CORRESPONDENCE

Independence of the Judiciary

TO THE EDITOR:

In Professor Lederman's admirable article, "The Independence of the Judiciary", which concludes in your December number, there is just one statement I venture to question: "that sections 96 to 101 inclusive of the B.N.A. Act are still specially entrenched, that is to say, are subject to alteration only by a process of constitutional amendment *involving the consent of the provinces as well as of the federal Parliament*" (page 1165, italics mine). That they are still "entrenched" I think Professor Lederman establishes. But that the constitutional amendment involves "the consent of the provinces" certainly goes beyond the strict law of the situation and even, I submit, beyond established convention.

In strict law, if Professor Lederman's main contention is correct, sections 96 to 101 inclusive can be altered only by act of the Parliament of the United Kingdom. By convention, that Parliament would not act without an address from both Houses of the Parliament of Canada. Is there any established convention that goes beyond that? If so, what is it? Must all the provinces consent? Or only a majority, and if so, what majority? Is the consent of the provincial governments enough? Or must it be the legislatures? Are there any precedents? Professor Lederman would lay us under an extra debt if he would elucidate what seems to me a rather cryptic dictum.

EUGENE FORSEY*

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Valuation Clauses in Ocean Bills of Lading

TO THE EDITOR:

On the assurance, which I now give, that I have purged my bias, I hope you will not allow the fact that I was counsel for the un-

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successful defendant in the interesting case of *Nabob Foods Limited* v. *The Cape Corso*, [1954] Ex. C. R. 335, to bar me from saying a word or two about the comment appearing at (1956), 34 Can. Bar Rev. 1196.

The statement by Mr. Tetley that Smith J. did not consider *The Harry Culbreath*, [1952] A.M.C. 1170, or *Foy & Gibson Proprietary Ltd.* v. *Holyman & Sons Proprietary Ltd.* (1946), 79 Ll. L. R. 339, is inaccurate and is contradicted in that portion of the judgment where the learned judge, after referring to the American and Australian equivalents of the English Water Carriage of Goods Act, says: ". . . and on these there is a decision by the Supreme Court of Australia, decisions by American Federal Courts, and a dictum in point by the American Supreme Court".

But more unfortunate is Mr. Tetley's error in considering the *Foy & Gibson* case as support for the decision in *The Cape Corso*. In the *Foy & Gibson* case, which is also reported in 73 C.L.R. 622, a clause of the bill of lading provided: "It is mutually agreed that the value of each package or parcel . . . does not exceed the sum of £5 . . . on which basis the rate of freight is adjusted . . .". This clause was attacked as contravening both article III, rule 8, and article IV, rule 5, of the Hague Rules, and was held void by a majority decision as contravening article IV, rule 5, in that it fixed a maximum liability per package or unit less than that provided by the rule. Several judges of the court, however, expressed their view that a true valuation clause did not contravene article III, rule 8, notably Latham C.J. at pages 626-627, Williams J. at page 641, Starke J. at page 632 and Dixon J. at pages 633-634, McTiernan J. dissenting.

The Cape Corso was decided under article III, rule 8, and Smith J. has clearly declined to follow the strong dicta in the Australian High Court. With the exception of Knauth, Ocean Bills of Lading (4th ed., 1953) at page 277, the textwriters appear to agree with his conclusion, which accords with the French and Belgian decisions cited at pages 142 and 145 of Dor, Bill of Lading Clauses (1956).

C. P. DANIELS*

TO THE EDITOR:

I have read with interest a copy of Mr. Daniels' letter and would like to make the following reply.

Mr. Daniels refers to two inaccuracies in the comment on *The Cape Corso*. The first is a statement by me that Smith J. did not consider *The Harry Culbreath* or *Foy & Gibson*. It is true that in his initial remarks Smith J. does mention that an Australian de-

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cision and some American decisions exist, but he does not, as I put it, "consider or even cite" them, and therefore we cannot know to what judgments he is referring. How then can we conclude that they have been considered, particularly when in the body of his judgment his lordship cites and relies upon five cases without reference or even allusion to *The Harry Culbreath* or *Foy & Gibson?*

Mr. Daniels then observes that the Australian High Court decision in *Foy & Gibson* does not support the decision in *The Cape Corso*. This does not seem to be so, to me. The court, composed of six judges, unanimously held that the valuation clause in question was invalid as contravening the Hague Rules, which was the identical finding in *The Cape Corso*. It is true that the Australian court relied on article IV, rule 5, rather than article III, rule 8, which was the basis of the judgment of Smith J., but this only leads one to believe that valuation clauses are invalid as contravening either of the two rules. "The strong dicta" referred to by Mr. Daniels were, after all, only dicta and cannot reverse the judgment that the Australian judges were rendering, which is in effect Mr. Daniels' position. I suggest too that the judges in their dicta were confusing the Harter Act with the stricter provisions of the Hague Rules. It is to be noted that their brief remarks are supported, where supported at all, by Harter Act decisions or pre-Hague Rules decisions. Smith J. in *The Cape Corso* clearly points out the difference between the Hague Rules and the Harter Act and his remarks, besides their evident value in the interpretation of the Hague Rules, are perhaps the clearest exposition of the law affecting valuation clauses under the Harter Act. Very probably Smith J. does not refer to *Foy & Gibson* because of the dicta and because the judgment came to the same conclusion as he does, but by a different route.

WILLIAM TETLEY*

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Prerogative Powers of the Head of State

TO THE EDITOR:

I cannot see that Professor McWhinney's argument in your January issue, that the discretionary power of the Head of State to choose the Prime Minister is now inappropriate, can be justified either by experience or by current notions of democratic theory. By making the choice of a Prime Minister by the Head of State practically automatic he would introduce a needless rigidity into a constitutional practice which now possesses a commendable

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flexibility. It is very rare that, under existing conventions, the choice of a Prime Minister is not virtually automatic. It is precisely in the rare cases where it is not that the discretion of the Head of State is both necessary and desirable. Constitutions are the fruit of experience, and experience makes it clear why the present convention makes sense.

In summary, the rules governing the succession to the office of Prime Minister might be stated as follows: in choosing a Prime Minister it is the duty of the Head of State to call upon the person most likely to form a stable government, which normally means the recognized leader of the majority party. The only difficulties appear when there is either (a) no majority party, or (b) the majority party has no recognized leader. In the first case the problem for the Head of State is to assess the views of the various party leaders until it becomes clear who is most likely to succeed in forming a government. In this case the initiative of the Head of State may well be the only means of bringing the manoeuvering for advantage of the various factions to a point where a government can be formed.

The case which aroused Professor McWhinney is of the second type. It is rare, but it happens. It comes about either by the death of the Prime Minister or by his resignation in circumstances in which he is unable or unwilling to recommend a successor. Thus the dying Bonar Law conveyed to the King the wish that he be not asked to suggest a successor, and the King did not press him. The circumstances of Sir Anthony Eden's resignation cannot, of course, be fully known at the present time. His illness was genuine enough to bring about the precipitate decision to resign, but the political circumstances were such that his advice as to a successor would not carry the usual authority of a resigning Prime Minister. The resignation of Neville Chamberlain in 1940 is a similar case.

When the Prime Minister dies in office, the Head of State has no choice but to take the initiative in finding a successor. Before he retired from office Mackenzie King was careful to see that his successor was installed as leader of the party by a party convention. But not all Prime Ministers are so provident. The succession has to be settled, and no one can settle it except the Head of State.

I take it that Professor McWhinney objects to this on two main grounds. In the first place, because when the Head of State chooses a Prime Minister he is in effect choosing the party leader. This is something which should be done by free choice of the party. The Sovereign's choice may light on the wrong man, and thus the Head of State is involved in "partisan political issues". Secondly, he thinks it would be better to make the succession to the prime ministership automatic, rather than discretionary, for then we should be "in line with the contemporary constitutional

trend towards the limitation or elimination of discretionary powers in non-elective organs of government".

But why is the Deputy Prime Minister (or, in Canada, the Minister who is designated Acting Prime Minister in the absence of the Prime Minister) the obvious choice for the succession? Does anyone doubt today that Lord Stanley was perfectly right in rejecting at once the idea that Sir Hector Langevin was a possible successor to Sir John A. Macdonald in 1891?

Professor McWhinney prefers the Australian custom by which, as in 1939 and 1945, a "caretaker" government is formed under the former Deputy Prime Minister, until the party has in solemn conclave decided who the rightful successor should be. This may be a necessary arrangement in Australia, but to me it is far more repellent than the customs which prevail elsewhere in the Commonwealth.

Caretaker governments are undesirable. They lack the moral authority to take decisions. In the present world it is neither wise nor safe to put the powers of government in cold storage to accommodate a political party. Under the constitution it is, as Sir Ivor Jennings says, "the King's primary duty to find a Government. It is no less the duty of political leaders to assist him to find one. In the Duke of Wellington's famous phrase, The King's service must be carried on'." Once a Prime Minister has formed a government, it is the business of that government to govern unless there are clear and generally recognized signals that it ought to resign.

If there is "a contemporary trend towards the limitation or elimination of discretionary powers in non-elective organs of government", it is not a trend which need be welcomed with uncritical enthusiasm. Her Majesty's judges administer non-elective organs of government. Are they less respectable thereby? A number of writers, from John Stuart Mill to Walter Lippmann, have warned that rule by the majority is not an absolute good. The whim of a temporary majority may be the voice of the people, but it is not necessarily the voice of God. If the choice of the Prime Minister must *always* be left to the inner processes of whatever party happens to be in power, we shall confer a constitutional right on party oligarchs. As things now stand the Head of State has a reserve of discretionary authority which is at least a moral deterrent to the absolute rule of the majority.

J. R. MALLORY*

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