Correspondence

Some Constitutional Matters

TO THE EDITOR:

Mr. Gerard A. Lee, in his excellent article in the December 1950 issue, "The President of Ireland", says (p. 1094) that in England the Prime Minister has "the right to demand a dissolution whenever a vote of no confidence is passed or an important government measure is defeated". If this means "demand and get", I should be very much interested to see the evidence for it. There is an enormous weight of authority against it, the most notable recent pronouncement being Mr. Churchill's in the House of Commons on March 29th, 1944: "I must make it absolutely clear that it does not rest with the Prime Minister to dissolve Parliament. The utmost he can do is tender advice to the Crown. . . . This is one of the exceptional occasions when the prerogative of the Crown comes into play, and where, in doubtful circumstances, the Crown would refer to other advisers. It has been done on several occasions. I must make it absolutely clear that it does not rest with the Government of the day. It would be most improper on my part to use any language which suggested that I have the power to make such a decision."[1]

I venture to suggest that the provisions of the Irish Constitution on this subject are really not at all at variance with English usage, but, on the contrary, an attempt to embody it in the written fundamental law of the Republic. Mr. Lee himself, farther down the same page, quotes from Mr. de Valera's speech in the Dail: "I grant you that there are certain circumstances in which the leader of a government, or a government, should not be given a dissolution but there are circumstances in which they should. In order to try and distinguish between these two cases, we bring a third person, so to speak, as arbiter. He will give his decision and grant a dissolution, or refuse it, at his own discretion." But this statement has to be read in its context, and of the context Mr. Lee says very little.

The Irish Free State Constitution, as Mr. Lee points out, absolutely prohibited dissolution to a government defeated in the Dail: a complete break with the English tradition. Mr. McGilligan, when this part of the new Constitution was under debate, argued that the absolute prohibition should be retained.[2] Mr. de Valera, in reply, said what Mr. Lee quotes, but he also said some other things which cast a good deal of light on what he meant by "circumstances". For one thing, he observed that the President might say to the defeated Prime Minister: "I cannot give you a dissolution; the circumstances under which you have been defeated are such that *I do not think there is any*

[1] Hansard, Fifth Series, vol. 398, p. 1516.
[2] Dail Debates, Vol. LXVII, cols. 1204-06.

question which should be put to the people".[3] And he summed up: "What that simply means is that we are making provision in the Constitution for the possibility of *referring a question of prime importance, on which the Government has been defeated, to the people for a decision*".[4] But Peel, Russell and Gladstone had all emphasized that one of the cardinal points in deciding whether a defeated government was entitled to dissolve was whether there was a great question of public policy at issue. This part of Mr. de Valera's argument, therefore, certainly suggests that he was well aware of the classical English view on the subject, agreed with it, and wanted to restore it to the Irish system of parliamentary government. It is certainly remarkable that in the whole debate, so far as I can discover, no one argued that a defeated government had a right to dissolution on demand. The Opposition argued that it had no right at all; the whole trend of Mr. de Valera's argument is that there are cases, the exception rather than the rule, in which dissolution to a defeated government is proper.[5]

In the words which Mr. Lee quotes (p. 1088) from an earlier part of the same debate, the President "is there to guard the people's rights and mainly to guard the Constitution". This is precisely the position of the King and his representatives in exercising their "reserve powers", among them the power to refuse dissolution. The difference between the British and Irish Constitutions is, therefore, I submit, far narrower (to say the least) than Mr. Lee implies.

Mr. Ballem, in his comment in your January issue on the decision of the Supreme Court of Canada in the delegation case, says (p. 83): "The principle, first enunciated in *Hodge* v. *The Queen*, that provincial and federal legislatures are equally sovereign within their respective jurisdictions, is now so well established as to admit of no doubt". In 1883, the year in which *Hodge* was finally decided, both Dominion and provincial acts were subject to disallowance. Disallowance of Dominion acts has since become constitutionally obsolete; disallowance of provincial acts has not. Has this any bearing on the "principle" Mr. Ballem cites?

EUGENE FORSEY*

The Judge

These, then, are those faults which expose a man to the danger of smiting contrary to the law: a Judge must be clear from the spirit of party, independent of all favour, well inclined to the popular institutions of his country; firm in applying the rule, merciful in making the exception; patient, guarded in his speech, gentle, and courteous to all. Add his learning, his labour, his experience, his probity, his practised and acute faculties, and this man is the light of the world, who adorns human life, and gives security to that life which he adorns. (Sydney Smith: The Judge That Smites Contrary to the Law. 1824)

---

[3] *Ibid.*, col. 1209 (italics mine).
[4] *Ibid.*, cols. 1212-13 (italics mine).
[5] *Ibid.*, cols. 1209-10.

*Eugene Forsey, M.A. (McGill and Oxon.), Ph.D. (McGill). Director of Research, Canadian Congress of Labour; sessional lecturer in political science, Carleton College, Ottawa. Formerly lecturer in economics and political science, McGill University. Author of *The Royal Power of Dissolution of Parliament in the British Commonwealth* (1943) and a frequent contributor to periodicals.