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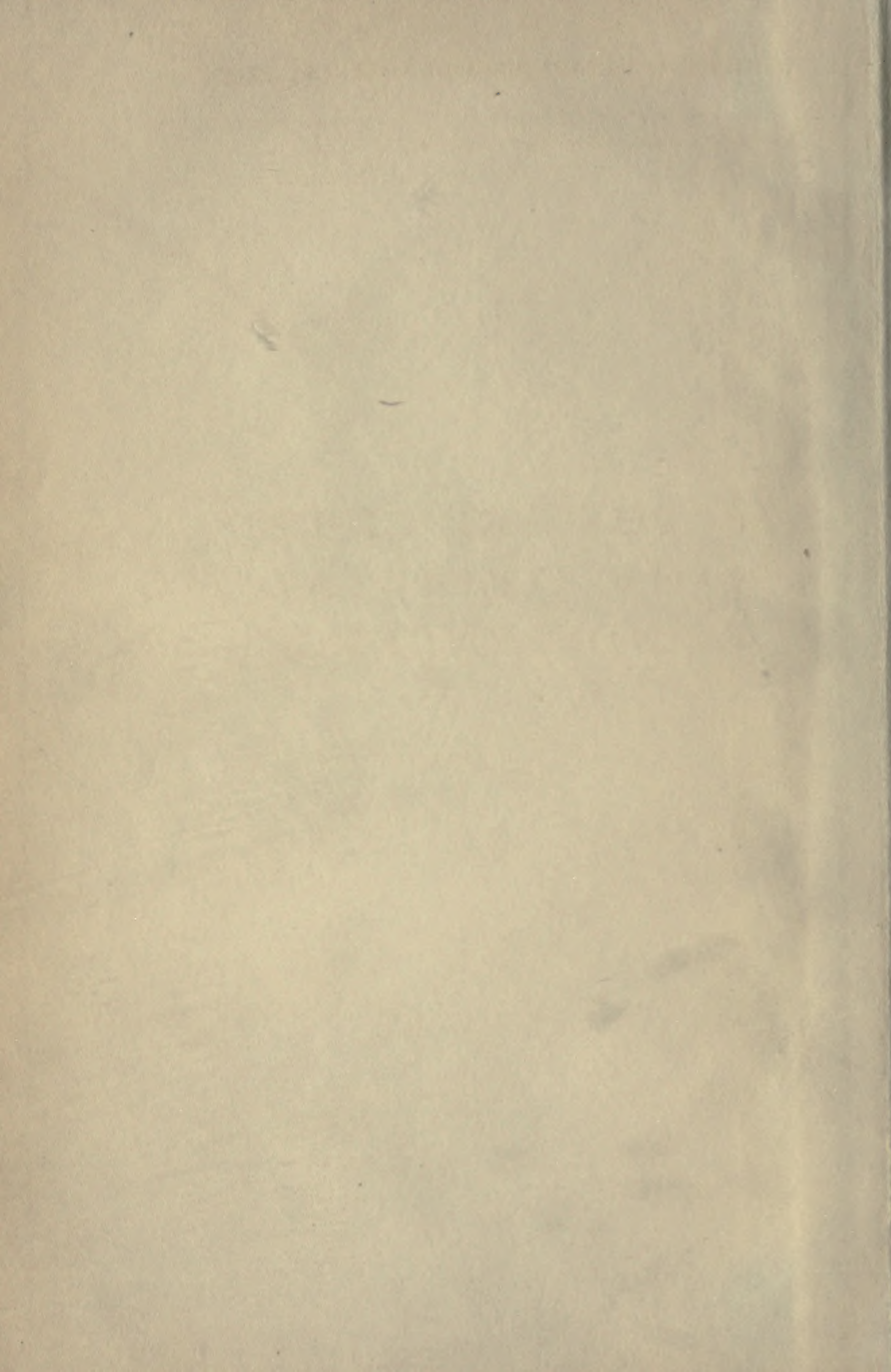
SOCIAL

DEPENDENCE

RIMACGREGOR DAWSON



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STUDIES IN ECONOMICS AND POLITICAL SCIENCE

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School of Economics and Political Science

THE PRINCIPLE
OF OFFICIAL
INDEPENDENCE

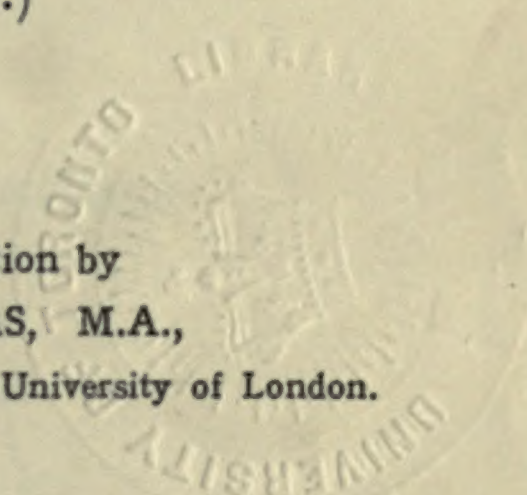
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THE PRINCIPLE OF OFFICIAL INDEPENDENCE

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.,
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BY
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TO
MY MOTHER AND FATHER

TO
THE MOTHER AND FATHER

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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.

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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 Bolsheviks, 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.

THE PRINCIPLE OF OFFICIAL INDEPENDENCE

CHAPTER I.

THE PRINCIPLE OF OFFICIAL INDEPENDENCE.

THE doctrine of parliamentary responsibility has long been accepted as a fundamental principle¹ 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

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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.

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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.

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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 one³; 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 somewhat 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 debates, 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 pleasure¹ 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 subservient 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 gentleman 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 Bench²—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 Commons²; 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 stage²; several have reached the Select Committee³; 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 remove 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,⁵ however, will never be used again in Canada,⁶ 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 Acts² 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 II, 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 1882⁵ 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 passed⁶ 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 1918³ 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 deductions³ 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 judge⁶ 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.

belief in the absolute authority of the Pope 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 1912⁴ 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 suggested⁶—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 contended⁷ 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 1906³ 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-optation 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 accompanying 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 candidates³—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 1908⁶ 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 Act⁸ 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 over-estimated, 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 proficient 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. Examination¹ 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 1911⁴ 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 Re-classification of 1919 must answer for is that its failure will probably lead to reactionary measures. The faults will be attributed not to the Re-classification 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 1893³ 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 Act³ 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*¹⁹¹⁴ 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

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 identical² 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 bye-laws 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 1888³ 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 1903⁴ 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 Trans-continental 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 Montréal, 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 1911² 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 contended¹ 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.