

# THE CONSTITUTIONAL DEBATE

JOHN S. EWART, K. C.

THE constitutional debate at the commencement of the present session of the Dominion parliament is another striking illustration of the main defect of the party system of government. The question was one of constitutional law and practice, and one, therefore, upon which very few of the members were competent to form an opinion. Nevertheless, the rules of the system demanded that all the Conservatives should vote one way, and all the Liberals the other way; and everyone complied with the rules. Worse than that, the rules required that every member of the old parties who might address the House should advance arguments in support of his party attitude, quite regardless of his view as to their validity. The debate, therefore, was of the schoolboy character—a subject prescribed, with speakers assigned to one side and the other. They were permitted no discretion. To a hundred odd came the order "In this way shalt thou speak and vote." And that they did. Another hundred odd were told to act contrariwise. And that they did. Could any system be more stupid? It is one of the "British institutions" for which some of our people express unbounded admiration; whereas it has been only by the gradual discarding of many of such institutions that our political progress has been made. This one, too, must go.

The Progressives, on the other hand, not as yet sufficiently inured to party discipline, felt themselves to be at liberty to speak and vote as they pleased. Although the question was not one for a farmers' meeting, Mr. E. J. Garland made probably the best contribution to the debate—closely pertinent and analytical, coherent and orderly. The principal difficulty with the Progressives seemed to be a curious doubt as to what would be the effect of their vote. Some of them appeared to think that to negative Mr. Meighen's amendment would be an affirmative expression of their confidence in the government, and that that would mean an expression of their approval of the conduct of the government throughout the past years. Now let us see what it was all about.

*Motion and Amendment*—To Mr. Lapointe's motion that the speech from the throne should be taken into consideration next Monday, Mr. Meighen moved an amendment as follows:

That all the words after the word "that" be struck out, and the following substituted therefor:

In the late general election, the candidates of His Excellency's then advisers, at whose instance the appeal to the country was made, were defeated in a large majority of the constituencies.

That nine Ministers of the Crown, including the Prime Minister, were rejected at the polls, and have no seats in parliament.

That the party represented in the last parliament by His Majesty's opposition secured in the said election by far the largest support in the popular vote, and has substantially the largest number of members of any party in the present House of Commons.

That those who now assume to be His Excellency's advisers have among them no Prime Minister with a seat in either House of Parliament, and under such circumstances are not competent to act as, or to become, the committee of parliament commonly known as the government, or to address parliament through His Excellency, and their attempted continuance in office is a violation of the principles and practice of British constitutional government (*Hansard*, p. 28).

I do not know whether the appearance of faulty grammar in a resolution is a breach of the rules of the House. If it is, Mr. Meighen and his seconder ought, for their reference to "the *largest* number of members of *any* party," to have been sent to the Tower or some other penitentiary place. Nobody, however, so proposed, and the House proceeded to discuss—or rather, amid all the irrelevancies, at intervals to discuss—two constitutional questions: (1) As a result of the elections, ought the government to have resigned? and (2) Did the personal defeat of the Prime Minister, and his absence from the House, automatically oust him and his government from office?

*Ought the Government to have Resigned?*—One would think that the first half of Mr. Meighen's resolution would have been followed by a statement that, as a result of the polling, the government ought to have resigned. It was not, but that did not prevent the contention (offered by several speakers) that constitutional practice required that such resignation should have been sent to His Excellency (*Hansard*, pp. 16, 52, 64, 96, 102, 128, 130). Conservative debaters had no difficulty in citing authorities, such as the following from Lord Bryce:

If the Ministers dissolve and the election goes against them, they resign forthwith, and a new government is formed. (*Hansard* p. 128)

Such statements always relate to the working of the two-party system. But that fact was overlooked, and the authorities were applied to the syllogistic argument that when a government is

defeated at the polls it ought to resign; that the King government was so defeated; and that, therefore, it ought to have resigned. If applied to the working of the group system, the major premise of this argument is erroneous. For example, the last French elections resulted approximately as follows, (*Annual Register*, 1924, p. 158):

Conservatives (that is, Monarchists).....	20
Republican Entente.....	117
Republicans of the Left and Democratic Left.....	13
Radicals and Radical Socialists (who had combined during the elections).....	139
Republican Socialists.....	36
Socialists.....	102
Communists.....	29
Independents.....	11

In France governments are always defeated at general elections in the sense in which the King government was recently defeated—namely, that a party is defeated unless it obtains a majority over all others. In that sense, every French government is defeated at every election. For it is the normal condition of affairs in France, Germany, and other countries that no party has ever a majority over all others, and that the government is carried on by temporarily improvised blocks or combinations. Since 1921 we have had somewhat the same situation in Canada—namely, no party with a working majority, and government by the co-operation of the Progressives with the Liberals. In the recent elections, as in France, every party was defeated. For, although it is true that the polls did not give to the Liberals a majority over the other two parties, it is also true that neither of the other parties obtained such a majority. In truth, therefore, as between the two old parties—the Conservatives having about 117 members and the Liberals 101—the ability to carry on the government depended upon the vote of the Progressives.

Introduction of the group system makes necessary, therefore, revision of the major premise of the above syllogism; and perhaps the best form in which it can be put is that “when, as the result of the polls, the government is reasonably certain to be defeated in the House of Commons, it ought to resign.” That is so, because the one test of the right of a government to retain office is not the numerical relation between groups, but whether in the division lists in the House of Commons the names of the Ministers shall appear in the long or in the short column. If you look at those division lists, you will see nothing but names. No regard whatever

is paid to party affiliations. Sometimes opposition members vote with the government, and sometimes government members vote with the opposition. Of such eccentricities the division lists take no notice. The question under the group system, therefore, is not one of the numbers of which the groups are composed, but of the enjoyment by certain men of the support of the House.

I have said that if, as a result of the polling, the King government had been reasonably certain of defeat in the House, it ought to have resigned. On the other hand, if there was a reasonable doubt upon that point—namely, a doubt as to whether it was Mr. King or Mr. Meighen who could, under the circumstances, carry on the government—the duty of the government was to do that which it did, namely, summon parliament in order that the wish of the House might be made manifest. That there did in fact exist a doubt as to what the House would do, was made very apparent by what happened—namely, the greatest uncertainty and anxiety throughout the course of the debate, and a government majority of only three.

*Effect of Meeting of Parliament*—Raising the second question for debate, Mr. Meighen's motion affirmed that because the Prime Minister had no seat in parliament, those persons who were assuming to be His Excellency's advisers

are not competent to act as, or to become the committee of parliament commonly known as the government, or to address parliament through His Excellency, and their attempted continuance in office is a violation of the principles and practice of British constitutional government.

Mr. Meighen explained what he meant when he said,

I did not say that because a Prime Minister was defeated, the government thereupon went out of existence. I stated that a government could not function in parliament without a Prime Minister in either House. (*Hansard* p. 26)

Mr. Guthrie stated his contention and that of other speakers as follows:

My submission is that there is no government of Canada at this moment. When the head of the government goes, the whole government goes . . . my submission is that the King government legally disappeared the day the House opened. (*ibid.* p., 95)

Mr. Meighen said,

I have proceeded, I think, far enough to establish that this claiming government has not only no right to be in office, that it in fact is not a government in the sense of being a committee of

this House, but that all proceedings initiated by them in this House are null and void, and a usurpation, an assertion of power which they have not, and that this parliament should repel them. (*ibid.*, p. 18).

The question then is, whether the meeting of parliament in the absence of the Prime Minister terminated the existence of the Ministry. The government was in office until Thursday at 2.59 p. m., and one minute after it ceased to exist. If that proposition were true, it would operate irrespective of the numerical relationship of the parties. For example, Mr. Stanley Baldwin, as a result of the last British elections, had an overwhelming following in the House of Commons; but if he had been personally defeated, and the opening of parliament had found him without a seat, the suggested rule would have terminated his government. Not only is such a rule unreasonable, but no authority can be cited in support of it. Indeed, the books may be searched in vain for an opinion of anybody in favour of it. It is true that many authorities indicate that a Prime Minister (in fact, every Minister) must have a seat in the House. But that statement is always made subject to this, that if he has not, he must secure one within a reasonable time. There is no authority, or appearance of authority, to the effect that the absence of a Prime Minister at the opening of parliament, or at any other time, has the automatic effect of dissolving the government.

In the debate there was constant confusion between executive and parliamentary functions. As above quoted, Mr. Meighen explained his amendment by saying

that a government could not function in parliament without a Prime Minister in either House.

Mr. Meighen overlooked the fact that a government, that is an executive (the word is better), never does exercise its function in parliament. Its functions are two: (1) to advise the Crown, and (2) to administer the affairs of the country in conformity with the empowering statutes. Neither of these functions is discharged "in parliament." Whatever the members of the executive do in parliament, they do, not as executive officers but as members of parliament. Dealing with the point, Mr. Meighen said,

The Prime Minister is not only the leader of the House, in whichever House he may be, but he is the spokesman of the nation before the Crown. He is the spokesman, and the only spokesman, of the nation. He is the sole *via media* between parliament, as parliament, and the Crown or the representative of the Crown. . . While His Honour the Speaker may, as between

the House of Commons and the Crown, be the *via media* here, as between parliament in the collective sense and the Crown the Prime Minister is the sole medium, except when the Houses for grave reason resort to joint address. (*Hansard*, p. 17).

For bad Latin, Mr. Meighen in these degenerate days may be forgiven. But those who repeated his *via media* ought to be informed that the middle of the road is something quite different from a go-between—a road is not an intermediary. Passing that, one takes little risk in asserting that the contention was not well founded. For, so far from the Prime Minister being “the sole medium,” he is not, and he never acts as, a medium—sole or other—of communication between the Crown and “parliament in the collective sense.” He never can so act, for he has not a seat in “parliament in the collective sense”—nobody has. And all that he can do is to address the House in which he has a seat. The Crown alone addresses “parliament in the collective sense.” Three days before Mr. Meighen spoke, that is what the Governor-General did.

Waiving that point too, we see that Mr. Meighen’s argument would go to this; that any temporary absence of the Prime Minister from parliament would dissolve the Ministry. There is no reason why his absence on the first day of a session should dissolve the Ministry if his absence for weeks, or even months, at a stretch leaves his Ministry intact. In the session of 1919, for instance, Sir Robert Borden was absent during long periods, but no one found that there was any difficulty in the matter of communication between his Excellency and parliament, and nobody suggested that the Ministry was dissolved because the *via media* was absent.

There are, moreover, two instances in British constitutional practice which demonstrate decisively that Mr. Meighen’s contention was erroneous. In 1792, while the war arising out of the French Revolution was raging in Europe, and while grave revolutionary activities in England were becoming more and more alarming, the Pitt administration determined to call out the militia. A British statute provided that the calling out of the militia must be followed by the summoning of parliament within two weeks, and it was summoned accordingly for the 13th of December. It so happened that, shortly before calling out the militia, Pitt had accepted the office of Warden of the Cinque Ports, that for that reason his seat had become vacated, and that his re-election was impossible before the 13th of December. What happened is thus related in the *Annual Register* of 1793, page 4:

Such was the general state of public affairs at the meeting of parliament which took place on the 13th of December, 1792. The meeting of parliament, therefore, will be distinguished by two extraordinary circumstances. Some of the members of both Houses who had been for years the opponents of government will be seen to support the measures not only with their votes but their eloquence; and the Prime Minister will not possess a seat in it. Mr. Pitt, having accepted the office of Warden of the Cinque Ports, was obliged to wait for the forms of re-election, so that the very important debates, of which some account will be immediately given, did not receive the advantage of his superior talents and splendid eloquence.

Perusal of the debates will show that no such objection as was taken in the Canadian parliament was raised because of Pitt's absence. Idea of that sort did not originate until January, 1926. Conservative speakers declared that the Pitt precedent was too old—an objection that would have had weight were there any countervailing precedent of a later day. So far from that being the case, however, Mr. Bennett, evidently imagining that he was citing an opposing precedent, really supplied the House with one which supported it. In 1874, just shortly before the meeting of parliament, Gladstone, who was Prime Minister, assumed the office of Chancellor of the Exchequer. He was already First Lord of the Treasury, and grave question was raised as to whether the assumption of a second office did not vacate his seat. He consulted with the Earl of Selborne, who was of opinion that the seat had been vacated, and who, in his *Memorials Personal and Political*, says as follows:

What was to be done? He was sensible of the difficulty (as he put it in writing to myself on September 19) of either taking his seat in the usual manner at the opening of the session, or letting the Address be voted, an amendment (perhaps vital to the government) disposed of, and the necessary arrangements in the House of Commons made in the Prime Minister's absence. (*Hansard*, p. 54).

Very clearly, neither Selborne nor Gladstone had any idea that if a Prime Minister had no seat in parliament his government would be dissolved, that they were "not competent. . .to address parliament," etc. What they feared was that something "vital to the government" might happen in the House. The government was alive and continued in existence although no Prime Minister was present, but might suffer defeat by an adverse vote, during the proceedings in the House. Gladstone did not wish to run that risk, and, in order to escape from his dilemma he advised the King to dissolve parliament.

Morley, in his *Life of Gladstone*, quotes, in this connection, a letter from Lord Halifax to Mr. Gladstone—a letter which Mr. Bennett himself read to the House. It was as follows:

Up to the meeting of parliament you clearly must act as if there was no doubt. If you do not, you almost admit being wrong. You must assume yourself to be right, that you are justified in the course which you have taken, and act consistently on that view. When parliament meets, I think the proper course would be for the Speaker to say that he had received a certificate of vacancy from two members, but not the notice from the member himself, and having doubts he referred the matter to the House according to the Act. This ensures the priority of the question, and calls on you to explain your not having sent the notice. You state the facts as above, place yourself in the hands of the House, and withdraw. (*Hansard*, p. 54).

This letter supplies further evidence that, whatever difficulty had been created, no one imagined that there was any question as to the continuation in office of the Ministry because of the absence of Mr. Gladstone. For observe that "the matter" to be referred to the House was not whether the absence of the Prime Minister dissolved the Ministry—nobody was possessed of such a notion as that—but whether by his acceptance of an office Gladstone had vacated his seat. An affirmative declaration would have meant, not that the government had ceased to exist, but that Gladstone must submit himself for re-election.

*Conclusion*—Fortunately for the reputation of the Canadian parliament, the two propositions above dealt with were decided in the negative.

1. Constitutional practice does not require that a government which has failed in a three-cornered election to carry more than one half of the constituencies ought necessarily to resign. If the result of the polling makes reasonably certain that the government will be defeated in the House, it ought to resign. If the result makes reasonably certain that it will be sustained, it need not resign. And if reasonable doubt upon that point exists, it ought to summon parliament in order that the wish of the House of Commons may be ascertained.

2. Constitutional practice requires that Ministers must have, or must within a reasonable time secure, a seat in one or other of the Houses. But it is not true that a temporary absence of the Prime Minister ousts him from office and dissolves his Ministry.