since the general level of education has risen, there is no clear-cut educational distinction between the two classes, nor does the social justification of the two-fold division carry any weight in Canada. But although the immense advance in the education of the modern egalitarian society has altered some aspects of the problem of gradation, the need for two divisions in the Service remains. Men do differ by their natural powers; the state is unable to train every one for high administrative office; and it therefore becomes necessary to recruit the best and to train them alone to be good administrators.

The recent classification of 1919 is built on the very opposite assumption from its predecessors, viz., that routine and intellectual work are barely distinguishable, that the former will not cramp or deaden the initiative of the civil servant, and that all the employees in the lower grades can naturally expect to rise to the top of the Service. The "experts" who drew up the classification went even further than this in a conversation that they had with the writer. They claimed that not only was nothing gained by a division of the Service into these two classes; but that no such distinction between intellectual and routine work could be made, an assertion which they endeavoured to support by adding that everybody did some routine and some intellectual work. The shallowness of such reasoning is too apparent to need contradiction. Nor is the claim that no benefit is gained by such a distinction much easier

[1] *Can. Sess. Pap.*, 1913, § 57A, pp. 20–21.

to defend. A civil servant who has spent years filing documents and keeping books does not get the training that will fit him for the higher posts. Those qualities which are required in the executive and administrative offices are best obtained, as has been pointed out above, by a high standard academic examination, and are best developed by an apprenticeship in the intellectual rather than the routine work of the Service.

The other assumption made by the "experts," viz., that promotions will take place as a rule throughout the whole Service from the lowest office to the highest, is not in accordance with facts, indeed it is denied (though not explicitly) in the *Classification of the Civil Service of Canada.* The most casual examination of this schedule shows that the promotions which it suggests and upon which the report insists are not feasible, and cannot be made on the basis of the classification itself.[1] Promotion from the bottom of the Service to the top is as a rule inadvisable because of the lack of proper training; but it is also usually impossible because of educational qualifications. The so-called "experts" find themselves in this quandary: they deny that men of high educational qualifications must be admitted directly to high-class clerkships, yet their classification obviously demands it; they insist upon promotion throughout the entire Service, and while one part of the schedule suggests the line that this promotion shall take, another part renders it inoperative by demanding a college education from those who have entered years before with a high school training. One answer might be made, viz., that those with advanced qualifications might enter in the lower grade in order to qualify later for promotion to the higher. Such a contention might be justified were the salary scale higher than it is; but the remuneration for such posts is so low that it cannot hope to attract men of university standard. Judged in every light the present classification, if rigidly adhered to, is unworkable. But even if the educational requirements were reduced or the salary in-

[1] E.g., the suggested line of promotion for the *Clerk*, pp. 179, 623, 563, 371, 138, 35, or that for the *Farm Hand*, pp. 325, 322, 438, 47, 310.

creased, the result would still leave much to be desired. Promotion from the lower ranks to the higher would indeed be made possible; but none of the advantages following from a separation of routine and intellectual work would be obtained. In short, the classification is inherently bad, and no amount of patching or readjustment will make it equal to the older system.

It has already been indicated that the scope of promotions in the Service has been greatly changed by the reclassification of 1919. A further alteration was made at the same time by the reintroduction of the promotion examination. The Act of 1882 had established such an examination, which remained in force until 1908, when it was made optional, and in the succeeding years gradually died out.

The idea of examinations for promotion has always been looked upon with disfavour in the United Kingdom for reasons which appear to be very sound. It is considered that after a certain age (usually taken to be about 28)[1] a person ceases to be examinable—he is no longer capable of dressing his intellectual shop window to the best advantage. To demand examinations after that age gives a decided advantage to the younger men, who, though less efficient, may make higher marks than their older colleagues. The only time a man of any age is fit for examination is after a long and arduous preparation, which, if done by a clerk, is apt to detract from his efficiency in the office.

A more serious difficulty, however, is in the subject matter of promotion examinations. Academic subjects are clearly ruled out; they would not test the clerk's claim to advancement, nor could he be expected to pass such a test after years of office work. The usual subjects given are those concerning the work and routine of office duties, which do not lend themselves readily to examination and can be more satisfactorily ascertained by the past record of the clerk. If the test be on the duties of the old office, the clever and efficient clerk has little advantage over the one steeped in routine; if it be on the duties of the office to which the promotion is to be made, none of the candidates can have a

[1] *Parl. Pap.* (*Great Britain*), 1914, Cd. 7338, pp. 46–47.

thorough knowledge of the subject. The most important objection, however, to promotion examinations is that advancement generally depends upon those intangible qualities which cannot be weighed by means of any written test. Honesty, tact, good judgment, initiative, breadth of outlook, and possibilities of future development are a few of the most significant qualifications to be considered in making a promotion, and these must be judged by experience and not by examinations.

The new classification in the Canadian Service demands a competitive promotion examination, consisting of questions on the duties of the office to which promotion is to take place.[1] This, as has been pointed out, is a very unfair test, as the candidate cannot possibly familiarise himself with the duties of an office which he has had little or no opportunity of studying. The exact meaning of the competitive examination is difficult to grasp, for the *Report* also says that "due credit for length of service and demonstrated efficiency"[2] must be given. How these different and in some cases conflicting factors are to be reconciled is not stated. It would seem to be much wiser, if promotion examinations must be held, that these should be made qualifying and not competitive, i.e., they would determine the minimum qualifications for advancement. The choice might then be made by the deputy head, who could give weight to the more personal factors as well.

The new Act[3] takes from the deputy head of the department all power in the matter of promotion and gives it to the Civil Service Commission. Apart from the bad effect that this must have upon discipline, it is a misreading of the functions of the Commission. This body originated because it was a convenient means of selecting persons for first appointments to the Service; but the function of deciding the merits of officers whom it is desired to promote, which depend on quite different factors than those for entrance, is quite without the scope of the Commission.

[1] *Report of Transmission*, p. 43.
[2] *Ibid.*, p. 39.
[3] *Can. Stat.*, 10 Geo. V. c. 10, sect. 45.

The *Report of Transmission* considers that these two functions are to all intents and purposes the same—a supposition which it is impossible to justify. The making of promotions demands as its most essential condition familiarity with three things, the personality and qualifications of the candidates, the duties of their offices, and the duties of the office to be filled. The efficiency records, the examination, and the classification schedule are the means which the Commission has at its disposal to form a judgment on these points. The officer in the department has also the same or even better information on the vacant position and the record of the candidates; but he has in addition a far more intimate acquaintance with the officials' possibilities and latent talents than the Commission can ever hope to possess.[1]

In certain exceptional offices promotion examinations have been used with success, notably in the customs and excise. In such cases promotion does not depend entirely upon an increase in general efficiency, but also upon a certain amount of technical knowledge which the official must possess, e.g., as regards tariff classification, differentiation, valuation, etc. Here again, however, it is more advisable to have the examination non-competitive, and to treat it as the minimum qualification necessary for promotion, in order that the personal factors may be considered.

The new classification has, however, one great advantage; it is an excellent check on indiscriminate promotion without any real change in duties, a fault which has been with the Canadian Service ever since its inception. Employees have been promoted for faithfulness and length of service, while performing precisely the same duties; the office has been advanced as well as the men. This is made well-nigh impossible by the new schedule.

The efficacy of the promotion system in the Canadian Service has also been injured in the past by the granting of salary increases without reference to the ability or industry of the employee.[2] The result of this has been that an

[1] *See* Shortt, A., "Efficiency Records," *The Civilian* (*Canada*) Oct., 13, 1916, pp. 289–91. *Can. Sess. Pap.*, 1913, § 57A, p. 17.
[2] *Can. Sess. Pap.*, 1897, § 47. *Ottawa Citizen*, Oct. 21, 1911.

additional salary was regarded as a right of the civil servant rather than a reward for efficiency. The new classification provides minimum, intermediate, and maximum salaries for each class, and the *Report of Transmission* states that the increases shall only take place for merit on the recommendation of the deputy head and the approval of the Commission, and that no employee who has reached the maximum shall have any additional salary as long as he remains in that class.[1] This will no doubt prevent indiscriminate increases to some extent; but it cannot hope to surmount the difficulty entirely. The salaries of the Canadian civil servants are deplorably low, particularly in the higher grades of the Service, and the deputy heads will naturally endeavour to obtain a larger remuneration for their ill-paid subordinates. The provision which makes the consent of the Civil Service Commission necessary before any increase is granted is only a nominal check, for the Commissioners cannot possibly investigate all the cases and satisfy themselves as to the justice of each recommendation.

The extent to which a civil servant should be made independent within the organisation must of necessity vary with the office which he fills; but all civil servants should enjoy a certain personal independence common to the whole group. It is desirable, in the first place, that appointments should be made for merit through some impartial body, such as the present Canadian Civil Service Commission.[2] The tenure should also be one during good behaviour (either by law or practice), and removals allowed only on grounds of inefficiency or proved political activity. The comparison between a partisan and independent Service has already been made,[3] and the advantages are all on the side of the latter. The public must be able to place reliance on the integrity and impartiality of their civil servants, and no means has yet been devised whereby this end may be secured under political control. The impartial appointment, the permanence of tenure, and the limitation on

[1] Pp. 30–31. Confirmed by *Can. Stat.*, 10 Geo. V. c. 10, sect. 45B.
[2] For an account of the Commission, *see* pp. 154–62.
[3] Pp. 88–89.

removal are all necessary precautions to secure this public confidence and to guard against corruption by the government.

A very large number of civil servants need little independence outside of that which is accorded to the whole group; indeed, in the majority of the lower offices any additional independence would result in chaos. It is, for example, quite impossible to have a record clerk alter a whole filing system at his pleasure or to allow a typist to reconstruct the letters which she receives in dictation. But there are a great many officers in the Service whose duties demand a measure of additional independence over that which is common to all. The officer class is chiefly composed of experts, possessing either technical knowledge or knowledge which has become specialised as the result of long experience in administrative work. If their peculiar skill is to be utilised to the best advantage, it must be exercised with some freedom, and their initiative and originality must be encouraged and not penalised. The necessity for independence is further emphasised by the nature of the Service itself; it is a large scale organisation, with all the defects of its counterpart in the business world. Its machinery is cumbersome, it has a tendency to move slowly, and there is the deadening influence of red tape and officialism. Independence cannot entirely eradicate these faults; but it is one way in which these tendencies in the Civil Service may be greatly lessened.

It has been said that the door of entrance to the Civil Service should bear the inscription *All hope abandon ye who enter here.* It is a pessimistic conclusion, but one which finds a ready echo in the mind of at least one Canadian member of parliament:—

"I have had some knowledge of the Civil Service for a few years, and, from my experience, my advice to my friends and acquaintances has been to keep clear of the Civil Service above anything else. If you have any ambition; if you ever expect to make any headway in the world; if you place any value on your initiative, your freedom, then, for Heaven's sake, steer clear of the Civil Service. If you want to become part of a

machine by which you move along, without exercising your initiative, then the Civil Service is the proper place for you." [1]

It is a sad picture, but one which can be duplicated at any time in any government department. A young man enters the Service on the verge of manhood, bright, intelligent, eager to do well and to make his mark in the world. Thirty years pass, and he has become a doddering old automaton, wrapped up in routine, with his mental vision limited to the four walls of his office. The solution of the problem is not simple, for the big difficulty, the impersonality of administering a country by pencil and paper, must remain. But much can be done to ameliorate matters. Routine can best be overcome by encouraging initiative and enabling the civil servant to express his individuality. It is impossible to say what amount of routine work can be taken over by the labour-saving devices of the future—it will probably not be inconsiderable, though the need for them will increase as the years elapse. At present, however, such machines (as, for example, the typewriter) have but pointed out the possibilities of the future; the relief must be sought from reorganisation and alterations in the Service itself.

It is necessary in this connection to reiterate what has been said above in regard to the gradation of the Service. It is essential that the Service should be divided into two general grades according as the nature of the work performed be mechanical or intellectual. Such a division must correspond to the standard of examinations which are set the candidates on entrance. Promotion may take place from the Second to the First Division; but such promotions should be rare. It may be objected that this classification does not abolish routine work, it merely segregates it and gives it to the Second Division; but it is much better to confine the bad effects of routine to one class than to allow it to poison the entire system. The new classification of the Canadian Service of 1919 commits this fundamental error, it neither makes nor admits that such a dual

[1] *Can. H. of C. Debates*, May 10, 1918, p. 1740.

division can be made, with the result that initiative and self-reliance will be largely crushed before the official reaches a position where he can use them.

Although a two-fold division of the Service is the most important part of its organisation, many other minor devices must be resorted to if it is to be kept at the height of efficiency. Scientific management demands that all employees from the highest to the lowest shall be assigned work according to their maximum abilities. It follows as a corollary that promotion in many cases should be rapid, and that it should go by merit and not according to seniority or any other method that would tend to discourage an ambitious and capable official. There should also be an effort made to make the civil servant aware of the important functions which he discharges, and to quicken in him a sense of moral consciousness; he should be made to feel that his position demands his utmost exertions, and that good service will receive its due reward. Ambition, vanity, prospect of advancement, competition and similar factors will act as incentives. One such stimulus, which the Civil Service supplies to a greater extent than any other organisation, is the pleasure that is derived from participating in the big things of the country's life. It is a tremendous inducement for a large number of men who are well up in the Service to feel that their hands are on the levers which guide the destinies of their country; and this feeling will call forth not only their utmost exertions, but self-sacrifice as well.

Frequent change of work is very necessary if the dangers of routine and a narrowed outlook are to be avoided. In a few cases clerks may be shifted with profit from one department to another; but such a practice, however desirable, is not possible as a general rule, for the gain obtained by the change does not in most instances compensate for the loss of time and effort resulting from the unfamiliarity of the work. But many changes may be made within the department with benefit to all. The officials, whose work lies at the capital and who deal almost entirely with written reports and "words, words, words," are apt to lose touch with the realities which engage the attention of their associates

outside the central office. The latter in turn are disposed to rail at the "red tape of Ottawa" and to minimise the difficulties which are encountered at the seat of government. Such misunderstanding could be greatly smoothed out by more frequent personal interviews, and the narrowness of outlook might be widened by an actual interchange of positions. If, for example, a part of the inspectorships in certain departments were recruited from the clerks, and a number of the clerkships from inspectors, the work of both grades of officials would be improved and stimulated. The deadening effect of print on paper might also be negatived to some extent by more frequent resort to oral methods, by sending officials from Ottawa to hold public enquiries, or by requiring them to make official reports under their own signatures.[1]

Another means of stimulating the Service is by the infusion of new blood. An exchange, temporary or permanent, might be made with the provincial civil services, or failing that, the latter might supply a certain percentage for the Dominion Service. It is desirable as a general rule to have promotion within the organisation, and to give the highest prizes to those who have spent their lives in it; but the introduction of fresh minds from without is sometimes beneficial. Some friction may result where this is resorted to, but this is a small disadvantage compared to a diminution in formalism and the cutting of superfluous red tape. A broader outlook may also be given to the civil servants by granting leave to the most promising to attend the universities, where they may specialise in some subject with which their work particularly deals. On their return they will be found to have reaped a double profit—they will be more proficient in their special subject, and will also have their minds freshened by their new experiences.

Initiative and enterprise can be greatly encouraged and fostered by the higher civil servants themselves. The first essential is to obtain cordial co-operation amongst the members of a department and between one department and

[1] Cf. Wallas, Graham, *The Great Society*, pp. 273–275

another. The deputy head, the heads of branches, and the clerks will work with much better results if they are united by a keen *esprit de corps*. The new Whitley Council scheme as used in Great Britain should encourage this; but it has not yet been adopted by the Canadian Service. The size of the group which must work together is of great importance in determining the spirit of co-operation which will dominate it; the danger is that it may be made so large that the personal affection and loyalty which is so essential may disappear.[1] The zeal of the young employee may be encouraged and his initiative quickened if his superiors ask him to add suggestions to documents that pass through his hands. One of the leading Canadian civil servants told me that he found it very profitable to discuss troublesome matters with his subordinates. Such discussion helped the superior by aiding him to sort out his own ideas and thoughts on the matter, as well as giving him an occasional good suggestion and a new viewpoint; it also made the younger man think for himself and feel that his opinion was really desired and valued. Unfortunately my friend is the exception. The usual response which meets the civil servant with ideas is indifference or hostility on the part of his superiors. It is better, they think, to let well enough alone, though in most instances it amounts to letting bad enough alone. But even if the young official gets a hearing, his task is not an easy one: he must not only induce the head or deputy head to endorse his proposal, but oftentimes must persuade them that they thought of it, and should it succeed he must allow them to take the credit. Such treatment is scarcely conducive to that encouragement of initiative and originality which the Civil Service must possess if it is to become a real, effective, living organisation.

[1] Cf. Wallas, Graham, *The Great Society*, pp. 333–336.

## CHAPTER IV.

## THE PERMANENT COMMISSIONER.

THE problem of official independence has assumed an additional importance of recent years because of the rapid growth of the permanent independent commission. Several commissions were set up in the nineteenth century, but they possessed few marks of independence; they were for the most part closely connected with the Dominion Government, and were allowed very little freedom in the exercise of their functions. Such a body as the Railway Committee of the Privy Council, for example, was composed of members of the government and was in reality, as its name implied, a section of the cabinet sitting as a separate committee. The Montreal Harbour Commission from the time of its inception in 1830 to its re-organisation in 1906 was largely composed of governmental nominees, and its policy and *personnel* were frequently controlled from Ottawa. At the beginning of the present century these quasi-political bodies began to be displaced by independent commissions—a movement which has continued to the present day. The scope of these commissions, however, has been greatly extended during the last decade; they have taken over a large number of functions once performed by government departments as well as a great many duties which were formerly considered to be outside the sphere of the state.

With the establishment of these commissions has come a recognition on the part of parliament and the public that these new bodies occupy a peculiar position in the governmental structure. Partly due to the technical nature of their work, partly because the work has often been of a quasi-judicial character, these commissions have been

conceded an independence approximating to that of the judiciary. This has necessarily been accompanied by a partial abandonment of the doctrine of ministerial responsibility. To quote the Minister of Justice in 1905:

"My hon. friend argues for ministerial responsibility with respect to the control of the Board of Railway Commissioners. My hon. friend will realise at a glance that the whole principle of the *Railway Act* under which the board was created, is a departure from that principle. The old Railway Committee of the Privy Council carried out the idea which my hon. friend had in mind."[1]

How great a degree of independence is extended to these commissions it is the object of this chapter to indicate. For this purpose no classification or grouping according to function has been followed, but commissions which are the most typical or which present unusual features have been chosen.

*The Board of Railway Commissioners.*

One of the most common types of commissions in Canada is that which includes the Board of Railway Commissioners, the Board of Commerce, the Grain Commission and the Board of Pension Commissioners. The most outstanding function of this type is that of administration—generally the administration of a particular Act bearing on a specific subject—but the Boards also act in most cases in quasi-judicial, advisory, and inquisitory capacities. The constitution, powers and functions of these different Commissions are so nearly identical[2] that it will be quite sufficient for our purpose to concentrate upon the Railway Commission and to omit any detailed account of the others. In some instances, however, points have arisen in connection with one or other of these bodies that have not occurred with the Railway Commission, but which illustrate some principles common to all alike. In such cases brief reference has been made to them in order to throw some additional light on the general type which they represent.

[1] *Can. H. of C. Debates*, Feb. 23, 1905, p. 1610.
[2] Cf. *Can. Stat.*, 2 Geo. V. c. 27. *Ibid.*, 9–10 Geo. V. cc. 37, 43, 45, 68, also *Can. H. of C. Debates*, July 3, 1919, p. 4467.

Before Confederation the policy of the various governments towards the railways was one of *laissez-faire*, and the control exercised was consequently very small. Some of the early charters gave the railway companies power to fix their own tolls,[1] others provided maximum rates with a provision for automatic reduction in tolls should the dividends of the company become too large,[2] while in 1846 a provision was inserted in one charter which prohibited any rate discrimination.[3] A few years later a limited control of tolls and byelaws was placed in the hands of the Governor in Council.[4] In 1851 a new body appeared, called by the now familiar name of the Board of Railway Commissioners.[5] It must on no account be confused with the present Commission; it was purely political in nature, and was composed of four members of the government. Their special duties were to condemn railway bridges, crossings, tunnels, etc.,[6] to pass, modify, or disallow Inspectors' reports,[7] to regulate the speed of trains,[8] and to oversee other matters of railway control.[9] These functions were exercised, however, subject to the approval of the Governor in Council, who had direct control over such matters as tolls and new works of construction.[10] When the Dominion was formed, the same system was continued; the Board becoming officially known as the Railway Committee of the Privy Council, a name which described its actual position much more accurately.[11]

The first Railway Commission in England was established in 1873,[12] and the English example played a very large part in the Canadian movement for a different form of railway regulation. From 1880 to 1886 the Hon. D'Alton McCarthy introduced seven bills to provide for a Railway Commission

[1] *Upper Can. Stat.*, 4 Wm. IV. c. 28, sect. 8. *N. B. Stat.*, 6 Wm. IV. c. 59, sect. 11.
[2] *Lower Can. Stat.*, 2 Wm. IV. c. 58, sect. 36.
[3] *Can. Stat.*, 9 Vic. c. 79, sect. 1.
[4] *Ibid.*, 10–11 Vic. c. 63, sect. 14. *N. S. Stat.*, 16 Vic. c. 1, sect. 73.
[5] *Can. Stat.*, 14–15 Vic. c. 73, sect. 17.
[6] *Rev. Stat. Can.* (1859), c. 66, sect. 185.
[7] Sect. 187.
[8] Sect. 188. [9] Sects. 174, 175. [10] Sects. 28, 138.
[11] *Can. Stat.*, 31 Vic. c. 68, sects. 23–47. *Ibid.*, 42 Vic. c. 9, sects. 35–59.
[12] *British Stat.*, 36–37 Vic. c. 48.

modelled on the lines of that of England, and largely as a result of his activity, a Royal Commission was appointed in the latter year to investigate the matter and to submit recommendations. It reported that the Railway Commission in Great Britain, as then constituted, was by no means satisfactory, and that the Interstate Commerce Commission in the United States was too young a body to form a satisfactory precedent.[1] It recommended, therefore, that the establishment of a Commission be postponed until it was proved a success in other countries, but that in the meantime the powers of the existing Railway Committee should be extended.

"The political constitution of Canada recognises direct ministerial responsibility to Parliament, much more than in the United States, and, therefore, as a Railway Tribunal is necessarily tentative, it seems to them (the Commissioners) undesirable to remove its operation, in its inception, beyond the direct criticism and control of Parliament. At the same time the Commission admit that serious objection may be taken to the selection of the Railway Committee of the Privy Council as the General Railway Tribunal. The members cannot leave their duties at Ottawa, and must, therefore, delegate to subordinates much very important work. . . . They hold their office by a political tenure and are liable to sudden change, whereby the value of their experience is lost. They can scarcely be regarded by the public as so absolutely removed from personal or political bias as independent members of a permanent tribunal. They cannot possibly give their exclusive attention to their railway duties, and in taking upon themselves the duties which would necessarily devolve upon them they would be in fact performing judicial functions."[3]

The recommendations of the Royal Commission were embodied in the Act of 1888[3] and the powers of the Railway Committee enlarged.[4] But the situation was felt to be unsatisfactory;[5] and as time elapsed, the merits and defects

[1] *Can. Sess. Pap.*, 1888, § 8A, pp. 19, 20. The Interstate Commerce Commission was formed in 1887 by the 49th Congress, 2nd Sess. c. 104.
[2] *Can. Sess. Pap.*, 1888, § 8A, pp. 20–21.
[3] *Can. Stat.*, 51 Vic. c. 29.
[4] Sects. 10, 11. Also *Ibid.*, 56 Vic. c. 27. *Ibid.*, 57–58 Vic. c. 53.
[5] "Railway Commissions," *The Week*, March 6, 1891.

of the Railway Commissions in other countries, notably in the United States and Great Britain, became more apparent. In 1898 a motion was carried in the House of Commons that a Railway Commission should be formed in the immediate future,[1] and Professor S. J. McLean was appointed to report upon regulative legislation, rate grievances, and Railway Commissions.

Professor McLean submitted two reports,[2] which reviewed in considerable detail the American and British experience with Railway Commissions, and contained recommendations which formed the basis for the Canadian Commission which was shortly to follow. His solution was an independent commission invested with even more power than the Railway Committee.[3] It would present none of the defects of the latter body: it would be primarily administrative and not political in its functions; it would be composed of men with technical qualifications for the work, who could give all their time to it and who would not change with the government; it would be, finally, a migratory body, conducting investigations throughout the Dominion as the occasion demanded. To the better attainment of these ends, it was suggested that the new Commission should be composed of three members, one a railway man, one a business man, and the third a lawyer. It was to be quite independent of politics: the members were to hold office for life on the same tenure as the judges, and technical qualifications for office rather than political affiliations were to determine the appointments.

The Railway Act of 1903[4] followed for the most part the lines suggested in the above report.

"The proposal," said the Minister of Railways and Canals, "is to abolish the existing Railway Committee of the Privy Council, and to substitute for that body a railway commission composed of members independent of the government, independent of parliament in a practical sense, though not in the broadest sense, and capable, as we think and hope they will be, by experi-

[1] *Can. H. of C. Debates*, March 14, 1898, pp. 1787–827.
[2] *Can. Sess. Pap.*, 1902, § 20A.
[3] *Ibid.*, pp. 38–40, 76–79.
[4] *Can. Stat.*, 3 Edw. VII. c. 58.

ence and ability, of making thoroughly effective the legislation we are now proposing to place on the statute book." [1]

"We have strengthened the hands of the commission we are constituting. We are investing it with larger powers, we are giving it more executive authority, and we have in this respect perhaps gone beyond any legislation which has been passed in any other country up to the present day." [2]

The new body was christened the Board of Railway Commissioners for Canada and was given all the powers previously exercised by the Railway Committee which it displaced.[3] Each Commissioner is appointed by the Governor in Council, holds office during good behaviour for a period of ten years, but is removable at any time by the Governor in Council for cause, with compulsory retirement upon reaching the age of seventy-five. He is eligible for re-appointment.[4] There is to be a Chief Commissioner and a Deputy Chief Commissioner; the opinion of the former on any question of law is to prevail over those of the other members of the Board.[5] No Commissioner is to hold any stocks, shares, bonds, etc., of any railway subject to the Act, or to have any interest in any device or machinery which may be required to be used as a part of railway equipment.[6] The members are to devote all their time to the work of the Commission,[7] and to receive $8,000 each, the Chief Commissioner receiving $10,000.[8] If the Board should require assistance, the Governor in Council may appoint one or more experts having technical or special knowledge to act in an advisory capacity.[9] The Commission is given full jurisdiction to inquire into, hear and determine any application by any interested party respecting violation of or neglect of duty under the *Railway Act* or Special Act of incorporation of a railway, and it may issue injunctions or mandatory orders to ensure compliance with these Acts, having all the powers of a Superior Court in this regard.[10]

[1] *Can. H. of C. Debates*, March 20, 1903, p. 245.
[2] *Ibid.*, p. 247.
[3] *Can. Stat.*, 3 Edw. VII. c. 58, sect. 8.
[4] *Ibid.*, cf. *Can. H. of C. Debates*, June 1, 1903, p. 3855.
[5] Sects. 8–10. [6] Sect. 11. [7] Sect. 13.
[8] Sect. 20. [9] Sect. 21. [10] Sect. 23, sub-sect. 1.

The Board is empowered to conduct certain investigations upon its own initiative, or upon the request of the Minister of Railways.[1] It may issue orders and regulations respecting speed of trains, use of whistles, car couplings, shelters for employees, signals, rolling stock, etc.[2] Any decision or order of the Board may be made an order of the Exchequer Court or of any Superior Court of any province and shall be enforced as such.[3] On a question of law an appeal may be made on motion of the Board to the Supreme Court of Canada, which shall report its decision to the Board.[4] The Governor in Council may at any time change or rescind any order, rule or decision of the Board.[5] Decision by the Board on questions of fact are binding upon all parties and in all courts.[6] An appeal shall lie from the Board to the Supreme Court of Canada on a question of jurisdiction, and on any question which in the opinion of the Board is a question of law.[7]

The position of the Railway Commission has been somewhat altered since 1903, though in essentials it remains unchanged. The scope of its action has been extended,[8] the membership has been increased from three to six, and provision has been made for the Board to hold different sittings at the same time.[9] An Assistant Chief Commissioner has been inserted between the Chief and Deputy Chief Commissioner.[10] Anyone is eligible for the post of Chief Commissioner who is a judge of a Superior Court in Canada or a lawyer of at least ten years' standing. Anyone is eligible for the post of Assistant Chief Commissioner who has complied with the Chief Commissioner's qualifications or who is a lawyer with ten years' experience on the Board.[11] The process of removal has been altered, a joint address of both Houses being necessary before the Governor in Council can remove.[12] The salary of the Chief Commissioner is now

[1] Sect. 24. [2] Sect. 25. [3] Sect. 35. [4] Sect. 43.
[5] Sect. 44, sub-sect. 2. [6] Sect. 23, sub-sect. 2.
[7] Sect. 44, sub-sect. 3.
[8] *Rev. Stat. Can.* (1906), c. 37. *Can. Stat.*, 9–10 Geo. V. c. 68.
[9] *Ibid.*, 7–8 Edw. VII. c. 62. [10] *Ibid.*, sect. 2.
[11] *Can. Stat.*, 9–10 Geo. V. c. 68, sect. 10.
[12] *Ibid.*, sect. 9.

$12,500; that of the Assistant Chief Commissioner $9,000; that of the other members $8,000.[1]

There have been, therefore, two quite different bodies that have exercised approximately the same functions in railway administration at different periods in Canadian history. The earlier body, the Railway Committee of the Privy Council, was purely political; it was composed of members of the government, and was directly responsible to parliament for its actions. Its successor, the Railway Commission, is non-political; its members are in no way connected with the government, and they are virtually irresponsible so long as they act within their jurisdiction. It was expected that the faults attributed to the Railway Committee would not re-appear in the independent non-political body that was its successor, and an examination of the history of the Railway Commission shows that these hopes have not been unfounded.

The first point brought against the old Railway Committee by Professor McLean was that its *personnel* was political, and that it was compelled to combine both political and administrative functions. Any possibility of the latter contingency arising has been prevented by a definite statement in the Act that the Commissioners shall have no other occupation, and shall devote their whole time to their duties.

The appointment of the members of the Commission, however, has remained with the government, and political affiliations have never been entirely absent in the nomination of men for the post.[2] Since 1904 there have been fourteen Commissioners appointed, nine of whom might be termed active politicians, some having even been members of the Dominion cabinet. Of the remaining five, all were of the same political persuasion as the appointing government, but had taken no more than a passive part in politics. It is a significant fact that this five includes the best and most eminent of those who have occupied the position, and these members have been largely responsible for the high place that the Commission holds in the public estimation. The political connection, however, has invariably ceased with

[1] *Can. Stat.*, 9–10 Geo. V. c. 68, sect. 26.
[2] *Can. H. of C. Debates*, Jan. 26, 1910, p. 2439.

the appointment, and there has been no suggestion of a rumour that the members of the Commission were in any way under government control or influence.

The next criticism made by Professor McLean against the Railway Committee of the Privy Council was its lack of permanence and consequent lack of continuity in policy. The steps taken by the Railway Act of 1903 to ensure a long and stable tenure to the Commission have been outlined above; and the tendency has been during the intervening years to make this even more secure. In 1905 the Act was amended in order to secure the services of the Hon. A. C. Killam, Judge of the Supreme Court of Canada, by providing that a joint address of both Houses of Parliament should be necessary to remove the Chief Commissioner if he had been a judge previous to his appointment.[1] "The new chairman of the Railway Commission," said Sir Wilfrid Laurier, "will be more secure, more independent of the government, more independent of everybody, and more distinctly liable only to his own conscience than before."[2] This provision affected the Chairman alone, and a later amendment provided that a joint address should be necessary in order to remove any member of the Board. There has been no attempt up to the present time to remove any Commissioner from office, and there is every assurance that this clause will be used with the same caution as obtains in the case of the judge.

It will be noted that the recommendation of Professor McLean in favour of life tenure was abandoned for one of ten years. At first glance this would not appear to have militated against the success of the Board. Four Commissioners have been eligible for re-appointment: one received it; two would have been unable on account of age to complete a second term, and were therefore not re-appointed; the fourth was dropped, presumably for political reasons or because of inefficiency. But the ten-year tenure has disadvantages which lie below the surface, the greatest of which is that it is apt to prevent a really first-rate man from accept-

[1] *Can. Stat.*, 4–5 Edw. VII. c. 35.
[2] *Can. H. of C. Debates*, Feb. 3, 1905, p. 515.

ing the position. The salary offered is good; but the attraction can be made doubly strong if the Commissionership carries with it the security and dignity of a judicial tenure. The ten-year clause has as its sole justification that it enables the government to dispose quietly of mediocrity or inefficiency, a claim that could also be advanced in the case of the judiciary. But the life tenure, as has been already indicated, is the best security against second-rate men, provided the appointments are properly made. The retention of the ten-year clause, therefore, creates the conditions for the same disease which it is meant to cure.

Although the tenure of the Railway Commission is not yet perfect, it is an immense improvement on the precarious political tenure of the old Railway Committee. This change has undoubtedly been reflected in the greater continuity of the Commission's policy, and the increased public confidence in its work. "In the matter of railway regulation," said Professor McLean in 1902, "there is a tradition, as well as a continuity of policy which is essential."[1] The Commission has realised both these aims, and by establishing its own precedents and recognising its own decisions as binding, has constructed an entire system of railway administrative law. When the creation of a Railway Commission was suggested in 1881, grave doubts were expressed as to whether such a body would be able to command the confidence of the public. One member of the House stated that:

> "It would be a matter of very great difficulty to any government to choose in this country men whose judgments in the important matters which would be referred to them, would be entirely free from the suspicion on the part of one party or the other, that they were influenced by other considerations than the public interest, or the abstract principles of justice applicable in such cases. It might be that we could find men who would discharge their duties just as thoroughly and impartially as in any other country, but you could not persuade the public or the railway companies respectively, that in a judgment given against them some improper influence had not been brought to bear upon any men, one can think of, as likely to aspire to such an office as is proposed in this Bill."[2]

[1] *Can. Sess. Pap.*, 1902, § 20A, p. 75.
[2] *Can. H. of C. Debates*, Feb. 17, 1881, p. 998.

This gloomy foreboding has proved quite unfounded. Partly due to the non-political nature of the Board, and partly because of the tradition it has been able to establish as a result of its independent position, the Commission to-day has a reputation for ability and equity and enjoys the public confidence to an extent unsurpassed by any court in the Dominion.[1] It must be remembered, however, that the tendency of the Board in the past has been in the direction of a stricter regulation and supervision of the railways, which has been largely due to the exceptional freedom previously enjoyed by the latter. There will probably be an increasing emphasis in the future on the rights of the railway companies, and public opinion of the Board may diminish accordingly.

A further objection that was raised in 1902 to the Railway Committee of the Privy Council was that its members had no technical qualifications for the rôle which they were called upon to perform. It was urged that the new Commission should include a lawyer, a business man and one versed in railway affairs, and that care should be taken to prevent it becoming predominantly legal.[2] This balance has been fairly well maintained, though the present Commission may lean too much towards the legal profession. Yet a large part of the duties of the Board are quasi-judicial and the Act insists that the Chief and Assistant Chief Commissioners should have legal training—a pre-requisite which is essential if they are to over-rule the other members on a matter of law.[3] The House of Commons, however, was not content with legitimate restrictions on the choice of members, and in 1909 it placed itself on record as favouring the appointment of one " who is acquainted with western railway conditions." [4] Since that time it has been deemed advisable to have one Commissioner on the Board as a representative of the western provinces. It is very necessary that two members of the Commission should have a thorough

[1] *Can. Law Jour.*, 1912, p. 313. *Ibid.*, 1913, p. 319.

[2] *Can. Sess. Pap.*, 1902, § 20A, p. 77. Cf. *Can. H. of C. Debates*, June 1, 1903, p. 3856.

[3] *Can. Stat.*, 9–10 Geo. V. c. 68, sect. 12, sub-sect. 2.

[4] *Can. H. of C. Debates*, March 15, 1909, pp. 2659–70. For a similar attitude on the membership of the Board of Commerce, see *Ibid.*, Sept. 19, 1919, pp. 449–51. *Ibid.*, Sept. 30, 1919, pp. 698–706.

legal training; it is also advisable to have a business man and a railway man on the Board; but there can be little justification for the claim that conditions in Western Canada are so exceptional that a special representative must be guaranteed to those provinces. All restrictions upon the choice of *personnel* are *prima facie* bad, and they should be avoided except where some very material advantage is to be gained.

These three points, the mixture of political and administrative functions, the lack of permanency and continuity of policy, and the absence of technical qualifications, were the chief objections raised by Professor McLean to the Railway Committee of the Privy Council. They have all ceased to be valid grounds of complaint against the later Board of Commissioners, as have also the other objections to the old Committee, expense and immobility. These two latter faults, however, might conceivably have been overcome by a better organisation of the older body; but no amount of organisation could have cured the Railway Committee of the three major ills above noted. That could only be done, as it was done, by eliminating the political element and creating a body independent of government control and supervision. It has already been pointed out that the independence of the Commission has brought advantages which were not possible under the old system, and it has been partially shown what expedients have been adopted to create that independent position itself. It remains to discuss a few more of these expedients, and to see what amount of freedom has been granted the Commission in the exercise of their functions.

The Board of Commerce [1] furnishes an interesting illustration of the manner in which salaries of this type of commission should be paid. The Act creating the Board provided that the members should receive such salaries "as may be determined by the Governor in Council." [2] This was felt to be unsatisfactory; and the Minister of Justice subsequently introduced a Bill which explicitly stated the amount of their

[1] The Board of Commerce was created under *Can. Stat.*, 9–10 Geo. V. c. 37.

[2] *Ibid.*, sect. 19, sub-sect. 1.

remuneration. He justified the alteration on the grounds that the Board was a court, that the Commissioners were therefore analogous to judges, and that their salaries should be fixed by statute and the members made more independent of the government.[1]

"Such a board," said he, a few days later, "must not be in a position of rendering its decisions under supervision of the Governor in Council, and with perhaps a suggested power to change their salaries if we do not like their judgments. An element of independence is, I think, essential to the satisfactory working of any board of this kind."[2]

While not preserved from criticism in parliament to the same extent as the judges, the Boards and Commissions of this type are treated with marked courtesy and moderation by the members of both Houses. On one occasion when some uncomplimentary remarks were made in the Commons in reference to the Board of Commerce, the Chairman of the Committee sustained the claim that such remarks were improper because of the quasi-judicial status of the Commissioners; though he later withdrew his ruling on the ground that their tenure and removal were not the same as a Supreme Court judge.[3] A quasi-judicial status was, however, conceded to the same Board on June 29th, 1920, by the Acting Speaker of the House:

"I do not think it is within the province of an hon. member to refer to a member of this board, which is practically a court of record, as being a creature of the Government. Such a personal reflection upon a member of the board is entirely out of order."[4]

The Board of Commerce in particular has shown itself quite capable of protecting itself outside the House from reckless attacks upon its motives, and it has not hesitated to use its powers as a court of record to maintain its dignity and authority. To quote its own statement in a recent case:

[1] *Can. H. of C. Debates*, Sept. 19, 1919, p. 444. *Can. Stat.*, 9–10 Geo. V. c. 68, sect. 26, guarantees the salaries of the Railway Commissioners in the same way.
[2] *Can. H. of C. Debates*, Sept. 30, 1919, p. 708.
[3] *Ibid.*, Sept. 19, 1919, pp. 449–52.
[4] *Ibid.*, June 29, 1920, p. 4483.

"The members of the Board have in their charge as a trust, for the time being, the authority and dignity of the court wherein they have been appointed to preside. The trust is not of a personal character and it is their duty to inviolably (*sic*) preserve it. They must, in due course, hand over to their successors, unimpaired by reason of any neglect or cowardice on their part, the authority which has been reposed in them. . . . The Board, within the limits now laid down, can hardly avoid noting, and, if necessary, punishing, any serious attempts to disparage it as a court or to intimidate its members in the performance of their duties." [1]

Mock obeisance only is given to the principle of ministerial responsibility; in fact, any political responsibility might be said to be non-existent. The government maintains control in two ways: I. It has the power of appointment and of removal. II. It may (acting through the Governor in Council) vary or rescind any order, rule, regulation or decision of the Board upon appeal.[2] The government's responsibility for appointment ends when the nomination is made, and, as has been pointed out above, the removal clause of the Act is either inoperative or quiescent. There remains the appeal to the Governor in Council. As a matter of history, from February 1904 to December 1918, twenty-three appeals were made from the decision of the Railway Commission, of which fourteen were dismissed, one withdrawn, two referred back to the Board, five were pending, and only one was allowed.[3] The government has clearly indicated that it is extremely loath to interfere with the work of the Board, and that only in exceptional matters of policy will it overrule a decision.

"In connection with the administration of the work of the Railway Commission the Governor in Council has followed about this rule, if I am able to define it correctly, they would not interfere with a judgment of the Railway Commission unless it appeared that certain elemental and relevant facts had not been taken into consideration; in which case—so far as I am aware, always, but I know very generally—they referred the case back for the renewed consideration of the Railway Commission.

[1] *Ottawa Journal*, Dec. 4, 1919.

[2] *Can. Stat.*, 9–10 Geo. V. c. 68, sect. 52.

[3] McLean, S. J., *Modern Business*, p. 43. Cf. Order in Council, § 1266, May 10, 1912.

Whatever reasons existed for the retention of that appellant or supervisory power over the Railway Commission exists in this case (i.e. the Board of Commerce) particularly in the earlier stages of the operation of the Act; it is a sort of balance wheel that may be called into play where that appears to be absolutely essential in the public interest." [1]

It is interesting to note that the Minister who made the above statement was the Premier a year later when the Government over-ruled an order of the Board of Commerce on sugar prices. The reasons assigned for such drastic action were: 1st. The order of the Board was *ultra vires.* 2nd. If it were not *ultra vires,* it exceeded the powers that were intended to be given the Board. 3rd. The order was not in accord with the spirit of the Act. The entire Board of Commerce resigned on October 22nd, 1920, as a result of the Government's over-ruling, and it was decided to appoint no new members until the legal status of the Board was established beyond question. [2]

The government has not only been extremely cautious in the use of the right to over-rule, it has stated very definitely the relationship between it and the Commission, in some cases even going so far as to insist on the analogy between the independence of the Commission and that of the judicial courts.

"The hon. member is quite mistaken in saying that this Board (the Board of Commerce) is under a department of the Government. The board is a court and the members are no more under a department of the Government than the judges of our courts are under the Minister of Justice simply because they are appointed on his nomination. This Board exercises the functions conferred upon it not under instructions from the Government but in accordance with the judgment of its own members." [3]

The Board of Commerce was no less explicit as to what it would do if the government attempted to interfere with its work or to influence its members.

[1] Hon. A. Meighen, Minister of the Interior, *Can. H. of C. Debates,* July 4, 1919, p. 4563.
[2] *Ottawa Journal,* Oct. 23, 1920. *Ottawa Citizen,* Oct. 15, 21, 1920.
[3] Hon. C. J. Doherty, Minister of Justice, *Can. H. of C. Debates,* Sept. 19, 1919, p. 446.

"It (the Board) cannot properly function if it be even assumed that it is subjected to influence or to fear. It is an independent body created by Parliament and free of government control. No government control has been attempted. If it were attempted the board would resent and disclose the attempt. This reference is made because government control of the board has been at times alleged. The Government may reverse the board's findings of fact upon appeal, but the board has and has been accorded entire freedom of action as by statute provided." [1]

This statement of the Board acquires additional significance in the light of subsequent developments. On February 23rd, 1920, ex-Judge Robson, Chairman of the Board, resigned. On June 15th, 1920, the Vice-Chairman resigned, which was followed on June 24th, 1920, by the resignation of the remaining member. The latter, Mr. James Murdock, publicly charged that certain members of the cabinet were endeavouring to nullify the work of the Board in its efforts to regulate prices, and he also made grave charges against the past Chairman of the Board.[2] The matter was aired in the House; but the Government refused an enquiry on the grounds that the charges were too indefinite. "We exercised," said the Premier, "and could exercise, no control or direction over the members of that commission, they were given a certain status so as to render them absolutely independent of the Government." [3]

The Railway Commission (as well as others of the same type) is primarily an administrative body, forming and applying regulations under the existing acts of parliament. It supervises the inspection of the railways, exercises a general oversight over the construction of new lines, passes upon all freight and passenger rates, and, in short, regulates every phase of railway activity. As a consequence of this function, it must often act in a quasi-judicial capacity by hearing and deciding disputes and complaints that may arise. It is also to a certain extent an inquisitory body, conducting investigations on its own motion or preparing

[1] *Ottawa Journal*, Dec. 4, 1919.
[2] *Ottawa Citizen*, June 25, 1920. *Ibid.*, June 26, 1920, edit.
[3] *Can. H. of C. Debates*, June 29, 1920, p. 4471. See *Ibid.*, pp. 4466–501.

reports for the Governor in Council, in which latter instance it also assumes the character of an advisory Board.

Briefly, then, the Railway and kindred Commissions are primarily administrative, secondarily quasi-judicial, and lastly, inquisitory and advisory. The membership of such a body must be reasonably small, both because of the nature of the work to be done and also in order that a coherent policy may be maintained. This fact was recognised by parliament in 1851, when it took the matter of railway regulation out of its own hands and placed it in those of the old Board of Commissioners. But this body in turn failed to meet the demands made upon it. It was political; it was obedient to the whim of parliament, and it changed with every government. Its members lacked the technical fitness, the aloofness and the judicial temper which are necessary to the successful performance of its functions. They were politicians, primarily interested in the party contest; railway administration was a matter to be attended to in spare moments, and then always in a political atmosphere. The result was the formation of the present Commission, a body not only exercising great powers, but exercising them in almost complete detachment and isolation from the government. The members are experts in railway law and administration and quasi-experts in matters of technical engineering detail; in the former capacity they act on their own knowledge obtained by their training and past experience, in the latter capacity they decide questions after a consultation with the expert engineers and statisticians on their staff.

This new type of organisation, ushered in by the Railway Commission, has proved so successful that it has been copied in other branches of administration, such as the regulation of grain, pensions and commerce. The Board of Commerce has been the one conspicuous failure in the group, a failure which may be attributed to several causes. In the first place, the form of organisation was not suited to the work that it had to perform, as the *Combines and Fair Prices Act* [1] could only be successfully administered by a govern-

[1] *Can. Stat.*, 9–10 Geo. V. c. 45.

ment department or a body in intimate touch with the government itself. The work of the Board was necessarily of a very controversial nature, and brought the Board into constant conflict with either the manufacturers on one hand or the consumers on the other. The membership of the Board of Commerce was never of as high a character as the Railway Commission, nor did it possess the knowledge of economics that was necessary for so delicate a task. Finally, there were always grave doubts as to the extent of its jurisdiction and the legality of many of the orders it issued.[1] As a result of all these faults, the Board never possessed the public confidence; it was always compelled to stand on its dignity rather than on its deeds, and when the resignation of the entire body was announced in the latter part of 1920, the public welcomed rather than regretted its sudden demise. Its short history, however, has not been valueless. It has afforded a practical example of the folly of adopting a stilted form of organisation to meet any new administrative problem that may arise, without paying sufficient attention to the peculiar nature of the questions with which that organisation may have to deal.

### *The Commission of Conservation.*

The Commission of Conservation is quite different from any other body in Canada in its functions, organisation and aims. The formation of such a body having been recommended by the North American Conservation Conference, it was created by Canadian statute in 1909.[2] The Act provides that the Commission shall consist of *ex-officio* members and those appointed by the Governor in Council. The *ex-officio* members are the Ministers of Agriculture, Mines, and the Interior of the Dominion, and the member in each provincial government who is charged with the administration of the natural resources of that province. The members appointed by the Governor in Council hold

[1] The Judicial Committee finally decided that both the *Combines and Fair Prices Act* and the *Board of Commerce Act* were *ultra vires.*—*Halifax Morning Chronicle*, Nov. 12, 1921.

[2] *Can. Stat.*, 8–9 Edw. VII. c. 27.

office at pleasure. They are twenty in number, of whom "at least one member appointed from each province shall be a member of the faculty of a university within such province, if there be such university."[1] The Commission holds one regular meeting a year.[2] No fee or emolument is to be paid to any member save to cover his reasonable expenses.[3] "It shall be the duty of the Commission to take into consideration all questions which may be brought to its notice relating to the conservation and better utilisation of the natural resources of Canada, to make such inventories, collect and disseminate such information, conduct such investigations inside and outside of Canada, and frame such recommendations as seem conducive to the accomplishment of that end."[4] The Commission has the direction of a permanent expert staff, and it may also employ such assistants as are necessary for the purpose of any special work or investigation.[5] It is to report to the Governor in Council at the end of each fiscal year.[6]

The original Act has since been amended,[7] of which amendments the two following may be noted. Any Committee of the Commission may, with the approval of the Chairman of the Commission, exercise all the powers of the whole body under Section 12 of the original Act.[8] The Commission shall report from time to time to the Senate or the House of Commons at the direction of either House.[9]

The most noticeable thing about the Commission is the number and catholicity of its membership. Twelve *ex-officio* members and a score of others make a House of Parliament rather than a Commission. Almost every profession is represented; professors of physics, classics and science sit with a lumber merchant, a journalist, a railway magnate and a Minister of the Crown. A few members might be called experts, such as the deans of the faculties of forestry or applied science; but the remainder cannot pretend to have any special knowledge on conservation. A Minister of Agriculture or Mines, though nominally expert,

[1] Sects. 2–4. [2] Sect. 7. [3] Sect. 9.
[4] Sect. 10. [5] Sect. 12. [6] Sect. 13.
[7] *Can. Stat.*, 9–10 Edw. VII. c. 42. *Ibid.*, 3–4 Geo. V. c. 12.
[8] *Ibid.*, 9–10 Edw. VII. c. 42, sect. 5. [9] Sect. 6.

is in reality much more of an amateur than some other members with less pretentious titles. The *ex-officio* members hold office on a very precarious tenure, the whim of a legislature; the others hold office nominally at pleasure, but in reality during good behaviour. All the members owe their appointment to politics; but while some are leaders of governments, others scarcely know the names of the political parties. Superficially the Commission is a non-partisan body; in reality it contains representatives of every party in the Dominion.

How does this extremely composite body endeavour to conserve Canada's natural resources? It meets once a year for a prolonged session of two days. During this time the Commission listens to addresses given by its experts, its own members, and a few outsiders, and breaks up into committees which later report to the Commission as a whole. These Committees deal with the following subjects: Fisheries, Game and Fur-bearing Animals, Forests, Lands, Minerals, Press and Co-operating Organisations, Public Health, Waters and Water Powers. The Commission passes recommendations as to the work to be done by its staff of experts, and then disbands to meet the following year. Occasionally, in the interval, some of the Committees may meet, though such meetings are extremely rare because of the great difficulty of getting the members together.

One function of the Commission which has given rise to much criticism is that of reporting upon a Bill which has been referred to it by parliament. In 1910 a Bill for the incorporation of the St. Lawrence Power Transmission Company provoked a hot debate in the Commons. It was referred for an opinion to the Commission of Conservation, which reported against its chief clauses.[1] As the actual Commission was at this time scattered throughout Canada, a private member raised the pertinent question as to who composed "the Commission" which had made the report.

"The practice is growing up in the committees of referring matters to what is called the Conservation Commission; that is, referring them practically to the chairman of the Conservation

[1] *Can. Ann. Review*, 1910, pp. 247–48.

Commission. I recognise that the chairman is a man of very exceptional ability, but that alone does not constitute a reason why we should leave matters of important legislation to him. The question of ability is not the sole question. I have a very serious objection to that method. . . . For a time the chairman may recommend things that seem to be in the line of conserving the public interest, and the opposition will say it is very willing on these occasions to adopt them, but we have no guarantee that on other occasions the chairman will not recommend the adoption of a Bill which is a very dangerous Bill. . . . I do not wish to attack either the Conservation Commission or the chairman of that Commission, but I say that in principle it is wrong. We are delegating our duties to a Commission which has no responsibility, because we cannot consider that Mr. Sifton as chairman of the Commission is filling a responsible position in the sense of being a member of this House, although he happens to be a member. . . . The most valuable work of the Commission will be to deal with general cases, not in reference to a particular instance or particular Bill.." [1]

There can be no question but that the practice of referring Bills to the chairman of the Commission (who in this case was also a member of the House) is a mistake. Even if an attempt were made to call the Commission together for the purpose of considering such a reference, the members who lived at Ottawa would probably exercise a preponderating influence, and an unbiased judgment would be impossible. The opinion of a small body of experts sitting constantly at Ottawa would be very valuable ; but the present Commission is differently constituted. The political proclivities of some of the members, the lack of specialised knowledge, and the scattered membership should make parliament extremely cautious in referring questions to the Commission for decision. To do so is not only useless but dangerous ; for it hides ignorance and prejudice under a cloak of knowledge and independence.

The Commission of Conservation has hardly a point in common with a body like the Railway Commission. It has no executive or administrative functions ; it is an advisory body, which collects information, and gives it to the country or to parliament in the form of reports and recommenda-

[1] *Can. H. of C. Debates,* March 14, 1910, pp. 5482–83.

tions; it collects scattered information and concentrates it upon one point—the conservation of natural resources. It has no coercive power; it may see and speak but not act; like the priests of humanity of Auguste Comte, it persuades rather than commands, its influence rests on education and publicity not on statute or Order in Council.

It can scarcely be said that the Commission has been an unqualified success; indeed most people in Canada would say that it has been an unqualified fraud. As a matter of fact, while the Commission has done some good work, it undoubtedly might have done a great deal more had it been differently organised. One outstanding fault is its size. Mr. Lloyd George, with his usual gift for metaphor, has said that "you couldn't run a war with a Sanhedrim," and he reorganised his cabinet accordingly. It is equally impossible to have an effective Commission, if you insist upon a membership of thirty-two in a body whose functions are supervisory and advisory, and which meets but two days during the year. A debating society might be an admirable model if the Commission had a session of a couple of months and was ruled by an executive of five or six. The business would be done and might conceivably be done well. But when twenty or thirty busy men get together for two days to review the work of a year and to map out the work for a similar period, it is a happy accident if anything is done at all.

Another objection to the present Commission is its lack of *expertise*. If it is to advise the government and the people as to what measures of conservation ought to be adopted, it must do so with all the authority that comes from a specialised knowledge. The members of the government do not desire the advice of laymen—that they can supply themselves—but they do need the suggestions of experts. The majority of the present Commission are laymen of different descriptions. The scientist speaks in the terms of his science, the journalist replies in a jargon equally unintelligible, and the professor of classics cannot forbear to illustrate his point on the conservation of the forests

by a quotation from the *Georgics*. The members have nothing in common save that they are on a board whose object is to conserve the natural resources; how this conservation is to be attained, they have but the vaguest ideas. The few technical minds find themselves hopelessly outnumbered by those who are ignorant of the real problems to be faced. The Commission also lacks accurate knowledge as to the needs which exist and the questions of research that demand investigation. A few years ago, it was suggested that the Commission begin a research on the utilisation of fish waste. The idea was accepted, the research carried out, and results presented which had been known and practised in England twenty years before.

The great defect in the Commission is that its members have too much independence and independence of the wrong kind. It is a comparatively small fault that they have no political responsibility. Nine of them are quite independent of Ottawa—in the year 1920 they were all politically opposed to the Federal Government. Twenty other members hold office at pleasure; but are in reality irremovable and not politically responsible for their actions. The remaining three form part of the Dominion Government itself. It has been shown, however, in previous chapters that this lack of political responsibility is not in itself an insuperable obstacle to efficiency. But the chief trouble with the Conservation Commission is that its members have also very little moral consciousness. There is no great honour attached to the post, no salary to stimulate their efforts, no arduous duty to perform, no dignity or tradition to maintain, no vivid sense that the members are really doing very much good by meeting together year after year. They are the twentieth-century counterpart of Jeremy Bentham's country justices:—

> "The country justices are all gentlemen: their mess like the member of parliament's, is all sweet without bitter, all power without obligation. What they vouchsafe to do, the country is to think itself obliged to them for: they do just as much as they like, and as they like it, and when they like it." [1]

[1] *Judicial Establishment*, Chap. V. Tit. III., *Works* (1843), IV. 376.

The cumulative effect of these faults in the constitution of the Commission of Conservation is that it is on the whole a useless body and had better be abolished. An examination of the work that it performs points to the same conclusion. The Department of Agriculture should cover the Commission's work on Forests and Lands; the Department of Mines that on Minerals; the Department of Fisheries, that on Fisheries; and the Dominion Board of Health, that on Public Health. The only functions of the Commission left are those of Water Powers and Publicity. The former could easily be handled by one of the Dominion departments or by the provincial Public Utilities Boards, the latter by a branch of the Dominion Stationery Office. Each department in the government is much better qualified to choose subjects for research and investigation than is the Commission; and it is as well, if not better equipped to carry them out.

If such a complete annihilation of the Commission of Conservation is too drastic and it is desired to retain some such body for purposes of co-ordination amongst the various government departments, the suggestion of Sir George Murray might be adopted. His proposal was a commission of three, or at most five, members:—

"Who should devote their whole time to the work, and who should be assisted by a staff of the best experts procurable either in Canada or elsewhere. Their functions should be (*a*) to initiate and work out—but not to execute—schemes for the utilisation in the future of the natural resources of the country; (*b*) to examine and report upon every scheme affecting these resources, whether promoted by the Government or by private parties, before it is sanctioned by Parliament; and (*c*) to train up a body of technical experts who could be transferred, as opportunity offered, to the permanent service in any Department in which they were required. The Commission would in short be a thinking, planning, advising, and training body, with no executive functions. It should be directly responsible to and under the general control of the Prime Minister." [1]

A still further alternative would be a scheme whereby the departments might work in conjunction with such a

[1] *Can. Sess. Pap.*, 1913, § 57A, p. 25.

body as that proposed by Sir George Murray. The objection to abolishing the Commission and assigning its duties to the ordinary departments is that there would be no means whereby pressure could be brought to bear upon the latter to compel them to do the work. If Sir George Murray's Commission were set up, it could see that the departments carried out their duties, which would largely consist of making reports to the Commission as to the various problems of conservation that demanded research. The Commission could then proceed to co-ordinate the different branches of work and fulfil the other functions as suggested by Sir George Murray.

### *The Transcontinental Railway Commission.*

This Commission, though no longer extant, presented in its lifetime at least two points of exceptional interest. It furnished a good example of the relationship that may exist between an independent body and the government on financial matters, as well as the relations of that body to the staff of experts under its supervision.

The aim of the Government which created the Commission was to provide a body to supervise the construction of the eastern half of the transcontinental railway.[1] The Commission consisted of a chairman and three members, who received $8,000 and $7,000 each respectively. They held office for an indefinite term at the pleasure of the Governor in Council.[2] The statute thus placed the Commission in a certain sense under the Government, and made its members dependent upon the ministry for their tenure of office. This point was seized by the Opposition and the whole matter of the constitution of a commission debated in the House. Mr. Monk claimed that—

"The object of the creation of a commission ought to be to make it independent of the government, but that is not so in this case. These commissioners hold office during pleasure and their appointment is revocable at the will of the government. They are absolutely under the control of the government, holding

[1] *Can. Stat.*, 3 Edw. VII. c. 71. [2] *Ibid.*, sect. 9.

no greater measure of independence than an employee of the Railway Department." [1]

This statement the Minister of Finance denied. He held, in the first place, that a commission such as the one contemplated would have to spend such vast sums of money that complete independence was undesirable, and that responsibility to parliament must be enforced. He also explained that there is a difference between a commission, however precarious its tenure, and an ordinary official in a government department: the latter is immediately under the direction of a minister, whereas the commissioner has a degree of freedom and initiative which cannot be given to the ordinary government official.

"The situation," he concluded, "is that, while you employ gentlemen of ability and independence to do the work, if at any moment their conduct is inconsistent with the public interest, you have the power to remove them." [2]

The Minister of Finance showed a thorough grasp of the general principles underlying the functions of commissioners. He correctly stated the chief distinction between the civil servant and the commissioner, as well as the advantages to be obtained from the latter. He considered that the degree of independence that should be accorded to a commissioner depended on the amount of money that was to be spent; and while this cannot be accepted as the sole criterion, it remains generally true that where large disbursements have been made the reins of control have been tightened.[3] Parliament may abandon or delegate many of its powers; but it is generally considered that the power of the purse must remain in its hands. The proposed organisation of the Commission provided for dependence in law, though this might be, as indeed it was, stretched to virtual independence in practice. One example of this may be cited. In 1906 the Minister of Finance wrote to the Commission and strongly urged that it should abandon the

[1] *Can. H. of C. Debates*, Sept. 15, 1903, p. 11303.
[2] *Ibid.*, pp. 11306–07.
[3] The Transcontinental Railway Commission spent in seven and a half years over $116,000,000. *Can. Sess. Pap.*, 1913, § 37, p. 56.

severe conditions under which it had been letting contracts. The Commission ignored his advice, and continued to impose the same conditions as before.[1] No further action appears to have been taken by the Government.

The second interesting point that occurs in the history of the Transcontinental Railway Commission is the relation of that body to the experts under its supervision. The original appointments to the Commission were criticised by the Opposition on the ground that the members had no previous experience of railway construction. The reply of the Government was that all the Commissioners were shrewd business men with experience in finance and public administration.[2] It was expected that their lack of special knowledge would not be a severe handicap, for they were to be assisted on matters of technical difficulty by a staff of competent engineers.[3]

According to the interim report of the Board, the theoretical scheme as to the relation between the Commission and the experts was working well in practice:—

"The Board," says the report, "meets every week-day when a quorum of two Commissioners is in town. The chief engineer attends all Board meetings, takes part in the deliberations, and aids the Commissioners by his opinion and advice upon all matters. . . . Appointments to the engineering staff have been made by the Commissioners, in consultation with the chief engineer." [4]

In 1907 the first signs of friction arose when A. E. Hodgins, one of the District Engineers, was dismissed. A few months later he announced that the difficulty between the Commission and himself had been one of classification of material:—

"They wanted me," said he, "to change my ideas, based on a good many years' experience on construction, to classification that is allowed to the contractors in Quebec. . . . I refused to be more liberal in classification than I was then allowing, and

[1] *Can. Sess. Pap.*, 1914, § 123, p. 20.
[2] *Can. Ann. Review*, 1904, p. 101. *Toronto Mail*, Aug. 27, 1904, edit.
[3] *Can. H. of C. Debates*, Nov. 29, 1909, p. 630.
[4] *Can. Sess. Pap.*, 1905, § 62c, pp. 8, 10.

suggested that the Commissioners, not being railroad men, should leave the engineering department alone." [1]

In 1909 the Chief Engineer resigned, because of a difference of opinion which also arose on a question of classification. It later developed that one reason for this step had been that the Chief Engineer believed that the Commission would not give him their support on the matter under dispute.[2]

The Transcontinental Railway Commission was a failure; and the chief cause was a lack of knowledge on the part of its members. A Royal Commission, which investigated the whole history of the railway, reported that until 1911 "no member of the Commission had any experience or knowledge of railway building or operation." [3] In the method of inviting tenders, in the awarding of contracts, in the construction of bridges, buildings, stations, sidings, and in countless other ways, the Commission showed their ignorance of railway construction as well as a total disregard of economy.[4] The result was that at least $40,000,000 was needlessly expended in the building of the road.[5]

The inefficiency of the Transcontinental Railway Commission is therefore directly traceable to the ignorance of its members. The question that gave the most trouble, the classification of material, was one that could only be decided by those well versed in railway construction, and the same difficulty was experienced in a great number of other problems that arose. It does not necessarily follow that highly trained experts would have made the best Commissioners; but the Board should have contained one such expert, or, failing that, two or three members who were familiar with railway construction and who could, after receiving the advice of their engineers, arrive at a sound decision on matters of technical difficulty.

[1] *Can. Ann. Review*, 1908, p. 70. Cf. *Can. H. of C. Debates*, July 8, 1908, pp. 12265–388.

[2] *Can. Sess. Pap.*, 1910, § 42A, pp. 28, 48. *Can. H. of C. Journals*, 1908, App. § 3, pp. 316–17.

[3] *Can. Sess. Pap.*, 1914, § 123, p. 5.

[4] *Ibid.*, pp. 6–139.

[5] *Ibid.*, p. 12.

*The Ottawa Improvement Commission.*

The Ottawa Improvement Commission was created in 1899.[1] In its present form it is composed of eight members, one appointed by the City of Ottawa and seven others appointed by the Governor in Council. All hold office at the pleasure of the appointing power.[2] They receive no salary, but are paid for their actual expenses incurred in the discharge of their duty under the Act.[3] The Commission may purchase, acquire and hold real property for parks, streets, drives, etc., and may expropriate land; they may prepare, build, repair, and maintain all works under their care; and they may make such bye-laws as are necessary for their purposes.[4] All bye-laws, purchases of real property and expenditures must be approved by the Governor in Council before they become effective.[5] No Commissioner shall enter into any contract with the Commission or be pecuniarily interested in any contract or work for which the money to the credit of the Commission is to be paid.[6] The Commission have an annual grant of $150,000 which they may spend for the purpose of beautifying the City of Ottawa.[7]

The Commission, therefore, is largely an executive body, though in a sense its functions are advisory also. The object of the government was to secure a Commission of patriotic men who would be actuated by a desire to improve the city. These gentlemen were to be encouraged to initiate and propose schemes for making any changes or improvements, but the government reserved the right to pass on all the proposals before any money was expended.[8] The same reason for ultimate government control appears as in the case of the Transcontinental Railway Commission, viz., the expenditure of money, though in this case the amount is very small.

[1] *Can. Stat.*, 62–63 Vic. c. 10. Amended by *Ibid.*, 2 Edw. VII. c. 25. *Ibid.*, 3 Edw. VII. c. 45. *Ibid.*, 4–5 Edw. VII. c. 29. *Ibid.*, 9–10 Edw. VII. c. 45. *Ibid.*, 9–10 Geo. V. c. 62.

[2] *Ibid.*, 9–10 Geo. V. c. 62, sect. 4.

[3] Sect. 7. [4] Sects. 5, 8, 10. [5] Sects. 5, 10, 11.

[6] Sect. 16. [7] Sect. 2.

[8] *Can. H. of C. Debates*, Aug. 2, 1899, p. 9189.

The Ottawa Improvement Commission has had to meet the same criticism that was made in regard to the Transcontinental Railway Commission, viz., the lack of technical knowledge on the part of its members. On October 4, 1911, the Royal Architectural Institute of Canada passed a resolution stating that—

> "*Whereas* the Federal Government of Canada has for some years been contributing a considerable amount of money with the laudable intention of beautifying the City of Ottawa and its environs,
>
> "*And Whereas* this work has been carried out without any comprehensive study or plan of the whole possible schemes of improvement,
>
> "*And Whereas* many things have been done which are unsuitable and inadequate and will require change,
>
> "The Royal Architectural Institute of Canada in their Annual Convention assembled, respectfully petition the Federal Government of Canada to appoint an advisory commission of not more than five persons, all of whom have artistic or technical knowledge directly valuable to the evolution of a general scheme of improvement." [1]

The Ottawa Improvement Commission, on this being forwarded to them by the Premier, denied its accuracy. It stated that far from not having "any comprehensive study or plan," the Commission had followed a scheme outlined in 1903 by Mr. F. G. Todd, a well-known landscape architect.[2] One member of the Commission, however, dissented from the above, and claimed that the plans of Mr. Todd had not been detailed but merely preliminary in nature, and they had not been adhered to as fully as the resources of the Commission had permitted.[3] The matter was allowed to drop; but two years later a Royal Commission was appointed "to draw up and perfect a comprehensive scheme or plan looking to the future growth and development of the City of Ottawa and the City of Hull." [4] This Commission presented a very elaborate plan for the future expansion of the two cities,[5] which the

[1] *Can. Sess. Pap.*, 1912, § 51A, p. 3. [2] *Ibid.*, p. 20.
[3] *Ibid.*, pp. 38–39.
[4] *Report of the Federal Plan Commission*, 1915, p. 9. [5] *Ibid.*

Government accepted,[1] and which, no doubt, the Ottawa Improvement Commission will follow.

The work of the Commission calls for little comment. The members are given great latitude and the government merely keeps a watchful eye on the schemes that are undertaken. It is another example of technically ignorant men supervising a work that calls for some specialised knowledge; but, unlike the Transcontinental Railway Commission, this body has been a success. The criticism of the Architectural Institute may have had some foundation at the time it was made; but the Ottawa Improvement Commissioners have now a definite plan to follow, and even if they have occasion to consult a landscape architect, they are quite competent to make an intelligent decision. The questions that arise are those which any reasonable man would be able to solve after he has examined the plans which are submitted, and has heard the opinion of those who have mastered the subject. It is an incident that occurs a hundred times a day in the business world and is accepted as being quite a normal method of procedure. The Ottawa Improvement Commission is made independent of the government, not that it may obtain experts and give them a free hand, but that it may secure men of normal ability who have opportunities for initiative, and who have a sincere desire to improve and to beautify the city.

### *The Montreal Harbour Commission.*

There are six Harbour Commissions in Canada, viz., in Quebec, Montreal, Toronto, Three Rivers, Vancouver and New Westminster, and of these the Montreal Harbour Commission is the most interesting and the most important.

The Harbour Trust of Montreal dates back to 1830 when "An Act to provide for the improvement and enlargement of the Harbour of Montreal" was passed, which authorised the Governor to appoint three Commissioners for the purpose of carrying the Act into effect.[2] These

[1] *Can. H. of C. Debates,* June 30, 1919, p. 4250.
[2] *Lower Can. Stat.,* 10–11 Geo. IV. c. 28.

Commissioners were to be appointed temporarily and to go out of office when their work was completed; but as new work arose, they were kept on indefinitely. In 1841 the Governor was authorised to add to the number of Commissioners if it became necessary, though such a step was not taken until 1855.[1] The jurisdiction of the Board was widened in 1850 to include Lake St. Peter[2]—the first work to be given to the Commission outside of Montreal. In 1855 appears the beginning of that varied membership which was to characterise the Board's subsequent history. Five Commissioners were authorised, three to be appointed by the Governor in Council, the other two being the Mayor of Montreal and the President of the Montreal Board of Trade.[3] In 1873 Trinity House, Montreal (a body with allied functions[4]) was abolished, and its duties given to the Harbour Commission. At the same time the latter body was increased to nine members; four to be appointed by the Governor in Council, and five to be elected, for terms of five years, as follows: two by the Montreal Board of Trade, one by the Montreal Corn Exchange, one by the Montreal City Council, and one by the shipping interests.[5] In the following year this was amended, whereby one Board of Trade member was dropped, the government nominated five members, and the term for the elected members was reduced to four years.[6] In 1893 yet another addition was made to the membership, one more being appointed by the Governor in Council, and one being elected by La Chambre de Commerce du district de Montreal, making eleven in all.[7] The last change occurred in 1906 when the old Board was abolished, and provision made for a new Commission composed of three members, who were appointed by the Governor in Council on the recommendation of the Minister of Marine and Fisheries. These members hold

[1] *Canada, Ordinances Special Council,* 4 Vic. c. 12

[2] *Can. Stat.,* 13–14 Vic. c. 97.

[3] *Ibid.,* 18 Vic. c. 143.

[4] *Can. Sess. Pap.,* 1867–68, § 39.

[5] *Can. Stat.,* 36 Vic. c. 61. The shipping representation appears to be characteristic of harbour boards; presumably because the shipping interests have to be catered to, and also because there is a check on extravagance in the shape of higher dues which the shipper will have to pay.

[6] *Ibid.,* 37 Vic. c. 31.

[7] *Ibid.* 56 Vic. c. 21.

office at pleasure, and are paid such salary as the Governor in Council determines [1] ($7,000 for the Chairman, $5,000 each for other members). Since the passage of the Act several amendments have been made, none of which, however, alter the Commission in any important respect.[2]

The Montreal Harbour Commission has thus run through a cycle of changes, beginning with three members appointed by the Governor in Council, gradually becoming more and more complex, and then returning in 1906 to the original membership.

In the year 1873–74 the Board was nominally independent of government control, as five out of nine members were appointed by outside bodies. But if the influence of the government over the majority were weak, its power over the minority was strong. In November, 1873, the Macdonald Government resigned; and shortly afterwards its nominees on the Commission were removed, and four others more congenial to the Mackenzie administration took their place. This procedure was justified by one of the removed Commissioners on the grounds that "to the victors belong the spoils" [3]; but the Prime Minister claimed that the action of the Board in the letting of contracts had been such as to warrant the interference of the Government.[4] Even this extreme action on the part of the administration would have been insufficient had the majority of the Commission remained recalcitrant, and the Mackenzie Government decided to take precautions against the possible occurrence of such a difficulty. In 1874 it passed the Act, noted above,[5] which provided that the government should control the majority of the appointments to the Board.[6]

The next twenty years in the Board's history are uneventful, except for the fact that at each change of administration (in 1878 and in 1896) the government nominees on the Com-

[1] *Can. Stat.*, 6 Edw. VII. c. 33.
[2] *Ibid.*, 8–9 Edw. VII. c. 24. *Ibid.*, 3–4 Geo. V. c. 32.
[3] *Toronto Mail*, April 23, 1874. [4] *Ibid.* [5] p. 141.
[6] The Act was justified on the ground that as the ministry were responsible for the money expended, they should have the controlling influence in the body that expended that money. *Toronto Mail*, May 13, 1874. *Ibid.*, May 26, 1874.

mission also changed.[1] In spite of the political nomination of over one-half of its *personnel*, the work of the Board was satisfactory, and its members were apparently given every latitude in the exercise of their functions. They borrowed money in the open market, and expended it on what works they saw fit; they made rules and bye-laws for navigation within the port; exercised a general supervision over the harbour; and, in short, were "an independent, self-respecting, self-governing body." [2]

After 1896, the government's control over the Commission began to tighten. The latter, wishing to borrow some money, found that they could get it on more reasonable terms from the government than from any other source. But the Act which authorised the advance, contained a clause stating that the money should be spent "in such manner as the Corporation, with the consent and approval of the Minister of Public Works, deems best calculated to facilitate trade."[3] Another Act two years later granted money on the condition that a definite plan, officially known as Number 12 A, was followed,[4] a plan which was a compromise arrived at after a long dispute between the Government and the Commission.[5] How drastic was this increased control and how keenly it was resented may be seen from the following passages:—

"Until 1896 the Harbour Commissioners were supreme in all matters connected with the harbour, but in that year they, to secure a lower rate of interest obtainable by the Government guaranteeing their bonds, consented to a clause being inserted in the Act whereby the approval of the Minister of Public Works is necessary to any plan of harbour improvement to be paid for out of that loan. To that unfortunate clause may be attributed the delay in arriving at a satisfactory conclusion in the matter of harbour improvement, the Minister refusing to approve the plan submitted by the Commissioners and approved by the leading commercial organisations of this City, and those organisations then deeming the Minister's plan impossible of acceptance."[6]

[1] *Morgan's Annual Register*, 1879, p. 356. *Annual Report of Harbour Commissioners for Montreal*, 1896, p. 11.
[2] *Can. H. of C. Debates*, May 4, 1906, p. 2628.
[3] *Can. Stat.*, 59 Vic. c. 10, sect. 5. [4] *Ibid.*, 61 Vic. c. 47, sect. 3.
[5] *Annual Report of Montreal Board of Trade*, 1897, pp. 16, 20–22.
[6] *Ibid.*, pp. 16–17.

"The Council takes exception to your claim that the Bill authorising the loan should define where the improvements are to be made; that is a matter with which the Harbour Commissioners are best able to deal and indeed is what they are constituted for, nothing short of the Government assuming the cost of the works can, in the Council's opinion, justify dictation as to where and how they should be constructed; no such interference on the part of the Government was ever thought of until 1896, when the Harbour Commissioners accepted a loan granted by an Act which most unfortunately contained a clause providing that the consent and approval of the Minister of Public Works is required for the works to be constructed with that loan, but it was not expected that the Minister would interpret that clause to give him the right to originate plans and force them upon the Commissioners." [1]

From this time until its reorganisation in 1906 the independence of the Harbour Commission steadily declined. The Board became more and more dependent upon Ottawa; the government appointees assumed an increasing influence in its deliberations; and it became a hot-bed for political patronage.

"It will be noted in connection with the unbusiness-like proceedings at the last, as at other meetings of the Montreal Harbour Commission, that the prominent part was taken by the Government appointees. Since it was openly avowed some time ago that the leading positions in the gift of the commission were to be used to reward workers for the Liberal party, affairs have been going from bad to worse. . . . Mr. Prefontaine is said to have it in his mind to end the organisation and substitute another for it. If in the new body he keeps out the politicians and leaves on the business men there may be an improvement." [2]

The Board of Harbour Commissioners had still other faults. It was above everything else an executive body, and it was too large to discharge either executive or administrative functions successfully. In addition, because of its large membership, the Commissioners were paid very little, a small amount for each sitting; and they devoted but a portion of their time to its deliberations. Numerous delays arose, which were also due to a large degree to the

[1] Letter from Montreal Board of Trade to Minister of Public Works, June 9, 1898. *Annual Report of Montreal Board of Trade*, 1898, pp. 9–10.
[2] *Montreal Gazette*, Jan. 23, 1905, edit.

organisation of the Board. The Government therefore decided upon reform: the Commission was reorganised in 1906, and its complex membership of eleven was reduced to three appointed by the Governor in Council.

It might be supposed that because the representative members have been abolished, the Commission has lost since 1906 such little independence as it had left. Such has not been the case. With the appointment of the reformed Board has come a new spirit in its work and its relation to the government. In the first place, patronage has been stamped out. When the Liberal Government was defeated in 1911, the Montreal Board of Trade showed its appreciation of the reorganised Commission by passing the following resolution:—

> "*Resolved*, That the Council of the Montreal Board of Trade hereby records its belief that fitness and not party complexion should be the first consideration for office in this country,—
>
> "That, because the members of the present Board of Harbour Commissioners have displayed high qualifications for their duties and given general satisfaction by their business-like method of administration and by the splendid results they have achieved, the Council gives expression to its hope that the present Commissioners may be continued in office." [1]

Partly as a result of such petitions, partly because of the excellence of the work of the Board from 1906 to 1911, and also because the Liberal Minister of Marine had "taken it out of politics," the Conservative Government made no changes in its *personnel*.[2] The passivity of the Government is all the more noticeable in view of the record number of removals in other parts of the public service,[3] and indicated that the tenure "at pleasure" had actually become one of "good behaviour."

The governments since 1906 have also shown a more sincere desire to allow the Harbour Commissioners greater independence in the exercise of their powers. This indeed is but a natural consequence flowing from the fact that the

[1] *Annual Report of Montreal Board of Trade*, 1911, pp. 9–10.

[2] *Can. Ann. Review*, 1911, p. 299.

[3] The members of the Quebec Harbour Commission, for example, were discharged on Nov. 21, 1911, "in the interests of the service." *Can. H. of C. Debates*, Nov. 30, 1911, pp. 579–80.

Commissioners are permanent and expert, devote their whole time to their work, and are better equipped to discharge their functions. The statutes authorising monetary advances still bear the condition that the plans, specifications, and estimates must be submitted to and approved by the Governor in Council, but this provision is more broadly interpreted than the earlier ones which demanded approval by the Minister of Public Works. The Harbour Commission was able to report in 1912 that "six years of co-operative work, unhampered by interference of any kind, has created a patriotic, zealous and competent staff upon whose shoulders rests the responsibility of whatever has been achieved," [1] and it concludes by thanking both the Liberal and Conservative ministers for the assistance and co-operation that the Commission has received.[2] In short, the keynote of the relations between the government and the Commission since 1906 has been one of active co-operation instead of the former jealous surveillance and hostility, and even on financial matters the Board has been subject to only a nominal supervision. It has gone far towards realising the aim of Mr. Brodeur, the Minister of Marine and Fisheries, as expressed at the time of the Board's last reorganisation:—

> "In view of the suggestion made to-day by the hon. member for St. Antoine (Mr. Ames) that the harbour commission should be absolutely free from interference by the government, I do not know whether it would be advisable to make the government responsible for its administration. It is true, the appointments are going to be made by the government, at the same time, I would like to see it composed of men who would act for themselves, without the government being held responsible for their action. If the government took absolute control of the harbour the case would of course be different, but so long as the commission is paying the interest on its debt, I think it should be left free to regulate its own expenditure." [3]

## *The Lighthouse Board.*

This Board was created by Order in Council on February 26, 1904.[4] Its function was to enquire into and report

[1] *Annual Report of Montreal Harbour Commission*, 1912, p. 21.
[2] *Ibid.*, pp. 24–26. [3] *Can. H. of C. Debates*, May 4, 1906, p. 2661.
[4] *Can. Gazette*, 1904, p. 1685.

to the Minister of Marine and Fisheries "upon all questions relating to the selection of lighthouse sites, the construction and maintenance of lighthouses, fog alarms, and all other matters assigned to the Minister of Marine and Fisheries by Section 2 of Chapter 70 of the Revised Statutes of Canada."[1] The Board originally consisted of four officials of the Department of Marine and two representatives of the outside shipping interests appointed by the government.

The Lighthouse Board is a comparatively unimportant body; its chief claim to notice is the peculiarity of its function and the notoriety that the Board achieved a number of years ago. Its functions are purely advisory; it has no other duty than to receive applications, consider them, and advise the Department what steps, if any, should be taken. It was on account of this characteristic that the Board was so fiercely attacked by the Royal Commission on the Civil Service in 1908.[2]

"This Board seems to have no duties but the giving of their decision upon all applications for new or improved aids to navigation coming to them from all parts of the country, from the Straits of Belle Isle and Newfoundland in the East to British Columbia in the West. Whatever importance their decisions may have (and they mean much when expressed in dollars), it does not concern them. Figuring as an impartial and skilled tribunal, passing upon all demands for government money under the plea of necessary aids to navigation, they can do so without the slightest sense of responsibility, for they absolutely incur none. The responsibility for all consequences is immediately assumed by the Marine and Fisheries Department, although the head of that department is not a member of the Lighthouse Board and personally cannot be considered responsible for them. Between June, 1905, and June, 1907, this Board approved of and passed applications for new and improved aids to navigation amounting to $1,691,813. With the voting away of this vast amount of money, the responsible minister had nothing to do. He was simply asked to initial the minutes of the different meetings of this most powerful but irresponsible board. The effect of this state of things is disastrous. It means practically the removing of all responsibility from those to whom extensive powers of administration and expenditure are granted."[3]

[1] *Can. Gazette*, 1904, p. 1685. [2] *Can. Sess. Pap.*, 1907–08, § 29A. [3] *Ibid.*, p. 36.

The Commission proceeded to state that the membership of the Board was such as to unfit them for their work; the two members representing the shipping interest could not serve two masters, themselves and the country, while the officials on the Board were open to political influences and departmental pressure.

"They are in no proper sense qualified to fill such a position of trust as a seat on this Lighthouse Board should mean—where the most absolute sense of justice, with complete independence, is called for; with a keen desire to administer the people's money with the utmost economy and good judgment, and with all personal considerations sunk. If the Board is intended to be a permanent institution it should be reorganised; and the Minister of Marine and Fisheries should be a member of it, as being chiefly responsible for the finding of its expenditures." [1]

The Lighthouse Board was made the subject of further enquiry by another Royal Commission a few months later. It was then pointed out that the Board was merely advisory, and that the Minister might accept or reject its recommendations. As to its *personnel*, it was answered that inasmuch as any improvement must benefit all steamship lines alike, the representatives of any of those lines were not thereby disqualified to sit on the Board. The other points raised by the first Commission were left untouched.

In the main, however, the Royal Commission of 1908 was justified in its criticism. The composition of the Board was not a happy one: the condition of the Service at that time certainly did throw the official element in the Lighthouse Board open to the suspicion that they might be influenced in their decisions by political motives, and the two representatives of the shipping interest had every inducement toward extravagance and none toward economy. For the second Commission to say that the unofficial members would be impartial, because a benefit to one steamship line would be a benefit to all other lines, was to see but one side of the difficulty. It is true that the Allan Line could not benefit itself without conferring the same favour on the Canadian Pacific; but it would be in the

[1] *Can. Sess. Pap.*, 1907-08, § 29A, p. 36. [2] *Ibid.*, 1909, § 38, pp. 9–10.

interests of both to have a lighthouse every hundred yards from Gaspé to Montreal. If the Board had been granted a definite sum of money to expend, there would have been an inducement to save; but under the old system the more money that could be voted the better. The members of the Board were far from impartial judges as to the needs and requirements of the Canadian lighthouse service; they lacked the detachment and possessed a personal bias incompatible with a successful performance of their duties. In addition to these disqualifications the Board met only once in three months, the members received no remuneration worth mentioning, and had nothing to stimulate them and to arouse more than a casual interest in their work. It is impossible to say definitely, for it is not disclosed in the evidence, but it seems very probable that most of their recommendations were accepted by the Minister of Marine without question. Consequently this Board had the actual spending of $1,691,813 in two years —a sight which might well horrify the Royal Commission of 1908.

Although the second Royal Commission endeavoured to clear the name of the Lighthouse Board, the Government was not unmindful of the warning that had been given, and the Board was reconstructed in 1911. The membership now consists of the Minister of Marine, the Deputy Minister, three officials of the Department, and three representatives of the shipping interests, one from each of the three geographical Divisions into which the work of the Board is divided. The functions of the Board remain the same. Each representative of the shipping interests is only allowed to vote on matters concerning his Division, a change which really reduces the shipping membership to one. Three is a quorum, but two of the three must be officials of the Department. The Chairman (the Minister of Marine) has a vote as an ordinary member and another vote in the event of a tie. The non-official members receive their travelling expenses and $5.00 a day as a recompense for their services.[1]

[1] P.C. § 88, Jan. 20, 1911, amended by P.C. § 2556, Sept. 19, 1912.

The Board has been somewhat improved by this change. The shipping interests have lost ground, and the Minister has been made a member in order that there may be a greater assurance that the works recommended are actually needed. But the improvements in *personnel* have made the Board itself useless. The official element so strongly predominates that the work might as well be done by a branch of the Department of Marine. The idea of the Minister being on the Board may be helpful, but it is also ridiculous; for the Board advises the Minister, and the Minister being a member of the Board therefore advises himself, and should he be overruled as a member of the Lighthouse Board, he will always get his way as the Minister of Marine. Nor is it easy to see how any principle of ministerial responsibility is secured. The Minister might always claim that whatever advice was given was contrary to his opinion, he being in a minority. He is of course responsible for the acceptance of such advice as Minister; but as he incurred that responsibility under the former constitution, his position has not been improved, save for the fact that he is probably better informed.

The Lighthouse Board, as a valuable adjunct to the Department of Marine, is a delusion; as an independent body, it is a fiasco. "Figuring as an impartial and skilled tribunal," with no political responsibility and little moral consciousness, composed largely of members of the Civil Service, the Board is as unnecessary as it is useless. The solution is not reform but abolition.

*The International Joint Commission.*

The forerunner of this body was the International Waterways Commission, the Canadian section of which was appointed under authority of an Order in Council of April 27, 1903.[1] It was a permanent Board composed of three Canadians and three Americans, whose duties were to deal with all questions of dispute that might arise in connection with the water powers and water rights of

[1] *Can. Sess. Pap.*, 1906, § 19B, p. 20.

the frontier and particularly those of the Great Lakes.[1] The result of the Board's labours was the conclusion of a treaty, dated January 11, 1909, between the United States and Great Britain, providing for the establishment of another body known as the International Joint Commission. This Commission, like its predecessor, was to be composed of three Americans and three Canadians, who were to administer the waterways agreement between the two countries as stated in the same treaty. This agreement was ratified by a Canadian statute of 1911 [2] which also provided for the constitution of the Canadian section.

The nature of the Commission's function was challenged immediately after its formation by the action of the new Conservative Government. On August 11, 1911, an Order in Council of the Liberal Government had advised that Sir George Gibbons, A. P. Barnhill and Aimé Geoffrion be appointed as the Commissioners for the Canadian section. According to the terms of the treaty, the appointment had to be made by the Crown in England; but as the latter evidently had more important matters to attend to, two months elapsed without any action being taken. In the meantime the Canadian Government had changed, and on October 10 the new ministry were sworn. On the following day the Governor-General cabled Downing Street to ask that the appointments to the Commission be withheld (though the British Government had evinced no signs of haste) until the new Cabinet had time to reconsider them. The result was that three other men were appointed, on the ground that "the new government desired the appointment of Commissioners who will be in sympathy with their policy respecting matters which will come before the Commissioners for consideration and determination." The situation was made more difficult by the fact that the original appointees, acting on the advice of the Colonial Secretary, had already held an informal meeting at Washington with the American Commissioners.[3]

[1] *Empire Club Speeches*, 1910–11, pp. 241–52.
[2] *Can. Stat.*, 1–2 Geo. V. c. 28.
[3] *Can. Ann. Review*, 1911, p. 303. *Can. Sess. Pap.*, 1912, § 119.

The question which the Conservative Government brought to the foreground in 1911 was this: Was the International Joint Commission primarily judicial or primarily representative in character; should they be independent or ministerial? If the former, the action of the Government was wrong; if the latter, it was right.

The Joint Commission is empowered to decide questions arising in connection with the boundary and connected waters, to report on questions arising along the common frontier referred to it by either government, and to decide any question referred to it by consent of both governments. One reading of the treaty is sufficient to convince anyone that the Commission is a judicial body, an international court, a Hague Tribunal on a smaller scale. A majority of the Commission decides any point, and in some cases, should the votes be equally divided, an Umpire is chosen under the Hague Convention. The contention of the Conservative Government was that the Commission must be in sympathy with the administration; the members were to be delegates through whom the Government could express its will. Such a reading of its function is wholly incompatible with the treaty, and even the Government was compelled to change its ground a few months after the original announcement. It then contended [1] that as the Canadian members of the Commission would require information from the officers of the Government almost every day and would wish to seek their advice and assistance, there should be a political intimacy between them. There is undoubtedly something to be said for this argument, but it is a small advantage when the whole Commission has to be given a partisan bias to attain it. Sir Wilfrid Laurier rightly summed up the character of the Joint Commission in these words:—

"The commissioners appointed have nothing to do with the policy of this government; the duties they have to discharge are quasi-judicial, if not absolutely judicial. . . . My right hon. friend should not have dismissed that commission on the grounds that he has given; and the manner in which he has

[1] *Can. H. of C. Debates*, March 30, 1912, p. 6706.

taken this action conveys the impression, not only to the British government but to the American government also, that the idea is that these commissioners are to be partisans, whereas the idea that should go abroad is that these men are not partisans." [1]

It would be fairly safe to assert that even the Conservative Government did not believe what it professed as to the nature of the Commission's functions; the ministry was swept away by the flood of patronage that it had released, and which at times it seemed powerless to check. Two of its appointees to the Commission were defeated candidates, and the third had rendered valuable services to the party. This, and not any supposed necessity for a sympathetic Commission, was the real reason for the Government's action.

If the members of the International Joint Commission [2] discharge largely judicial functions, it appears to be desirable that their office should resemble more closely that of a judge. At present the only signs of similarity are the salary (though this is only $7,500), the dignity of the office, the respect in which it is held, and a certain tradition which has arisen. The negative side of independence has not been developed in the least. The members have not been held politically responsible for their decisions; but it would not be safe to say that the question will never arise. Particularly is this the case in disputes of a political nature which might be referred to the Commission by both countries for arbitration. A decision adverse to the country's interest, followed by a gust of popular anger, might easily lead to the political responsibility being awakened from its slumber and the members of the Commission being called to account. The best solution would be to place the office on the same footing as that of the judge, a tenure during good behaviour coupled with an indefinite term or one of ten years. A Commissioner would in such case have no fear in rendering a just decision, and would be in a position to resent and ignore any interference that might be attempted on the

[1] *Can. H. of C. Debates*, March 30, 1912, p. 6705.

[2] These quasi-judicial international bodies have recently become of very great importance because of the mandates and other questions arising out of the peace treaty and the Covenant.

part of an unscrupulous government. Finally, it would be a cause for increased confidence on the part of the United States, and might result in the amicable settlement of many disputes which under a more questionable or unacceptable Board would be the cause of much friction and ill-feeling.

### *The Civil Service Commission.*

The Board of Examiners, the first ancestor of the present Commission, was established in the Colony of Canada in 1857.[1] It was composed of twelve leading civil servants who held their positions on the Board *ex officio*. The Board, as its name implied, was an examining body; it drew up regulations for the candidates, examined those who presented themselves, passed judgment on their papers and testimonials, and issued certificates of qualification to the successful. Shortly after the formation of the Dominion in 1867, a similar Act was passed for the new Canadian Civil Service,[2] whereby a Civil Service Board, composed of the fourteen deputy heads of departments, was created. This Board was almost an exact copy of the one that preceded it, and it exercised precisely the same functions.

It is interesting to see what success attended the working of the Board in practice. The reports of the Royal Commission of 1868 [3] are silent as to the provincial Board, and can of course say nothing of the other body which had only been recently formed. But in 1877 a Select Committee of the House of Commons investigated the Service and unearthed some startling information as to the uselessness of the Civil Service Board.

The Chairman of the Board stated that as a rule it did not examine candidates until after the appointments were made, and that the majority of the nominees never came before it at all. In the event of a failure, the candidates were allowed to take the examination again. Only one candidate was known to have been finally rejected. Between

[1] *Can. Stat.*, 20 Vic. c. 24. Two years after the establishment of the first Civil Service Commission in Great Britain.

[2] *Ibid.*, 31 Vic. c. 34.

[3] *Can. Sess. Pap.*, 1869, § 19. *Ibid.*, 1870, § 64.

1868 and 1877 only 72 tried the examinations; in 1875 there were no candidates, in 1876 only one.[1]

> "The examination is only useful in excluding those who are utterly ignorant and entirely unfit for the Service. It . . . is no adequate test of the qualification of the candidate. Any boy of 13 should be able to pass it. It is not nearly as severe as the entrance examination of High Schools. We do not necessarily receive notice of any appointment. Any number of appointments might be made without our knowledge. We have no power to compel nominees to be examined. We have often represented to the Government that the law has not been complied with in regard to examinations. Appointment before examination is a violation of the Act." [2]

By 1880, when a second Royal Commission on the Civil Service was appointed, the helplessness of the Civil Service Board was complete. It continued to hold a *pro forma* monthly meeting; but as the Government had supplied it with no work, there were no duties that it could perform. No examinations had been held since 1876.[3]

What were the main faults of the Civil Service Board as constituted under the Act of 1867? The thirteen years following had shown these faults to be two: lack of power, and too close an intimacy with the government. The Act had only given it authority to examine candidates who had received nominations; consequently when the ministers ceased to send candidates up for examination, the work of the Board necessarily ceased. Inasmuch as all its work depended upon the co-operation of the government, the Board had no power of initiative and could take no action except at the latter's bidding. In the second place, the uselessness of the Board is also traceable to the fact that the members were not separated from the government of the day. They were, on the contrary, the servants of the administration in their capacity of deputy heads of departments, and when they assumed the guise of members of the Civil Service Board the change deceived no one. Even if they had had the power of compelling the government to submit candidates for examination, they could not have

[1] *Can. H. of C. Journals*, 1877, App. § 7, p. 18. [2] *Ibid.*
[3] *Can. Sess. Pap.*, 1880–81, § 113, pp. 71–73.

exercised it. They held office on too precarious a tenure and were too dependent on the pleasure of ministers for any of them to risk offending the administration by interfering with its patronage. All that the members of the Board could do was to inform their masters that the law was being violated by appointing before examination; when the warning went unheeded, they could but shrug their shoulders and allow the matter to drop.

In 1882 the Civil Service Board was displaced by the Board of Civil Service Examiners.[1] This body was composed of three members who were appointed by the Governor in Council and held office at pleasure. One fault of the former Board, lack of authority, was rectified to some degree by an increase in the new Board's powers; but the second weakness, the dependence of the Board upon the government, was left in almost as bad a state as before.

The suspicions of the Opposition fastened upon this latter fact, and they denounced the Act as a farce so long as there was the possibility of government control of the examiners. Mr. Casey, the most ardent Civil Service reformer in Canada, stated that such a Board would be utterly useless.

"Hon. gentlemen will have noticed that the Bill provides that examiners may be appointed from time to time by the Government, to hold office during the pleasure of the Government, and that these examiners will conduct the examination. Now, Sir, who are these judicial individuals who are to decide as to the fitness or unfitness of those who enter the service? They are simply members of the Civil Service themselves; and they are as much at the mercy of the Government of the day, as are second and third class clerks in a Department. What is to be expected from ordinary human nature, and especially from political human nature, under such circumstances? No doubt the examiners will be chosen from among political friends, and what examiners, dependent for their positions and salaries on the influence of the Government of the day, will refuse to pass highly recommended individuals, if they happen to come anywhere near the standard which the Government have chosen to set up."[2]

[1] *Can. Stat.*, 45 Vic. c. 4.
[2] *Can. H. of C. Debates*, April 11, 1882, pp. 796–97. Cf. *Ibid.*, April 24, 1882, p. 1122.

The danger that Mr. Casey perceived was not an imaginary one. If the appointments to the Board in 1882 had been of an inferior nature, its constitution would have tended to convert it into a department for the distribution of patronage. The members held office at pleasure, their salaries were dependent on the government of the day, and two of them held other positions in the Service. All these might have been used as levers to make the Board useful to the party in power. Such a danger was avoided in part by the increased powers held by the new Board, but chiefly by the character of the members who were appointed. Even Mr. Casey, who had been most sceptical in 1882, was forced to admit in 1890 that "the gentlemen themselves are as respectable as any who could be named, but it is not to be expected that the public will believe them to be as independent as men who are not so subject to the control of the Government." [1]

The lack of independent status, as Mr. Casey suggested, militated against the success of the Board's work in another way, which was almost unrelated to the question of *personnel*. The Board was quite clear of improper affiliations with the government and was left unmolested and unhampered in the exercise of its functions. Yet the usefulness of its members was crippled by the fact that they did not appear to be independent and as a result were looked upon by many people as mere distributors of patronage.[2]

The Board of Examiners, although its powers had been increased by the Act of 1882, was still helpless to prevent many of the rules being violated. In such cases it called the attention of parliament to the breach; but if that body chose to ignore the complaint, the matter dropped. The promotion examinations gave the Board the most trouble. One year the government abolished them entirely [3]; then the custom grew up that one examination might do duty for a number of promotions; [4] and finally the examinations for promotion were reduced to but one or two subjects.[5]

[1] *Can. H. of C. Debates*, Feb. 4, 1890, p. 218.
[2] E.g., *Can. Sess. Pap.*, 1892, § 16B, p. 6.
[3] *Ibid.*, 1896, § 16C, p. 7.
[4] *Ibid.*, 1899, § 16C, pp. 5–6.
[5] *Ibid.*, 1906, § 31, p. iv.

Against these infringements the Board of Examiners protested in vain.

The great change came in 1908, when the Board was replaced by the Civil Service Commission.[1] The members of this new body held a position far more independent and possessed much greater powers than any of their predecessors. They held office during good behaviour and were only removable upon a joint address of both Houses of Parliament. They were given a substantial salary, were to devote all their time to their work, and were to hold no other office under the government or elsewhere. Finally, their powers were much increased, appointments, promotions examinations, etc., in the Inside Service were under their control, and they exercised supervision over the Service generally.[2]

This was the great step that had been advocated by Mr. Casey, by the Select Committee of 1877,[3] by the Royal Commission of 1880,[4] and by the later ones of 1891[5] and 1907.[6] But, as the Minority Report in 1880 observed, it meant the abandonment of the theory of ministerial responsibility.

> "We feel it incumbent upon us, as Members of the Commission, to dissent from the recommendations, which have in view the establishing of an irresponsible body in a paid Board of Examiners, to supersede the action of the Executive as well as the legitimate exercise of influence on the part of the people's representatives, and this the more strongly when considering the multiplied and diversified elements of our country. . . .
>
> "In the spirit and practice of the English Constitution, the Crown is the fountain of all appointments, and among the duties and responsibilities of its advisers stand the proper and responsible selection of the servants of the state. If it be, at times, expedient for Constitutional Governments to institute Commissions to investigate, it is repugnant to them to devolve on such bodies, the duty of governing and administering, of which appointments and promotions form an essential part."[7]

[1] *Can. Stat.*, 7–8 Edw. VII. c. 15.
[2] *Ibid.*
[3] *Can. H. of C. Journals*, 1877, App. § 7, p. 5.
[4] *Can. Sess. Pap.*, 1880–1, § 113, p. 21.
[5] *Ibid.*, 1892, § 16c, p. xxi.
[6] *Ibid.*, 1907–08, § 29A, p. 45.
[7] *Ibid.*, 1882, § 32, p. 87.

Parliament, by relinquishing its hold on appointments to the Inside Service, released itself from any political responsibility in that respect. By a later Act in 1918 [1] the Outside Service was also given in charge of the Civil Service Commission, and this statute marked the passing of the last traces of parliamentary responsibility in reference to the administration of the Civil Service. The Prime Minister seems to have been very reluctant, however, to recognize this as the case.

"*Mr. Burnham.*

"1. Is the Government aware that constituencies hold their representatives responsible for all appointments not made by examination ?

"2. Is the Government aware that it is impossible to shift this responsibility to others ?

"3. Does the Government therefore intend to refer appointments to the representatives concerned, for approval ?

"*Sir Robert Borden.*

"The Government, in respect to appointments to the public service, is responsible to Parliament ; Parliament is responsible to the people. In making such appointments the Government is, of course, desirous of obtaining the best possible information that may be available as to the qualifications of the persons proposed to be appointed. It will always be very glad to receive suggestions or recommendations from members of this House in regard to such appointments." [2]

Such a statement assuredly needs an interpreter of no mean order if it is to be reconciled with fact. Had it been made before the Order in Council of February 13th, 1918, was passed, it might possibly be explained by saying that the Prime Minister referred to the Outside Service. But his reply was made three months after that date, when it had been clearly stated that henceforth all appointments would be made only upon recommendation and with the approval of the Commission. The language of the Prime Minister, moreover, is quite explicit : "The Government, in respect to appointments to the public service, is responsible to Parliament." Let us take an instance. Suppose a certain candidate enters a competitive examination in

[1] *Can. Stat.*, 8–9 Geo. V. c. 12.
[2] *Can. H. of C. Debates*, May 16, 1918, p. 2101.

which he heads the list, and otherwise satisfies the Commission that he is qualified for a certain post. He is appointed. Does any political responsibility attach to anyone? and to whom? Certainly not to the Commission, for parliament, both by law and convention, is forbidden to interfere in the work of that body if they act within their jurisdiction. Nor does it attach to parliament or the ministry, for having no power to appoint or test a candidate's qualifications they cannot be made responsible for them. The case is even more strong when appointments are made by the Commission on the advice of expert Boards, who can have no possible political responsibility in their recommendations.[1] Sir Robert Borden would have done well to recall the words of his illustrious predecessor in reference to the political responsibility of judges, and have applied the same principle to the Civil Service Commission:—

> "It is a strange doctrine . . . to preach that the judges are responsible to parliament. Where is that responsibility? I have always understood that the judges were responsible only to their own conscience, and parliament has no power over them. . . . They are only responsible to parliament in extreme cases of malfeasance."[2]

The Civil Service Commission, particularly before 1918, when it assumed complete control, had frequent clashes with the government of the day. The result was generally a victory for the Commission, though sometimes patronage would win through by means of some loophole in the Act. But these cases merely emphasised the importance and strength of the independent position. Without it the Commission would have been hopelessly beaten from the start, as its predecessors had been; but entrenched behind a secure tenure, its members were free to oppose the government whenever it seemed to be necessary. There is, perhaps, outside of the judiciary, no office which demands

[1] *Can. H. of C. Debates*, May 10, 1918, pp. 1760–61. *Ibid.*, March 19, 1919, p. 616.

[2] Sir Wilfrid Laurier, *Can. H. of C. Debates*, Sept. 15, 1903, p. 11313. Some of the other members of parliament seem to have grasped the situation more clearly than Sir Robert Borden. Cf. *Can. H. of C. Debates*, April 16, 1919, pp. 1555, 1558, 1559–60. *Ibid.*, Oct. 2, 1919, p. 768. *Ibid.*, Oct. 10, 1919, p. 960.

security of tenure to the same extent as does the Civil Service Commission. No other position is in such constant conflict with the government, no other Commissioner is called upon to thwart a minister or a member of parliament as many times in the month, no other office is in such daily contact with the cabinet. It must be remembered that a Civil Service Commissioner is like Blackstone's judge, who simply interprets the law.[1] The Commissioner's verdict on a candidate is not only impartial but impersonal, and it therefore should prevail over that of a Prime Minister, whose opinion on such a question will generally be influenced by personal or political bias.

Appointments to the Canadian Commission have not been unmindful of the political associations of its members. The present Chairman, for example, was a member of the Commons for twenty-one years and had held two cabinet positions before his appointment. But none of the Commissioners have carried any of their party prejudice with them;[2] they have shed their old and shabby coat, and have appeared in new and shining raiment. The metamorphosis of the member of parliament into a Civil Service Commissioner is little short of amazing. He adopts a point of view in his new capacity that was both unknown and impossible before, and he responds to the same stimulus in quite a different manner than he did as a member of the House. The reason for the transformation is not difficult to understand. The moral consciousness of a Civil Service Commissioner has been immensely quickened; he feels a new sense of duty to the public, and sees that the welfare of the Service is of much more importance than the satisfaction of a party supporter. In spite of this welcome change, however, the appointment of Commissioners from the House of Commons is very undesirable. In the first place, the members of the House are not apt to have the mental detachment and disregard for party that should characterise a Commissioner so well developed

[1] Cf. p. 61.

[2] The Chairman in 1915 was accused of acting in a partisan manner, but the charges were not substantiated. *Can. H. of C. Debates*, March 4, 1915, pp. 634–87.

as one who has spent his life outside of politics. Having grown into the political habit of mind, it is very difficult for them to shake off their prejudice and leave themselves as untrammelled as those who have never suffered from it. But in addition to this, such appointments bring the office into disrepute in the eyes of the Service and of the country.[1] There is a tendency to look upon the office with suspicion, politics are invariably believed to have influenced many appointments, and prejudice imagined and imputed where it does not exist.

### *The Canadian National Railway Company.*

This is a new organisation, quite unparalleled in Canada, which was authorised in 1919.[2] It is an attempt to run a government concern on lines similar to those employed in a private corporation. To this end the railways owned by the Dominion Government are declared to be under the Canadian National Railway Company, the Directors of which are to be appointed by the Governor in Council. These Directors are to number not less than five and not more than fifteen, and are to hold office from one annual meeting to another, unless removed by the Governor in Council for cause. They receive such remuneration as the Governor in Council directs. Generally speaking, the Directors are to be entrusted with the management of all the Canadian Government railway lines, though these powers are in many instances only exercised through or with the consent of the Governor in Council.

The difficulty with the plan is that it falls between two stools: it is neither a commission nor a government department. It endeavours to create an independent body, and it succeeds only in producing an anaemic Board of Directors with hardly enough strength to stand alone. The Leader of the Opposition promised in 1907 that the government railways would be operated and managed by an independent

[1] Cf. Speech of The Hon. W. T. White, Minister of Finance. *Can. H. of C. Debates*, March 4, 1915, p. 658.

[2] *Can. Stat.*, 9–10 Geo. V. c. 13. Cf. the Australian experiments with railway control by commissions. Acworth, W. M., *State Railway Ownership*, pp. 89–94.

commission free from partisan control or influence,[1] and this Board of Directors is presumably the commission which was foretold. In what way is it independent? It is not a government department—outside of that negative characteristic it has scarcely a mark of independence. Its members are removable by the Governor in Council, they hold office for a year only, and their salary is at the mercy of the ministry.[2] They have scarcely an important function to perform that does not require the assent of the Governor in Council or the recommendation of the Minister of Railways. One guarantee of independence has been given them, and that is so extreme and so unusual that it appears to have strayed in from some other Act.

> "No Director of the Company shall be under any personal responsibility to any shareholder, director, officer or employee of the Company, nor to any other person, nor, except with the approval of the Governor in Council, shall be subject to any pecuniary penalty under the provisions of any statute, in respect of his office, or any act done or omitted to be done by him in the execution thereof." [3]

In short, this section ventures to guarantee to a Director of the Company what no other official (save a judge) in Canada enjoys, viz., personal immunity from the civil consequences of any action taken in the course of his work. It is a new edition of the *droit administratif* in a Canadian binding. It is contrary to the spirit of the Canadian law, and is all the more grotesque when applied to a body which has scarcely another sign of independence.

In 1917 a Royal Commission (Drayton-Acworth) reported in favour of a different scheme.[4] The suggestion was that the government railways should be directed by a non-political, permanent, and self-perpetuating Board of five, appointed on the Board's own recommendation for a term of seven years during good behaviour, and subject to removal by joint address.[5]

[1] *Can. Ann. Review*, 1907, p. 460.
[2] Cf. Acworth, W. M., *State Railway Ownership*, pp. xii–xiii.
[3] *Can. Stat.*, 9–10 Geo. V. c. 13, sect. 6.
[4] *Can. Sess. Pap.*, 1917, § 20G.
[5] *Ibid.*, p. lxxxvii.

The reason for not accepting the findings of the Commission appears to be the old one, viz., finance. So long as there is a deficit on the government railways (and apparently it will not disappear for some time) parliament will retain its right to interfere, to ask questions, and to criticise the management. The reasoning which assumes that independent control cannot be tried so long as there is a deficit seems to lack logical justification; a loss might be turned to a gain, and the experiment would be worth a trial. But until the roads by some incredible turn of the wheel begin to produce a revenue, the control of parliament will be maintained. Members of parliament must be allowed to ask such important questions as "What is the cost of the operation of the special train leaving Toronto at 1.55 a.m. each weekday morning for carrying Toronto newspapers to London?" [1] or "Why was this special newspaper train established to run west of Toronto to London and not east of Toronto?" [2] The ex-Minister of Finance was but stating the accepted belief when he said: "The idea of taking these railways entirely out of politics is a dream and a delusion. You will never take any service completely out of politics so long as a dollar of the people's money goes into it." [3]

This idea, that financial aid must mean greater political responsibility, has been accepted as axiomatic in Canada. Rightly or wrongly, it has been applied to this particular instance of railway management, and the Board of Directors represents the greatest concession that the ministry will make to the principle of independence. Inadequate as it is, the government has indicated that the Board will be given every assistance from the administration in the independent exercise of its powers.

"Public ownership will be a success in Canada in almost direct proportion to the character, integrity, responsibility and ability of those who control and direct the operations of the Government system. The greatest service that the Government can render in reference to transportation in so far as it is under Government

[1] *Can. H. of C. Debates*, July 24, 1911, p. 9982.
[2] *Ibid.*, p. 9983.
[3] *Ibid.*, April 23, 1919, p. 1633.

administration, is in the appointment of first-class men of the highest standing in the community, men of such self-respect that they will feel that they will be judged so much by the success of their administration of the system that they will not brook any interference on the part of the Government." [1]

This concludes the review of the nine different Canadian boards and commissions which have been chosen as typical. Their most noticeable feature is their diversity, which is so great that any generalisation is made well-nigh impossible. They vary from the judicial International Joint Commission on the one hand to the advisory Lighthouse Board on the other, from the highly paid technical membership of the Railway Commission to the unremunerated lay talent of the Ottawa Improvement Commission. But whether their functions are executive, administrative, advisory, educational, or examining, they are alike in that one respect which has caused them all to be gathered into this chapter, viz., each illustrates some form of official independence.

These commissions owe their origin to different causes. Some have been created in order to place their members beyond government influence and control; others have arisen because of a demand for technical experts; and a great many of such bodies have been so constituted as to combine both these advantages. In glancing over the list of boards and commissions it will be seen that the majority are composed of men technically expert, and that two of the others, the Commission of Conservation and the Transcontinental Railway Commission, have been failures largely because their members lacked any special knowledge. The idea of the layman acting under expert advice is a good one if it is not abused; but it must be recognised that the principle is to be applied with caution, and that it has one very important limitation, viz., it cannot be extended to cover highly technical work. In some cases it has been possible to have both lay and technical minds represented on the one body, as, for example, in the present Railway

[1] *Can. H. of C. Debates*, April 23, 1919, p. 1634.

Commission. The legal element is one part of the specialised side of the Commission, while another kind of *expertise* is furnished by a professor of railway economics. The lay element is represented by the business men. It is true that the lawyer will vote on a question of railway rates, and the economist on one of legal procedure, but there is probably a tacit understanding that on questions of technical difficulty the member who is specially qualified to form a judgment will carry the rest of the Board with him.[1] Lapse of time coupled with the permanence of the office gives to every commission another kind of special knowledge, viz., the mastery of detail which is the result of practical experience. The expert official has become common in all branches of government, and the commission is but the logical result of the effort to give this official more power and to guard him against interference.

Although the majority of commissions carry with them a political irresponsibility, this negative aspect of independence is not always emphasised for the same reasons. In some cases a resemblance to the judiciary suggests that the quasi-judicial body would work best in an atmosphere that approximates to that of the Bench. In other instances, as the Civil Service Commission, it is imperative that all suspicion of governmental interference and politics should be removed. Such bodies as the Railway Commission and Board of Commerce present an intermixture of both these motives for independence, with an additional one, that their work will be better performed if they are left unmolested and their members given a high status.

Greater stress has been laid on the positive side of independence in those offices where political irresponsibility exists than where the members have been held strictly accountable. This, as has been pointed out in the first chapter,[2] is very necessary, and is but a proper safeguard to take against too great a looseness of political responsibility. In connection with this point it may also be

[1] The Chief and Assistant Chief Commissioners overrule the other members on a question of law. *See* pp. 115, 120.

[2] pp. 7–8.

noted that few half or part-time offices on a commission have yielded satisfactory results.[1] The remuneration will probably be nominal or non-existent, the official's interest but transitory, his sense of public duty only faintly aroused, and his heart will usually not be in the work. There is the additional disadvantage that a half-time position is not likely to utilise the sub-conscious as well as the conscious mind of a commissioner. If the duties of the commission are isolated and unconnected with the member's own work, he will pick up his conscious thinking when he sits down at his desk, and shed it as soon as he has left the office. If, however, the commissioner is working full time or if his public and private work are along similar lines, there is a much stronger probability that his conscious and sub-conscious mind will continue to play about the problems of the commission outside of the nominal office hours. It is therefore desirable to have either a full-time commissioner or a part-time man whose private business is closely associated with the work of the board.

Great care must also be taken to prevent the individuality of the members being entirely merged in the corporate personality of the board; the commissioner should have a right to express his views in the same way that an appeal judge has a right to give a dissenting judgment. "A *board*," said Jeremy Bentham, "is a *screen*. The lustre of good desert is obscured by it; ill-desert, slinking behind, eludes the eye of censure; wrong is covered by it with a presumption of right, stronger and stronger in proportion to the number of the folds."[2] The personality of the member must not only be given free expression, but, as Bentham suggests, the number of commissioners should be as few as possible in order that the board may not overshadow the individuals who compose it.

The problem of a commission's financial expenditure is full of difficulties. Parliament has always insisted on maintaining its power of finance, and it has shown no sign of relinquishing its claim; the government has either

[1] The International Joint Commission is the exception.
[2] *Works* (1843), V. p. 17, *Letters on Scotch Reform*, II.

reserved the right to approve all expenditures, or has maintained an indirect control by insisting that the commission shall hold office at pleasure. Although it may seem axiomatic that the people's representatives should control the expenditure of their money, it might also be urged that a commission represents the people in as true a sense as parliament, although the relationship is more indirect. There can be no doubt that in many instances a commission would be able to spend money to better advantage. Take as an instance the operation of the Canadian Government railways. If this were under the control of an independent commission, it could be managed more economically than it is now as a half-hearted branch of the Railway Department. All administration ultimately involves financial expenditure, and if the government control of funds were pushed to the utmost limit, it would deny any liberty to anyone. The appropriation of money is obviously different, and can only be carried out by the people's representatives. The old conceptions of political responsibility have been tremendously altered by the growth of the commission idea; they will have to be changed still further to allow a certain financial irresponsibility also. There has been a time, and it is not entirely past, when to accuse an administration of instituting "government by commission" was to charge it with gross violation of public duty.[1] Such a contention will not continue to bear much weight; it will be recognised that a wise use of permanent independent commissions will do more to advance the public good than the alternative of departmental bungling.

[1] *Can. H. of C. Debates,* Sept 15, 1903, p. 11312.

## CHAPTER V.

## THE ROYAL COMMISSIONER.

THE Canadian Government, when it desires to obtain information on any particular subject, frequently appoints a Royal Commission to make an enquiry and to report the results of its investigations to the Governor in Council. In adopting such a procedure, Canada has followed the British precedent; but there are several important differences between the Royal Commissions in the two countries. The Canadian body is usually small, varying as a rule from one to three; the members generally devote their whole time to the work; they are paid a good salary while engaged on the investigation; and they frequently have the power to administer oaths.

The Canadian Royal Commissioner is appointed by the Governor in Council and holds office during the pleasure of that body.[1] While the government in making such appointments has rarely disregarded political affiliations, it has usually realised that the success of the enquiry and the public confidence which will be placed in the report depend to a large degree on the high character and impartiality of the Commissioners; and the result has been that the Royal Commissions have generally included in their membership some of the best men in the country. The Premier in 1891, for example, was quite explicit as to the qualifications which he desired for the proposed Royal Commission on the Civil Service.

[1] *Can. Stat.*, 31 Vic. c. 38. *Ibid.*, 43 Vic. c. 12. *Ibid.*, 52 Vic. c. 33. *Rev. Stat. Can.* (1906), c. 104. Such bodies as those established under *Rev. Stat. Can.* (1906), c. 113, sects. 781–801, and *Can. Stat.*, 60–61 Vic. c. 16, sec. 18, though called Commissions, come under special statute and are not included in the general category of Royal Commissions.

"It would probably be composed of three persons, one of whom, it is hoped, we shall be able to select from the Civil Service itself, whose position before the country will be such as will place him practically beyond the suspicion of partisan control; another probably having a judicial character, and a third probably from among persons having an experience outside of politics, in the management of large numbers of people—a gentleman, if possible, who will not have engaged in politics, and will be free from any imputation of partiality on that score; though I do not see why partiality should exist in a matter in which both parties are equally interested. But, if practicable, a person will be selected who is independent of politics and party; and who will have had a large experience in the management of men in a business way." [1]

This method of appointment, though usually satisfactory, is difficult to justify when applied to Royal Commissions which investigate charges of political corruption against the government; for the latter are then placed in the embarrassing position of appointing their own judges. The most famous Canadian case is the enquiry on the Pacific Scandal in 1873. The matter had been partially investigated by a Committee of the House of Commons, and was later transferred to a Royal Commission composed of three judges. "The two functions of a Royal Commission and a Committee of this House," said Mr. Holton, a prominent member of the Opposition, "were utterly incompatible. All the instruction that they would receive in virtue of the Commission must come from the Crown, and all evidence taken by virtue of the Commission must be reported also to the Crown." [2] The *Canadian Monthly* condemned this system of appointment even more strongly:—

"That the accused shall not be permitted to appoint his own judge is a rule not of any particular constitution, but of common justice. It has been palpably violated on the present occasion. We need not impugn the motives of the gentlemen who have consented to serve on the Commission; we need not even criticise the appointments individually. It is enough that the Court as a whole is manifestly packed in the interest of the

[1] *Can. Senate Debates*, Aug. 20, 1891, p. 469.

[2] *Ottawa Times*, May 17, 1873. Cf. Stewart, G., *Canada under the Administration of the Earl of Dufferin*, pp. 150–51.

accused Minister, and incapable of doing justice between him and the nation. It has been alleged that the function of the Commission is only to take the evidence, not to pronounce sentence. Supposing this to be true, the sentence would still be in great measure determined by the manner in which the evidence was taken. But it is not true; the Commissioners are distinctly empowered to express their opinions in their report."[1]

The opinion of Lord Dufferin that "the length of time all three (judges) have been removed from politics frees them from the suspicion of political partisanship,"[2] was not shared by the entire press;[3] nor does the fact that the judges acted impartially[4] materially lessen the objections that may be raised to allowing a government to appoint its own judges.

A similar case arose in 1892 when charges of corruption were made against Sir Adolphe Caron, a Minister of the Crown. A Select Committee was refused by a strictly party vote, and the Government appointed a Royal Commission to take evidence.[5]

"It is not," said Mr. Mills, a prominent member of the Opposition, "a question for a Commission created by the Government, subordinate to the Government and responsible to the Government; but it is a question for the High Court of Parliament. . . . A Commission is a creature of the Administration. It is appointed, not to investigate the conduct of the Government, but to investigate the conduct of those who are subordinate to the Government and who are responsible to the Government. If one of these honourable gentlemen sitting on the Treasury benches is charged with wrong-doing, can it be for a moment said that they themselves are the proper parties to advise the Crown as to who shall be appointed to investigate their conduct? To whom is the report to be made? Why, to themselves. Who is to advise the Crown upon that report? Why, the very gentlemen who are accused. . . . Is it not clear that if these honourable gentlemen have the appointment of the Commission by

[1] Sept., 1873, pp. 249–50. [2] *Can. H. of C. Journals*, 1873, p. 111.
[3] *Montreal Herald*, Aug. 20, 1873.
[4] Stewart, G., *Canada under the Administration of the Earl of Dufferin*, p. 232.
[5] *Can. H. of C. Journals*, 1892, pp. 284–85.

whom they are to be tried, that they will make it, so far as they are concerned, a very merciful tribunal indeed ?"[1]

The tenure of a Royal Commission is during pleasure, and the members may be removed at any time by the Governor in Council. It has been realised, however, that a strict enforcement of the statutory rights of the government in this respect would be fatal to the independence of the Commissioners, and would deprive their investigation of a large part of its value. The extent to which a Royal Commissioner is given the power of initiative, and the reluctance which the government has shown to interfere in the work of a Commission is best seen by an examination of several Royal Commissions in Canadian history.

In the first place, a Royal Commission is given a free hand in the procedure that is to be adopted and in the manner in which the investigation is to be conducted. Some Commissions have circulated questionnaires before taking evidence,[2] some have allowed anyone who wished to make statements before them to do so,[3] but the majority have contented themselves with taking evidence by the examination of witnesses. The instructions usually state the main points to be investigated, and often conclude with a general statement which allows the Commissioners great latitude in enlarging their field both of enquiry and recommendation.[4] When the Royal Commission on Technical Education was formed in 1910, the Minister of Labour announced that

"The Commission will not be limited in the scope or character of its work. It will not be content with observations and investigations at two or three centres. It will be asked to travel from one end of Canada to the other ; to do its work thoroughly. . . . The Government proposes to give the Commission the right to travel the United States and Germany and France and Britain and other European countries if necessary, to see and to study industrial processes and industrial equipment."[5]

[1] *Can. H. of C. Debates*, April 6, 1892, pp. 1054–55. Cf. *The Week*, May 27, 1892, edit.

[2] *Can. Sess. Pap.*, 1892, § 16c, p. xiv.

[3] Supplement to the *Labour Gazette*, July, 1919, p. 5.

[4] *Can. Sess. Pap.*, 1880–81, § 113, p. 14.

[5] *Can. Ann. Review*, 1910, p. 325.

The government have even indicated that if a Royal Commission found that its powers were insufficient, the ministry would feel bound to increase its jurisdiction.

"If," said Sir Wilfrid Laurier in 1908, "the power of the commissioners [1] had been exhausted by efflux of time, if they had told us that they had gone thus far and that they had no more power to go farther, it would have been our duty to have asked them to go on, but when they told us of their own volition that they did not want to go beyond that, that they desired to limit their inquiry to that point, would it be fair or just or equitable or advisable to ask them to go farther?" [2]

It has also been the traditional policy of Canadian governments to abstain from any interference in the work of a Royal Commission. The Leader of the Opposition asked in 1908 whether the Cassels Commission was to consult the Royal Commission which had preceded it. Mr. Brodeur, the Minister of Marine and Fisheries, replied:—

"That would be a matter for the commissioners themselves to dispose of. It is not for us to suggest to the judge the way in which he should proceed. I want to leave him absolutely free to act as he likes in this investigation. I would not wish to make any suggestion to him which might be interpreted as restricting him in the exercise of his powers. . . . The commission gives to the judge the right to investigate this matter, and he is absolutely free, so far as the government or the department are concerned, to act in the way he likes." [3]

The proceedings of the Royal Commission on Life Insurance of 1906 were criticised by the Opposition, and fault was found with the Minister of Justice because he had not exercised sufficient control over the investigation.[4] Sir Wilfrid Laurier defended the Government's inaction on the ground that the proceedings were quasi-judicial, and the Commissioners were therefore entitled to judicial independence in the investigation.

"The Commission was appointed for a certain purpose . . . it was a quasi-judicial proceeding. Are we to be told, is that the

[1] The Royal Commission on the Civil Service, 1907.
[2] *Can. H. of C. Debates*, April 3, 1908, pp. 6152–53.
[3] *Ibid.*, April 28, 1908, p. 7326.
[4] *Ibid.*, Feb. 28, 1907, pp. 3906–08.

pretension of honourable gentlemen on the other side of the House, that the Minister of Justice is to keep his hands upon judicial proceedings? . . . What would be the grievance, and the legitimate grievance, of honourable gentlemen on the other side of the House if the Minister of Justice had attempted at any time to direct those proceedings? The commission was an independent body. It was to receive its instructions from nobody. It received its instructions from the Governor in Council, who appointed it and directed it to perform certain duties, and there would have been a just grievance on the part of the people of this country and of the opposition of His Majesty in this House if the Minister of Justice had at any time interfered with or attempted to interfere with the manner in which the duties of that commission were being carried out."[1]

It is rather doubtful whether the designation of these proceedings as quasi-judicial was accurate; but the conclusions of the Premier were nevertheless sound, and the independent position of the Commission was later conceded by some members of the Opposition.[2]

The government is naturally responsible for the appointment of Royal Commissioners; but its responsibility cannot be made to cover the investigations and reports which those Commissioners may make. The manner in which the report of the Royal Commission on the Civil Service of 1907 was received affords an excellent illustration of the relation between a government and a commission of its own nomination. Mr. George E. Foster, speaking in the House on April 30th, 1908, stated that the Royal Commission was composed of government nominees, that the Government had declared them to be able men; and yet when they presented their report, the members of the Government repudiated the findings of their own Commission. He expressed great surprise that the Ministers of Marine, Finance, and Justice, and even the Prime Minister had claimed that the Commission went beyond the scope of the enquiry, and had stated that they did not agree with all of the report.[3] A few months later Sir Frederick Borden (Minister of Militia) added his criticism to the effect that

[1] *Can. H. of C. Debates*, Feb. 28, 1907, pp. 3908–09. [2] *Ibid.*, p. 3910.
[3] *Ibid.*, April 30, 1908, pp. 7545–46. Cf. *Ibid.*, April 28, 1908, p. 7362, *Ibid.*, March 26, 1908, pp. 5620–22, 5626.

the investigations of the Commission were not conducted with sufficient care; that the procedure adopted in the enquiry was not wise; that the Chairman, though qualified by long experience in the public service, was probably prejudiced and cherished some grudges against certain departments or members of the Service; that the Commission had exceeded its jurisdiction and reported on technical departments like the Militia with insufficient knowledge and information at its disposal.[1]

The incident shows the strong independent position occupied by Royal Commissioners, and their irresponsibility to the government which appoints them. The investigations were public, the members of the various departments themselves gave evidence, and the ministry could not help being cognisant of the trend of the investigation. Yet they considered it inadvisable to interfere, and allowed the enquiry to take its course. Once having made the appointments, their responsibility in the matter virtually ended. It is best to be charitable, and to interpret Mr. Foster's amazement at the Goverment's criticism of the report as mere party politics; if he were serious, he displayed an ignorance that would be unpardonable in view of his long and distinguished parliamentary career. A government is no more bound to agree with the report of a commission which it appoints, than it is to agree with the finding of a judge whom it has raised to the Bench. It is true that it virtually promises to execute the decisions of a judge, whereas it does not agree to carry out the recommendations of a Royal Commission. But the more independent a Commission is, the more difficult it becomes for a government to refuse to accept its verdict. In the case, for instance, where a Royal Commission is appointed to investigate a charge of political corruption, the government is morally and politically bound to agree with its decision; the Commission is really discharging a judicial function, and its finding must be obeyed. The usual constitutional practice is that a government will defend and take responsibility

[1] *Can. H. of C. Debates*, July 9, 1908, pp. 12506–46.

for the work of a Royal Commission if it agrees with that work,[1] and will disclaim responsibility if it disagrees; which is but another way of saying that there is no responsibility at all. The only time when a government's responsibility for the work of a Royal Commission becomes operative is, as in the case of a judge, when a grave breach of law or jurisdiction occurs. A government would then be bound to intervene; and would probably remove an offending Commissioner or cancel the Commission under which the body was holding the investigation. Such extreme action, however, has never been taken in Canada since Confederation.

The membership of Royal Commissions is a varied one: they may be composed entirely of technical men, entirely of laymen, or a mixture of both. The obvious criterion is the nature of the subject under investigation. The Royal Commission on the Quebec Bridge Collapse in 1907[2] could only be composed of engineers with the highest technical qualifications; but a Commission such as that of 1902 on Chinese Immigration[3] could include almost anyone with a sound educational background. The usual membership, however, is a mixture of both experts and non-experts. The different Royal Commissions on the Canadian Civil Service, for example, have generally included one or more members with a thorough knowledge of the Service, as well as several others who have had no connection with any of the government departments. In 1891 the Chairman of the Royal Commission on the Civil Service mentioned "the great assistance the Commission received from the Deputy Minister of Finance, whose intimate knowledge of the business of the departments prepared the way for much of the work that has been done, and enabled it to be carried out in far less time and yet with far more thoroughness and efficiency than would have been possible under any

[1] E.g., The Royal Commission on Life Insurance. "I am here because from the position in which I happen to be, it naturally, and I suppose expectedly, falls to my lot to defend the position of the commissioners appointed by the Crown." Minister of Justice, *Can. H. of C. Debates*, April 10, 1907, p. 6348.

[2] *Can. Sess. Pap.*, 1907–08, § 154.

[3] *Ibid.*, 1902, § 54.

other circumstances."[1] In 1868 and 1880, however, the Commissions were chiefly composed of civil servants, whose bias, conservatism, and prejudice were clearly reflected in the Minority Reports.[2]

In addition to the technical qualifications of the members, great care should be taken to ensure that the Commissioners will inspire public confidence. *The Week* emphasised this need in 1891 when criticising the appointments to the Royal Commission on the Civil Service.

"Some of the members of the Commission, to say the least, are not generally known to have proved themselves possessed of the kind and amount of knowledge and experience necessary for the discharge of so important a trust. This is unfortunate, for in the constitution of such a body it is of the first importance that its members should be so well and favourably known as to command, by their very names, general confidence in the thoroughness of their work and the value of their recommendations."[3]

If a suspicion is cast on the members of an investigating Commission either as to its motives or its qualifications, the value of their findings decreases in geometric proportion. One result of this desire to inspire public confidence is that judges have occupied a prominent place in the history of Royal Commissions. The appointment of a judge, from the point of view of a Commission, can only be regarded with favour; from the standpoint of the Bench, such an appointment has grave disadvantages.[4] The dilemma cannot be easily avoided: the extreme cases offer a simple solution; but the intermediate ones present many difficulties. In 1916, for example, the fire in the Houses of Parliament was investigated by a Royal Commission which consisted of a judge and a lawyer.[5] No conceivable argument can be advanced to justify the appointment of a judge to that position; it could have been filled much better by the Chief of the Montreal Fire Department. The appointment of the judge who presided over the Com-

[1] *Can. Sess. Pap.*, 1892, § 16c, p. xcv.
[2] *Ibid.*, 1869, § 19, First Report, pp. 39–40. Second Report, pp. 43–45. *Ibid.*, 1882, § 32A, pp. 85–93.
[3] Oct. 23, 1891, edit.
[4] Cf. pp. 54–55.
[5] *Can. Sess. Pap.*, 1916, § 72A.

mission on Industrial Relations in 1919[1] might be excused on the ground that all other members were avowedly partial; but some other person, such as a professor of economics, might have done equally well. The other extreme is illustrated by the Royal Commission on Election Frauds in 1902,[2] which was composed of three judges. The presence of judges on this and similar Royal Commissions can scarcely be avoided: politics is such an all-pervading element that an impartial enquiry on political matters can rarely be secured; and the nearest approach to a fair investigation can be given only by a Bench of judges. But on the vast number of Royal Commissions that lie between these two extremes, it is impossible to dogmatise; each case must be decided on its own merits as it arises. Two cautions, however, may be given. Instead of there being a presumption that a judge is the natural choice for a Commission, the onus should lie on a ministry to prove that no one else would do as well. In the second place, a government should not overestimate the public confidence that a judge will command. In 1906 the Minister of Finance said in reference to the Royal Commission on Insurance that

"One advantage in having a judge to preside is that it gives an assurance to the public of a fair and impartial enquiry. Supposing the government had appointed some person chosen from professional or private life, it would be always open for somebody to use the phrase which my honourable friend used a moment ago when he described these people as 'the creatures of the government.'"[3]

But subsequent events proved that even this judge was not immune from criticism, and one of the leading members of the Opposition charged him with partiality.[4] On the other hand, cases have arisen when the personality of the judge was such as to raise him above suspicion, although the subject matter and findings of the Commission were strongly criticised.[5]

[1] Supplement to the *Labour Gazette*, July, 1919.
[2] *Can. Sess. Pap.*, 1900, § 151.
[3] *Can. H. of C. Debates*, May 28, 1906, p. 3980.
[4] *Ibid.*, April 10, 1907, pp. 6281–311.
[5] *Ibid.*, April 1, 2, 1909, pp. 3706–936.

It has been already stated that the *personnel* of a Royal Commission depends on the subject-matter of the enquiry; but it depends also on the purpose which the enquiry seeks to achieve. A distinction must be drawn between a Commission whose purpose is to conduct an investigation and a Commission which aims at settling a dispute. The former is a simple enquiring body, the latter a court of arbitration (though neither party is bound by the decision); the membership of the one should be independent and impartial, that of the other should be partial and representative of the conflicting interests. The Royal Commission on Industrial Relations, 1919, was a strange and unsuccessful mixture of both types: its members were openly partial, and yet its object resembled an investigation much more than an arbitration. The Commission consisted of seven members: three represented labour; three represented capital; the Chairman was the Chief Justice of Manitoba.[1] The preponderating influence of the prejudiced minds made the Commission quite unsuited to conduct any investigation on industrial relations or to make any valuable suggestions for the future, and the report, as was inevitable, simply reflected the prepossessions of the members.[2] Two representatives of capital drew up a Minority Report; while the third, though agreeing with the majority, added a supplementary Report: the three labour members and the judge were the other signatories to the Majority Report.

"A Royal Commission . . . is an Organisation predominantly concerned with knowing. The Commissioners are directed to collect evidence and to assist each other to draw conclusions from that evidence. But the conclusions of individual Commissioners will differ, not only according to their industry in studying the evidence and their acuteness in thinking about it, but also according to variations in their desires. Every Royal Commission is therefore, to a certain extent, a Will-Organisation, a machine by which persons of different desires are enabled to form compromises and act by the votes of the majority; and some Royal Commissions prove, when they get to work, to

[1] *Labour Gazette*, April, 1919, pp. 432–33.
[2] Supplement to the *Labour Gazette*, July, 1919.

be almost exclusively Will-Organisations and hardly Thought-Organisations at all." [1]

The above quotation is an excellent summary of what lies at the root of all Royal Commissions of enquiry, and it also gives an indication of what characteristics should be sought in the members who are appointed. A Royal Commission is not an administrative body; it is not formed in order to settle disputes between conflicting interests (save in the exceptional case of a Commission of arbitration); nor is it a debating society. It exists to acquire and collate information and to advise—a function which is often forgotten. The aim should be, therefore, to make a Royal Commission as much a Thought Organisation and as little a Will Organisation as possible, or, to be more accurate, the Will of the members should be such as to aid the free exercise of Thought and not to impede it. A Royal Commissioner must make a severe effort of mind and will; but care should be taken in choosing him to ensure that this effort will turn into proper channels.

The Royal Commissioner differs from the majority of public officials in that as his tenure extends over a short period of a few months, there is no permanence to the office. This fact renders it almost impossible to invoke those psychological factors which are used to supplement the independence of other officials, and makes it essential to exercise unusual care in choosing the members of the Commission. They should possess above everything else intellectual honesty, and should have become habituated by their training to allow their minds to play freely about social, economic and political problems. It is on account of this last qualification that experts do not necessarily make the best Royal Commissioners. A man who has an extensive knowledge of the subject under investigation usually combines with that knowledge fairly definite convictions, and his mind is apt to be closed to new points of view. In many enquiries experts are the only ones qualified to act; but where this limitation on the choice of available

[1] Wallas, Graham, *The Great Society*, p. 238.

men does not exist, it is advisable as a rule to have the experts in a minority. The experts are then able to give their point of view, to place their knowledge at the disposal of the Commission, and to suggest the lines of investigation; while the other members will supply the breadth of view, the freshness, the initiative, and the originality which are so essential if the Commission is to do really constructive work.

The natural alternative to a Royal Commission is a Select Committee of either or both Houses of Parliament; but the former has many advantages which are not possessed by a Select Committee. A Royal Commission is formed with one object in view, to which it devotes its entire time and energy with a thoroughness that a Committee cannot hope to emulate. It also has greater mobility, and may go from one end of the Dominion to the other in order to gain expert knowledge of local conditions and to obtain different points of view. The choice of membership for a Royal Commission is wider than the country in which it works, whereas a Committee is necessarily limited to the members of either House. But the greatest advantage of a Royal Commission lies in the relation of its members to the government: they may be free from political prejudice; they do not conduct an investigation to justify or condemn any Act or Bill that may be in dispute; they pursue their enquiry without any molestation from parliament, and incur no political responsibility if their conclusions do not happen to accord with those of the Government or the Opposition. One kind of investigation, however, which has hitherto been conducted in Canada by Royal Commissions, might well be given to Select Committees, viz., investigations on the political corruption of ministers. The government, in the event of this transference, would not be placed in the false position of having to appoint its own judges; and though all the members would be more or less biased, parliament or the country could be trusted to enforce the political responsibility of the offending minister. Another alternative to a Select Committee in such cases might be suggested, viz., that the government should appoint a Royal

Commission composed entirely of its political opponents. Such a body would be morally bound to act with the strictest impartiality or even, perhaps, to allow the accused the benefit of any doubt.

Two suggestions might be offered in the matter of *personnel* which would seem to arise as a result of Canadian experience. The first is that it may be desirable to create a new permanent office of Royal Commissioner. The majority of the Commissions that have been formed have had as their chairman not an expert, but a man who was believed to have combined sound common sense with impartiality. It has been to this position that so many of the judiciary have been appointed. It would seem quite within the bounds of possibility to appoint one or two men of exceptional ability and fairness of mind as permanent Royal Commissioners, holding office on judicial tenure and at a liberal salary: They would not fill all the Royal Commissionerships by any means; it would probably be advisable to use them only as presiding officers on Commissions which would be composed in all other respects as to-day. They could certainly preside over all Commissions which do not demand expert investigation, and over all those which are quasi-expert in their *personnel.* The advantages of such an office would be many. It would release the judges from participation in all but political cases. It would provide an expert chairman, that is, a chairman whose life work would be to preside at investigations, and who would be an expert in elucidating evidence and information, and directing the course of an enquiry without delay and with impartiality. It would also add a dignity to an office, which its present impermanency renders impossible. Finally, the report of such a Commission would probably command a greater confidence on the part of parliament and the public than is possible under the present system.

The second suggestion is that it may be advisable to appoint more Royal Commissioners from outside Canada—preferably from Great Britain or the United States. This suggestion is made upon admittedly insufficient evidence, viz., the investigation of Sir George Murray on the Canadian

Civil Service in 1912,[1] and that of the Drayton-Acworth Commission on Railways in 1916; [2] but both reports easily rank among the best which are to be found in the long list of Canadian Royal Commissions since 1867. The principle beneath such appointments is unquestionably sound: it obtains experts who do not suffer from local prejudice, and whose knowledge of conditions in other countries should stimulate them in studying Canadian institutions. Sir George Murray, for example, was undoubtedly prejudiced; but he was prejudiced in favour of the British Civil Service, on which that of Canada was largely modelled and which was in most respects far superior to the Canadian. Sir George Murray was able therefore to get a long distance effect which was unaffected by local prepossessions, and he was free to apply the broad principles of public administration from a detached and scientific point of view. The *personnel* of the Drayton-Acworth Commission was particularly happy. It combined three of the best men in the three countries,[3] and whatever bias any one might possess in favour of the railway system to which he was accustomed, was bound to be counteracted by that of the other two members. Although it may be dangerous to generalise upon so little data, yet the success which has attended these two Commissions undoubtedly points to the desirability of further experiments in the same direction.

[1] *Can. Sess. Pap.*, 1913, § 57A. [2] *Ibid.*, 1917, § 20G.

[3] Sir Henry Drayton, Chairman of the Canadian Railway Commission. Mr. A. H. Smith, President of the New York Central Railway. Mr. W. M. Acworth, the British railway expert.

# CHAPTER VI.

## THE GOVERNOR-GENERAL.

THE independence that the Governor-General may or does exercise has long been a matter for dispute among the best authorities. The two following quotations may be taken as a typical illustration of this divergence of opinion, the first from the pen of Professor Goldwin Smith, the second from that of Mr. Alpheus Todd. Both opinions are characteristic of the writers and were expressed within a few years of each other :—

"The Constitution of the Canadian Dominion has a false front of monarchy. The King who reigns and does not govern is represented by a Governor-General who does the same, and the Governor-General solemnly delegates his impotence to a puppet Lieutenant-Governor in each province. Everything is done in the names of these images of Royalty, as everything was done in the names of the Venetian Doge and the Merovingian Kings ; but if they dared to do anything themselves, or to refuse to do anything that they were told to do, they would be instantly deposed. Religious Canada prays each Sunday that they may govern well, on the understanding that heaven will never be so unconstitutional as to grant her prayer." [1]

"In a British Colony, the representative of the Crown is usually a man of special qualifications for his exalted office. Necessarily impartial, and usually experienced in the science of government, the statesmen to whom such eminent functions are entrusted rarely fail to win the respect and confidence of the people as well as to merit the favour of their sovereign. For their powers are conferred upon them in trust for the welfare of the people, to whom in the last resort every governor must appeal, when in the discharge of his constitutional rights he dismisses an incompetent or unworthy ministry, or asks for a verdict to ratify or to disallow a decision of the popular assembly." [2]

[1] Smith, Goldwin, *Canada and the Canadian Question*, p. 147.

[2] Todd, Alpheus, *Parliamentary Government in the British Colonies* (2nd ed.), p. 681.

Whether the position of the Governor-General justifies the cynical contempt of Goldwin Smith or the reverential adulation of Todd may well be left unanswered until his functions in the Canadian state have been more fully examined. Before proceeding with the Confederation period, however, it will be well to sketch the history of the office immediately preceding the year 1867.

Before the era of responsible government the influence and power of the Governors [1] in British North America were immense. The Governor could dissolve or prorogue the Assembly at pleasure; he chose none of his advisers from its members; he was even independent of them to a large degree in financial matters, as there was a constant revenue from Crown lands, customs and the Imperial treasury.[2] He was dependent to some extent on his Legislative and Executive Councils, as his instructions stated certain matters on which he must ask their advice; but he was the sole authority for making appointments to both these bodies. Consequently both Councils were for the most part passive instruments in the hands of the Governor, who used them to accomplish his ends. As late as 1836 the Governor claimed that he was only bound to consult his Council in the cases explicitly stated in his instructions; but this attitude was so extreme that it resulted in the resignation of his entire Council.[3] His constant relations with this latter body, though they varied with the temperament of each Governor, forced him to rely more or less on one political party, viz., the Tories, or Family Compact groups. But inasmuch as he was the leader of that party, and had at his disposal the seats in the Councils and all the other patronage of the Crown, his influence was generally supreme. His duty was to direct the government of the Colony; and he chose as the means to that end the rôle of a political leader. The distance from Downing Street, the imperfect and slow communications,

[1] There was a Governor-General in addition to the Lieutenant-Governors before Confederation, but the latter were only nominally subordinate to the former. The Governor of Lower Canada was Governor-General of British North America. Cf. *Lord Durham's Report* (*Lucas*), II. pp. 8, 8N. *Ibid.*, III. pp. 311–14.

[2] Porritt, E., *Evolution of the Dominion of Canada*, pp. 82–88.

[3] *Canada and Its Provinces* Vol. IV, p. 453.

and the nature of the administration necessarily threw the major part of the government upon the person of the Governor. It was Crown Colony rule, not as it is known to-day, but at its worst, and its central figure, the Governor, dominated the whole administration.

After the Durham report the Governor reigned but governed no more; though an occasional Governor was found who rebelled against the manner in which the new system diminished the prerogatives of the Crown:—

"If you mean," said Sir Charles Metcalfe, one of the last Governors of the old school, in 1843, "that the Governor is to have no exercise of his own judgment in the administration of the Government, and is to be a mere tool in the hands of the Council, then I totally disagree with you. That is a condition to which I never can submit, and which Her Majesty's Government, in my opinion, can never sanction. . . . If you mean that the Governor is an irresponsible officer, who can, without responsibility, adopt the advice of the Council, then you are, I conceive, entirely in error." [1]

But responsible government, in its later forms at least, meant very little short of what Sir Charles Metcalfe abhorred. While it did not kill the Governor's independence outright, it was the swift beginning of that lingering and incurable disease which has left the patient weaker and less active year by year. Lord Elgin, who succeeded Sir Charles Metcalfe, was an enthusiastic supporter of the new system, and considered that under it great opportunities were still given for the free exercise of the Governor's power:—

"In Jamaica there was no responsible government: but I had not half the power I have here with my constitutional and changing Cabinet." [2]

"I believe . . . that there is more room for the exercise of influence on the part of the Governor under my system than under any that ever was before devised; an influence, however, wholly moral—an influence of suasion, sympathy, and moderation, which softens the temper while it elevates the aims of local politics." [3]

[1] Egerton and Grant, *Canadian Constitutional Development*, pp. 295–96.
[2] Walrond, T., *Letters and Journals of the Earl of Elgin*, p. 125.
[3] *Ibid.*, p. 126.

Lord Elgin's influence over his governments was unquestionably great, though it was, as he stated, persuasive rather than dictatorial. The Governor-General of to-day, however, would have to give a different account of his function—a difference of degree as well as of kind. When the Governor began to caution rather than to command, the reins of control began to slip from his hands; and while a few of the earlier governors were able to check the movement, the later incumbents were compelled to recognise its inevitability and to acquiesce in extending their own powerlessness.

The office of Governor-General was continued under the *British North America Act* and was assigned duties more in accordance with the actual meaning of the term. The relations of the Governor-General to his ministers were continued as before.[1] Certain new functions were added; but in all cases the duties were to be performed not by the Governor acting alone but under the advice of the Council.[2]

In order to ascertain the independence of the Governor-General it will be necessary to begin by an examination of the conditions making for or against independent action on his part, and then scrutinise the various functions he is called upon to discharge as well as the manner in which these have been exercised by the different Governors-General in Canadian history. The first point embraces the negative and positive conditions of independence. The second is particularly concerned with the historical struggle between the Governor-General's independence on the one hand and ministerial responsibility on the other.

The Governor-General is appointed by the King on the advice of the Colonial Secretary and with the approval of the British Prime Minister. This method would appear to preclude the Dominion from having any voice in the matter; but the custom has gradually been established whereby the Canadian Government is informally consulted before appointment. The point first arose in 1888 in a dispute over a new Governor for Queensland, when the Colonial Secretary (Lord Knutsford) opposed any suggestion that the Colonial Government should be consulted on the appointment. "It

[1] Sects. 10–13. [2] Sects. 58, 59, 90, 93, 96.

appears," said he, "to be necessary on every ground that Her Majesty's Government should conduct, without assistance from the Colony, the confidential negotiations preliminary to the selection of a Governor, while they could not invite a person so selected by them to allow his name to be submitted for the approval of gentlemen at a distance, to whom (though well and favourably known here) he may be altogether unknown." [1] Shortly afterwards, however, on the appointment of the Marquess of Normanby, the Colonial Office was forced to admit that its position was untenable, and the practice of consultation began. The danger expressed in 1888, that if a Governor were in any sense the nominee of the local government his impartiality might be impugned, has proved more apparent than real.[2] The Dominion Government exercises the same privilege accorded to any country in the appointment of an ambassador, the reason in both cases being the same, viz., that the appointment shall be such as to ensure harmonious relations between the two countries.[3]

In South Australia in 1908 and in Western Australia in 1913 official claims were put forward to have the post of Governor filled by one of their own citizens.[4] The Canadian Government has never favoured such a proposal, though at different times the names of Sir John A. Macdonald, Sir Wilfrid Laurier, and Lord Strathcona have been mentioned as possible Governors-General.[5] Sir Wilfrid called these suggestions "the expressions of a laudable, but, to my mind, a misguided expression of national pride," [6] and he mentioned several reasons against such a proposal, viz., that it would be one tie less to Great Britain, and that the

[1] *Parl. Pap.* (*Great Britain*) (5828), LV. 1889, p. 20.

[2] Keith, A. B., *Imperial Unity and the Dominions*, pp. 29–30.

[3] In 1883, when the announcement was made that Lord Lansdowne was to be the Governor-General of Canada, there was an outburst from the Irish-Canadian press because of Lord Lansdowne's past political career in regard to Ireland. The objection was not heeded, for two reasons, viz., this occurred before the Normanby case; and it was a protest, not by the Government of Canada, but by a small section of the population.

[4] Keith, A. B., *Imperial Unity and the Dominions*, p. 30.

[5] *Can. Ann. Review*, 1903, p. 248. *Ibid.*, 1904, p. 373. *Can. H. of C. Debates*, Feb. 21, 1883, p. 65.

[6] *Ibid.*, May 3, 1910, p. 8738.

undoubted advantages of having a Governor-General who was unconnected with Canadian politics and who had been politically trained in the home of responsible government would be lost. The force of these arguments has been generally recognised, and the movement for a Canadian-born Governor-General has never gained more than a few scattered adherents.

When it was suggested to Queen Victoria in 1856 that the new Governor of Victoria should be Mr. James Wilson, she replied with hauteur that "Mr. Wilson would not be at all a proper person [1] to be Governor of so large and important a Colony as Victoria. It ought to be a man of higher position and standing, and who could represent his Sovereign adequately." [2] Whether special anxiety were shown because the Colony in question had the unusual honour of bearing the royal name is not known; but the standard set by the above letter has governed all similar appointments in Canada. The Governor-General has never been tainted with a common origin, and there has been an increasing tendency in recent years to place a greater emphasis on high rank than on political experience.[3]

It is important to remember that although non-partisan in Canadian politics the Governor-General is a political nominee of the Imperial Government, a circumstance which sometimes exposes his actions to criticism and abuse:—

> "A Governor is not a passionless abstraction, or a crown upon a cushion. He is the nominee of a party leader, taken from the ranks of the party, and commissioned to carry its policy into effect in the colony, so far as his influence extends. . . . It cannot be doubted that Lord Dufferin came here disposed to support the Minister to whose co-operation the Gladstone Ministry, of which his Lordship was a member, deemed that it owed the acceptance of the Washington Treaty and the compromise of the Fenian Claim." [4]

[1] Mr. Wilson was a man of undoubted ability; but had shown poor taste in choosing manufacturing as a means of livelihood.

[2] Benson and Esher, *Letters of Queen Victoria*, 1837–61, Vol. III., p. 190.

[3] The recent appointment of Lord Byng has been a gratifying exception to the practice of appointing men who owed their titles to the accident of birth.

[4] *Canadian Monthly*, Sept. 1873, p. 244.

In 1903 Lord Minto, speaking at a banquet in Montreal, ventured to express his own personal views on Imperial relations with the Dominions. M. Henri Bourassa made a vigorous assault on him in reply, and contended that the Governor was publicly opposing his Premier :—

"Why, then, had the representative of the Crown contradicted him ? The English people had dethroned Kings for taking that line of action heretofore. How dared Lord Minto speak thus when the great peacemaker of the Empire had taken such pains to observe the constitution and to refrain from doing anything that might in the least embarrass his constitutional advisers. It was because Lord Minto was here as the representative of Mr. Joseph Chamberlain rather than of . . . Edward VII." [1]

The Governor-General holds office at the pleasure of the Imperial Government, and his recognised term is six years, though in Canada this has generally been reduced to five. The rule for limiting the tenure of office "was established principally for the purpose of ensuring in governors the utmost impartiality of conduct, by disconnecting them from fixed relations with the colony over which they are appointed to preside." [2] The tenure and removal of the Governor-General is quite apart from the Canadian Government, although the latter might conceivably apply for his dismissal should he prove either hopelessly incompetent or exceedingly industrious. But even in such an event, it is certain that before matters could reach that stage the Colonial Office would have already terminated the tenure. The Canadian Government have even discountenanced any request for the reappointment of a popular Governor-General, on the ground that it was a matter quite outside the purview of the Canadian Parliament and one which might result in grave inconvenience to both the Dominion and Imperial authorities.[3]

The salary of the Governor-General, though granted by the Canadian Parliament, has been virtually removed from

[1] *Can. Ann. Review*, 1903, p. 249. Cf. *Ibid.*, 1910, p. 196.
[2] Todd, A., *Parliamentary Government in the British Colonies* (2nd ed.), p. 123.
[3] *Can. H. of C. Debates*, April 3, 1878, pp. 1638–39.

its control. In 1868 an attempt was made to reduce the amount from £10,000 to £6,000, and a Bill to this effect was passed by the Senate and House of Commons. The Imperial Government refused assent to the Bill on the ground that Canada would thereby be reduced to the status of a third-class colony,[1] the Colonial Office having apparently adopted the curious method of classifying colonies according to the salary of their respective governors. The importance of the salary has been somewhat overlooked in recent years, due to the fact that the Governors-General have been in very affluent circumstances; but in 1869 the proposed reduction to £6,000 caused Lord Mayo and several others to refuse the position.[2] The Canadian Government provides a large official staff, and makes other allowances to supplement the regular salary.

The Governor-General as the representative of the Sovereign has been surrounded with as much pageantry and ceremony as the democracy of the Dominion will allow. He is styled Excellency; he is entitled to special salutes from men-of-war; he is allowed to wear a special uniform; and he holds a miniature Court of his own. Among many disadvantages this has one point in its favour: it sets the Governor in a place apart, and sharply distinguishes his office from the other branches of government; he is less liable to be exposed to public criticism or to have his actions attacked because of alleged political bias. The Colonial Office imposes a number of restrictions which are intended to have the same effect and to ensure the Governor's absolute impartiality. He is not permitted to be the editor of a newspaper or to take any part in its management; he may not contribute anonymously to any newspaper within the Dominion or outside of it; nor may he write on any political or administrative questions.[3] He may not make any investment or be connected with any local business which might in any way bring his public and private interests into

[1] *Can. Sess. Pap.*, 1869, § 73. Cf. *Ottawa Times*, May 21, 1869.

[2] Keith, A. B., *Responsible Government in the Dominions*, I. p. 97n. *Canadian Magazine*, July, 1917, p. 247.

[3] *Regulations for His Majesty's Colonial Service*, 1920, Chap. II., par. 5, sect. 44.

conflict.[1] He is not allowed to accept or to give valuable presents either on his own behalf or that of his family in their public capacity without the permission of the Secretary of State for the Colonies[2] :—

> "In the self-governing colonies the governor must not belong to any party within the colony; he should not have ties of politics, of family, of business, or of property within the colony. Within the colony he is, as it were, the governor of an engine, only capable of properly doing its work so long as it has no special connection with any one among the other parts of the machinery, or any one or other of the individual forces at play." [3]

The Governor-General is quite irresponsible, both civilly and criminally, for acts done within his jurisdiction and within the legitimate powers which he enjoys, though the courts will not hesitate to review any case in order to decide whether his jurisdiction or power has been exceeded. Unlike the Sovereign whom he represents, the Governor cannot claim immunity from suit. He may be sued in the courts of Canada or of England for private debts contracted within or outside of Canada.[4] He may be sued in either country for acts done in his official capacity[5] if he exceeds the powers given him; for he is not a viceroy.[6] He is liable to suit even though he may have acted on the advice of his constitutional advisers, and was so placed that no real alternative was open to him.[7] In civil matters he may be cleared of liability by an Act of Indemnity passed by the Dominion Parliament; [8] but in criminal cases such an Act offered in defence will not be upheld by an English court.[9]

The precedents for the immunity of the Governor-General from criticism or censure in parliament are conflicting, and

[1] *Regulations for His Majesty's Colonial Service*, 1920, Chap. II., par. 5, sect. 41.

[2] *Ibid.*, sect. 46. Case of Governor Darling. Keith, A. B., *Responsible Government in the Dominions*, II. pp. 602, 1021.

[3] Baden-Powell, Sir G., "Selecting Colonial Governors," *Nineteenth Century Review*, Dec. 1888.

[4] *Hill v. Bigge*. 3 Moo. P. C. 465.

[5] *Fabrigas v. Mostyn*, 20 St. Tr. 81.

[6] *Musgrave v. Pulido*, 5 A. C. 102.

[7] Keith, A. B., *Imperial Unity and the Dominions*, pp. 38–39. Bourinot, J. G., *Studies in Comparative Politics*, pp. 21–22.

[8] *Phillips v. Eyre*, 4 Q. B. 225, 6 Q. B. 1.

[9] Keith, A. B., *Responsible Government in the Dominions*, I. pp. 136–38.

it is impossible to state with certainty the extent of his privilege. Some Speakers have allowed addresses to pass which were really votes of censure on the Governor; others have ruled them out of order.[1] Such an address has never been introduced into the Canadian Parliament, though a similar procedure has occurred in the provincial legislatures against the lieutenant-governors.[2] The Speaker of the Canadian House has held that the speeches or acts of the Governor-General on any public question are subject to criticism because there is a responsible minister to answer any such remarks; but the Speaker was careful to add that "there must be the greatest propriety and respect in the language used."[3] On various occasions, however, speeches have been made in the Commons that approach perilously near to direct attacks on His Excellency's speeches and acts.[4] The Governor-General has also been frequently taken to task for what the press or speakers outside the House have considered breaches of duty, particularly when he has ventured upon addresses in the country.[5]

All these expedients have given the Governor-General an independent position in the Dominion, and all are calculated to encourage the strictest impartiality and to stimulate the free exercise of his powers. But is there, as Goldwin Smith would have us believe, no independent power to be exercised and no scope for independent action? The question can best be answered by an examination of some of the most important functions of the position and the manner in which the Governors of the past have discharged their duties—an enquiry which, owing to the nature of the office, must turn upon the extent to which the Governor has followed or declined to follow ministerial advice.

The Letters Patent authorise the Governor-General to

[1] Keith, A. B., *Responsible Government in the Dominions*, I. pp. 174–76. *Imperial Unity and the Dominions*, p. 100.

[2] *Ibid.*, p. 175N.

[3] *Can. H. of C. Debates*, Feb. 7, 1898, p. 176.

[4] *Ibid.*, May 8, 1899, pp. 2727–28. *Ibid.*, May 4, 1898, pp. 4820–22.

[5] *Morgan's Annual Register*, 1884, p. 70. *Can. Ann. Review*, 1903, p. 249. Porritt, E., *Evolution of the Dominion of Canada*, p. 264.

summon, prorogue and dissolve parliament.[1] A dissolution was refused in 1858 by Sir Edmund Head and the precedent followed by Lord Mulgrave in Nova Scotia in 1860. Both these instances, however, occurred when responsible government was still in the formative period, and they cannot be taken as authoritative precedents to-day. In no instance since Confederation has a Governor-General refused to grant a dissolution in Canada. This has by no means been the case in the other Dominions; in Australia, for instance, the Governor-General refused to accept ministerial advice on this point in 1904, 1905, and 1909.[2] But the action of Sir Ronald Munro Ferguson in granting a dissolution of both Houses in 1914 is regarded by Professor Keith as evidence that in Australia also the Governor's constitutional discretion to grant or withhold a dissolution is about to disappear.[3]

There can be little doubt but that a party leader will often use the prerogative of dissolution for his own advantage if he considers that the Governor's power of refusal has become a dead letter. Such a dissolution was mooted in Canada in 1886, and an emphatic protest was raised by *The Week*:—

> "A Parliament is by law elected for a certain term of years, and for that term it ought to sit, unless the occurrence of a constitutional crisis such as is brought on by a defeat of the Government, a collision between the two Houses, or some fundamental change of policy, renders necessary an appeal to the country. Whether a crisis has occurred, and whether a dissolution ought to be granted, are questions of which, we submit, the Crown or its representative is the judge, and which ought to be decided in the interest, not of a party, but of the whole community and of the Constitution." [4]

This is a very plausible argument; but on closer examination it proves to be the very negation of ministerial responsibility. For if the ministry does not acquiesce in the refusal to dissolve it must perforce resign, and the Governor is

[1] Letters Patent, 1905, sect. 5. Keith, A. B., *Responsible Government in the Dominions*, III. p. 1562.
[2] Keith, A. B., *Responsible Government in the Dominions*, I. pp. 191–92.
[3] Keith, A. B., *Imperial Unity and the Dominions*, pp. 104–12.
[4] Nov. 18, 1886.

then left to seek other advisers who will take an *ex post facto* responsibility for his refusal, which is really no responsibility at all. The Governor-General by rejecting ministerial advice also lays himself open to a charge of partisanship by the people of the country, and whatever influence he might exert by virtue of his supposed detachment from politics would be largely destroyed. On the whole, therefore, it cannot be regretted that the Dominions have shown a decided tendency, particularly of recent years, to approach the position of the United Kingdom on this question, and that the Governor-General has limited his interference in a dissolution to a possible remonstrance with his advisers.

An interesting case of prorogation occurred in connection with the Pacific Scandal in 1873. Charges against the Government had been made in the House on April 2, and a Select Committee was appointed to investigate the matter. Pending the enquiry, the House was adjourned until August 13, when it was to reassemble for prorogation. In the interval, however, twelve Ministerialists joined the Opposition; and when August 13 arrived, a memorial signed by ninety members of the House (almost half its total membership) was presented to the Governor-General, praying that prorogation should not take place until the House had had an opportunity of taking steps in regard to the charges.[1] The situation was made more difficult by two further considerations. The Government had no majority in the House because a number of their supporters, relying on the prorogation promised by the Governor, had gone to their homes.[2] Further, if the House were prorogued, the Select Committee would *ipso facto* be dissolved. After many misgivings Lord Dufferin, the Governor-General, followed the advice of his ministers and prorogued Parliament for reasons which he stated in a dispatch to the Earl of Kimberley on August 15, 1873.[3] His suggestion to Sir John A. Macdonald that he would be the channel of communication between Sir John and his opponents was

[1] *Can. H. of C. Journals*, 1873, p. 31.

[2] *Ibid.*, p. 27. A number of these lived in British Columbia and the railway to the coast was not yet built.

[3] *Ibid.*, pp. 12–39.

unheeded.[1] The ministry also refused to face a vote in the Commons at that time and unanimously advised prorogation.[2] Lord Dufferin's alternatives as he saw them were either compliance with this advice or the dismissal of the ministry, which would cast the stigma of guilt upon them.[3] He compromised by making the stipulation that Parliament should be convoked as soon as conveniently possible.[4] Immediately after prorogation the signatories to the memorial held an indignation meeting, at which they assailed the action of the Governor-General and resolved :—

"That in the opinion of this meeting, the prorogation of Parliament without giving the House of Commons the opportunity of prosecuting the enquiry which it had undertaken is a gross violation of the privileges and independence of Parliament and of the rights of the people." [5]

The *Canadian Monthly* summarised the Governor's dilemma in the following editorial :—

"His Excellency is carried round in a strange circle. He cannot reject the advice of Ministers who have the confidence of Parliament : whether his Ministers have the confidence of Parliament can be decided only by suffering Parliament to meet : but he cannot suffer Parliament to meet because by so doing he would be rejecting the advice of Ministers who have the confidence of Parliament. . . . If he is to be a mere seal of state, and to allow himself mechanically to be affixed to any instrument, whether of right or wrong—whether of honour or of dishonour—by any hand that may happen for the moment to have got hold of him, we respectfully submit that such an instrument might be furnished to the public at a far less cost, and that we might at the same time avoid the moral snare of having a pure name attached to proceedings which are the reverse of pure." [6]

This was but a mild form of what the Governor-General was subjected to in the press and on the platform ; he was likened to King John, James II. and even Charles I.[7] It was a close parallel to the indignation aroused by Lord

[1] *Can. H. of C. Journals*, 1873, p. 28. [2] *Ibid.*, p. 30.
[3] *Ibid.*, pp. 32–37. [4] *Ibid.*, p. 30.
[5] Stewart, G., *Canada under the Administration of the Earl of Dufferin*, pp. 222–23.
[6] Sept. 1873, pp. 245–46.
[7] Stewart, G., *Canada under the Administration of the Earl of Dufferin*, p. 215.

Elgin when he assented to the Rebellion Losses Bill in 1848. In both instances the principle of acting under ministerial advice was endorsed by the Governor at the cost of temporary personal unpopularity. Lord Dufferin could have made a strong case against complying with his ministers'advice in 1873, and by not doing so, he established a precedent in Canada which will probably never be broken.

The power of the Governor-General to dismiss his ministers has also never been exercised since the creation of the Dominion,[1] though the existence of such prerogative has never been seriously disputed.[2] The possibility of such a step on the part of Lord Dufferin was widely discussed at the time of the Pacific Scandal; and Sir Charles Tupper has recently stated that the Governor-General asked for Sir John A. Macdonald's resignation, and was only dissuaded from insisting on it because he might appear to take the side of the Liberals in the controversy.[3] In his dispatch to the Earl of Kimberley, Lord Dufferin stated that as the data was insufficient to prove the guilt of the ministry he preferred to retain their services until the charges were more definitely proved.[4] The *Canadian Monthly*, always a firm believer in the Governor's discretionary power, thought differently :—

"The principle of constitutional government is, that the Crown shall be guided by the advice of Ministers who have the confidence of Parliament; but there are three cases at all events in which, as it appears to us, a Governor-General has a right, and is bound, to think and act for himself. He has a right, and is bound in case of doubt, to assure himself that his Ministers really have the confidence of Parliament; he has a right, and is bound, himself to call his Ministers to account for anything affecting their personal integrity; and he has a right, and is bound, at

[1] Lord Aberdeen refused to accept ministerial advice on certain appointments in 1896, and the ministry resigned as a consequence. But as the Government had been already badly defeated at the polls, it can scarcely be called a dismissal.

[2] Todd, A., *Parliamentary Government in the British Colonies* (2nd ed.), pp. 615, 817. Keith, A. B., *Responsible Government in the Dominions*, I. p. 223. *Imperial Unity and the Dominions*, pp. 112–13. *Can. H. of C. Debates*, March 31, 1875, p. 1008.

[3] Tupper, Sir C., *Recollections of Sixty Years*, pp. 156–57.

[4] *Can. H. of C. Journals*, 1873, pp. 34–35.

all hazards to reject advice which he deliberately believes to be not only impolitic but morally wrong, or plainly at variance with the principles of the constitution." [1]

The *Monthly* claimed that all three questions had arisen on this issue and that Lord Dufferin should demand the resignation of the ministry. Eventually the Government did resign; but it was at their own instance, and not at that of the Governor-General.

A few years later Lord Dufferin expressed his opinion on another case as to the circumstances that would justify his demanding his ministers' resignation. Speaking at Victoria, B.C., on September 20, 1876, in reference to the widespread conviction that Mr. Mackenzie, the Premier, had connived at the defeat of his own Pacific Railway Bill in the Senate, Lord Dufferin said :—

"Had Mr. Mackenzie dealt so treacherously by Lord Carnarvon, by the representative of his Sovereign in this country, or by you, he would have been guilty of a most atrocious act. . . . I tell you in the most emphatic terms, and I pledge my own honour on the point, that Mr. Mackenzie was not guilty of any such base and deceitful conduct; had I thought him guilty of it, either he would have ceased to have been Prime Minister, or I should have left the country." [2]

This position is rather extreme, but Lord Dufferin's grasp of the basic principles of responsible government was by no means small, and his position was no doubt quite sound. The prerogative of the dismissal of ministers may be considered to be still extant, and though it has never been exercised in the Federal Government, it would be unwise to regard it purely in the light of a theoretical power. But a Governor-General will do well to hesitate before he takes such an extreme step, for he must be prepared to find other advisers to carry on the administration. Failing to do this or failing to have his choice ratified by the people, he would have no alternative but to resign himself. The safest and wisest policy is for the Governor to forbear using his personal

[1] Oct. 1873, pp. 323–24.
[2] Stewart, G., *Canada under the Administration of the Earl of Dufferin*, p. 479.

discretion and allow matters to take their natural course. If the administration is an iniquitous one, its reign will be short, and the people will be quite competent to mete out justice instead of the Governor-General endeavouring to do it for them.

Another question which aroused a hot controversy was the refusal of Lord Aberdeen in 1896 to sanction appointments recommended by Sir Charles Tupper. The latter had been decisively defeated in the general election, but had retained office pending the assembling of parliament. He made numerous recommendations for appointments of judges, senators and minor officers, which Lord Aberdeen refused to allow for reasons which he stated in a minute to Sir Charles on July 4, 1896.[1] The Governor-General claimed that as the administration had been formed when no parliament was in existence, their acts were "in an unusual degree provisional," that they should therefore limit their actions "to the transaction of all necessary public business" and "avoid all acts which may embarrass the succeeding government." He also pointed out that as a result of the long Conservative *régime* the Senate and the Bench were filled with the nominees of that party. Sir Charles Tupper replied on July 8, setting forth Imperial and Canadian precedents to justify his claim, and concluded by tendering his resignation.[2] He contended with truth that Mr. Mackenzie had been permitted after his defeat in 1878 to appoint a deputy minister and a number of judges. During the next few years Sir Charles expressed his opinion even more forcibly in parliament.

"The late Governor-General (Lord Aberdeen) . . . undertook to do that which no Governor-General . . . which no British sovereign of later times has undertaken . . . and that was to dictate to his Government the restrictions that he himself was disposed to impose in regard to appointments and recommendations for appointments to office." [3]

[1] *Can. Sess. Pap.*, 1896, *2nd Session*, § 7, pp. 2–3.
[2] *Ibid.*, pp. 3–7.
[3] *Can. H. of C. Debates*, May 8, 1899, pp. 2727–28. Cf. *Ibid.*, May 3, 1897, pp. 1639–57. *Ibid.*, May 4, 1898, pp. 4819–25. Articles in *National Review*, Nov. 1896, *Canadian Magazine*, Jan. 1897.

The action of Lord Aberdeen was approved by the Colonial Secretary,[1] but it was in accord with neither Canadian nor Imperial precedent. Even Sir Wilfrid Laurier did not attempt to explain the sanctioning of Mr. Mackenzie's recommendations nor to distinguish between the two cases of 1878 and 1896.[2] There can be no doubt that the recommendations made by Sir Charles Tupper were extremely ill-advised under the circumstances; but that does not excuse the Governor-General for refusing to act upon them. It would have been much better for Lord Aberdeen to have retained his ministry in complete confidence rather than attempt to retain them in office while refusing to act on their advice. It was precisely such a position of quasi-ministerial responsibility that Lord Dufferin had refused to adopt in 1873.[3] The best policy would have been to have used his personal influence with Sir Charles to dissuade him from pressing his claim, or, failing that, to sacrifice a few appointments and allow the Premier to suffer just retribution at the hands of parliament. It is quite safe to assert that had Lord Aberdeen not been so certain of getting a new ministry he would never have ventured to take up so dangerous a position. As it was, he had the edification of seeing his name and office dragged into the political arena and of hearing himself hailed as the leader of the Liberal party—a result that was scarcely worth the gaining of a few appointments.

The exercise of the prerogative of pardon has undergone a great alteration since the formation of the Dominion: it is one of the few cases where it can be said with certainty that the independent action of the Governor-General has been reduced. Previous to Confederation and until 1878 the Governor's instructions empowered him to disregard the advice of his ministers in administering the prerogative of mercy, although he was bound to consult them and give consideration to their advice.[4] In 1861 Sir Edmund Head

[1] *Can. H. of C. Debates*, June 10, 1898, p. 7689.
[2] *Ibid.*, May 8, 1899, pp. 2734–38.
[3] Cf. *Can. H. of C. Journals*, 1873, p. 35.
[4] Instructions to Lord Dufferin, 1872, *Can. Sess. Pap.*, 1875, § 29.

reprieved one Patterson, although his Council were opposed to such action.[1] In 1875 Lord Dufferin commuted the sentence of death passed on Alexander Lepine "entirely on his own responsibility and according to his independent judgment, thus relieving his Ministers of any obligations whatever in the matter."[2] The situation, however, was unsatisfactory, and the exercise of the prerogative was freely criticised.[3]

In 1878 important alterations regarding pardons were made in the instructions of the Governor-General, a change which was largely due to Edward Blake, the Minister of Justice in the Mackenzie administration. In a minute of July 1, 1876, to the Colonial Secretary, Mr. Blake explained his position, viz., that in all cases except those in which Imperial interests were involved, the Governor-General should take the advice of his ministers, who would accept full responsibility.[4] On the appointment of the Marquis of Lorne in 1878 a new commission and instructions were issued [5] containing several important changes which, combined with the understanding between the two governments that in purely Canadian cases the advice of ministers should prevail, secured the essence of Mr. Blake's demand.[6] In cases which affect the Empire or international relationships the Governor still acts on his own responsibility, though the matter may be referred to the Colonial Secretary by "the Governor in Council" as was done in the Martin case in 1877.[7] An unusual case occurred during the Bowell administration in 1895; the ministry could not agree as to what action should be taken on the condemnation of one Shortis, and they referred it to Lord Aberdeen for decision.[8] The Minister of Justice still uses the Governor-General as a convenient shelter to

[1] Todd, A., *Parliamentary Government in the Colonies* (2nd ed.), p. 362.
[2] Stewart, G., *Canada under the Administration of the Earl of Dufferin*, p. 412. *Can. Sess. Pap.*, 1875, § 11.
[3] *Canadian Monthly*, Dec. 1875, p. 542. Oct. 1876, p. 355. Dec. 1876, p. 556. Cf. Opinion of Sir H. Robinson, *Can. Sess. Pap.*, 1876, § 116, p. 67.
[4] *Can. Sess. Pap.*, 1877, § 13, pp. 3–9. [5] *Ibid.*, 1879, § 14.
[6] Todd, A., *Parliamentary Government in the Colonies* (2nd ed.), pp. 364–65. [7] *Ibid.*, p. 366.
[8] Keith, A. B., *Responsible Government in the Dominions*, III. p. 1404.

protect the government from criticism, and refuses to discuss a pardoning case in parliament on the questionable ground that as it is a prerogative of the Sovereign it ought not to be made the subject of controversial discussion.[1]

The disallowance of provincial legislation by the Governor-General has given rise to a great deal of theoretical controversy between the Canadian governments and the Colonial Office, caused for the most part by the faulty wording of the *British North America Act*. Section 90 states that the provisions of the Act regarding "the assent to Bills, the disallowance of Acts, and the signification of pleasure on Bills reserved—shall extend and apply to the Legislatures of the several Provinces as if those provisions were here re-enacted and made applicable in terms to the respective Provinces and the Legislatures thereof, with the substitution of the Lieutenant-Governor of the Province for the Governor-General, of the Governor-General for the Queen and for a Secretary of State, of one year for two years, and of the Province for Canada." Sections 56 and 57 of the same Act state that the power of assent or disallowance of Dominion legislation is vested in the Queen in Council. Section 90 was obviously worded badly, and shortly after Confederation an interesting correspondence ensued as to the proper interpretation of this section. A short summary follows :—

I. Sir John Young, the Governor-General, in a dispatch dated March 11, 1869, referred to the Colonial Secretary for instructions on the subject of disallowance of provincial legislation.[2]

II. Lord Granville replied on May 8, 1869, stating that:

(1) As a general rule, the Governor-General should act on the advice of his ministers, whether he agreed with them or not.

(2) If the Act in question were gravely unconstitutional or were objectionable on grounds of Imperial policy, he should refer home for instructions.[3]

III. This satisfied the Canadian Government and it passed an Order in Council on July 17, 1869, directing that this dispatch should be communicated to the Lieutenant-Governors.[4]

[1] *Can. H. of C. Debates*, June 13, 1906, pp. 5183–84. *Ibid.*, June 14, 1906, pp. 5324–26.
[2] *Can. Sess. Pap.*, 1870, § 35, pp. 3–4.
[3] *Ibid.*, pp. 4–5.
[4] *Ibid.*, pp. 25–27.

IV. In a letter of December 13, 1872, to the Under-Secretary of State for the Colonies, Lord Ripon, Lord President of the Privy Council, gave as his opinion: "As the power of confirming or disallowing Provincial Acts is vested by the Statute in the Governor-General of the Dominion of Canada acting under the advice of his constitutional advisers, there is nothing in this case which gives to Her Majesty in Council any jurisdiction over this question. . . . His Lordship is of the opinion that Her Majesty cannot with propriety be advised to refer to a Committee of the Council in England a question which Her Majesty in Council has no authority to determine." [1]

V. The Earl of Kimberley, Colonial Secretary, in a dispatch to the Governor-General on June 30, 1873, in reference to disallowance of certain Acts of the New Brunswick Legislature said: "This is a matter in which you must act on your own individual discretion, and on which you cannot be guided by the advice of your responsible Ministers of the Dominion." [2]

VI. The different members of the Imperial Government having held three conflicting views on the subject, the Canadian Government not unnaturally thought that it might make a contribution. A Committee of the Canadian Privy Council accordingly investigated the matter, and its report was approved by the Governor-General in Council on March 8, 1875. After reviewing the whole situation it stated that Sections 90, 56 and 57 intend that disallowance shall be vested in the Governor in Council, that the interpretation given by Lord Kimberley would, if adhered to, "destroy all ministerial responsibility, and impose on the Governor-General a responsibility not intended by the Statute, and at variance with the Constitution." [3]

VII. The Earl of Carnarvon, then Colonial Secretary, did not accept this. In a dispatch to the Governor-General on November 5, 1875, he considered that the ministerial responsibility should be limited to giving advice, and it would not be the fault of the ministers if the Governor-General declined to act upon it. His Excellency was, he thought, bound to exercise his personal discretion.[4]

VIII. Edward Blake, Minister of Justice, then reported to the Canadian Privy Council, on December 22, 1875. He stated that the Canadian ministry must be exclusively responsible for any disallowance, that any distinction between advice given and advice taken was quite impossible, and that a ministry must resign if its advice were not followed. He also pointed out that provincial legislation was bound to treat of local matters

[1] *Can. Sess., Pap.*, 1876, § 116, p. 85.
[2] *Ibid.*, 1874, § 25, p. 13.
[3] *Ibid.*, 1876, § 116, pp. 84–85. [4] *Ibid.*, pp. 83–84.

only, and that Imperial questions cannot in the very nature of things be involved.[1]

IX. This was concurred in by the Governor in Council on February 29, 1876, and forwarded to the Imperial Government.[2]

X. Lord Carnarvon again replied on June 1, 1876, re-stating his position, and adding that Sections 10 and 13 of the Act also distinguish between the Governor-General and the Governor-General in Council. He suggested that control of provincial legislation by the Dominion Government would nullify many of the rights of the provinces in legislation.[3]

XI. The Governor in Council on September 19, 1876, passed a minute from the Department of Justice stating that where the words "in Council" had been omitted, it had been done for the sake of brevity and not with any desire to curtail the advice of ministers. The Governor-General could not be expected to be capable of deciding such cases on his own initiative and he must resort to his Council for advice. As to the argument that the provinces would suffer, they replied very truly that it did not affect the question; but even if it did, no Canadian government would dare to interfere seriously with provincial autonomy.[4]

XII. The Secretary of State replied on October 31, 1876, by once more drawing a distinction between acts under the advice of ministers and according to the advice of ministers.[5]

XIII. On November 31, 1876, a further report was approved by the Governor in Council and forwarded to the Colonial Secretary reiterating its position.[6]

XIV. The Secretary of State for the Colonies briefly acknowledged its receipt on January 4, 1877.[7]

This terminated this extremely interesting correspondence, which, with intermissions, extended over a period of eight years. It is impossible to say definitely in whose position the truth lies, and additional difficulties have been created by a certain shifting of ground by both parties. The Canadian interpretation, however, seems to be most in accord with the spirit and wording of the Act, particularly the view stated by Mr. Blake on December 22, 1875. Both Mr. Todd and Professor Keith agree that the statute does

[1] *Can. Sess. Pap.*, 1877, § 89, pp. 449–53. This latter contention has been proved to be unsound by the recent British Columbian legislation on the exclusion of Asiatics, a matter of very vital Imperial interest.

[2] *Ibid.*, p. 449. [3] *Ibid.*, pp. 453–54. [4] *Ibid.*, pp. 455–56.

[5] *Ibid.*, pp. 456–57. [6] *Ibid.*, p. 458. [7] *Ibid.*, p. 458.

not give to the Governor personally any discretionary power, though they disagree on the grounds from which they draw their conclusions.[1] The dispute, strangely enough, has never taken a practical form in a test case: the power of disallowance has been very freely exercised by the Dominion Government; [2] but there is no instance where a Governor-General has sought to disallow an Act on his own personal responsibility. Even when Imperial interests were involved, the offending Act was disallowed by the Governor in Council after a request by the British Government to do so.[3]

The same question as to the interpretation to be placed on the word "Governor-General" in the *British North America Act* was raised in the discussion that preceded the dismissal of a Lieutenant-Governor. Section 58 of the Act provides for the appointment of a Lieutenant-Governor by "the Governor-General in Council," while Section 59 states that he holds office during the pleasure of the "Governor-General." The test case arose in March, 1879, when Sir John A. Macdonald, the Premier, advised the Marquis of Lorne to dismiss Mr. Luc Letellier, Lieutenant-Governor of Quebec. The Governor-General demurred at removing his deputy, and finally, with the acquiescence of his ministry, referred the matter to the Imperial Government. The Colonial Secretary replied on July 3, 1879, and after stating that it was a matter in which the British Government would not interfere, he took up the question of the legality of the Governor-General using "his own individual judgment." Having cited sections 58 and 59 of the Act he proceeds:—

"But it must be remembered that other powers, vested in a similar way by the Statute in 'the Governor-General,' were clearly intended to be, and in practice are exercised by him, by and with the advice of his Ministers. . . . Her Majesty's

[1] Todd, A., *Parliamentary Government in the Colonies* (2nd ed.), pp. 452–57. Keith, A. B., *Responsible Government in the Dominions,* II. pp. 729–30. Cf. *Can. H. of C. Debates,* March 31, 1875, pp. 1003–08.

[2] Disallowed provincial acts number about seventy. Riddell, W. R., *The Constitution of Canada,* p. 98.

[3] Keith, A. B., *Responsible Government in the Dominions,* II. p. 731.

Government do not find anything in the circumstances which would justify him in departing, in this instance, from the general rule, and declining to follow the decided and sustained opinion of his Ministers . . . Her Majesty's Government, therefore, can only desire you to request your Ministers again to consider the action to be taken in the case of Mr. Letellier." [1]

Following this recommendation the Governor-General referred the matter a second time to his Council, and as the ministry again advised removal, Mr. Letellier was dismissed on July 25, 1879. In the opinion of many, notably Professor Goldwin Smith, this was a clear case when the Governor should have refused to follow ministerial advice.

"He might have done the Colony a great service, though at some risk to himself, had he told the Minister that on questions of policy he was ready to be guided by others, but that on questions of justice, especially in a case where his own deputy was concerned, he had a conscience of his own, and that he would do what honour bade him or go home." [2]

Professor Goldwin Smith assumes the dismissal to have been unjust, which was by no means a certainty; but even if that be admitted, the Marquis of Lorne had no real alternative under the circumstances. The Colonial Secretary had explicitly stated that the Governor was not to use his own judgment, and although the latter was averse to so extreme a step as dismissal,[3] he had to obey his orders and follow his ministers' advice. This case gave an unmistakable interpretation to the ambiguous clause in the *British North America Act,* and when the Lieutenant-Governor of British Columbia was removed by the Governor in Council in 1900 [4] scarcely a voice was raised in objection.

The Governor-General is also deprived of personal initiative in making speeches throughout the country. He is only allowed, as one Governor is reported to have said, "to have opinions in Canada provided he does not express them."[5] Lord Lansdowne speaking at Halifax, N.S., in

[1] *Can. Sess. Pap.*, 1880, § 18A, p. 8.
[2] Smith, Goldwin, *Canada and the Canadian Question*, p. 151.
[3] Collins, J. E., *Canada under the Administration of Lord Lorne*, pp. 79–80.
[4] *Can. Sess. Pap.*, 1900, § 174.
[5] *Can. H. of C. Debates*, May 22, 1919, p. 2704.

1884, ventured to remind his audience of the distinguished career of Sir Charles Tupper, a native of that province. He was promptly rebuked by several newspapers on the ground that he was not supposed to eulogise any one who had been a political partisan.[1] Lord Grey was perhaps more addicted to giving and receiving addresses than any of the Governors-General; but he confined himself strictly to a few set subjects which, with one exception, were non-controversial.[2] This exception was the desirability of Canada assuming a share in Imperial defence, and although it was a subject in which he was keenly interested, he was very discreet as to his observations on its constitutional aspect[3]:—

"For nearly five years," said Lord Grey, "I have endeavoured in my public utterances to call the attention of the people to the importance of keeping before them high national and Imperial ideals. For nearly five years I have, quite conscious of my constitutional limitations, walked the tight-rope of platitudinous generalities and I am not aware of having made any serious slip."[4]

It has been established as a recognised principle that whenever the Governor-General speaks on public affairs, unless he does so as an Imperial officer, the ministry must accept responsibility for his utterances. This rule was expressly laid down by Sir John A. Macdonald in 1877,[5] and accepted by the Premier, Mr. Mackenzie, in these words:—

"I admit the responsibility of the Ministers for every utterance made by the Governor-General respecting public affairs, or which has any bearing on public affairs."[6]

On February 7, 1898, Sir C. H. Tupper asked in the House whether the Government supported the views of Lord Aberdeen on preferential trade as expressed by him at Toronto in 1897. Sir Wilfrid Laurier replied that on that occasion Lord Aberdeen spoke not as the Governor-

[1] *Morgan's Annual Register*, 1884, p. 70.
[2] *Canadian Magazine*, July, 1910, p. 226.
[3] *Ibid.*, p. 228. Cf. Begbie, H., *Albert, Fourth Earl Grey*, pp. 126–32.
[4] *Can. Ann. Review*, 1909, p. 44.
[5] *Can. H. of C. Debates*, March 1, 1877, pp. 373–75.
[6] *Ibid.*, p. 375.

General, but in his private capacity.[1] This was an untenable position; and Sir Charles Tupper on the following day attacked the Government for its attitude, particularly as the point to which he referred was then a matter of public controversy. The Premier was forced to admit the truth of this contention as well as the Government's responsibility, adding, however, that in the case under discussion preferential trade had barely been mentioned and no opinion expressed upon it.[2]

The conferring of honours upon Canadians was never covered by ministerial responsibility, though the government was usually consulted and of late years did in effect confer them. When the Prince of Wales visited Canada in 1901, the honours were given to such an ill-assorted lot of people that the general opinion was that the Government could not have had the dominant voice in the selection.

"The botch was no doubt made by Lord Minto," says the *Toronto Saturday Night*, "assisted by some other gentlemen of high degree who were totally unfit to make a selection. . . . Such things are hardly worth discussing, except that they afford Canadians proof of how necessary it is to guard every feature of our self government, lest in matters of graver moment excellent but indiscreet gentlemen like Lord Minto and Major Maude are permitted to have so much to say that real damage may be occasioned in our relations to the Empire."[3]

On July 9, 1906, Sir Wilfrid Laurier, in reply to a question, said that there was no foundation for the statement that in the conferring of birthday honours some had been given at the instance of His Excellency without regard to the views of the ministry.[4] Some years later he stated that while he was Prime Minister he had not considered the matter of sufficient importance to be covered by ministerial responsibility.[5] Inasmuch as titles of honour are no longer to be conferred upon Canadians,[6] this power of the Governor-General has now become obsolete.

[1] *Can. H. of C. Debates*, Feb. 7, 1898, p. 176.
[2] *Ibid.*, Feb. 8, 1898, pp. 253–63.
[3] Sept. 28. 1901, p. 1.
[4] *Can. H. of C. Debates*, July 9, 1906, p. 7460.
[5] *Ibid.*, Feb. 5, 1914, p. 482.
[6] *Can. H. of C. Journals*, May 22, 1919, p. 295.

One of the few functions of a Governor-General that demands the exercise of his initiative and the influence of his personality is that of acting as a peacemaker and diplomat between contending sections of the community. It is a function which requires above everything else an unblemished character and a reputation of political neutrality. Lord Dufferin was able to perform this delicate task more successfully and more acceptably than any Governor before or since his time. In the crisis of 1873 he showed both his appreciation of the possibilities of his position and his readiness to make use of them when the opportunity occurred.

"I thought it desirable to make a suggestion . . . to Sir John Macdonald, offering at the same time to become the channel of communication by which an understanding between him and his opponents might be arrived at." [1]

"I am quite ready to admit that one of the functions of a Governor-General is to moderate the animosities of party warfare, to hold the balance even between the contending parties, to see that the machinery of the Constitution is not unfairly strained for party purposes, to intervene with his counsels at opportune moments, and when desired by his Ministers to become the channel of communication with their opponents, or even though uninvited, to offer himself as negotiator in a difficulty." [2]

Three years later Lord Dufferin was indefatigable in his efforts to close the breach between British Columbia and the Dominion which had been caused by the latter's failure to build the Pacific Railway. His tact and adroitness, the manner in which he made use of his political neutrality to enforce his points, and his general attitude may be illustrated by two excerpts from his farewell speech at Victoria.

"Happily my independent position relieves me from the necessity of engaging with you in any irritating discussion upon the various points which are in controversy between this colony and the Dominion Government. On the contrary, I am ready to make several admissions." [3]

"My functions as a constitutional ruler are simply to superintend the working of the political machine, but not to intermeddle with its action. I trust that I have observed that rule

[1] *Can. H. of C. Journals*, 1873, p. 28. [2] *Ibid.*, p. 34.

[3] Stewart, G., *Canada under the Administration of the Earl of Dufferin*, p. 466.

on the present occasion, and that, although I have addressed you at considerable length, I have not said a word which has not been strictly within my province to say, or have intruded on those domains which are reserved for the action of my responsible advisers. As I warned you would be the case, I have made no announcement, I have made no promise, I hazarded no opinion upon any of the administrative questions now occupying the joint attention of yourselves and the Dominion. I have only endeavoured to correct some misapprehensions by which you have been possessed in regard to matters of historical fact." [1]

A more informal attempt at diplomacy occurred in 1895 on the Manitoba School question, when the Premier and Attorney-General of that province held a conference with the Governor-General at which the Canadian Government was not represented.[2] *The Week*, though admitting that such an incident was unprecedented, saw little in it to criticise :—

"It does not appear, however, that there is anything, either in the Constitution, the Imperial instructions, or, in the nature of things, to prevent His Excellency from communicating with whom he will, on whatever topics he may please, so long as he neither attempts nor contemplates any Executive action save at the instance and on the responsibility of his constitutional advisers. It would be no one's business, so far as we can see, where or whence the proposed action had originated, so long as the Government made the proposed measure or policy its own." [3]

The Governor-General must obey the law, and this may compel him at times to act on his own initiative and contrary to the counsel of his ministers.[4] He has a strong incentive to refrain from illegal acts because of his liability to suit in the event of his infringing the law, even though he may have acted under ministerial advice. "The Queen's Representative . . . is imperatively bound to withhold the Queen's authority from all or any of those manifestly unlawful proceedings by which one political party, or one member of

[1] Stewart, G., *Canada under the Administration of the Earl of Dufferin*, pp. 490–91.
[2] *Toronto Mail and Empire*, May 22, 1895. [3] May 31, 1895, edit.
[4] Todd, A., *Parliamentary Government in the Colonies* (2nd ed.), p. 628. Keith, A. B., *Responsible Government in the Dominions*, I. p. 246.

the body politic, is occasionally tempted to endeavour to establish its preponderance over another."[1] Such a difficulty is most apt to arise in one of two forms, the expenditure of public funds [2] or the declaration of martial law.[3] Neither have, however, given trouble in Canada, though the resignation of Sir Charles Tupper in 1896 was in part due to Lord Aberdeen's questioning certain expenditures for which parliament had given no authority.[4] But the refusal of a Governor to accept advice must be conditioned by his ability to find other advisers, and though he has undoubtedly the power to refuse in theory, that is reduced almost to a nullity in practice. Certainly if Sir Charles Tupper had been returned at the election of 1896, Lord Aberdeen would have been compelled to give the matter much further consideration before venturing to refuse the advice tendered him. The situation is extremely embarrassing for the Governor-General: if he refuses to comply with the advice of his ministers, they will resign, and he may be unable to procure others; if he complies and countenances an illegal act, he thereby renders himself liable to suit. The only solution would seem to be an alteration in the law, granting the Governor legal immunity whenever he acts under ministerial advice.

I have now examined the more important functions that the Governor-General performs as the nominal head of the Canadian Government. He discharges another duty, however, in a different capacity; he is an Imperial officer and the only agent of that government in Canada, and this position may at times compel him to act against the wishes and advice of his ministers. Some of his duties in this regard have been already dealt with under the prerogatives of pardon and the granting of titles. He may use his personal discretion in the Imperial interest if the question of pardon threatens to affect the Empire as a whole, and he is not bound to act on ministerial advice in recommending honours and titles. Inasmuch as the last-named function has now

[1] Dispatch of Nov. 25, 1865, from the Colonial Secretary. *Ibid.*, I. p. 262.
[2] *Ibid.*, I. pp. 246–68.
[3] *Ibid.*, I. pp. 269–82.
[4] *Can. Sess. Pap.*, 1896, 2nd Sess., § 7.

become obsolete and all pardons are in fact granted under advice, these two cases of the Governor's personal intervention may be disregarded. The same is true of certain minor duties imposed on the Governor-General personally by Imperial statute, but which are discharged by him acting under advice.[1] Cases may arise, however, when in his capacity of Imperial officer he may be compelled to oppose his ministry, but the opportunity for the exercise of any individual discretion or for independent action on these points virtually never arises ; the Colonial Office issues its orders, and he acts accordingly. The first trans-Atlantic cable was in operation in 1865, and since that time the Governor-General and the Colonial Secretary have been in intimate touch with each other.[2] The former, when in any doubt as to what action he should take, has been able to throw the responsibility on the Colonial Office by referring to England for instructions.

The Governor-General occupies, therefore, an anomalous position. His office, as nominal head of the Canadian Government, bears all the signs and trappings of independence ; yet it is lacking in one essential particular, the opportunity for independent action. His political irresponsibility, so far as the Canadian Parliament is concerned, is as complete as it can be made ; appointment, tenure, and removal are in the hands of the Imperial authorities, and the salary of the Governor has virtually been removed from the jurisdiction of the Dominion Government. In addition to this the Governor-General enjoys a limited civil and criminal irresponsibility ; he is practically immune from criticism in parliament ; he must keep aloof from anything that might savour of politics or partisanship ; and his office is surrounded with a halo of dignity and honour not accorded to any other Canadian official. All these are the outward marks of official independence ; but the examination of the Governor's functions has shown that his powers have been

[1] Keith, A. B., *Responsible Government in the Dominions*, I. p. 298.
[2] E.g. the Canadian crisis of 1873. Tupper, Sir C., *Recollections of Sixty Years*, pp. 156–7. Also the Natal crisis of 1906. Keith, A. B., *Imperial Unity and the Dominions*, pp. 75–79.

so whittled down in the last fifty years that his opportunities for independent action have almost vanished. In the summoning and prerogation of parliament, in the exercise of the prerogative of mercy, in the disallowance of provincial legislation, and in the removal of Lieutenant-Governors, the history of the Dominion supplies no instance of a Governor-General refusing to act on ministerial advice. There is no instance of the dismissal of a ministry by the Governor, and only one case where he refused to sanction appointments recommended by the cabinet. Professor Goldwin Smith gives the following explanation of this decline of the Governor's power:—

"The practical aim of a Governor-General is social popularity combined with political peace. So long as he simply gives way in everything to the politicians, he will have a quiet course, and at the end of it he will go away amidst general plaudits with the reputation of having 'governed' Canada well. Discerning eulogists will even point out to you the particular gifts of mind and temper which have enabled him to administer his province with so much success."[1]

There is, no doubt, much truth in this statement; but the most important factor in lessening the Governor's power has been the growth of Canadian autonomy coupled with the desire for a more democratic control of the Governor's powers. The process has naturally been a gradual one, although it was given an additional impetus in 1878, when the new instructions were issued to the Marquis of Lorne. The clauses relating to meetings of the Privy Council, authorising the Governor to act in opposition to ministerial advice, prescribing certain classes of Bills to be reserved and those dealing with matters within the scope of the provincial legislatures, were omitted, while the clause relating to the prerogative of mercy was modified.[2] Since that time, with the exception of the dispute regarding appointments under Lord Aberdeen, ministerial responsibility has held undisputed sway, and the Governor-General has shown unmistakable signs of becoming a mere seal of office.

[1] *Canada and the Canadian Question*, p. 154.
[2] Cf. *Can. Sess. Pap.*, 1867–68, § 22. *Ibid.*, 1879, § 14.

In his capacity of Imperial agent in the Dominion the Governor-General has not even the outward signs of independence. He is politically responsible to the Colonial Office for all his acts whether done as their agent or as part of the Canadian Parliament, and this responsibility may be enforced by the simple process of recall. His functions as an Imperial officer have been virtually reduced to one, viz., acting as the mouthpiece of the British Government. The means whereby the Governor-General may execute the orders that he receives may sometimes be left to his discretion, but his only practicable course is to lay his instructions before his cabinet. In the event of any crisis arising in the Canadian government that might call for his action or intervention, the Governor can cable the Colonial Office for instructions.

The Governor-General's power in the Dominion has therefore been largely reduced to the inconspicuous and indirect exercise of his personality and opinions on the ministry of the day. Lord Dufferin, by far the most forceful of the occupants of Rideau Hall, has compared his office to that of

> "the humble functionary we see superintending the working of some complicated mass of steam-driven machinery. This personage merely walks about with a little tin vessel of oil in his hand, and he pours in a drop here and a drop there, as occasion or the creaking of a joint may require, while his utmost vigilance is directed to no higher aim than the preservation of his wheels and cogs from the intrusion of dust, grits or other foreign bodies." [1]

The function of the agent, in short, is fast approaching that of his principal, the king, and his main duties are preserving an impartiality between political parties, forming the nucleus for social activities, and exercising the privilege, as Bagehot said, to advise, to encourage and to warn in the council chamber.[2] Authority has been replaced by influence, and while the importance of this latter function is great, it may be easily over-estimated.

[1] Stewart, G., *Canada under the Administration of the Earl of Dufferin*, p. 503.

[2] Lord Aberdeen dissuaded Sir Mackenzie Bowell from resigning on January 8, 1896. *Can. Senate Debates*, Jan. 9, 1896, p. 16.

"The constitutional hierophants of Ottawa, such as Mr. Alpheus Todd, assure the uninitiated in solemn tones that in spite of appearances which may be deceptive to the vulgar, the Governor-Generalship is an institution of great practical value, as well as of most awful dignity. Highly deceptive to the vulgar, it must be owned the appearances are." [1]

It is extremely easy to say of anyone who is in constant touch with members of the government that he has a very great influence with them, and to adduce his very inconspicuousness as proof that the statement is true. Mr. Todd undoubtedly committed this error, and it was accentuated by the exaggerated views that he held on the position of the Sovereign in Britain. Professor Goldwin Smith went to the other extreme and concluded that the office of Governor-General was worse than useless. The true view, as often happens, would seem to lie somewhere between the two, though Goldwin Smith exaggerates the real position less than Todd. It is reasonable to suppose that the Prime Minister's policy will be indirectly affected by the advice and suggestions of any of his friends, particularly if they possess a thorough knowledge of practical affairs combined with an absolute impartiality in politics. Such a counsellor is the Governor-General, although in addition to the above qualities he brings unimpeachable motives and the prestige of high office, which cannot but carry weight to any advice that he may tender to the Premier and his colleagues.

Even though the independence exercised by the Governor-General is small, it is very necessary that the tradition of political impartiality and neutrality should be maintained. If he is to have any influence whatever in the councils of the government, his motives and opinions must be above suspicion. Lord Dufferin gave the following admirable expression of his idea of the duty of a Governor in this regard :—

"If there is one obligation whose importance I appreciate more than another, as attaching to the functions of my office, it is the absolute and paramount duty of maintaining not merely an outward attitude of perfect impartiality towards the various parties into which the political world of Canada, as of the mother

[1] Smith, Goldwin, *Canada and the Canadian Question*, p. 152.

country, is divided, but still more of preserving that subtle and inward balance of sympathy, judgment, and opinion, that should elevate the Representative of your Sovereign above the faintest suspicion of having any other desire, aim or ambition, than to follow the example of his Royal Mistress in the relations which she constantly maintains towards her ministers, her parliament, and her people, to remember every hour of the day that he has but one duty and but one office—to administer his government in the interests of the whole Canadian people. . . . In fact, I suppose I am the only person in the Dominion whose faith in the wisdom and in the infallibility of Parliament is never shaken. Each of you, gentlemen, only believes in Parliament so long as Parliament votes according to your wishes. I, gentlemen, believe in Parliament, no matter which way it votes. . . . As the head of a constitutional state, as engaged in the administration of Parliamentary Government, he (the Governor-General) has no political friends—still less need he have political enemies; the possession of either—nay, even to be suspected of possessing either—destroys his usefulness." [1]

The present system of appointment secures this desired detachment from Canadian politics, and the practice of a preliminary consultation with the Canadian Government ensures a person who will not be distasteful to the Dominion. Judged by the same criterion the appointment of a Canadian would be unwise, for it would be quite impossible to obtain one of sufficient eminence who would be free from the suspicion of party affiliations. It has been proposed that the legal immunity of the Governor-General should cover all acts done under ministerial advice,[2] that ministerial responsibility should be extended to control all pardons [3] and dissolutions of parliament,[4] and that the privilege of allowing a Governor to dismiss his ministry should be discountenanced.[5] These changes are very necessary; they would eliminate what are obvious anachronisms in the Constitution and bring it more in line with its English model. It may be urged that the office of Governor-General would become even more of an ornamental appendage than it is to-day; but the whole trend of parliamentary government as it is

[1] Stewart, G., *Canada under the Administration of the Earl of Dufferin*, pp. 193–96.
[2] Keith, A. B., *Imperial Unity and the Dominions*, pp. 35–51.
[3] *Ibid.*, p. 70. [4] *Ibid.*, pp. 87, 104. [5] *Ibid.*, pp. 118–19.

understood in Britain and the Dominions is in that direction, and on the whole the development is not to be regretted. There can be no doubt that if such a reform is made the Governor will be largely deprived of the opportunity of ameliorating intense party feeling and prejudice. It is, however, equally true that if a party is but given enough rope it will eventually hang itself, and the safest way is to allow a government to work out its own ruin rather than interpose a Governor-General, an expedient which generally results in a confusion of the issues.

One signal advantage that the Canadian system of government has over that of Great Britain is that the Governor-General is a picked man, whereas the king is born and not chosen. The Imperial Government has not made the most of this fact, and its choice of men has not been over-successful. The Governors-General have been of a decidedly neutral tint,—Earl Dufferin and Earl Grey having been the exceptions. It is with no sense of surprise that one reads the following sentences in an article on "The New Governor-General" in the *Canadian Magazine* :—

> "None of the Cavendishes has ever been remarkable for brilliance and only one for genius. . . . The Cavendish type is . . . strong and virile and clean and hard-working, but rarely brilliant. . . . He (the Duke) does not overpower with his brilliance, nor is his intellect an amazingly bright one, but he has a pleasing manner." [1]

It is no doubt consoling to know that the representative of the Sovereign has a pleasing manner ; but it can scarcely suffice, particularly if his intellect is not a bright one There has been too much care shown in the past to appoint those whom Queen Victoria would term "proper persons" and too little attention given to the much more essential point as to their ability and force of character. It is a matter of no importance whether the Governor-General can claim an unimpeachable ancestry or not ; but it is a matter of the greatest consequence that what is in one sense the most important office in the state should be filled by one whose

[1] Feb. 1917, pp. 308, 312.

ability is unquestionable and whose character can be admired. It may be very difficult in the future to induce any one of more than mediocre talents to occupy a position which calls for so little initiative and self-expression, though this may be overcome by possible alterations in the Imperial relationship. The Governor-General may then combine his present functions with those of a British ambassador—a change which would undoubtedly make the office much more attractive to men of ability.

From the days of Crown Colony rule, through the period of a self-governing Colony, to the present status of a Dominion and a nation, the Governor-General of Canada has perforce adapted himself to the changing conditions of his environment. He began as a political leader with immense opportunities for good or evil, on whom the whole burden of government devolved and the welfare of the Colony depended. Under responsible government and the earlier days of Confederation his duties became more confined to the protection of the rights of Great Britain and to the checking of any undue pretentiousness on the part of a subordinate Colony. These functions have gradually degenerated as the occasion for their use has departed, until the Governor-General of to-day is little more than a useful consultant in the council chamber and a convenient peg on which to hang our system of government. The old *régime* demanded a Governor who was skilled in administration, who was fertile in ideas, and who possessed a strong will to carry his plans into effect. He was an expert, and as such was given the opportunity to use his powers with freedom. That day has passed. The Governor is no longer looked upon as a specialist; questions of constitutional law arise in the disallowance of provincial legislation or questions of justice and state policy occur in the exercise of the prerogative of pardon, and the Governor must perforce act under the advice of his ministers. Independence has been narrowed down until it appears in the uninspiring form of giving impartial advice to a cabinet and of entertaining members of parliament at receptions. Instead of being a positive force, it has become largely a negative abstention. Thus

it is that although surrounded by the customary framework of independence, the occasion and opportunity for the Governor's independent action has almost entirely disappeared: the finger-posts still mark the old road; but their directions are now misleading, and their utility has long since departed save as a reminder of the old days of the Governor's greatness.

## CHAPTER VII.

## THE MEMBER OF PARLIAMENT.

THE problem of the independence of the member of parliament differs in one very important particular from the other cases that have been examined. The independence of the judge, the civil servant or the commissioner arises from the relation of that official to parliament, and such political responsibility as exists is referred to the latter body. The independence of the member of parliament must obviously spring from a different relationship; if he is a part of parliament itself, his political responsibility must go back yet another step. Of whom is the member to be made independent? Four centuries ago the answer would have been, the king; and to-day the Canadian Parliament still bears the marks of the old British conflict in the shape of the "rights and privileges" of freedom of speech,[1] freedom from arrest,[2] and protection against threats and bribes.[3] The utility of these privileges still remains; but there has been a transformation: they were originally erected as barriers against an autocratic king; they have become a protection against the modern power of the corporation and the press. Recent developments of the same idea are found in the enactments that no member may receive any compensation for services rendered in relation to any Bill or proceeding before the House,[4] and that no libellous statements may be made outside parliament in reference to any member's actions or motives in the House.[5]

[1] *Can. H. of C. Journals*, 1867–68, p. 3. *Ibid.*, 1918, p. 8.
[2] Bourinot, Sir J. G., *Parliamentary Procedure* (4th ed.), p. 47.
[3] *Ibid.*, pp. 43–46. *Ibid.*, pp. 55, 57. *Can. H. of C. Journals*, 1873 (2nd sess.), pp. 134–39. *Toronto Globe*, Nov. 4, 1873.
[4] *Can. Stat.*, 6 Edw. VII. c. 49.
[5] Bourinot, Sir J. G., *Parliamentary Procedure* (4th ed.), pp. 51–54. *Can. H. of C. Debates*, June 6, 1906, pp. 4708–34. June 7, 1906, pp. 4792–97. June 14, 1906, pp. 5266–320.

The political responsibility or independence of the member of parliament of to-day cannot be referred to any one person like the old Tudor or Stuart king, and even the later conception of a double relationship to party and constituents, such as was enunciated by Burke and Mill, has proved too narrow for modern conditions. The member may now find himself owing a political responsibility to any or all of the following bodies. I. His constituents, to whom he is bound by definite or implied promises, and who may enforce his responsibility in the last resort by refusing to elect him. II. His party executive in his constituency, to whom he probably owes his original nomination, and who may deny him another nomination in the future. III. Some body, which is not necessarily a political organisation; but which may exercise a constant surveillance in politics, and on which the member may be dependent, e.g. a Labour Convention or Trades Union Congress. IV. The members of parliament sitting as a party caucus, of which the member himself is a part, and with which he may be forced to co-operate. V. The leaders of his party in parliament, whether they are in power or in opposition, who may read him out of the party if he fails to live up to their standard of what a supporter should be.

The Canadian member of parliament rarely finds himself brought into relation with all of these bodies. Such an organisation as the third mentioned is yet to appear as an active force in Canadian politics; though the rapid growth of the Progressive party coupled with the increase in farmers' conventions may produce a body somewhat similar to the Labour Congresses in Britain or Australia. The party executive in the constituency rarely has to be considered, for the very excellent reason that it seldom exists as a permanent entity. It appears for the most part only at election time, after which it quickly dissolves until another contest again gives it a *raison d'être*. The other bodies, however, are always present; and each has a certain effect on the many decisions that a Canadian member must make every day of his parliamentary life. Although the influence of these bodies must necessarily overlap, they fall naturally

into two groups, the first being the member's constituency, the second his party caucus and his party leaders.

The relation of a member of parliament to his constituents has been regarded by most writers as presenting a clear issue between the two theories of representation and of delegation.[1] Both views suffer from over-simplification—a fact that is generally admitted by saying that neither theory can be pushed to its logical conclusion. Representative and delegative functions are inextricably mingled; and we must recognise at the outset not only that any real separation is impossible, but also that the actual relationship between a member and his constituents is much more subtle than that stated by either of the above theories.

What is the usual relation of the Canadian member of parliament to his constituents in actual practice? The most typical instance that can be chosen is that of the semi-rural constituency, one that is largely agricultural but includes within its scope two or three small towns. There is no real party organisation in such cases; a paid secretary is very rare, and the party nucleus is usually an informal group of men who are interested in politics and are active in the canvass. These men take the lead at the party convention, and generally manage to secure the nomination of the candidate whom they themselves have informally chosen. The nomination is then offered to the candidate, who indicates his acceptance by a speech to the convention.

It is at this point that the relations of the member of parliament to his constituents begin. If one examines the speech of acceptance with the delegate theory in mind, the most outstanding feature is the absence of any definite pledge to the convention. It must also be remembered that statements of policy are rarely demanded before nomination—the candidate is recognised as being a good party man and that is a sufficient guarantee that his views are acceptable. The vagueness that characterises the convention speech is continually repeated throughout the

[1] Cf. Lowell, A. L., *Public Opinion and Popular Government*, pp. 124–25.

campaign. One may imagine, for example, a Liberal candidate making the following statement, which has been preceded by an hour's denunciation of Conservatism and Conservative administration :—

"Ladies and Gentlemen : I stand before you to-night as the representative of the Liberal party in this constituency. Should I be returned at the coming election I shall do my uttermost to conserve the interests of this our native province ; I shall oppose any increase in the protective tariff, whereby the large manufacturers may enrich themselves at the expense of the consumers ; I shall not lend my support to any scheme of Imperial centralisation whereby Canadian autonomy would be lessened or Canadian nationhood impaired. I am a firm supporter of the great principles and proud traditions of Liberalism, under whose ægis I am assured that this great Dominion of ours may best realise its glorious future."

In short, the candidate contents himself with repeating in various forms and under different rubrics the one assertion that he is a staunch adherent of the Liberal party—a state of affairs that has been known the whole time, and without which the candidate would not have obtained the nomination. The chief point to be noted is that if he is successful in his candidature, he finds himself a member of parliament with but one restriction on his vote, the pledge that he will support the party to which he belongs.[1] The same thing is generally true in the urban constituencies, though the local leaders may be able by virtue of their superior organisation to exact a few more definite promises prior to the candidate's nomination.

Although the member of parliament may have avoided giving many definite pledges to his constituents, the freedom that he exercises must be tempered with discretion. Every member must decide for himself the extent to which his own judgment and his own opinions must be subordinated to those of the people whom he represents. When Burke made the statement that "Your representative owes you, not his industry only, but his judgment ; and he betrays,

[1] Temperance organisations in Canada as elsewhere have been an exception ; invariably they have required a cast-iron pledge from candidates.

instead of serving you, if he sacrifices it to your opinion," he was expressing a great psychological truth. Every member of parliament is more or less vaguely aware of a certain fact which he may call his self-respect, which leads him to set a limit somewhere to the dictation and mandates of his constituents. The location of this boundary will naturally vary with the character of each individual member. If he is intellectually indolent, it will be very ill-defined; indeed, he may be only half aware of its existence until some issue brings it sharply into the foreground of his consciousness. Even where such a limit has been definitely recognised, the intellectual process is by no means simple or easy when a practical issue arises for solution. Human motive and sub-conscious influences are hard to gauge, and the member must make a very severe and intense effort if he is to discover how far his vote is governed by his honest opinion and judgment, and to what extent he is biased by a recent meeting of prohibitionists in his constituency, a resolution of an Orange lodge, or a letter from a Roman Catholic bishop.

It is in comparatively rare instances that a serious clash will occur between a member and his constituents. In the first place, the member has been elected as a supporter of a party, and so long as he follows the party lines there will be very little criticism from his supporters. Popular interest in politics rapidly cools after an election, and the majority of a member's constituents regard his parliamentary career with either complacency or indifference. In many matters on which the member has no settled or decided opinions the feeling in his constituency will probably sway his judgment in their favour. When, for example, the Titles Resolution came before the Canadian Commons in 1919, there was a perceptible effort to find out the feeling of the country on the matter, and ten out of the twenty speakers referred to the popular opinion and used it to reinforce their views and to justify their vote.[1]

A sense of local patriotism is another connecting force

[1] *Can. H. of C. Debates*, May 22, 1919, pp. 2696–749.

between the member and his constituents: the latter like to think of their representative as an important member of the House, and they frequently tend to give him a more exalted place than his actual position in parliament justifies. This feeling is accentuated in Canada by the fact that the member generally resides in his own constituency, and is on that account regarded as doubly representative of the locality. The small population of the Canadian electoral district, coupled with the local residence of the member, produces a very vivid conception of that member's personality in the minds of the people—a conception that may cut both ways in determining the confidence that will be extended to him. He will owe a large amount of the trust that will be reposed in him to the fact that he is well known, and if he adds a cheery manner and a reputation for being a "good fellow," his extensive circle of acquaintances is made all the more effective. On the other hand, when the constituency know their member very well, the recognition of his leadership is weakened; he is regarded as one of themselves, and is denied any peculiar qualities or exceptional knowledge that would justify them in accepting his opinion as final.

The immense geographical extent of a country like Canada also has an important bearing on the problem. When the seat of government is separated by thousands of miles from some constituencies, it is obviously impossible for a member to run home for a week-end during the session in order to ascertain the opinions of his constituents on a Bill that is under discussion. Inasmuch as political responsibility enforced by telegraph has not yet been developed, the member must necessarily be thrown on his own judgment to a large extent, and must trust his constituency to support him in his decisions.

The most acute conflict with a constituency will naturally arise when the member votes against his party. He was elected as a party nominee, and if he goes against any of its fundamental tenets the people naturally feel that they have a grievance. They have every reason to expect that if the candidate holds certain views to-day, the member

will hold the same views to-morrow; they elected a man whom they had intellectually labelled and placed in a certain pigeon-hole, and he has developed a strong tendency to adopt another classification, the nature of which is quite unknown. The member must, in fairness to his constituents, lay his ideas on the disputed matter before them and, if possible, convert them to his point of view. The extent to which he will be successful depends on a large number of factors, the least of which will probably be the issue involved; for his action must presumably have had some very good justification. The personality of the member himself, the impression he has made on his constituency during his tenure of office, his recognised position in his party, and the reputation of the government are but a few of the more important facts which will be influential in determining the verdict of the constituency. If the member can convince the electors that his motives were pure, and that his action was consistent with what he believed to be the highest aims of the state, he may be able to make a successful appeal which will rise above party. Should there be any real doubt as to how far the constituency has followed the member, he may resign and test public opinion by an election.

Beyond these few remarks it is very difficult to state definitely the relation of the Canadian member to his constituents. It is quite certain that the member of parliament is not a detached irresponsible leader of the people; but he is still less a helpless automaton completely subservient to the popular will. There is a continual adjustment of opinion between the two parties to the relationship, and the extent to which one will overcome the other must depend on such intangible and personal factors as those suggested. It is extremely probable that as Canada grows in population and as industry replaces agriculture, the position of the member of parliament will undergo a change. The emphasis will pass from the independence of the member to his political responsibility to the people, and such bodies as the local caucus or party committee will exercise an increasing power. If kept within reasonable limits, such a change would not

be regretted; but there would very probably be a strong tendency to make the member of parliament less and less a man and more and more a machine. Such a usurpation of power could have but one result: the functions of a representative having sunk to those of a rubber stamp, the mentality of the average member would sink to the same level, and few persons of ability or character could be persuaded to accept the post. It is essential, therefore, that this fundamental principle should be emphasised: that the efficient government of a country depends in a large measure on the moral consciousness that is developed by the members of parliament. An increase in this consciousness is most likely to be brought about if the member strengthens and directs his action by some definite intellectual conception of his office such as that held by Edmund Burke :—

"The lovers of freedom will be free. None will violate their conscience to please us, in order afterwards to discharge that conscience, which they have violated, by doing us faithful and affectionate service. If we degrade and deprave their minds by servility, it will be absurd to expect, that they who are creeping and abject towards us, will ever be bold and incorruptible assertors of our freedom, against the most seducing and the most formidable of all powers." [1]

Any discussion of the independence of the member of parliament which treated solely of his relations to his constituency would be obviously incomplete; it would neglect a complete circle of other influences which are no less important and which raise equally complex issues, viz., those arising from the member's connection with his political party. Under modern conditions of government no member of parliament can hope to wield very much influence so long as he acts individually; his will must find a collective expression in one of the two or three great parties in the state. The danger is immediately apparent. While seeking in the party the strength which it alone can give, the private member may find that he has lost far more than he has gained, that the additional collective power has been won

[1] Burke, E., *Bristol*, 1870, *Works* (1826), III. pp. 359–60.

at too great an expense of individuality and of self-expression.

The relations of a member of parliament to his party are very delicately adjusted; he must co-operate with his fellow members and the party caucus, and yet must preserve his critical faculty and his privilege in the last resort of throwing over the party control. The basis of this co-operation was stated by Burke to be the fact that all measures are "related to, or dependent on, some great, leading, general principles of government," [1] and that the individual members are united by their agreement on those principles. But although a member's original choice of his political party may be the result of a deliberate study of the fundamental principles underlying the parties (more usually it will be the result of birth, training or accident), his future attitude to political questions will be largely determined by the habits of mind which he has formed by constant intimacy with his party. These cannot be dignified by the name of principles; they appear largely as a result of intellectual slackness, and find their most frequent manifestation in a desire to keep the other side out of power. It is to this conflict between Ins and Outs that Canadian parties owe their stability. The members of each party in Canada are partially united, it is true, by their agreement on general principles, e.g., on the tariff question and the Imperial relationship; but their unity chiefly depends on the habit which they have formed of regarding all questions from the party point of view, and their consequent desire to keep the other party out of office. Canadian parties, paradoxical though it may seem, have been held together largely because of the absence of principles: the small issues have never been of sufficient importance to split a party; but when a vital matter of policy or principle has appeared, the parties have been held together with difficulty and have at times been completely broken.

Canadian history supplies only three instances of serious party ruptures, and on each occasion the disagreement was on an important matter of principle. In 1873 the

[1] Burke, E., *Present Discontents Works* (1826), II. p. 339.

Conservative party was split as a result of the disclosures made in the Pacific Scandal enquiry. In 1896 the question of provincial rights, which arose from the dispute over the Manitoba schools, caused a second break in the Conservative party. In 1917 the conscription issue broke off a large section of the Liberals from their old allegiance, and caused a breach that has not yet been entirely closed.

Several generalisations may be drawn from these cases which throw a little light on the independence of the Canadian member of parliament. In each of the three instances cited, the movement was not confined to a few members, but included a very large number ; it was a migration rather than a mere separation. The breach was invariably caused by the sudden emergence of a new issue which confronted a party that had been formed on the basis of an old and irrelevant one. In each case the secessionists carried the country with them in the election that immediately followed each break in the party. It may be concluded, therefore, that the Canadian member of parliament rarely changes his party allegiance, and it needs the shock of a new and important issue to separate him from his old associates. It would also seem fairly obvious that he is very reluctant to oppose his party simply because of his individual view on a question of principle ; he prefers to wait until there are a number of other members who hold the same opinions and will support him in his desertion. Another inference that may be drawn is that the member has some assurance that the country will favour his break with his party. This conclusion does not necessarily follow from the facts ; but the election results make its truth highly probable. Certainly in the crises of 1873 and 1917 the secessionists had every promise of support in the country ; and though the issue was more doubtful in 1896, the result of the election was by no means unexpected. In short, few Canadian members of parliament have shown their independence of their party, and in the notable cases when members have ventured to do so, they have been influenced not only by the principle involved but by the action of their fellows and the opinion of their constituents.

There are many ways in which the member may exercise his independent will and judgment without taking the extreme step of voting against his party. A really able man will work himself out within the limits of the party organisation. He may exert his influence by the direct means of speeches in the caucus and in the House or by the more indirect means of personal contact with other members. The frank expression of a private member's opinions, even though that expression may be confined to the smoking-room of the House, may, if the member possesses character and ability, materially alter the policy of his party.

Cases will undoubtedly arise, however, when a member of parliament will feel that he has no choice but to vote against his party. The break rarely comes suddenly; it is preceded by a period of doubt, during which the member makes tentative attempts to shake off the party discipline. He absents himself from a division, he speaks and votes against minor Bills that are supported by his associates, until finally he informs the party caucus of his decision to vote as he pleases, no matter what attitude the caucus may decide to adopt. The break must always come first in the caucus and later in the House. In some cases the decisive step has been long foreshadowed and appears inevitable, the member having been guilty of a certain intellectual indolence in joining a party to which he was quite unsuited. In other instances, however, the split occurs because some new issue has suddenly appeared, and the member is unable to align his views with those of his colleagues. A conspicuous example of this occurred in Canada when the Liberal party split on the conscription issue in 1917.

Several considerations unite to make the member very reluctant to vote against his party. In the first place, there is always the ethical difficulty. It is quite conceivable that the member may be wrong and the party right, and the consciousness of this possibility compels the member to think well before taking extreme action. It is apt also to savour of conceit if he boldly sets himself against the considered judgment of the rest of his colleagues on no other grounds than his own personal opinion. In the second place,

the measure must be one of great consequence before he would run the risk of putting his own party out of office or sustaining the other party in power. In the words of Lord Morley :—

> "If the effect of voting against a measure of which he disapproves would be to overthrow a whole Ministry of which he strongly approves, then, unless some very vital principle indeed were involved, to give such a vote would be to prefer a small object to a great one, and would indicate a very queasy monkish sort of conscience." [1]

While the member may recall that "the history of success . . . is the history of minorities," [2] he will be very reluctant to realise that success in company with the party which he has always abhorred and which he has so often denounced. Finally, it must be remembered that if a private member repeatedly votes against his party, he soon loses what little influence he may have once possessed. He will be regarded as a man of very uncertain convictions, and will be distrusted by both political parties.[3] In short, he will exchange a position of considerable power and influence for one of comparative impotence. It follows, therefore, that the reasons must be very powerful, his convictions very strong, and the issue exceedingly important to justify him in casting a vote against his party.

An interesting illustration of the manner in which votes are changed by a party pronouncement occurred in the Canadian House of Commons in 1918 when a resolution was introduced to abolish titles in the Dominion. The question had never been discussed before, and it was treated by all the speakers as a non-partisan measure. But in spite of the assurance of the Leader of the Opposition that the passage of the resolution would not be treated as a vote of want of confidence in the Government,[4] the Prime Minister insisted upon making it a party question.

[1] Morley, John, *Studies in Literature*, p. 338.
[2] Morley, John, *On Compromise*, p. 226. Cf. *Ibid.*, pp. 212–27.
[3] Cf. the definition of an independent member of parliament as "one that could not be depended upon." Benson and Esher, *Letters of Queen Victoria*, III. p. 83.
[4] *Can. H. of C. Debates*, May 21, 1918, p. 2351.

"If the House," said Sir Robert Borden, "does not propose to accept the course which I have asked them frankly and with much respect to take, I should consider that I am relieved from my duty of carrying on any longer the government of this country." [1]

As a result of this ultimatum the Conservative members of the House, irrespective of the fact that many favoured the resolution and some had spoken for it, were compelled to fall in line and vote with the Prime Minister. A year later the question again came before the same House, and on the Government stating that it had no pronounced policy,[2] a resolution (similar to that of 1918) was passed by a vote of 96 to 43.[3]

This case illustrates but one of the many ways in which the party executive controls the vote of the private member. The success that attended Sir Robert Borden's statement was not entirely due to his threat of resigning the Premiership, there was also an appeal to that personal loyalty which a party leader can usually command. A Prime Minister or a Leader of the Opposition is bound to possess ability and is likely to have a large amount of personal magnetism; the first will earn the respect, and the second the devotion of his followers, with the natural result that they will be inclined to waive their own opinions in favour of those of their leader. The possibility of promotion to ministerial office has the same tendency. The leaders of the parties hold the prizes of political life in their hands, and a prospective Minister will think well before he injures his chances not only for a larger salary but for the offices by which parliamentary success is usually measured. The possibility of procuring titles of honour has been another inducement which the party leaders were able to hold out to their followers; but these are fortunately now only a matter of historic interest. But the strongest force that fights on the side of the party executive is probably the active dislike of the other party. The private member never wants to leave his side of the House and

[1] *Can. H. of C. Debates*, May 21, 1918, p. 2364.
[2] *Ibid.*, May 22, 1919, p. 2730. [3] *Ibid.*, p. 2749.

sit next to those against whom he has always fought, particularly if such action would result in the defeat of his old party to which he owes the allegiance of a lifetime.

But there are other influences than those of party or constituency which affect the member's independence. The ultimate justification of the member of parliament, like the civil servant, is that he should make a certain intellectual effort, and this effort will be aided or discouraged by several factors other than those which directly touch his political responsibility. One of such factors is his salary. The Canadian member in 1867 received only $600 per session; [1] but this has been gradually increased until it stands to-day at $4000.[2] The salary of a member of parliament must affect his independence in two quite distinct and opposite ways. A large salary has this advantage, that it widens the field of candidates by enabling many very desirable men to enter politics who would otherwise be debarred. The member of parliament should not be compelled to resort to newspaper writing or similar devices to augment his income; he should be able to devote his whole time and sustained efforts to the business of the House. On the other hand, the salary should be kept reasonably small in order that it may not produce a class of professional politicians who enter the field with the sole object of making money. The large salary also carries with it a further danger; the member's desire to retain his seat is increased, and he is more apt to be tempted to sacrifice his principles in order that he may remain in so lucrative a profession.

The independence of a member of parliament is again jeopardised by the financial and other interests outside the House. His position as a legislator exposes him to constant temptation; for as long as there is a possibility of outside interests being able to attain their ends by direct or indirect corruption, they will not hesitate to attempt it. Wherever the member chooses to set up his standard of

[1] *Can. Stat.*, 31 Vic. c. 3.

[2] *Ibid.*, 10–11 Geo. V. c. 69.

probity some one will be pressing against it and endeavouring to drive it further back. The inducements offered will be cut to fit the man: the direct bribe, the "ground-floor" shares in a new company, a directorship, the free railway pass, the threat of affecting a sectional vote in the constituency, or the more subtle method of a newspaper, which may give a verbatim report of a speech or may not mention it at all—these are a few of the varied expedients that the member frequently encounters. It need cause little surprise that in the strife and turmoil of modern political and industrial life, the member of parliament finds it increasingly difficult to keep alive that little flickering light of an independent mind and judgment, which alone can guide him in his position.

The fact that members are extremely loath to act on their own initiative has been recognised by the House of Commons itself in the institution of Special and Select Committees.[1] These Committees have as their primary object the simplification of the discussion of detail; but they also give the private member an opportunity of expressing a frank opinion irrespective of party affiliations. This advantage was concisely stated by a private member of the House when the recent Canadian National Railway Company Bill was under discussion:—

> "The supporters of the Government would naturally hesitate to criticise the Bill and then have to vote for it if an amendment is moved in the House or in Committee here; whereas if the Bill were before the Railway Committee they would feel free to discuss it and vote as they saw fit."[2]

This understanding, that a member is not untrue to his party if he votes against it in a Select Committee, both maintains and discourages independent action. It maintains it because the private member is given the opportunity to impress his own views on the Committee without endangering his relations with his party. It discourages independence in its more extreme manifestations because the member is apt to content himself with minor alterations in Com-

[1] Cf. *Rules of the House of Commons of Canada*, 1907, §§ 10, 11.
[2] *Can. H. of C. Debates*, April 23, 1919, p. 1622.

mittee, although he may be in reality opposed to the principle of the Bill. An altered clause, a changed word, or a slight concession may be thrown to a discontented government supporter, who consoles himself with the reflection that a concession, however small, is far better than a break with his party.

The independence of the Cabinet Minister differs in some respects from that of the private member. His relations to his constituents are the same, except that his higher position will probably enable him to exercise a greater intellectual leadership over the electorate. But his relations to his party have been transformed by his elevation to ministerial office: he has exchanged a freedom of speech in the House for an increased influence in the Council Chamber; he has relinquished an open form of independence in order to exercise more power and initiative in secret.

Constitutional usage has ordained that the cabinet must publicly agree on all matters of government policy, and this convention is an effective bar to independent ministerial action in the country or in the House. Mr. J. Israel Tarte is quoted as having said that in Council the Laurier Government "fought like blazes" [1]; but when in 1902 Mr. Tarte carried his disagreement into the country by making speeches against the tariff policy of the Government, he ceased to be Minister of Public Works. Sir Wilfrid Laurier's summary, which he gave on this occasion, on the relation of a Cabinet Minister to the remainder of the Cabinet, will bear quotation at some length:—

"It was of no circumstance whatever whether my honourable friend advocated an increase of the tariff or a decrease of the tariff. The error; the constitutional error was the same; it mattered not whether he advocated to revise the tariff up or down. The one important thing was that being a member of the administration he was bound by the policy laid down by the member of the cabinet who had authority to speak upon this subject and whose voice had been heard upon the floor of this House in no uncertain tone, and who had laid it down as plain

[1] Willison, Sir J., *Reminiscences*, p. 107.

as language could make it: That the government would not under existing circumstances admit of any tariff changes.

"The gentlemen who are assembled at the council board are not expected to be any more unanimous in their views because they sit at Council, than would be expected from any other body of men. It is human nature . . . to differ. . . . But the council sits for the purpose of reconciling these differences—the council sits for the purpose of examining the situation and having examined it, then to come to a solution which solution then becomes a law to all those who choose to remain in the cabinet. . . . It can be possible that a member of the cabinet who assented to that policy may not be convinced that it is for the best; it may be possible that he thinks a wiser course could have been taken. But if he remains in the cabinet, it is because he thinks that on the whole it is better that his views on that subject should give way to the views of others, and that whilst his own judgment is not in accord with the judgment of his colleagues, still it is for the best interest of the country that he should resign his judgment to theirs, and continue to occupy a position in the cabinet. . . .

"When a policy has been determined upon; solemnly agreed upon and solemnly promulgated to the House and to the people, I need not tell the House . . . that under such circumstances it is not only the duty politically of a member of the cabinet, but it is his duty both as a friend and as a member of the party, to stand by that policy. And, if at any later stage he thinks that the policy is wrong, that it ought to be improved, that it ought to be amended; then the battle, or the action is to be taken, not before the public, not before the constituencies, but the reform has to be advocated in the first place in the cabinet of which he is a member." [1]

On several occasions slight indications have been given that the members of the cabinet were far from being in complete agreement on some subject which had been given their nominal unanimous support. For example, Mr. Charles Fitzpatrick, Minister of Justice in the Laurier Government, made the following interesting statement to the House on May 1, 1902:—

"The hon. gentlemen who have preceded me are in the happy position of being private members and so are free to speak their minds. If I were a private member I would like to say that I am in favour, and always have been in favour, of giving

[1] *Can. H. of C. Debates*, March 18, 1903, pp. 132–33.

proper consideration to the judges of the land. . . . I would have absolutely no sympathy with those who think that our judges now are paid, beyond the value of the services they render. . . . Probably there are a good many in this House who are not in sympathy with what I have said; but as I said a moment ago, when speaking as a private member one can speak more freely his own mind." [1]

This unusual expedient of temporarily divesting himself of his ministerial office [2] drew the natural rejoinder from Mr. Borden, the Leader of the Opposition :—

"I think my hon. friend is the second member of the government who has said what he would do if he were a private member. It might be interesting to consider what would happen if all the members of the government were private members. Apparently some very notable reforms would take place in the affairs of this country if that happy consummation could some day be achieved." [3]

It is evident that the question of when a minister should leave a cabinet because of disagreement is largely a relative one. In the example that has just been cited, Mr. Fitzpatrick apparently desired an increase in judges' salaries to which the majority of the ministers were opposed. It could scarcely be called a question of principle, nor was it of sufficient importance to compel his resignation. The Minister no doubt considered that he could do more good by remaining at the head of the Department of Justice and steadily advocating an increase in the judges' salaries, than he could hope to achieve by resigning and perhaps precipitating a cabinet crisis. The position that a Minister may hold is also of great importance in determining the attitude that he will adopt in the event of a disagreement. Mr. A. G. Blair, the Minister of Railways, resigned in 1903 not merely because he disapproved of the Goverment's railway policy, but also because his position rendered him particularly responsible for any matter which concerned the railways.[4] A Minister of Customs, even though

[1] *Can. H. of C. Debates,* May 1, 1902, pp. 3941–42.
[2] Cf. speech of T. W. Crothers, ex-Minister of Labour. *Ibid.,* Oct. 2, 1919, p. 800.
[3] *Ibid.,* May 1, 1902, p. 3942.
[4] *Ibid.,* July 16, 1903, p. 6742.

he thought the same scheme thoroughly bad, might have remained in the Government on the grounds that the majority of the Cabinet had approved and that it was not a matter within his province. A more unusual resignation was that of Mr. Monk, who retired from the Borden Government in 1912, not so much because he disagreed with their policy on naval matters, but because he was pledged to a referendum on the question. He considered that his duty to his constituents would not allow him to remain in the Cabinet after it had refused a plebiscite on the naval programme.

"There is even reason to think," writes the *Round Table* correspondent, "that the French leader was impressed by the private memorandum from the Admiralty, and was more or less soundly convinced that action by Canada to strengthen the sea forces of the Empire was desirable. Mr. Monk held, however, that he was irrevocably pledged to have a referendum on any naval programme, and so was bound to relieve himself of ministerial responsibility unless a referendum was granted. As Mr. Borden definitely refused to consider a referendum the separation was inevitable." [1]

We are therefore led to the conclusion that the occasions on which the Cabinet Minister breaks with the Government can only be decided on the same general grounds as those which lead the member of parliament to vote against his party. The criterion must be the seriousness and importance of the issue, and this is purely a matter for individual opinion and personal judgment. The same factors that discourage the member of parliament from voting against his party also operate against the desertion of a Cabinet Minister, though in the latter case they are given an additional force by the peculiar circumstances of his office. The Minister is in very intimate relations with his chief and colleagues, and the appeal of personal loyalty to his leader must be very strong. If he leaves the Government, he abandons a position of great influence for one of comparative unimportance, and he may lose the opportunity to secure

[1] *Round Table*, March, 1913, p. 335. Cf. *Ibid.*, December, 1912, pp. 134–36.

a number of important measures which he may have very much at heart. Any break with his party must receive exceptional consideration, for the reverberations of his desertion may carry very far and his action precipitate a Cabinet crisis which might result in the defeat of the entire ministry.

## CHAPTER VIII.

## THE SENATOR.

THE senator is nominally the most independent of all the Canadian officials: he enjoys the same civil and criminal immunity as the member of parliament,[1] but with the immense difference that he has complete political irresponsibility as well. The senator is appointed by the Governor-General in Council and, subject to some minor conditions,[2] he holds office for life.[3] It is the most impregnable position known to the Canadian Constitution; there is no tenure during good behaviour, but one that is virtually unrelated to the actions of the incumbent. Add to this the fact that the position is one of honour and dignity, and bears the substantial salary of $4,000 per session,[4] and the conditions for independence would appear to be ideal. An examination of the history of the Senate, however, shows that while it was the aim of the founders of the Dominion to secure the personal independence of its members, that aim has never been secured.

It was the avowed intention of the Fathers of Confederation that full scope should be given to the individual independence of the proposed senators; and the *Confederation Debates* lay great stress on the benefit that would accrue from an Upper House whose members would be quite unbiased in their judgment and fearless in their advocacy of what they deemed right.

"He did not say it was desirable that at all times the Legislative Council (i.e., the proposed Senate) should be a reflection of such

[1] *British North America Act*, 1867, sect. 18, as amended by *Brit. Stat.* 38–39 Vic. c. 38.
[2] Cf. *British North America Act*, 1867, sects. 30 and 31.
[3] *Ibid.*, sect. 29.
[4] *Can. Stat.*, 10–11 Geo. V, c. 69.

(public) opinion, though it was, of course, desirable that it should not continue violently to shock it. He would have that House conservative, calm, considerate and watchful, to prevent the enactment of measures which, in its deliberate judgment, were not calculated to advance the common weal." [1]

"The desire was to render the Upper House a thoroughly independent body—one that would be in the best position to canvass dispassionately the measures of this House, and stand up for the public interests in opposition to hasty or partisan legislation." [2]

"It would be of no value whatever were it a mere chamber for registering the decrees of the Lower House. It must be an independent House, having a free action of its own, for it is only valuable as being a regulating body, calmly considering the legislation initiated by the popular branch, and preventing any hasty or ill-considered legislation which may come from that body, but it will never set itself in opposition against the deliberate and understood wishes of the people." [3]

It will be observed that emphasis was also laid on the corporate independence of the Upper House and on the tendency that this would have to increase the individual independence of its members.

"The fact of the Government being prevented from exceeding a limited number [4] will preserve the independence of the Upper House, and make it, in reality, a separate and distinct chamber, having a legitimate and controlling influence in the legislation of the country." [5]

The provision to which allusion is made renders it quite impossible for the Canadian Government to influence the vote of the senators by any threat of swamping the chamber by additional members, such as was used against the British House of Lords in 1911.

"If," said Sir Wilfrid Laurier, "there was a deadlock between the House of Commons and the Senate, nothing short of a revolution could solve the difficulty . . . no constitutional remedy within our grasp could bring the Senate to a different view." [6]

[1] Hon. A. Campbell, *Confederation Debates*, 1865, p. 24.
[2] Hon. George Brown, *Ibid.*, p. 90.
[3] Hon. John A. Macdonald, *Ibid.*, p. 36.
[4] *British North America Act*, 1867, sects. 21, 26, amended by *Brit. Stat.*, 5–6 Geo. V. c. 45, sect. 1.
[5] Hon. John A. Macdonald, *Confederation Debates*, 1865, p. 36.
[6] *Can. H. of C. Debates*, Jan. 20, 1908, pp. 1571–72.

The founders of the Dominion realised that if appointments to the Senate were made by the Governor in Council without any restraint upon their choice, the independence of the senator would soon vanish. They therefore advised the doubtful policy of providing against party prejudice by allowing it to be equally represented. The resolutions formed by the Quebec Conference of 1864 and passed by the Parliament of Canada in 1865 included the following clause :—

> "14. The first selection of the Members of the Legislative Council (i.e., the Senate) shall be made, except as regards Prince Edward Island, from the Legislative Councils of the various Provinces so far as a sufficient number be found qualified and willing to serve; such Members shall be appointed by the Crown at the recommendation of the General Executive Government, upon the nomination of the respective Local Governments, and in such nomination due regard shall be had to the claims of the Members of the Legislative Council of the opposition in each Province, so that all political parties may, as nearly as possible, be fairly represented." [1]

It is doubtful whether it was intended to perpetuate this equal representation of the parties or to limit it to the first appointments. Sir Wilfrid Laurier claimed [2] that the numbers in the Senate were to be proportional to the strength of the parties in the country—an idea which seems to have no foundation whatever and which Sir Wilfrid, as he was not in politics at the time of Confederation, must have acquired by hearsay. Much more reliable is the evidence of Sir Charles Tupper, one of the chief figures in the Confederation movement, who said that it was intended that only the first appointments should be in equal numbers.[3] On the other hand, Mr. William Macdougall, who was also a founder of the Dominion and a delegate to London at the time of the passage of the *British North America Act*, stated in 1888 that there was a clear understanding between the political leaders that the Senate

[1] *Confederation Debates*, 1865, p. 1028. Cf. *British North America Act*, 1867, sects. 25, 127.
[2] *Can. H. of C. Debates*, May 3, 1897, p. 1651.
[3] *Ibid.*, p. 1645.

appointments should secure the permanent equal representation of the two parties.[1] It is impossible to say which of these statements is correct, but one thing at least is certain: the original appointments, as well as those made for the years immediately following Confederation, represented both shades of political opinion.

Although there may be some question as to what was the early intention in the matter of appointments to the Senate, there is little doubt as to the principles which have governed these appointments during the last fifty years. The original nominations were made from the old provincial Legislative Councils, and as there were more Councillors than positions, those remaining formed a waiting list from which new appointments were made. It was only when this supply was exhausted, that Sir John A. Macdonald began the practice of using his power of nomination to strengthen his party and to reward defeated candidates or faithful supporters. Five years after Confederation this system of party nomination was well established.

"For every vacancy in the Senate," said "A Bystander" in the *Canadian Monthly* of July, 1872, "there is a claimant who has done something, or expended something, for the party, and whose claims cannot be set aside. The Minister may feel as strongly as his critics how much the Senate would be strengthened, and his own reputation enhanced, by the introduction of some of the merit, ability and experience which do not take the stump. But party demands its pound of flesh."[2]

The natural result was that when Mr. Mackenzie assumed office in 1873, he found his party in a minority in the Senate. His request that he might be allowed to increase the number of senators as provided in the *British North America Act* was refused by the Colonial Secretary on the ground that such a step was only to be taken when a serious deadlock occurred between the two Houses.[3] The *Canadian Monthly* in 1874, while urging the independence of the senators,

[1] *The Week*, Oct. 18, 1888, edit. Cf. *Can. Senate Debates*, Jan. 28, 1909, p. 35.
[2] Article on "The Dominion Parliament," p. 67.
[3] *Can. Sess. Pap.*, 1877, § 68.

seemed very doubtful if this could be expected from those who had been appointed for party reasons :—

"If the Crown-nominated Senate be doomed, as many believe, it will be none the worse thought of for preserving its independence to the last. It can be useful only by being independent; but that it will persist in proving itself to be so is more than can be hoped for, for the supposition is contradicted by the whole course and tenour of the history of its progenitor, the Crown-nominated Legislative Council." [1]

In 1878 the Conservative Government returned to power and remained in office for eighteen years. In all that time not one Liberal was appointed to the Upper House :—

"The Senate of Sir John Macdonald," said *The Week* in 1884, "is nothing but a political infirmary and a bribery fund, nor is it possible to conceive any case in which a body so destitute of moral weight could render real service to the nation." [2]

When the Liberals again assumed office in 1896 they found themselves hopelessly outnumbered in the Upper House. They therefore began to readjust the balance by appointing only Liberals to the Senate—a habit that became so firmly fixed that Sir Wilfrid Laurier was not even guilty of the single indiscretion of Sir John A. Macdonald,[3] and he completed a fifteen-year tenure without making one Conservative appointment. On several occasions he gave an explanation, half serious and half humorous, of his action in this regard :—

"If I have to select between a Tory and a Liberal, I feel I can serve the country better by appointing a Liberal than a Conservative, and I am very much afraid that any man who occupies the position I occupy to-day will feel the same way. . . . The present mode . . . is not altogether satisfactory." [4]

"When it comes to the appointment of senators, it is a difficult matter. With all the good will I have, if I were to advise His Excellency to take a man from the opposition side, I do not know that my action would be well received. My honourable friend . . . would hardly expect me to submit to His Excellency

[1] *Canadian Monthly*, June, 1874, p. 528.
[2] *The Week*, May 1, 1884, p. 338.
[3] Sir John A. Macdonald in his first term had appointed a personal friend, who was a Liberal.
[4] *Can. H. of C. Debates*, April 30, 1906, pp. 2304–05.

the name of a man who represented us to be everything that was bad, who had nothing good to say of us, who declared that we were corrupt and wicked and guilty of all the sins in the calendar. That would be, I think, more than Christian charity could be expected to endure. . . . Even if I were to offer to His Excellency the name of one of the lukewarm Conservatives, who is not very strong on one side or the other, perhaps gentlemen on the other side would be the very first to find fault with such an appointment. Therefore on the whole I believe these appointments have to be made as all of them are made. . . . Sir John Macdonald in his day . . . appointed one gentleman from the Liberal side; but this gentleman was a personal friend of his and one who on a particular occasion had stood by him in very trying circumstances. I am sorry to say that I have not yet found in the ranks of the Conservative party a man of such independent views as John Macdonald [1] was in the ranks of the Liberal party. With all the diligence with which I have scanned the other side, I have not been able to find such a man." [2]

Recent years have only witnessed a repetition of what happened under the Macdonald and Laurier administrations. Neither Sir Robert Borden nor Mr. Arthur Meighen has been able in ten years to find one Liberal who possessed the qualities of a senator, and the country no longer expects that any other qualification save party service will be regarded as a reason for appointment to the Upper House.

Party appointments to the Senate have been faithfully reflected by the votes of its members, and an historical test fully justifies the statement of Mr. Justice Riddell that "politics run as strong and party lines are as closely drawn in the Senate as in the House." [3] Senator Sir George Ross has endeavoured to disprove this idea by a table of the Bills that have been rejected and amended by that body since Confederation. He finds that the percentage of Bills amended is approximately a constant, irrespective of the political opinions of the two Houses, but that the percentage of Bills rejected has varied. During the twenty-four years of Conservative majorities in both Houses the percentage

[1] The Liberal senator appointed by Sir John A. Macdonald.
[2] *Can. H. of C. Debates*, Jan. 20, 1908, pp. 1573–74.
[3] Riddell, W. R., *The Constitution of Canada*, p. 109.

of Bills rejected by the Senate was 1·7 per cent.; during the twelve years of a Conservative Upper House and a Liberal Lower House the percentage exactly doubled, viz., 3·4 per cent.; and during the eight years of a Liberal Senate and a Liberal House of Commons the percentage shrank to 2·3 per cent.[1] It is evident that even on Sir George Ross' own showing the political opinions of senators have influenced them in the rejection, if not in the amendment of Bills. But this analysis does not state the case fairly; the above conclusions are drawn from the action of the Senate on all the Bills that were introduced, without paying any attention to their importance. Since 1867 the Senate have rejected (or amended in such a way as to be unacceptable to the Commons) the following eight Bills—all of which were important measures and aroused great interest at the time of their introduction.

1. 1875. Esquimalt and Nanaimo Railway Bill.
2. 1897. Drummond County Railway Bill.
3. 1898. Teslin Lake Railway Bill.
4 & 5. 1899 and 1900. The Redistribution Bill (twice rejected).
6. 1912. The Highways Bill.
7. 1912. The Tariff Commission Bill.
8. 1913. The Naval Bill.

In all of the above eight cases the Government was in a minority in the Senate. It is, then, a serious misstatement of fact for Sir George Ross to claim that the Senate is virtually unaffected by the political complexion of the Commons. The statement of Mr. Porritt is much more accurate:—

"After each of these changes in government in 1896 and 1911, when the majority of the senate realised that for four or five years, at least, it would be in opposition to the government, and to the majority in the house of commons, there was a quickening of activity in rejecting and amending government bills. The power of revision was exercised from 1896 to 1901, and from 1911 to 1916, with a vigilance that was altogether lacking in the longer periods when the majority of the senate

[1] Ross, Sir George, *The Senate of Canada*, pp. 77–78.

was of the same party as the majority of the house of commons and the government." [1]

The method of appointment by party is not in itself a sufficient explanation of this lack of independence: a further cause is to be found in the poor quality of the men who have been appointed. The senators take their seats in the Upper House, not as open and fair-minded men, not as impartial critics, not as legislators whose one object is to produce good statutes; but as violent partisans, men whose minds have become warped and twisted with long party controversy, and whose chief end in life is to promote the interests of those whom they have always supported and to whom they owe their position. A large number of senators are those who were not of sufficient merit to get into the Commons, or, having got there, were unable to hold their seats. Professor Goldwin Smith described the Senate of 1890 in words that need little alteration to-day.

"Money spent for the party in election contests and faithful adherence to the person of its chief, especially when he most needs support against the moral sentiment of the public, are believed to be the surest titles to a seat in the Canadian House of Lords. If there is ever a show of an impartial appointment it is illusory. When the expenditure of money is a leading qualification, commerce is pretty sure to be well represented. But no one will pretend that the general eminence of Canada is represented by its Senate. No intellectual or scientific distinction finds a place, while illiteracy scarcely excludes those who have served a party leader well." [2]

There can be no doubt but that the Fathers of Confederation considered that the life tenure of a senator would negative any tendency he might have to be swayed by political prejudice. It was a superficial view; not only because the system of appointments was bound to encourage and foster party bias, but also because the senator's life tenure does not give him that incentive for continual intellectual effort which is essential if the independent position is to be made valuable. In the first place, a life tenure

[1] Porritt, Edward, *Evolution of the Dominion of Canada*, p. 298.
[2] *Canada and the Canadian Question*, pp. 168–69.

means that a majority of the Upper House will probably have reached an age when mental powers have begun to decline and intellectual indolence begins to replace activity. There is also the objection that a life tenure, unless otherwise counteracted, will kill incentive. A member of the British House of Lords finds some stimulus at least in his position as the representative of a great historic family. A judge's possible tendency towards mental laziness is sharply checked by frequent opportunities to express himself as an individual; he is constantly in the limelight and finds it impossible to take shelter behind the acts or decisions of anyone else. But the senator has none of these stimuli nor has he any others which might take their place, with the natural result that intellectual effort is practically unknown.

But in addition to the senator's political appointment, mediocre talents, and lack of incentive, his independence is further affected by the party discipline. Little pressure is needed on the part of the Prime Minister or the Leader of the Opposition to bring their supporters in the Upper House into accord with their views. The senator is usually past middle age [1] at the time of his appointment, and if he ever had an open mind on any political question, that time is over before he takes his seat. Ex-cabinet ministers, defeated members of parliament, and old party supporters are fairly safe material to place under party discipline; the personal loyalty to their leader and a sense of gratitude for their elevation to a position of honourable retirement can always be depended upon to secure a solid party vote.

"It is generally accepted that this Senate is as partisan as the House of Commons. I am willing to stake my reputation before the country upon that assertion. The Senate is not independent. Why would it be? The moment you say that a senator should be independent and should not vote against the government, you virtually say that he must be a man without gratitude. . . .

"It is a characteristic of most men to be grateful. It is a

[1] He must be at least thirty years of age. *British North America Act*, 1867, sect. 23. In 1904 Canada had the singular honour of having the oldest legislator in the world, Senator Wark, who was 100 years old and who sat in the session of that year.

noble trait in the mind of any man, and when a government takes a man from the cold shades where the people have left him and puts him in the Senate, it is a commendable trait in that man's character to feel that he must support the government. He must be a partisan, and he is a partisan ; the evidence shows it clearly."[1]

The extent to which the party discipline is openly used to influence the senator may be seen by a debate in the Commons in 1912, when Sir Wilfrid Laurier was accused of controlling the vote in the Senate—a charge to which he virtually pleaded guilty.

"*Sir Wilfrid Laurier.*—My honourable friend has said that the Senate must take the responsibility of killing this Bill. For my part I shall be glad to share that responsibility with the Senate."[2]

"*Mr. George E. Foster* (Minister of Trade and Commerce).—It is not the Senate that will have the responsibility ; it is my right honourable friend who created the Senate, and who to-day moves the Senate that he has created to do his behest of defeating the will of the majority of the people of this country."[3]

"Now, after he and his party have died ; after they have gone down before a triumphal majority of the people of this country, he saves himself again through the men he has planted in the Senate,[4] and he uses them to defeat the will of this parliament and of the people of Canada. . . . There is another measure which I believe has also been slaughtered in the Senate at the behest of my right honourable friend. I refer to the Temiskaming and Northern Ontario Railway Bill. Does he mean to tell the House or the country that if he had not lifted his voice and given his persuasion against them, either of these Bills would have been destroyed by the Senate ; does he mean to say that if he lifted his little finger in favour of these measures there would be any opposition in that other branch of our parliament to prevent them becoming law ? Yes, the responsibility is with my right honourable friend. We are very glad to let him claim the responsibility if he wishes. Let him take it as he must, and let him suffer by it as he will."[5]

The party executive has another and less pleasing method of controlling the vote of the Senate—the apportionment

[1] Senator Perley, *Can. Senate Debates*, June 20, 1906, p. 823.
[2] *Can. H. of C. Debates*, April 1, 1912, p. 6821.
[3] *Ibid.*, p. 6823.
[4] This is presumably a reference to the defeat of the Highways Bill in the Senate. [5] *Ibid.*, pp. 6823–24.

of offices. This was stated very frankly by Senator Alexander in 1885, and quoted at length in *The Week* :—

"'The Senate,' said Senator Alexander, 'had been justly called a pocket borough of the ministers. It was completely under the Minister's thumb, and no independent voice raised in the interest of the country alone had a chance of being heard.' . . . Being asked whether appointment for life placed a senator personally beyond the reach of Government influence, he replied that it did not; there were still hopes of preferment, such as Speakerships, Lieutenant-Governorships and departmental offices, which could be held out, in addition to the trammels of party, and the pledge virtually given to the party leader when the appointment was accepted at his hands. Social influences also were plied with assiduity and effect. Senator Alexander wound up by emphatically reasserting the absolute subserviency of the Senate as at present constituted to the minister, and the hopelessness of any independent action while it remained unreformed." [1]

The Canadian Senate is the one conspicuous failure of the Canadian Constitution, and it is a failure chiefly because of the lack of independence of its members. Mr. Alpheus Todd, with his usual skill at glossing over disagreeable facts, begins a digression on second chambers as follows :—

"Under parliamentary government, an upper chamber derives peculiar efficacy and importance from the fact of its independent position. Free from the trammels of party it is able to deliberate upon all public questions on their merits, unrestrained by political considerations, which are too apt to bias the judgment of every administration, in certain contingencies. For the same reason, an upper chamber, being unable to determine the fate of a ministry, is much less influenced by party combinations and intrigues than the popular assembly."[2]

Outside of the trifling objection that this paper upper chamber did not correspond to any known body in the British Colonies, it was an accurate description. Certainly the Canadian Senate derived no "peculiar efficacy and importance from its independent position" because it had neither independence, efficacy nor importance. It could not "deliberate upon all public questions on their merits"

[1] *The Week*, Jan. 29, 1885.
[2] *Parliamentary Government in the Colonies* (2nd ed.), p. 699.

because it was bound hand and foot by the "trammels of party" which Mr. Todd deemed non-existent. Finally, though the Senate could not admittedly "determine the fate of a ministry," the members were as much "influenced by party combinations and intrigues" as was the House of Commons. It was the special merit of the *Canadian Monthly* to see the facts of Canadian politics and to have the courage to face them, and its summary of the so-called independence of the senator is probably the best that has ever been made:—

"Unlike the House of Lords, the Senate can never be anything but a partisan body; to talk of its being in any sense judicial or independent is nonsense. It is independent of the people certainly, and that does not appear to be much in its favour; but, as for independence in the higher sense of impartiality or freedom from party prejudices and predilections, it can lay no claim to the slightest infusion of it. Given the length of time any party Administration was in power and the period its old opponents have had at their command to redress the balance, and a life-assurance actuary could tell you almost certainly how a party debate will result in a given year." [1]

In short, the senator combines a political irresponsibility with a lack of any incentive to independence; he is not accountable to anyone save his party leader for his actions, and he has no motive and no desire to exercise his independent judgment. He is treated with "ironical respect" and "surrounded with derisive state" [2] which but serve to emphasise his actual impotence. His own character and past history unite to make him look to his party for instructions, and he finds a non-partisan approach to any question well-nigh impossible. It has been said that any excessive admiration for the House of Lords may be cured by attending a single sitting of that chamber, and the same statement may be made with three-fold truth of its Canadian prototype. One sees a small group of men of dubious respectability, grey-headed and infirm, discussing the affairs of the country in a listless, bored and indifferent manner. The writer has never been present when an important

[1] *Canadian Monthly*, May, 1878, pp. 550–51.
[2] Smith, Goldwin, *Canada and the Canadian Question*, p. 166.

Government bill has come before a hostile Senate ; but it is not difficult to reconstruct the picture. The members have become revivified ; their languor has disappeared and has given way to a self-conscious activity and importance. There is an unfamiliar and almost sacrilegious bustle in the chamber : people may be seen in the gallery, and a newspaper reporter may even be taking down portions of the debate. The cause of the transformation is not far to seek : the senators are about to exercise their independence —a proceeding that takes place only two or three times in a decade. The Leader of the Opposition in the Commons has issued his order : The Senate must be independent and reject the Government Bill. The order is obeyed, the Bill rejected, the Opposition senators compliment the Fathers of Confederation on the wisdom of the Constitution, and the Canadian House of Lords returns to its slumber.

## CHAPTER IX.

## CONCLUSION.

Before any attempt is made to draw the threads of the preceding chapters together it will be well to note certain conditions that have obtained in Canada which bear directly or indirectly on the question of official independence.

The most casual student of Canadian politics cannot help observing the joint influence of Great Britain and the United States on almost every phase of Canadian political life. Blood and language, literature and history, laws and institutions are to a large extent common to all three countries, while the political tie to Great Britain and the physical proximity and similarity of the United States furnish additional causes of their common interest with the Dominion. One result of this joint influence has been that Canadians have usually been content, when adopting some new political expedient, to confine their choice to the institutions of either Great Britain or the United States. Every provision in the *British North America Act* bears the stamp of one of these two countries, though this combination of political institutions has in one conspicuous instance produced a new polity, viz., the combination of a federal with a cabinet form of government. The same process of adoption has been continued since 1867. The legal details have came in the main from Great Britain—a fact easily explained by habit and conscious affection and veneration for British institutions. But in the actual working of the Canadian constitution, there has been from time to time a movement towards the spirit and methods of the United States—a movement not always admitted or consciously recognised, but nevertheless clear to any student of politics who cares

to look below the surface. Generally speaking, the influence of the United States in Canada has been inimical to official independence, while the example of Great Britain has usually encouraged it. The whole history of the Canadian Civil Service, for example, is a struggle between the American "spoils system" and the policy initiated in Great Britain by the adoption of open competition for the Indian Service in 1854, the formation of the Civil Service Commission in 1855, and the adoption of open competition for the Home Service in 1870. The history of the Canadian Civil Service, it is true, is the most extreme instance of the results that have flowed from the American conception of office as being primarily a party reward and secondarily a recognition of ability; but that idea has affected almost every phase of Canadian official independence. The Permanent Commissions, Royal Commissions, the Senate, and even the Judiciary have suffered to a varying degree from the same influence.

Another tendency in Canadian government, which is partially due to the proximity of the United States but more largely to the similarity of Canadian and American conditions, has appeared in the immigration policy of the Dominion and its results. Mr. Joseph Chamberlain's advice, "Get population and all else will be added unto you," has been followed to the letter. Canadian immigration during 1900–14 totalled about 2,900,000 and in the fiscal years 1912–13 and 1913–14 reached 402,432 and 384,878 respectively. All other considerations were subordinated to the one prime object, the acquisition of people. The steamship companies were allowed to bring in many undesirables, no language test was imposed,[1] the immigrants were often settled in solid national blocks in the North-West, and the franchise was extended with a careless hand. The natural result has followed. The dominant idea of the immigrants has been the pursuit of wealth, and their ignorance and lack of interest in political ideals have made a large number of them the tools of the unscrupulous politician. It may be

[1] In Saskatchewan, for example, out of 140,000 persons of voting age, 60 per cent. are foreign born and illiterate. *Canada*, July 19, 1919.

that the Canadian-born descendants in the second and third generations will come to think of the country's interest as well as their own, but the immediate effect of the immense recent immigration has been a decided lowering of public spirit.

While political corruption has never penetrated so far as it has south of the forty-ninth parallel, Canadian history has not lacked its Croker or Platt even though it has never had a Tweed. The half-century since Confederation is dotted with political scandals. This is particularly noticeable in provincial politics, and the last five years have seen three grave charges of graft and misappropriation of public funds, one in British Columbia, one in Manitoba, and one in New Brunswick. More regrettable, however, than the occurrence of such scandals is the general attitude of the public that permits this corruption to exist and does not revolt at its appearance. There would seem to be a general opinion, such as exists in the United States, that political dishonesty is a necessary evil in a young and thriving country, the members of which have little time to devote to politics. The public have not approved of political corruption ; but they regard it as more or less inevitable, and take no drastic steps to ensure its disappearance.

Perhaps an even more important factor in Canadian political life has resulted from the rapid economic development of the country. The power of the big corporations, especially the banks, the manufacturing interests and the railways, has constituted a continual menace. The banks have begun and are still continuing a process of amalgamation that threatens to include all except the two or three that now head the list and have a working understanding with each other. The manufacturing interests have met on common ground in the Manufacturers Association, and by taking political action in 1911, largely contributed to the defeat of the Liberal Government. But it has been the railways that have always held the centre of the Canadian political stage, from the time when the Intercolonial and Canadian Pacific made their first appearance immediately after Confederation until a few years ago when the Canadian

Northern and the Grand Trunk were taken over by the Government.

> "No single work of man in any part of the world at any period of the world's history has so obviously and directly contributed to the making of a nation as the transcontinental railway in Canada." [1]

Such is Sir C. P. Lucas' succinct statement of the importance of railways in Canadian national life, and it is probably not exaggerated. The development of the country has been completely dependent on the growth of railway lines. Dominion and provincial governments have competed with one another in the concessions of land, which have run into tens of millions of acres, and subsidies, loans without interest and guarantees, which may be measured in hundreds of millions of dollars. [2] The influence of these powerful corporations on Canadian politics has been immense, and all have endeavoured at various stages of their development to corrupt the public life.

> "Take the Canadian Northern Railway. We all know what a bad influence it exercised on the public life of the country. We know how it lobbied in the Parliament of Canada, and in some of the provincial legislatures as well, when it wished to extend its lines and get railway bonuses and guarantees and land grants. I know that I am on safe ground when I say that there has been no more unfortunate influence at work in the public life of the country than that of our private railway companies." [3]
>
> "If there is one thing that has bedevilled the public life of this country it has been the influence of railway corporations." [4]

It is amidst such a conflict of economic forces that Canadian politics have been nurtured, and they naturally have not come off unscathed. There are unmistakable signs, however, that the influence on politics of two of these forces is beginning to diminish. The power of the banks

[1] Lucas, Sir C. P., *Greater Rome and Greater Britain*, p. 119.

[2] The Drayton-Acworth Commission reported that the Canadian people had granted, guaranteed or loaned through their governments the equivalent of $968,451,737. *Can. Sess. Pap.*, 1917, § 20 8, pp. xiv.–xix.

[3] Hon. T. W. Crerar, *Can. H. of C. Debates*, Oct. 20, 1919, p. 1216.

[4] Hon. N. W. Rowell, *Ibid.*, Oct. 21, 1919, p. 1259.

still grows, and governments and private persons are increasingly dependent on a few financial magnates in Montreal and Toronto.[1] But the manufacturers, though still powerful, have received a severe check at the hands of the Farmer movement, and the next Dominion election will see, beyond any doubt, a lowering of the tariff. The Canadian Pacific is still Canada's great achievement and her gravest danger. But the other railway companies have disappeared, and whatever may be the faults of public ownership, the control of the G.T.P., G.T.R., and C.N.R. by the Canadian Government will be a great help in the purification of the national life.

Another peculiar problem of Canadian government is presented by the racial, religious and geographical divisions of the Dominion. All federations are apt to give rise to friction and local jealousies, and Canada has been no exception; but superimposed upon this usual division have occurred two others, the isolation of the French Canadian and the division of East and West.

It is unnecessary to dwell on the strong local patriotism that exists in the provinces, except to state that while in many instances such patriotism is highly beneficial, in many other cases it takes very petty forms, such as the accepted custom for each province to be represented in the Federal Cabinet. The French Canadian question, which involves the Roman Catholic religion and bilingualism, has proved a fruitful cause of friction. An aggressive Church in Quebec and an equally aggressive Orange Order in Ontario do their best to keep the racial and bilingual questions well to the front—an aim in which they have been largely abetted by unscrupulous men on both sides of politics. The difficulties are further enhanced by the fact that, for the most part, the two races approach all questions from entirely different angles—they are in reality two separate civilizations which by historical accident have been forced to occupy a common home. If the divergence between French and British

[1] It is claimed by Mr. Porritt that in 1896 and 1912 the banking interests virtually nominated the Minister of Finance. Porritt, Edward, *Evolution of the Dominion of Canada*, pp. 261–62.

Canadian is racial and religious, that between East and West is almost purely economic. The Western provinces are predominantly agricultural and rural, the Eastern provinces are to a much larger extent industrial and urban. For the past fifty years Quebec has held the balance of political power; for the next few decades the balance will be held by the West. The latter claims that it has been ruled and sacrificed too long by the dominant East, and it now naturally insists that its influence in government should be recognised. There is, as might be expected, a strong clash of political policies. The West is emphatically in favour of reciprocity, of freer if not free trade, and exhibits a tendency towards radicalism which finds expression in a desire to try new political expedients. The strength of the Farmers' movement in Canadian politics is the direct result of this dissatisfaction of the West and of the determination that the East shall no longer grow rich at the expense of the farming community.

It must be quite obvious that no one panacea can be found that will be sufficiently powerful to cure all these ailments which are more or less characteristic of Canadian politics. But it is suggested that these difficulties, which are a serious menace to Canadian national life, can be partially solved by a greater regard for and use of official independence and all that it connotes. It is at least certain that many of the dangers that have been indicated serve to emphasise a real need for a better understanding of the principles underlying the conception of independence. It has been pointed out in the opening chapter that a modern democracy with a universal suffrage cannot work efficiently without the aid of the professional official. The Canadian enfranchisement of illiterate and politically uneducated immigrants with its consequent depression of the level of public opinion increases the necessity for such officials, who must be given not only responsible positions but also the opportunity to use their peculiar powers to the best advantage. The prevalence of graft and corruption, and the increased power of the banks, railways, trusts and corporations point in the same direction. If the elective

machinery is to be at the mercy of any who have the money and the desire to use it, there will naturally be a tendency to place more faith in those individuals who are independent of governments, and who may, from their position, be trusted not to abuse the confidence that has been placed in them. Finally, the more the separatist and local tendencies develop, the greater will be the demand for independent and impartial authorities who have the regulation and administration of the central government in their hands.

The subtle and complex political relationship which I have called in this book " independence " has grown slowly in Canada. The first independent official was the Governor, who was succeeded in the Dominion by the Governor-General. The judiciary was the next in chronological order ; and its independence was directly modelled on that which had long obtained with the judges of the United Kingdom. Then came the Montreal Harbour Commission in 1830, which was followed by many similar bodies, each differing in organisation according to the functions that they were expected to perform. The Civil Service was the last to obtain its " independence," partly because the idea of an independent Civil Service was only thought of in the middle of the Nineteenth Century, partly because of the peculiar position it occupied in the governmental sphere and the great opportunities it offered for party patronage. The member of parliament and the senator have always been in the same legal position that they are at present ; what has been lacking is not the opportunity for independence but a greater realisation of its need.

The significant fact that is revealed by this brief summary is that people have consistently kept their minds in water-tight compartments. Actual events and political exigency have combined to force independence point by point, in one office and another, on the political structure of the nation. But each surrender of political responsibility and each concession of independence was regarded as an isolated instance, and not as a permanent requirement applicable in some degree to every office in the state. It is true that the independence of certain of the permanent commissions

has sometimes been explained on the ground that their duties were quasi-judicial and that for this reason their position should resemble that of the judges. Such an explanation, however, has generally been in the nature of an excuse, and it has lacked any definite realisation that the judiciary and the commission had more in common than their function.

Although the principle of official independence has been accepted for some time in its practical application, it has not yet been clearly incorporated into Canadian political theory. Such reluctance is but natural; the implications of this principle are far-reaching, and its acceptance involves a frank recognition of the altered conception of democracy. The Canada of 1867 had recently emerged from the tyranny of an autocratic Governor, and the people were only beginning to enjoy a free, responsible and democratic government. Lincoln had just made his splendidly dramatic appeal that "government of the people, by the people and for the people shall not perish from this earth"—an appeal that by its very simplicity seemed to crystallise the highest political ideals of mankind. It need cause no surprise that the young nation to the North was inclined to regard the essence of democracy as identity,[1] to consider election and party appointment as the only two means of attaining office, and to look upon a strict application of ministerial responsibility as indispensable to responsible government. The events of the last fifty years, however, have necessitated some radical re-adjustment: there has been a gradual realisation of the fact that the simple process of election does not solve all the difficulties, and that what is needed is a keenness and active interest on the part of the electorate combined with legislative, executive and judicial efficiency. Democracy must remain the basis of our government; but a more complex conception must take the place of the simple political thought of the Confederation period.

I have endeavoured to emphasise throughout this book the great need that exists for a growth of moral consciousness and for a keener realisation of the ideals of public

[1] Cf. Wallas, Graham, *Our Social Heritage*, pp. 98–100, for the fallacy of confusing democracy and identity.

service. Until the last few years, however, the peculiar political position of Canada was not calculated to encourage either this consciousness or these ideals, both of which must necessarily derive their strength from the incentive and inspiration that is furnished by a virile national life. Canada has been protected alike by the power and interests of Great Britain and the Monroe Doctrine of the United States; but the price she has paid for this protection has been parochialism in politics with its consequent narrowness in outlook. Military and naval affairs and foreign relations have been until recent years almost dead questions. Much of this has been altered by the war. The increased demands for an amended Constitution, the proposed minister at Washington, and the representation on the League of Nations have been but symptoms of the new virility in national sentiment. The field for imagination that has been somewhat lacking in the past is being supplied to-day, and Canadians may now draw on their increased political consciousness and their broader national life for the inspiration and idealism that are so essential to real greatness. But the warning given by James Russell Lowell to the United States of thirty-five years ago is no less needful to the Canada of to-day, and its lesson must be seriously taken to heart if the Canadian people are to realise that great destiny of which they so often dream.

"I am saddened when I see our success as a nation measured by the number of acres under tillage, or of bushels of wheat exported; for the real value of a country must be weighed in scales more delicate than the Balance of Trade. The garners of Sicily are empty now, but the bees from all climes still fetch honey from the tiny garden-plot of Theocritus. On a map of the world you may cover Judea with your thumb, Athens with a finger tip, and neither of them figures in the Prices Current; but they still lord it in the thought and action of every civilised man. . . . Material success is good, but only as the necessary preliminary of better things. The measure of a nation's true success is the amount it has contributed to the thought, the moral energy, the intellectual happiness, the spiritual hope and consolation of mankind."[1]

[1] Lowell, J. R., *Democracy and Other Addresses*, pp. 235–37.

# INDEX.


ABBOTT, Sir J. J. C., 169–70
Aberdeen, Lord, 199–201, 207, 211, 213
Alexander, Senator, 250
Ambition, effect of, on independence, 20, 107
Anson, Sir W., 15
Appointment, of officials, 14–15
 of civil servant, 73–7, 85–7, 104
 of Governor-General, 187–90, 216–17
 of judge, 31–3, 63–5
 of permanent commissioner, 117–18, 127–8, 134, etc.
 of royal commissioner, 169–72, 180
 of senator, 240, 242–5

BAGEHOT, Walter, 22 *n.*, 214
Banks, influence of, 255–9
Bentham, Jeremy, 8, 8 *n.*, 20–1, 71, 132, 167
Blackstone, Sir Wm., 61, 161
Blair, A. G., 237
Blake, Edward, 36–7, 201, 203–4.
Board of Civil Service Examiners, the, 75, 86, 154, 156–8
 of Commerce, the, 111, 166
  criticism of, 122–3
  failure of, 126–7
  political responsibility and, 124–5
  salary of, 121–2
 of Grain Commissioners, the, 111, 126
 of Pension Commissioners, the, 111, 126
 of Railway Commissioners, the, 12, 111–27, 165–6
  appointment of, 115, 117–8
  functions of, 115–6, 125–6
  history of, 112–17
  personnel of, 117
Board of Railway Commissioners, the political responsibility and, 113–15, 121, 123–5
  qualifications of, 116, 120–1
  removal of, 115–16, 118
  retirement of, 115
  royal commission on, 113–15
  salary of, 115–17, 119
  tenure of, 115, 118–19
Borden, Sir F., 174–5
 Sir R. L., 9, 159–60, 232, 237, 238, 245
Bourassa, Henri, 190
Bourinot, Sir John, 38, 41
*British North America Act*, 30, 39, 42, 69, 187, 202, 205–6, 242, 243, 253
Brodeur, L. P., 145, 146, 173
Burke, Edmund, 20, 221, 223–4, 227, 228

CABINET MINISTER, *see* Minister, Cabinet
Canada, political position of, 260–1
 sectionalism in, 257–8
Canadian Bar Association, 32, 64
 National Railway Company, 162–5
Carlyle, Thomas, 26–7
Carnarvon, Lord, 203–4
Caron, Sir A., 171
Cartwright, Sir R., 88–9
Casault, Judge, 51
Casey, G. E., 156–7
Caucus, the party, 221, 230
Chamberlain, Joseph, 254
Character, effect of, on independence, 18
Civil Servant, the, 5, 14, 73–109
 appointment of, 73–7, 85–7, 104
 disfranchisement of, 92–4
 examination of, 74–88
 political responsibility and, 88–90

Civil Servant, the, probation of, 87–8
promotion of, 100–3
removal of, 90–2, 94–5, 104
retirement of, 95–8
salary of, 96, 103–4
tenure of, 90, 104
Civil Service, the, 73–109, 254, 259
entrance to, 73–89
gradation of, 98–100, 106–7
officialism and, 105–6
Re-classification of 1919, 77, 83–5, 94–5, 99–104
reform of, 74–9, 90–2
Civil Service Board, the, 154–6
Civil Service Commission, the, 15, 75–7, 86–7, 92, 102–4, 154–62, 166
appointment of, 161–2
development of, 154–8
political responsibility and, 158–60
Commissioner, the Permanent, 5, 11, 24, 110–11, 165–8, 254, 259–60
Board of Commerce, 111, 121–7, 166
Board of Grain Commissioners, 11, 111, 126
Board of Pension Commissioners, 111, 126
Board of Railway Commissioners, 12, 111–27, 165–6
Canadian National Railway Company, 162–5
Civil Service Commission, 154–162
Conservation Commission, 127–34
International Joint Commission, 127–34
Lighthouse Board, 146–50
Montreal Harbour Commission, 5, 110, 140–6
Ottawa Improvement Commission, 137–40
Transcontinental Railway Commission, 134–7
Commissioner, the Royal, 2, 5, 16, 169–83, 254
appointment of, 169–72, 180
function of, 169, 179–80
investigation of political charges and, 170–2, 175
judiciary and, 177–8
personnel, 176–9, 182–3
political responsibility and, 172–6
qualifications of, 180–1
Commissioner, the Royal, removal of, 172
salary of, 169
tenure of, 169, 172, 180
Committee on Class I. Examination (G. Britain), 79, 81
Conscription, 229, 230
Conservation Commission, the, 127–34, 165
appointment of, 127–8
failure of, 131–3
function of, 128, 129–31
history of, 127–8
personnel of, 127–9, 131–2
reform of, 133–4
Constituents, relation of member to his, 221–7
Controverted election cases, 51–4
Corruption, political, 255

DEMOCRACY, recent changes in, 24–5
need for independent officials under, 25–7, 258–61
Devonshire, Duke of, 217
Dicey, A. V., 3–4
Disfranchisement of civil servants, 92–3
Drayton-Acworth Commission, 163, 183
*Droit administratif*, 44 *n.*, 163
Dufferin, Earl of, 171, 189, 195–8, 200, 201, 209–10, 214–17
Durham's Report, Lord, 90 *n.*, 185 *n.*, 186

ELECTION of officials, 13–14
of the judge, 63, 63 *n.*
of the member of parliament, 222–3
Elgin, Lord, 186–7, 196–7
Ewart, J. S., 54–5, 56
Examination, of officials, 14
academic, 77–84
civil service (entrance), 74–88, 154–5
promotion, 101–3, 157–8
special, 84–5
Expert, advantage of independence to the, 11
relation of the, to the non-expert, 21–3, 24, 136–7, 165–6, 180–1

FAGUET, Emile, 7
"Family Compact," 185
Farmer's Movement, 221, 257–8
*Federalist, The*, 7, 17, 47, 62
Ferguson, Sir R. M., 194

Fielding, W. S., 9, 10, 136, 178
Fitzpatrick, Sir C., 56–7, 236–7
Foster, Sir G. E., 174–5, 249
Fraser, Mr. Justice, 46–7

Galt, Mr. Justice, 54
Governor-General, the, 38–9, 184–219, 259
  appointment of, 187–90, 216–17
  civil and criminal irresponsibility of, 192
  criticism of, 192–3
  function of, 184–5, 218–19
  political nominee, a, 189–90
  political responsibility of, 190
  powers of, 193–212
    appointments, withholding, 199–200
    decline in, 212–15
    diplomatic, 209–10
    disallowance, 202–5
    dismissal of a lieutenant-governor, 205–6
    dismissal of a ministry, 197–9
    dissolution, 194–5
    honours, conferring of, 208
    Imperial officer, 211–12, 214
    law, must obey the, 210–11
    pardon, 200–2
    prorogation, 195–7
    speech-making, 206–8
  qualifications of, 189, 217–9
  removal of, 190
  restrictions on, 191–2
  salary of, 190–1
  tenure of, 190
Gradation of the Civil Service, 98–100, 106–7
Grain Commission, *see* Board of Grain Commissioners
Granville, Lord, 202
Great Britain, influence of, 252–3
Grey, Earl, 207, 217

Hamilton, Alexander, 7, 17, 47, 61–2
Harbour Commissions, 5, 140, *see* Montreal Harbour Commission
Head, Sir E., 194, 200
Hodgins, A. E., 136–7
Holton, L. H., 170
Hopkins, J. C., 60
Hughes, Judge, 35–6

Immigration policy, 254–55, 258

Independence, corporate, 6
Independence, official, principle of, 1–27
  advantages of, 10–12
  characteristics of, 5–7
  consistent with democracy, 25–7
  forms of, 4, 8–9
  growth of, 23–4, 259–60
  limitations of, 21–3
  means used to attain, 12–21
  need for, 24–5
  negative and positive, 8
  objects of, 12
  quantitative element in, 10, 13
Initiative, aided by independence, 22–4, 108–9, 181
International Joint Commission, 150–4, 165
  Waterways Commission, 150
Interstate Commerce Commission, 113

Jackson, Andrew, 90
Judge, the, 2, 5, 9–10, 11, 17, 28–72, 254, 259
  appointment of, 31–3, 63–5
  civil and criminal irresponsibility of, 44–5
  company directorships and, 55
  controverted election cases and, 51–4
  criticism, immunity from, of, 45–7
  election of, 63, 63 *n.*
  function of, 60–3
  history of the independence of, 28–30
  hypothetical cases and, 57–8
  political responsibility and, 69–71, 160
  professionalism and, 63–4
  promotion of, 58–60, 65
  qualifications of, 33–4
  railway transportation and, 55–6
  removal of, 29, 35–42, 67–8
  retirement of, 42–4, 68–9
  royal commissions and, 54–5, 177–8
  salary of, 29, 47–50
  tenure of, 28, 29, 35, 42, 67
  tradition of, 71
  training of, 34, 65–7
  ultramontanism and, 50–1

Keith, A. Berriedale, 38–9, 194, 204–5

Killam, Mr. Justice, 118
Kimberley, Earl of, 203
King, W. L. McK., 172
Knutsford, Lord, 187–8

Labour Convention, relation of member of parliament to, 221
Lansdowne, Lord, 188 *n.*, 206–7
Laski, H. J., 26
Laurier, Sir Wilfrid, 31–2, 118, 152–3, 160, 173–4, 188, 200, 207–8, 235–6, 241, 242, 244–5, 249
Lay mind v. expert mind, 22–3
Leacock, Stephen, 17 *n.*
Letellier, Luc de St. Just, 205–6
Lighthouse Board, the, 146–50, 165
 reconstruction of, 149
 royal commissions on, 147–9
 uselessness of, 150
Lincoln, Abraham, 260
Lippman, Walter, 21
Lorne, Marquis of, 201, 205–6, 213
Low, Sir Sidney, 1, 4
Lowell, A. Lawrence, 18 *n.*, 82, 222 *n.*
 James Russell, 261

Macaulay, Lord, 80
Macdonald, John, 245
 Sir John A., 35–6, 188, 195–8, 205, 207, 209, 243–5
 Sandfield, 90
Macdougall, W., 242
McKenzie, Alexander, 91, 198, 199, 207, 243
McLean, S. J., 114, 117–19, 121
Manitoba School Question, 210, 229
Manufacturers, influence of, 255, 257, 258–9
Meighen, Arthur, 123–4, 125, 245
Member of Parliament, the, 220–39, 259
 caucus, relation to, 221, 230
 civil and criminal irresponsibility of, 220
 constituents, relation to, 222–7
 corruption and, 233–4
 nomination of, 222–3
 party and, 227–33
 party executive and, 221, 231–3
 pledges of, 222–4
 political responsibility and, 220–2
 salary of, 233
 Select Committees and, 234–5
 tenure of, 16

Metcalfe, Sir C., 186
Mill, J. Stuart, 221
Mills, David, 171
Minister, Cabinet, 235–9
Minto, Lord, 190, 208
Monk, F. D., 9, 134–5, 238
Monroe Doctrine, 261
Montreal Board of Trade, 143, 144, 145
 Harbour Commission, 110, 140–6, 259
  function of, 140
  personnel, 141–2
  relation to government of, 142–6
Morley, Viscount, 231
Mousseau, J. A., 31–2
Mowat, Sir Oliver, 59–60
Mulgrave, Lord, 194
Murdock, James, 125
Murray, Sir G., 98–9, 133–4, 182–3

Normanby, Marquess of, 188

O'Connor, John, 32
Officialism, *see* Professionalism
Ontario, County Court judges of, 39–40
Ottawa Improvement Commission, 6, 138–40, 165

Pacific Scandal, 170–1, 195–8, 209, 228–9
Party, relation of member to his, 227–33
Pension Commission, *see* Board of Pension Commissioners
Pension, of the civil servant, 95–8
 of the judge, 43–4
Perdue, Mr. Justice, 54, 56
Perley, Senator, 248–9
Plato, 5, 8, 17, 18
Political activity, of the civil servant, 92–4
 of the judge, 28–9, 59–60
Porritt, Edward, 246–7
Professionalism and independence, 21–3, 63–4, 105–6
Promotion, effect of, on independence, 20
 examinations, 101–3
 of the civil servant, 100–3
 of the judge, 58–60, 65

Quebec, Conference of 1864, 242
 judges from, on the Supreme Court, 34

RAILWAY COMMISSION, *see* Board of Railway Commissioners
Committee of the Privy Council, 12, 110–14, 117, 119, 121
Railways, influence of, 255–7, 258–9
Religion and independence, 32–3, 50–1
Removal, 16–17
of the civil servant, 90–2, 94–5, 104
of the Governor-General, 190
of the judge, 16–17, 29, 30, 35–42, 67–8
of the permanent commissioner, 115–16, 118, 127–8, 134–5, etc.
of the royal commissioner, 172
of the senator, 240
*Report of Transmission, The*, 85, 94, 102–4
Reputation, effect on independence, 19–20
Responsibility, civil and criminal, 3–4
of the Governor-General, 192
of the judge, 44–5
of the member of parliament, 220
political, 1–5, 23
of the civil servant, 88–90
of the Governor-General, 190
of the judge, 69–71
of the member of parliament, 220–2
of the permanent commissioner, 113–15, 121, 123–5, 166–8
of the royal commissioner, 172–6
Retirement, of the civil servant, 95–8
of the judge, 42–4, 68–9
Riddell, Mr. Justice, 245
Ripon, Lord, 203
Ritchie, Chief Justice, 31
Mr. Justice, 43
Robson, Judge, 125
Rogers, Robert, 54
Roosevelt, Theodore, 85
Ross, Sir George, 245–6
Routhier, Judge, 50
Royal Architectural Institute of Canada, 139
Royal Commissioner, *see* Commissioner, Royal
Commissions and the judiciary, 54–5, 177–8

SALARY, effect of, on independence, 7, 17, 18, 71
of the civil servant, 96, 103–4
of the Governor-General, 190–1
of the judge, 29, 47–50, 55, 71
of the member of parliament, 233
of the permanent commissioner, 167
of the royal commissioner, 169
of the senator, 240
Sectionalism in Canada, 257–8
Select Committees, 36, 38, 181, 234
Senator, the, 8, 240–52, 254, 259
appointment of, 240, 242–5
failure of, 250–2
independence, intended, of, 240–3
party control and, 245–50
salary of, 240
tenure of, 240, 247–8
Smith, Goldwin, 184, 185, 193, 206, 213, 215, 247
"Spoils System," 90–2, 254
Squier, Judge, 41–2
Strathcona, Lord, 188
Superannuation, *see* Retirement

TARTE, J. I., 235
Tenure of office, 7, 15–16
of the civil servant, 90, 104
of the Governor-General, 190
of the judge, 16, 28, 29, 35, 42, 67
of the member of parliament, 16
of the permanent commissioner, 118–19, 127–8, 134, etc.
of the royal commissioner, 16, 169, 172, 180
of the senator, 240, 247–8
Thompson, Sir John, 59–60
Titles Resolutions ,224, 231–2
Todd, Alpheus, 184, 185, 204–5, 215, 250–1
Tradition, influence of, on independence, 19, 22
Training, effect of, on independence, 18
of judges, 34, 65–7
Transcontinental Railway Commission, the, 134–7, 165
failure of, 137
relation to its experts, 136
relation to the government, 134–6

Tupper, Sir Charles, 197, 199–200, 207–8, 211, 242
Sir C. H., 207

Ultramontanism and the judge, 50–1

United States, influence of, 90–1, 253–5

Victoria, Queen, 189, 217

Wallas, Prof. Graham, 89, 108 *n.*, 109 *n.*, 260 *n.*

Webb, Sidney, 95

Wilson, James, 189

Wood, Chief Justice, 37
Judge, 41–2

Young, Sir John, 202

*Printed in Great Britain by* Butler & Tanner, *Frome and London*

# P. S. KING & SON, LTD.

## A HISTORY OF THE CANADIAN PACIFIC RAILWAY.

By Harold A. Innis, Ph.D. 12*s.* 6*d.* Postage, 9*d.*

In this study an attempt has been made to trace the History of the Canadian Pacific Railway from an Evolutionary and Scientific point of view.

Contents.—Introduction: The Pacific Coast, The Hudson Bay Drainage Basin, On the St. Lawrence—From National to Economic Union (1870–1880)—Fulfilment of the Contract—Expansion of the Road and the Development of Freight Traffic—The Freight Rate Situation—Passenger Traffic—Earnings from Operations—Expenses—Total Receipts—Capital—Conclusion—Appendix.

## TRUSTS IN BRITISH INDUSTRY, 1914–1921.

A Study of Recent Developments in Business Organization. By J. Morgan Rees, M.A. (Wales), Lecturer in Economics and Political Science, University College of Wales. 10*s.* 6*d.* Postage, 9*d.*

Retrospect—Effect of the War on the Trust Movement—Extractive Industries—Iron and Steel Industries—Textile Industries—Chemical Industries—Banking and Finance—Conclusion—Appendix.

## SOCIALISATION IN THEORY AND PRACTICE.

By Heinrich Ströbel, Finance Minister in the Prussian Revolutionary Government of November, 1918. Translated from the original by H. J. Stenning. 10*s.* 6*d.* Postage, 9*d.*

*Glasgow Herald.*—" A deeply interesting book of shrewd criticism of all sides, and should be read by all our students of economics, amateur and otherwise."

*Bristol Times and Mirror.*—" The book is a mine of information upon sociological experiments."

**Orchard House, 2 and 4 Great Smith Street, Westminster.**

## WEALTH AND TAXABLE CAPACITY.

Being the Newmarch Lectures for 1920–21 on Current Statistical Problems in Wealth and Industry. By SIR JOSIAH STAMP, K.B.E., D.Sc. 10*s.* 6*d.* Postage, 9*d.*

*The Times.*—" Full of interesting matter, and worth the careful consideration of all interested in economic and social problems."

*Morning Post.*—" The book should be read, and read carefully, by all who are concerned in post-war financial problems . . . the great merit of the book, and the one which makes it worth reading by the busy man, is that it is essentially practical. It is practical in the sense that the problems with which the book deals are approached from the business rather than the mere academic standpoint, and even in the more theoretical and scientific portions of the book the same practical spirit is displayed. . . . When the book has been mastered, the reader will be able to consider most of the current financial problems without fear of being misled by any kind of superficial theories or being taken in by the many specious and ingenious remedies which are put forward."

## REPARATIONS, TRADE AND FOREIGN EXCHANGE.

By L. L. B. ANGAS, M.A. 12*s.* 6*d.* Postage, 9*d.*

*The Times.*—" An interesting book which enunciates in clear language the difficulties of the problem, their causes and effects, and for this reason alone commends itself. The author condemns the indemnity in its present form as causing wide trade depression and unemployment. He urges that reparation should be applied to developing our younger Colonies."

*Statist.*—" This book deals with foreign exchange, industrial fluctuation, exchange speculation and inflation, with special reference to unemployment, as well as with the questions of German indebtedness to the Allies and inter-Allied indebtedness."

## COAL IN INTERNATIONAL TRADE.

By A. J. SARGENT, M.A., Professor of Commerce in the University of London. 2*s.* 6*d.* Postage, 2*d.*

*Yorkshire Observer.*—" A useful little book on a very big and very important subject . . . of practical value at the present moment when all matters regarding mechanical power for industrial purposes are being keenly canvassed."

**P. S. KING & SON, Ltd.**

**Orchard House, 2 and 4 Great Smith Street, Westminster.**

# INSURANCE AGAINST UNEMPLOYMENT.

**With special Reference to British and American conditions.**

By JOSEPH L. COHEN, B.A. (Cantab.), M.A. (Columbia University); Richard Watson Gilder Fellow in Economics (Columbia University). 18*s*. Postage, 1*s*.

*Chamber of Commerce Journal.*—"The four parts into which this highly interesting book is divided deal with the problem of Unemployment Insurance, the Ghent System, the British System, and the Problem in the United States of America, special attention having been paid to the last two. . . . To all who desire a well-written treatise on Unemployment Insurance this book should make a strong appeal."

*Spectator.*—"Mr. Cohen's elaborate treatise, though specially concerned with British and American conditions, gives a useful account of the whole subject. Nearly half the book is devoted to a critical description of the British scheme, which is the most complete and generous of its kind. . . . His book contains a mass of information."

---

# PROHIBITION IN AMERICA.

**And its Relation to the Problem of Public Control of Personal Conduct.**

By ARTHUR NEWSHOLME, K.C.B., M.D., Late Principal Medical Officer of the Local Government Board of England and Lecturer on Public Health at Johns Hopkins University, U.S.A. Author of *Public Health and Insurance.* Second Impression, 2*s*. Postage, 3*d*.

*Observer.*—"The nature of the evidence here contributed is to be noted. The witness is second to no living authority on public health. He achieved great things during the many years when he was responsible for public health in this country. He is a master of vital statistics as well as a practical administrator, and the compliment paid him by Johns Hopkins University indicates the international character of his reputation. He has spent the greater part of the past three years in North America, and has visited practically all parts of that Continent."

*Canadian Forum.*—"A very well written, very convincing, and very fair opinion on this subject . . . the author produces an appalling number of statistics to prove the value of Prohibition as a prohibiting agent; and in spite of any opinion you may have held previously on the subject he carries you with him, not on a wave of enthusiasm, but of sound proof and common sense."

*Survey (New York).*—"This report by one of the leading vital Statisticians of England, is very timely . . . represents the result of three years' study, during which the author visited Canada and many American States."

---

**P. S. KING & SON, Ltd.**

**Orchard House, 2 and 4 Great Smith Street, Westminster,**

## CATALOGUE OF PARLIAMENTARY PAPERS, 1911–1920.

Being a second Decennial Supplement to the Catalogue of Parliamentary Papers, 1801–1900. Contains particulars of the principal Parliamentary Papers and Reports published during the second decade of the present century, with prices, and, in most cases, Analysis of Contents. Medium Quarto. Bound in Buckram. 10*s.* Postage, 1*s.*

*Library World.*—"Indispensable to Public Libraries, whether they have sets of Parliamentary Papers or not."

*Scotsman.*—"Cannot but prove especially welcome to the many specialist inquirers engaged in historical researches covering a period in which military necessities kept so much in the dark."

## THE FOUNDERS OF POLITICAL ECONOMY.

By JAN ST. LEWINSKI, D.Ec.Sc., Professor of Political Economy at the University of Lublin, Poland. Author of *Origin of Property.* 6*s.* 6*d.* Postage, 6*d.*

*Economist.*—"Students who have mastered the elements of economics will find much to interest and a good deal to stimulate them."

*Saturday Review.*—"An interesting survey of the early gropings towards the discovery of economic laws . . . a refreshment to escape from the elusive obscurities of purchase-price parities to the common-sense simplicities of the Early Fathers, as sympathetically expounded with much more besides."

## THE TRADE CYCLE.

An Account of the Causes Producing Rhythmical Changes in the Activity of Business. By F. LAVINGTON, M.A., Girdler's Lecturer in the University of Cambridge. 3*s.* 6*d.* Postage, 4*d.*

*Scotsman.*—"Well-reasoned and instructive throughout, it throws out some practical suggestions for checking reckless speculative expansion of business and over-optimistic stimulation in periods of boom."

*Sheffield Independent.*—"An able account of the causes producing rhythmical changes in the activity of business."

## PRICES AND WAGES.

An investigation of the Dynamic Forces in Social Economics. By PERCY WALLIS and ALBERT WALLIS. Royal 8vo. 480 pp. With 83 Charts and Diagrams. 25*s.* Postage, 1*s.*

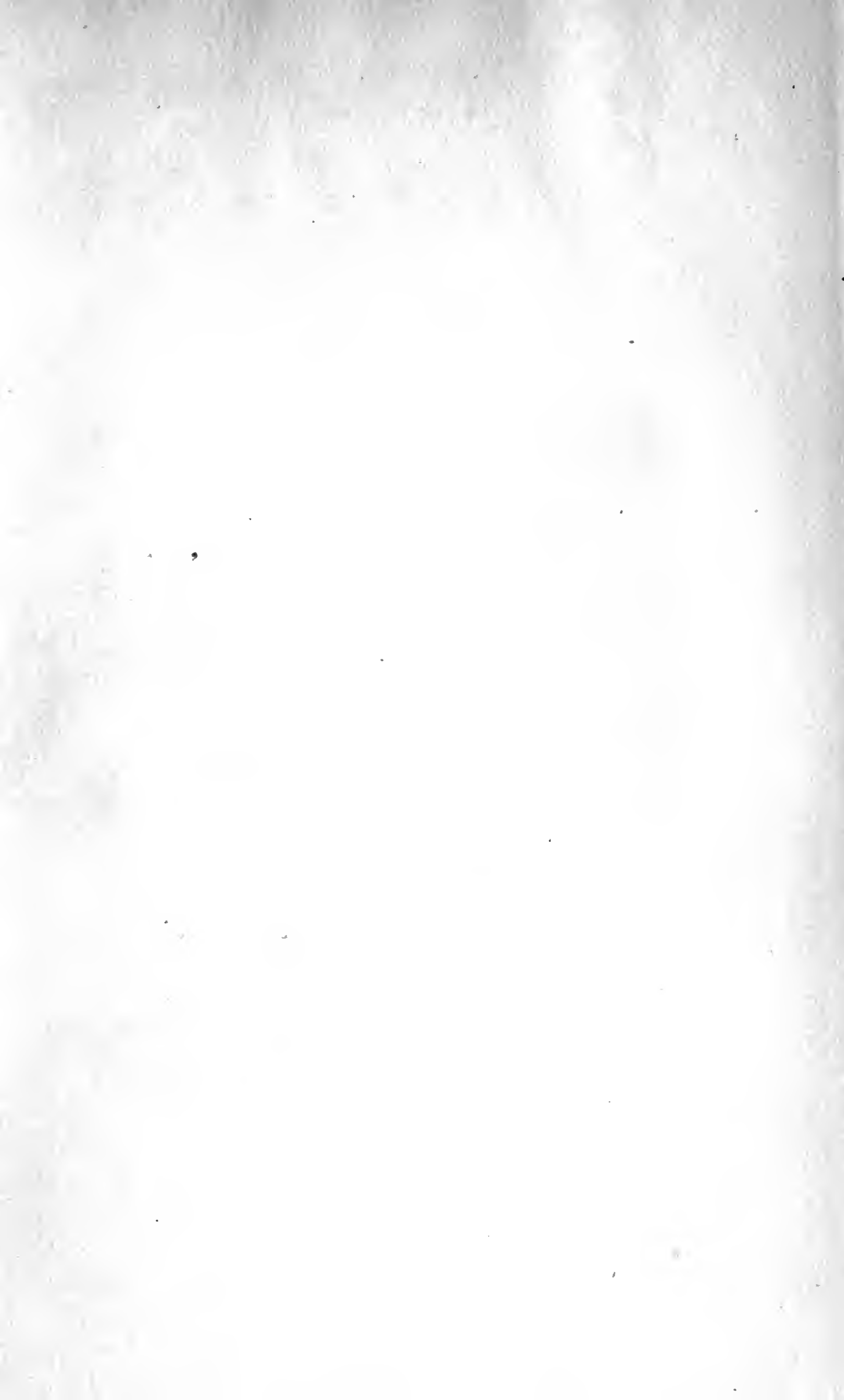
*Co-Partnership.*—"The importance of the work cannot be overestimated. . . . The book is of the utmost value to students of economics and sociology."

*Publishers' Circular.*—"The volume appears to us of great importance. It contains a vast amount of new material. . . . Economists, amateur and professional, will find that they cannot afford to leave the book unread."

---

**P. S. KING & SON, Ltd.**

**Orchard House, 2 and 4 Great Smith Street, Westminster.**



14 DAY USE
RETURN TO DESK FROM WHICH BORROWED

LOAN DEPT.

This book is due on the last date stamped below, or on the date to which renewed.
Renewed books are subject to immediate recall.

15Feb'62EE

IN STACKS
FEB 1 1962

REC'D LD
FEB 2 1962

28Nov'62

REC'D LD
NOV 28 1962

LD 21A-50m-8,'61 (C1795s10)476B

General Library
University of California
Berkeley

YC 08739

491470

JL65
D3

UNIVERSITY OF CALIFORNIA LIBRARY