THE ROYAL POWER OF DISSOLUTION OF PARLIAMENT IN THE BRITISH COMMONWEALTH

By

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With a Foreword by

SIR JOHN A. R. MARRIOTT

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To the memory of my grandfather,
WILLIAM COCHRANE BOWLES, I.S.O.
an officer of the Canadian House of
Commons from 1855 to 1915; Assistant
Clerk of Votes and Proceedings, 1868-
1888; Chief Clerk of Votes and Proceed-
ings, 1888-1915; to whom I owe my
first understanding of the principles of
constitutional government.

FOREWORD

Of all the Constitutions of the modern world the British Constitution is the most intriguing and the most elusive. Many foreign critics find it simply exasperating. Alexis de Toqueville, more familiar than most Frenchmen with English political institutions, declared in his haste that England has no Constitution. *En Angleterre la Constitution n'existe point.* In the sense understood by most foreigners that is true. In England we have no Constitutional Code or Instrument. Though there are documents and Statutes of high constitutional significance, such as Magna Carta, the Petition of Right, the Bill of Rights, the statutes embodying the terms of the Legislative Unions between England and Scotland and Great Britain and Ireland, the Parliament Act of 1911 and the like, the results have never been codified, nor do they possess any superior validity over any other Acts of Parliament. Politically such statutes are, of course, preeminently important, but not in a legal sense are they "Constitutional" or "Fundamental" like, for example, the "Organic" Laws of 1875 upon which the Third French Republic rested. Still less do they possess the sanctity of the American Constitution, or even the special statutory authority of the Commonwealth of Australia Act (1900) or the Union of South Africa Act (1909), and the Statute of Westminster (1931). In short, the English Constitution is, in unique degree, flexible, resting partly on Statutes which can be repealed or amended by the ordinary process of legislation, and still more on "conventions" and "understandings" and precedents the

interpretation of which is disputable and is frequently disputed.

It might have been expected that when we set out to confer upon a Dominion the benefits of the English system of government, and to do this by the legislative authority of the "Imperial Parliament" (as it then was), ambiguities would be cleared up, and we should thus obtain, indirectly, a codification of the British Constitution. To some extent this result has been achieved. But the history of Canada, Australia, and South Africa during the last seventy-five years, proves how very difficult it is to reduce to writing the British Constitution in its entirety. Consequently that Constitution remains to a large extent a mystery, and the mystery extends, of course in lesser degree, to the systems of government conferred by legislation upon the happy lands which enjoy, under the British Crown, "Dominion Status".

One small corner of the veil Mr. Forsey has lifted in the work to which I have been invited to contribute an Introduction. Though the author and I are personally unknown to each other I accepted the flattering invitation with alacrity. For these reasons. I hoped and felt sure that no one would embark upon so difficult and laborious a task as that essayed by Mr. Forsey unless he was a close and conscientious student of the constitutional practice of Great and Greater Britain, and unless he was convinced of the importance of elucidating its mysteries, in the interest not merely of the academic students of political theory, but of the statesmen and jurists of the British Commonwealth of Nations.

My assurance has been completely justified, my hope has been more than fulfilled.

By this exhaustive treatise Mr. Forsey has placed Constitutional historians and commentators as well as

practical politicians under a deep debt of gratitude. His work is essentially a monograph. The author concentrates attention upon a single point: the power of the Head of the State, King, Governor, or Lieutenant-Governor, to dissolve Parliament *proprio motu*, or to grant or refuse a dissolution to his responsible advisers. Never before has this point been tackled so thoroughly, nor can it ever be necessary again to go over the grounds covered down to 1939. The point is, however, likely to become of ever increasing importance with the development of parliamentary democracy in its present homes and its future application to other communities. Incidentally, I venture, perhaps superfluously, to express a hope that the English model will not be slavishly, thoughtlessly, or prematurely copied in other countries. Convinced as I am that no better Constitution has ever been devised or evolved for a people politically minded who have had long training, from a representative system of local administration, in the difficult art of self-government, I am equally certain that indiscriminate imitation, if flattering to us, has often proved disastrous for the copyists. In the British Commonwealth Parliamentary Democracy has succeeded because it is the result of gradual evolution. In modern Greece, in Italy and in other countries, it has failed because it was summarily adopted or imposed. But this is by the way.

Whether the Parliamentary System be the product of prolonged discipline and gradual evolution, or recently adopted, the point discussed by Mr. Forsey must be of first-rate importance. It may be permuted as follows: (1) Does it belong to the prerogative of the Crown, *proprio motu*, to dissolve Parliament, or (2) to refuse a dissolution to a responsible Minister; (3) if so, is it in the public interest that the Crown should retain this power? (4) If so, ought every written Constitution to provide specifically

for the exercise of this power (*a*) in general terms or (*b*) to lay down the conditions under which it should be exercised.

In order to answer these questions Mr. Forsey deals in great detail with the parliamentary history of Great Britain since 1784, of the six Australian Colonies, of New Zealand, of Cape Colony, of Newfoundland, of the Canadian Colonies (now Provinces), of the Union of South Africa and of the Dominion of Canada down to 1926. In still greater detail he deals with the South African crisis of 1939, and in the greatest detail (quite naturally) with the Canadian Constitutional crisis of 1926. Into this detail it would be improper for an introduction to follow him, but one or two general observations may be appropriate.

It would seem to be clear that under no circumstances is a Cabinet, still less a Prime Minister, entitled to "*demand*" a dissolution from the Crown, and Mr. Forsey would perhaps have been wise to avoid the formula (even if sanctioned by usage) "Mr. ——— dissolved Parliament". That as he well knows and emphasizes is the exclusive prerogative of the Crown. Equally clear is it that the King is entitled to appeal from the Cabinet to Parliament. This would naturally involve the resignation of the Cabinet and the appointment of a Minister, if not a Ministry, willing to accept responsibility for the King's action. Should Parliament support the outgoing Ministry, the King would be compelled, sooner probably than later, to appeal from Parliament to the "political sovereign", the electorate. This is evidently a right or duty which must be cautiously exercised. For an obvious reason. Were the electorate to endorse the policy of the displaced Ministry the authority of the King would necessarily be weakened, his dignity impaired. Lord Salisbury, if my memory serves me, when consulted as the leader of the Opposition in 1894 was ready to take the responsibility (though without himself

assuming office) of advising the Queen to appeal to the electorate against Mr. Gladstone. King George V must have been sorely tempted to take this course in November 1910 when requested by Mr. Asquith to give an undertaking that he would under certain contingencies create a sufficient number of peers to overcome the resistance of the House of Lords to the Parliament Bill. But George V was new to the duties which had suddenly devolved upon him, and he did not, like his grandmother, consult the Opposition leaders. This he was fully entitled to do, though not, perhaps, without intimating his intention to Mr. Asquith, and giving the latter the opportunity of protest or resignation. It would, under the circumstances, have been, to say the least, chivalrous, on Asquith's part, to have suggested such a consultation to an inexperienced King. As it was, the King was reluctantly persuaded to give the undertaking required of him.[1]

It all boils down to this. Save under very exceptional circumstances the King can appeal against his responsible advisers to Parliament, or against Parliament to the electorate, only if he can induce an alternative Minister to accept responsibility for the step contemplated. In 1910 and again in 1931 King George V would, of course, have had no difficulty in obtaining "advice" in the sense desired. But all practical experience tends to illustrate the exceedingly delicate equipoise of a Constitution which depends so largely upon understandings and conventions.

There are many other points incidentally made in the course of his meticulous analysis by Mr. Forsey, on which I am strongly tempted to comment. But to do so would overstep the proper limits of an Introduction.

[1] On the whole episode see Marriott: *Second Chambers* (revised (1927) edition) and references therein; and Lord Esher's more recently published *Journals* and *Letters*.

Most cordially, however, I commend the whole work to the careful attention of all, whether here in England or in the Dominions, who are interested in Constitutional theory, or are themselves called to the conduct of public affairs. To the latter, more particularly, is the question of the royal power of dissolution of great importance. Its importance may well be accentuated in the not distant future by the multiplication of "groups" in Parliament and the consequent supersession of the two-party system, or by developments even more subversive of parliamentary government. Comment on such developments might involve me in controversy which the writer of this work is scrupulously careful to avoid. It is my duty to follow so praiseworthy an example. For it is his conspicuous superiority to partisanship, not less than his conscientious scholarship and profound research that embolden me to recommend without hesitation a work original in conception and execution, and, as I judge, well calculated both to enlighten scholars and afford guidance to statesmen.

J. A. R. MARRIOTT

Oxford,
15 August 1941.

PREFACE

This book is an attempt to set forth the constitutional principles governing the exercise of the power of dissolution of Parliament. That the subject is of first-class importance the Canadian and South African cases of 1926 and 1939 made clear. That it is imperfectly understood, even by some writers on constitutional matters, the discussions evoked by both crises, especially the Canadian, have made equally clear. Indeed, it is the treatment of the Canadian case by most previous writers which has rendered imperative a new and extended consideration of the whole question. Most of the judgments pronounced on the Canadian case are unfounded and confused; some of them can only be described as subversive of parliamentary government.

For this state of affairs there appear to be four main reasons. First, many of the most important cases of grant and refusal of dissolution seem never to have been even described, let alone discussed; and of others the existing accounts are inadequate and sometimes incorrect. Second, the attempts to formulate general principles of constitutional usage in respect to dissolution have not always been happy. Some writers usually regarded as authorities have laid down dogmas which will not bear critical examination in the light of historical fact and the accepted principles of parliamentary government. Third, the writer who has had most to say on the question in general and the Canadian case in particular has made no serious attempt to apply to that case even his own formulations of constitutional

principles. Fourth, very few of those who have undertaken to pronounce *ex cathedra* on the Canadian case appear to have been anything like fully aware of what actually happened.

It has accordingly been necessary (*a*) to present a reasonably full record of exactly what happened in all the cases other than the Canadian of 1926 and the South African of 1939, a record based as far as possible on the original official documents; (*b*) to set forth, as completely as possible, all the opinions on the general question which have any claim to be considered authoritative; (*c*) to examine the validity of those opinions; (*d*) to describe exactly what happened in Canada in 1926 and South Africa in 1939; and (*e*) to analyse the 1926 and 1939 cases in the light of the precedents, the authoritative opinions, and the critique of those opinions. In doing this, I have tried to present the reader first with all the materials for forming his own judgment, and not to intrude my own opinions on controversial points until the later stages of the book.

In the chapters dealing with the Canadian crisis of 1926 it has been necessary to go into the fullest possible detail, first because of the crucial importance of the case, and second because on nearly every point I find myself in conflict with one or more eminent personages who have had their conclusions widely accepted, even sometimes as the basis of official action. In general, most previous writers on the case have concluded that Lord Byng's refusal of dissolution to Mr. King and/or his subsequent grant of dissolution to Mr. Meighen were unconstitutional. To me, on the contrary, it seems clear that any careful, dispassionate analysis shows that these judgments are utterly unfounded; that, indeed, Lord Byng's course from start to finish was not only entirely constitutional but essential to the preservation of constitutional liberty.

In the concluding chapter I have tried to formulate general principles which will sum up what actually has been the practice in Great Britain and the Dominions, with the inferences which arise from that practice and from the accepted, and indeed vital, principles of parliamentary government.

Many friends have helped in the preparation of this book, though of course none of them is in any way responsible for the opinions expressed. I am especially indebted to Dr. J. C. Hemmeon and Dr. C. E. Fryer of McGill University, Dr. Harold A. Innis of the University of Toronto, Mr. J. C. Farthing, Hon. C. H. Cahan, K.C. and Mr. W. H. Clarke of the Oxford University Press, for valuable suggestions. Dr. Hemmeon, Mr. Farthing and Mr. Cahan have also been most generous in encouragement at difficult moments. My thanks are also due to a host of my former students at McGill University for stimulating discussion and fruitful suggestions; to the staffs of the Library of Parliament at Ottawa, the Legislative Libraries of Ontario, Nova Scotia and New Brunswick and the Widener and Law School Libraries at Harvard University, and to Mr. Dundas of the Massachusetts State Library. Much of the information on Newfoundland, not easily available in Canada or the United States, I owe to the kindness of my friends Sir Alfred Morine, K.C., and W. J. Carew, C.B.E., secretary to the Commission of Government of Newfoundland. My mother, Mrs. F. E. Forsey, has verified a number of obscure references, and my wife has typed most of the manuscript and been throughout a most judicious critic. My indebtedness to previous writers on the subject, and to Sir John Marriott for a most generous foreword, is obvious. Unfortunately, it has been impossible for Sir John to correct the proofs

of his Foreword which was written in August 1941, but he has kindly given permission to print it as it stands.

EUGENE FORSEY

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CONTENTS