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THE CONSTITUTIONAL LAW

OF THE

BRITISH DOMINIONS



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THE CONSTITUTIONAL LAW OF THE BRITISH DOMINIONS

BY

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PREFACE

In *The Sovereignty of the British Dominions* I examined as it stood in 1929 the position of the British Dominions internationally and constitutionally under the terms of the Imperial Conference Resolutions of 1926, and indicated the matters in which they still fell short of full external and internal sovereign authority. The questions involved in their constitutional aspect were shortly afterwards made the subject of investigation by experts at the Conference of 1929, and their deliberations were accorded, with minor changes, approval by the Imperial Conference of 1930. The Statute of Westminster, drafted to give effect to the changes in the constitution of the Empire held desirable, was approved by all the Dominion Parliaments and enacted on December 11, 1931, by the Parliament of the United Kingdom. In the same year, without ostentation and without any communication to that Parliament, vital changes were effected in the mode of conducting the foreign affairs of the Irish Free State, which established the external sovereignty of that State on an assured footing by the total elimination of the British Government as an intermediary between the State Government and the King.

These two events render it desirable to attempt to

set out the main features of the Constitutional Law of the Dominions, using that term in the widest sense. The changes of 1931 have rather complicated than simplified the structure of the Empire; they have no doubt relaxed the bonds of imperial unity so far as form is concerned, but a remarkable step to counteract any disadvantages of this tendency has been taken by the determination of the Ottawa Conference on August 20, 1932, to establish the doctrine that inter-imperial preferences are matters outside the sphere of the operation of most favoured nation clauses in treaties with foreign powers. This involves, it must be noted, a renewed affirmation of the doctrine of the Imperial Conference of 1926, which refused to admit that inter-imperial relations could be governed by the terms of the Covenant of the League of Nations or of treaties concluded under the auspices of the League. Economic ties, it is clear, to be effective, must rest on the basis that the Empire is in a sense a unity, though one of a new kind; a Commonwealth rather than a confederation.

I have endeavoured to set out the present position of imperial relations as they are in fact, not as they were prior to 1931 or as they may become. For that reason I have refrained from criticism of earlier views. Progress has been so rapid that it would be unfair to deal with the opinions expressed by many eminent foreign authorities on the nature of the Empire, since they were necessarily based on a state of affairs which has passed away.

Of constitutional details I have endeavoured to

select those of most importance for the present day, and this consideration has guided me in the choice of topics affecting the federal constitutions, which of late have shown developments of great interest.

For much help in the preparation of this work I am indebted to my wife.

This work was completed on August 22 in order to include the record of the constitutional aspect of the Ottawa Conference. So rapid has been the process of printing, thanks to the skill of Messrs. R. & R. Clark, that there is little to add. The British Government has fulfilled its duty of dealing with the legal position of Dominion forces when visiting this country by introducing the Visiting Forces (British Commonwealth) Bill, which shows the mode in which such a problem as that of the treatment of deserters should be handled. The latest of the abortive conferences with Mr. De Valera has failed to end a tariff war of grave consequence to both countries, but the memoranda published on October 29 reveal the British Government appealing with some inconsistency to international law in support of its claim that the financial settlements of 1923 and 1926 required no ratification. Mr. De Valera on the other hand relies on a fundamental constitutional doctrine, the rule that an engagement by a minister is subject to the approval of Parliament, and denies that the action of the Free State Parliament in respect of the agreements amounts to a confirmation of either. It is clear that a grave error was committed when the final financial settlement with the Free State was not cast into treaty form and formally approved by both

Parliaments, and it may be hoped that a dispute on which so much can be pleaded on both sides may soon be settled in a prudent spirit of reconciliation.

The Ottawa Agreements have elicited in the Dominions a mixed response. In Australia and New Zealand they have been denounced as endangering the protective policy of these countries, and have been defended by Mr. Lyons and Mr. Forbes on the score that in principle nothing is changed. In Canada Mr. Mackenzie King has disapproved the scale of concessions to the United Kingdom and deprecated the spirit of hard bargaining involved, while General Smuts has deplored the failure to attain greater concessions for the Union. Mr. Scullin has emphasised the constitutional objection to any effort to bind future Parliaments, and unquestionably, in view of the brief duration of the Commonwealth Parliament, the period of five years is open to criticism of a much more serious kind than that pressed by Sir Herbert Samuel in the case of the United Kingdom. It must be noted that the impression appears to be general that a new Parliament will be free to refuse to continue the agreements in operation if they are deemed to run counter to national interests. If this is the case, the distinction between them and international obligations becomes very marked, and it is significant that no provision is made in them for settlement of differences of view by any form of arbitral tribunal. The discussions, however, have made it clear that too much stress must not be laid on the compacts as preventing the disruption of an Empire whose bonds are now dangerously weak.

Australia and New Zealand are bound by overwhelming considerations of national safety to the closest relations with the United Kingdom, and it is clear that the operation of the agreement with Canada will put a considerable strain on the good temper of either party. In special the boon of access to the Tariff Board appears likely to prove of little value to the British exporter.

To Messrs. Macmillan & Co. I tender most sincere thanks for undertaking the publication of this work, as of its predecessor.

A. BERRIEDALE KEITH

THE UNIVERSITY OF EDINBURGH,
November 4, 1932.

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PART I

THE SOVEREIGNTY OF THE DOMINIONS

CHAPTER I

THE DEVELOPMENT OF DOMINION AUTONOMY

THE war of 1914–18 was responsible for the definite raising in an acute form of the status of the British self-governing Dominions both as regards the United Kingdom and the other states of the world. It is true that the questions which came to be raised by the war would in due course have demanded solution, but the time for such action might long have been postponed if the Dominions had not been compelled to realise their essential implication in world affairs and their complete dependence in many vital matters on the United Kingdom. The régime of responsible government, which had been recommended by Lord Durham and which had been put into effective operation by Lord Elgin in Canada in 1847, was one essentially adapted to times of peace, for under such conditions it was possible for the Dominions to achieve almost complete internal autonomy without raising fundamental issues between them and the United Kingdom. Lord Durham's proposals seemed to offer a solution to the difficult question of the relation of an overseas European population to the mother country; self-government was speedily extended to the other provinces of British North America and to Newfoundland; in 1855–56 it became operative in New South Wales, Tasmania, and South Australia, and in New Zealand;

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it was granted to Queensland on separation from New South Wales in 1859, to Western Australia in 1890, and to the Cape of Good Hope and Natal in 1872 and 1893 respectively. In the South African cases the grant involved a new principle, for the population was predominantly non-European, and the interests of the natives were by the grant inevitably placed in the hands of the local European minorities. Despite the difficulties arising from this cause, responsible government was held to be the one mode by which the conquered republics in South Africa could be attached to the Empire, and the Transvaal and the Orange River Colony received this form of government in 1906–7. Nor was there any reluctance on the part of the United Kingdom to strengthen the autonomous units which it had brought into being. Though federation would manifestly strengthen them in any dealings with the United Kingdom, the British Government was in large measure responsible for the federation of Canada in 1867, for that of Australia in 1900, and the Union of South Africa in 1909.

In the grant of responsible government as conceived by Lord Durham there was involved no idea of the surrender of the sole sovereignty of the United Kingdom. He contemplated no inroad on the paramount authority of the Imperial Parliament and the Imperial Government; his desire was that they should confine their action to matters truly imperial, and, having created local administrations, leave them to deal unfettered with all matters of local concern. He saw that the struggle in Canada was largely waged over issues of patronage and expenditure on local objects in which the Imperial Crown had no special interest, and he

proposed that all such questions should be dealt with by local ministries framed on the British model which would thus express the will of the electorate from time to time. But he would have reserved from colonial ministries matters of the utmost importance, including control of their land policy, of their trade relations with the Empire and foreign countries, including issues of coinage and shipping, of their constitutions, of their foreign relations and defence. The Imperial Government was early persuaded that land policy could not be reserved without destroying the local autonomy which it proposed to grant. But in other matters it shared the views of Lord Durham, which in fact did not run widely counter to colonial opinion. Even the protagonists of the colonial claims in the American revolutionary movement had been prepared to admit the right of the British Parliament to regulate trade as a matter of general interest and convenience, and many of them had defended the navigation laws as an integral part of the imperial commercial system.[1]

It was not long, however, before the idea of commercial control had to be modified in essentials. The abandonment of the British system of protection with preference for the colonies evoked demands, which could not in fairness be resisted, for the repeal of the navigation laws in 1849, and in 1859 the Colonial Secretary was fain to admit the absolute right of Canada to raise her tariff against British imports. Though the general control of shipping was retained, the colonies were permitted to regulate their own registered shipping in 1854, and in 1869 to deal with their coasting trade. Moreover, the retention of supreme authority

[1] Keith, *Constitutional History of the First British Empire*, pp. 377 ff.

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over other forms of shipping was approved by a Colonial Merchant Shipping Conference of 1907. With abandonment of control of commerce went control over customs regulations and the postal services. Still more striking was the surrender of any control over immigration restriction; the idea that any British subject, or at least any European British subject, should be entitled to free entry into any part of the British Dominions was surrendered by 1901. In the field of copyright a longer battle was waged,[1] but by 1911 the right of every Dominion to complete self-determination was conceded. Even control over constitutional change was relaxed; while the constitution of Canada of 1867 made no provision for alteration save by the Imperial Parliament, that of the Commonwealth of Australia assigned to the Commonwealth Parliament and the electorate at a referendum almost unrestricted power of change. The decision to withdraw imperial forces from all parts of the colonies where there were no specially imperial issues to be safeguarded, leaving the colonies to secure their own internal defence, was taken in 1866–70, and the colonies were left free to control their own locally raised troops. Even when, as in South Africa until 1921, imperial forces had to be retained, the local governments exercised supreme authority over the forces which they raised. More difficulty was presented by naval defence, which demanded action beyond territorial limits and therefore was held normally to belong to the imperial power, while this argument was reinforced by the paramount importance of uniformity in naval organisation and training. Even, however, on this score the British Government yielded: the Colonial

[1] Keith, *Responsible Government in the Dominions* (ed. 1928), ii. 953–60.

Conference of 1907 saw the beginning of agreement to the creation of local squadrons under colonial control, and this policy was fully adopted at the Naval and Military Conference of 1909 and the Imperial Conference of 1911.[1]

In the field of foreign affairs progress was not less marked. From the first the necessity of consulting and if possible securing colonial concurrence in any decision affecting specially the colonies was frankly conceded. Immediately on the grant of self-government to Newfoundland Mr. Labouchere assured the government that no agreement affecting the treaty rights of France would be arrived at without consultation. For a time the British Government exercised unfettered authority in the conclusion of commercial treaties for the whole of the Empire. But soon this practice ceased; first the colonies were given the option of separate adherence to such treaties; then there was obtained the right of separate withdrawal, and in 1895 there was finally recognised the right of every colony to have special commercial treaties negotiated for it, subject to concurrence by the British Government in the action and to certain safeguards for the interests of other parts of the Empire. Political treaties of a general character long remained outside the purview of the colonies, but at the Imperial Conference of 1911 the issue was raised in connection with the Declaration of London, and a promise given that the Dominions should be consulted in future so far as practicable regarding such treaties as might be framed at The Hague Conferences or otherwise. Yet it was of the utmost significance as a sign of the reluctance of the premier Dominion to enter this field that

[1] Keith, *The Sovereignty of the British Dominions*, chap. vi.

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Sir Wilfrid Laurier insisted on negating any right of the Dominions to be consulted on issues of foreign policy in general as opposed to those affecting directly the Dominions. Consultation would, in his view, involve responsibility on the Dominions, and Canada was not yet prepared to accept such responsibility. His ideal, it was clear, was the highest measure of self-determination for the Dominion, and a resolute opposition to any tendency to engage Canada in the external affairs of the United Kingdom and to impose upon her burdens which would divert her energies from the prime task of perfecting her internal organisation.[1]

Nor was the view of Canada isolated. Mr. Fisher for Australia might desire that the Commonwealth should be placed in direct communication with the Foreign Secretary, but his view was isolated. The wider sphere of foreign relations had no interest for the Union, New Zealand, or Newfoundland, which proved to be content with the autonomy they possessed. It is significant that General Botha rebuked with point and asperity the effort of the Nationalist press in the Union to claim that the Dominions could claim to stand neutral in British wars, and the suggestion received no sympathy from the other Premiers present at the Conference.

Questions of external relations, however, were destined to destroy the attitude of satisfaction with the *status quo* evinced by the Conference of 1911. The Canadian Government had concluded an arrangement for reciprocity with the United States. That its operation might serve to weaken or even destroy the ties between Canada and the Empire was suggested by American comments, and the fear ultimately secured

[1] *Op. cit.* chap. xv.

the defeat of the ministry and brought Mr. R. Borden into power. Mr. Borden inaugurated a new ideal of imperial relations, that of Dominion sovereignty coupled with co-operation with the United Kingdom on the footing of equality, replacing the narrower aim of Sir Wilfrid Laurier to secure local autonomy and to remain aloof from implication in world affairs. For the moment Mr. Borden accepted as the only practicable policy, in view of the urgent menace of German naval strength, the plan of a monetary contribution to the British navy in lieu of seeking to create a Canadian navy, but he coupled this proposal with a demand for a voice in the determination of imperial policy, for which purpose the British Government offered to enter into full discussions with a minister of the Dominion Government to be stationed in London. Liberal hostility induced the Senate to reject his proposal of pecuniary aid, and the advent of war for a time rather emphasised the dependence of the Dominions on the United Kingdom. Though they approved *ex post facto* the British decision to share in the war, they recognised that they would in any case have been involved in it, and they found it necessary to place their forces, naval and military alike, under the supreme command of the British commanders-in-chief, war forbidding the possibility of the exercise of independent authority.

The Dominions, however, were soon to reassert their distinctive character and their autonomy, nor was the British Government reluctant to assure their position. In the expedient of the War Cabinet it found a means of associating the representatives of the Dominions with British statesmen in deciding on the direction of the war and the issues of peace, and it concurred with

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the Dominions in declaring at the War Conference of 1917 that a Constitutional Conference should be held after the close of hostilities to recast the constitution of the Empire on the basis of the maintenance of the autonomy of the Dominions. Even during the course of hostilities [1] Sir R. Borden was able to secure for Canada virtual control of her own division, and with the aid of Mr. Hughes and General Smuts he secured from the British Government and the allied powers acceptance of the right of the Dominions to distinct representation at the Peace Conference of 1919, and the vital concession of separate membership of the League of Nations with its implication of international status. This success was followed by insistence on the withholding of the formal British ratification of the peace treaties until Dominion concurrence had been secured, and in 1920 Sir R. Borden's efforts were crowned by the concession by the British Government of the right of the Dominion to have a Minister Plenipotentiary accredited to the President of the United States in order to represent at Washington those interests which were distinctively Canadian.

The Imperial Conference of 1921 seemed indeed to arrest development. Sir R. Borden had been compelled to resign office on the score of ill-health, and Mr. Hughes for Australia contended with effect that the Dominions had achieved all the power they could desire, and had no more worlds to conquer. This view prevailed and constitution-making was declared to be unnecessary, despite the objections raised by General Smuts. The position of that statesman is easily explained by the circumstances of the Union of South Africa. During the

[1] Keith, *War Government of the British Dominions*, p. 85.

peace conference[1] the British Government had rejected the demand of a delegation representing the Dutch of the Transvaal and the Orange River Colony who demanded the restoration of their independence as logically the sequel to the declarations of the allies as to the right of national self-determination. On his return to Africa after the peace conference General Smuts had preached the doctrine that the Dominions had won by the treaty of Versailles and membership of the League the position of fully sovereign states connected with the United Kingdom only through the possession of a common sovereign. The legal structure of the Empire clearly was inconsistent with this view, and it was natural, therefore, that in 1921 the voice of General Smuts should be raised in favour of a new definition of imperial relations. What then he failed to bring about was, however, not long to be delayed, and it was furthered in the highest degree by the creation in 1921–1922 of the Irish Free State. The mode of bringing the State into being was unique: the Articles of Agreement for a Treaty of December 6, 1921, were made between members of the British Government and persons who purported to act as the Government of Ireland, but who had prior to the treaty no legal status of any kind, and in fact were simply British subjects in rebellion against the Crown.[2] A State whose origin was so striking was not likely to assent to the adequacy of legal forms which owed their existence to conditions long since obsolete. The model of Canada had been chosen as that to determine the powers of the new State. Canada re-

[1] Keith, *op. cit.* pp. 230–33.

[2] Contrast Rynne, *Die völkerrechtliche Stellung Irlands*, pp. 44 ff., who claims State rank for Ireland. But see H. Walter, *Die Stellung der Dominien im Verfassungssystem des britischen Reiches*, pp. 16-18.

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frained from creating the legation at Washington which had been conceded in 1920, but the Free State insisted on exercising the right to accredit a Minister in 1924, and challenged the existing theory of imperial relations by claiming that the Articles of 1921 formed an international treaty of the type which under Article 18 of the Covenant of the League of Nations must, in order to be valid, be registered with the League Secretariat. This contention the British Government denied, but Canada also proved to be dissatisfied with the international status of the Dominions. Mr. Mackenzie King[1] admitted that the power of the King on the advice of the British ministry to declare war and make peace enabled him on that advice to conclude the treaty of Lausanne and to ratify it so that Canada was bound by it. But he insisted that, as Canadian plenipotentiaries had not been invited to aid in the conclusion of the treaty, Canada was under no obligation actively to maintain the binding force of the compact if its terms should be violated by Turkey. Canada also was dissatisfied with the status of the Governor-General as the result of the claim of Lord Byng in 1926 to exercise a wider discretion in the matter of granting a dissolution than was in practice assumed by the King in the United Kingdom. The claims of Canada, the Irish Free State, and the Union thus converged in a demand for reconsideration of the constitutional law of the Empire, and the Imperial Conference of 1926[2] met these claims in the amplest manner. The Conference held itself prepared to define the position and mutual relation of the group of self-governing communities composed of Great

[1] Keith, *Speeches and Documents on the British Dominions*, 1918–1931, pp. 322 ff.

[2] *Ibid.* pp. 161-70.

Britain and the Dominions: "They are autonomous communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations". This vital declaration was, however, not intended to ignore facts. "The principles of equality and similarity appropriate to status do not universally extend to function", and questions of diplomacy and defence in special required flexible machinery which could from time to time be adapted to the changing circumstances of the world.

The Conference of 1926, while it adopted this vital doctrine of equality in status, could only indicate the matters on which action would be requisite in order to bring legal forms into accord with it. It recognised that expert advice would be requisite before action could be taken, and a Conference of experts in 1929[1] took up the task. It interpreted its mandate in the widest spirit, disregarding the more cautious suggestions of the Conference of 1926. Some misgiving was created by its findings in Canada, Australia, and New Zealand, but the Imperial Conference of 1930 in substance approved its views, and the Imperial Government undertook to secure the legislation necessary to give effect to the Conference resolutions when these had been approved by the Dominion Parliaments. This preliminary was duly accomplished, and the Statute of Westminster was finally assented to by the King on December 11, 1931.[2]

[1] Keith, *Speeches and Documents on the British Dominions*, 1918–1931, pp. 173-205.

[2] *Ibid.* pp. 231-307.

CHAPTER II

INTERNAL SOVEREIGNTY AND THE STATUTE OF WESTMINSTER

Chapter II.

THE Statute is not a revolutionary measure. It represents the outcome of a long process of development under which the Dominions had achieved almost full autonomy as regards internal affairs, and its importance lies mainly in the fact that it establishes as law what had before rested on convention. The system of responsible government in the colonies rested essentially on a division in exercise of the authority of the Crown. The executive, legislative, and judicial functions of the Crown were exercised in part on the advice and authority of colonial ministries, legislatures, and judges, in part on the authority of the Imperial Government, the Imperial Parliament, and the Judicial Committee of the Privy Council. The whole system of the evolution of responsible government lay in the transfer of effective authority from the latter to the former instrumentalities. The vital step in the creation of responsible government was the decision of the British Government to transfer executive authority from the Governor, chosen by it and irresponsible to the colonial legislature, to ministers, who should on the British system represent the will of the majority of the lower house of the legislature. As a logical consequence, the

control over the passing of colonial legislation, hitherto freely exercised by disallowance of colonial acts, or refusal to assent to reserved bills of colonial legislatures, was relaxed in all matters not of vital imperial concern. Contemporaneously the appointment of judges was left in the hands of colonial ministries, and their removal made subject to the resolutions of colonial legislatures. The British Government thus ceased to have any control over judicial appointments, but supervision of judicial decisions was still preserved through the medium of the appeal permitted to the Judicial Committee of the Privy Council. No effort was made to limit by law the measure of the Governor's obligation to accept ministerial advice. Australian proposals in 1853–55 to limit the matters in which colonial legislation might be disallowed by the Crown were negatived, and the whole procedure was governed by a flexible practice which, with the passage of years, essentially freed the colonies from external control. In the same way the exercise of the supreme powers of the Imperial Parliament was restricted by practice to cases where legislation was desired by the colonies.

This conventional limitation of imperial control nevertheless left in being a mass of legal restrictions which might be deemed to fetter the Dominions. To claimants of national sovereignty like Mr. Cosgrave, General Hertzog, or Mr. Mackenzie King, these restrictions presented an inconvenient anomaly, and it was the work of the Conferences from 1926 to 1930 and the Statute of Westminster to abolish them, so that the internal sovereignty of the Dominions might stand out unquestioned. The issues affected were complex, and even yet the establishment of complete sovereignty in

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the sense of independence of imperial intervention is not wholly complete. But the essential elements of such sovereignty have been attained.

(1) The position of the Governor-General of the Dominions served originally as the essential means of control of the local executive by the Crown. When responsible government was accorded, his functions assumed a clear dualism. In the main he acted as the constitutional head of the government, advised by ministers as is the Crown in the United Kingdom. But he had also to play the part of intermediary between the local and the imperial authorities, and he owed his appointment to the Imperial Government, by whose advise he could be removed from office. The combination of functions had, and has, supporters in the Dominions, but the Conference of 1926, no doubt moved in part by the constitutional dispute in Canada in that year between Lord Byng and Mr. Mackenzie King over the issue of the grant of a dissolution, adopted a resolution which declared that the position of the Governor-General towards the administration was analogous to that of the King towards the government of the United Kingdom, and as a corollary it was compelled to recognise that it was inconsistent to combine this constitutional function with the duties of a representative of the British Government, in any case at least where the Dominion Government objected to such a combination of functions. This was followed by the restriction of the Governor-General of the Union of South Africa, the Irish Free State, and Canada to local functions only, but the appointment of the Governor-General to represent the King still remained under the control of the British Government, though the practice

had long prevailed to consult the Dominion concerned before any appointment, and the first Governor-General of the Irish Free State had been virtually selected by the Irish Government. The Conference of 1930, however, reviewed this issue, and arrived at the conclusion that the appointment was a matter between the King and the Dominion Government, which might or might not use the British Government as a channel of communication with the King in regard to the matter. The decision was followed by the appointment by the King, on the formal advice of the Prime Minister of the Commonwealth, of Sir Isaac Isaacs, the Chief Justice, to be Governor-General. The appointment was admittedly not advised by the British Government, nor was it wholly approved in Australia, where the opposition expressed dissent. The issue of the legality of any appointment made otherwise than on the advice of the Imperial Government was sharply contested in the Commonwealth,[1] but doubtless without sufficient ground. The Constitution does not require specifically that a British minister should recommend the appointment, and the King clearly can act on the advice of an Australian minister if he thinks fit. There arose, indeed, a technical difficulty in the fact that under the prerogative Letters Patent creating the office of Governor-General the appointment was required to be made under the signet, and this was controlled by a Secretary of State. The necessity of using this form rendered the co-operation of the Secretary of State for Dominion Affairs necessary, but his accord was really formal, and there is no legal difficulty in amending the Letters

[1] Mr. Latham, December 5, 1930, in House of Representatives. But see Keith, *Journ. Comp. Leg.* xiii. 259, 260.

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Patent to abolish the use of the signet and the formal intervention of any British minister. In effect, therefore, the Governor-General is the free choice of the Dominion Government, subject only to the concurrence of the King, who on the principles of ministerial responsibility is bound to accept the advice of the ministry if persisted in. In this way the selection of Lord Bessborough as the Governor-General of Canada on February 9, 1931, was made on the sole responsibility of the Dominion Government.

It follows inevitably that the power of securing the removal of a Governor-General before the expiry of the normal term of office (five years) rests with the Dominion Government, a fact of course which differentiates his position vitally from that of the King in the United Kingdom, and is in some measure inconsistent with the parallel drawn between the offices by the Conference of 1926. The right, however, of the ministry to advise removal and the practical necessity of the King to act on such advice were asserted in July 1932 by the Governor-General of the Irish Free State when protesting against the studied discourtesy shown to him as the King's representative by the ministry of the Free State. The position is of the highest importance, for it reveals the fact that the Dominions enjoy now virtually unfettered freedom in selecting and removing the head of the executive, subject only to such moderating influence as might be exercised by the King, by whom appointment and removal must formally be approved. In neither case need the Imperial Government now be consulted, nor need it be accorded any right to intervene.

(2) The change in the position of the Governor-

General resolved on by the Conference of 1926 raised immediately the issue of the exercise of the power vested formally in him regarding the reservation of bills for the signification of the royal pleasure. The right to reserve bills was obviously a valuable instrument in the control of Dominion legislation. The Governor-General had no doubt the power to refuse assent, but such refusal was obviously a drastic measure which would be gravely resented and would render relations between the ministry and the Governor-General difficult. By reserving a bill, on the other hand, the decision as to final assent was left to the Crown on the advice of the British Government. In practice, that Government, if it had good reason to suggest objections to a bill, would ask that these alterations should be made, and agreement would be reached before assent was given. The control exercised, therefore, had been reduced from a dictatorial attitude to one of representations, but the existence of the power was obviously a restriction on Dominion sovereignty, and as such it was examined by the Imperial Conference of 1926. Its opinion was guarded; it enunciated the doctrine that it was the right of the Government of each Dominion to advise the Crown in all matters relating to its own affairs, and that consequently it would not be in accordance with constitutional practice for advice to be tendered to the Crown by the British Government in any matter appertaining to the affairs of a Dominion against the view of the Dominion Government. But this view was not made applicable to provisions embodied in constitutions or in specific statutes expressly providing for reservation. The omission is significant; the Conference was not prepared to assert that the

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British Government was not entitled to advise on its own responsibility on such vital matters as constitutional changes or Merchant Shipping bills.

The Conference of 1929 took a further step towards Dominion sovereignty. It recognised that it was not proper for the Crown to issue any instructions to the Governor-General as to reservation of bills, which, therefore, he must reserve, if at all, only on ministerial advice or on some other constitutional ground. It held further that, if a bill were reserved in this way, the decision as to its fate must be in accordance with the views of the Dominion Government, not of the British Government. Even as regards bills reserved under constitutional or other statutory provisions the rule of the wishes of the Dominion Government should prevail, though this view was qualified by the use of the words "in general". The Conference of 1930 accepted the recommendations of 1929, and the doctrine that the British Government should not exercise its judgement as to reserved bills, if any, is definitely established.

On the legal side of the question the position is not yet quite satisfactory. Assent to a reserved bill must be expressed by Order in Council, and an Order in Council is still passed only on the formal request of a minister of the Crown in the United Kingdom. The omission of reservation from all constitutions and statutes is therefore desirable, and, as the Conference of 1929 pointed out, can be effected by local or imperial legislation. The latter[1] has already been invoked to render needless reservations under the Merchant Shiping Act, 1894, and the Colonial Courts of Admiralty Act, 1890.

[1] Statute of Westminster, 1931, ss. 5, 6.

Virtually, it appears, the Dominion Parliaments have received or can take effective relief from the inability to complete legislation of any kind in the Dominion. Pending such action, certain definite restrictions remain in the case of the Commonwealth, New Zealand, and the Union; Canada and the Irish Free State, on the other hand, are free from any compulsory reservation. The Commonwealth and the Union alike are permitted by their constitutions to limit the matters in which appeal may be permitted to the Judicial Committee of the Privy Council, but such bills must be reserved. The South Africa Act, 1909, provides in Section 64 that any bill repealing or amending that section, or any of the provisions of Chapter IV. of the Act dealing with the House of Assembly, and any bill abolishing the provincial councils or abridging their powers shall be reserved. It was also specially promised by the British Government when the Act was passed that special care would be taken to secure that in fact the Governor-General should reserve any bill restricting the Cape Native franchise, the intention then being that assent to such a measure might not be automatic. But this promise must be regarded as superseded by the Conferences of 1926–30. In New Zealand, under the Constitution Act, 1852, any bill altering the Governor-General's salary or the small sum secured for native purposes must be reserved. In none of these cases, it will be seen, is any essential imperial interest involved, and their disappearance would simplify the legal position and remove a needless formality.

(3) While reservation of bills was, at the time when the Conference of 1926 met, an essential element of the Dominion constitutions, the power of disallowance,

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though provided for in all cases save the most recent constitution, that of the Irish Free State, had long been a dead letter. No Canadian Act had been disallowed since 1873, and then virtually on Sir John Macdonald's suggestion; no New Zealand Act since 1867; and disallowance had never taken place in the case of the Commonwealth or the Union. It was easy, therefore, to contemplate the formal removal of provision for disallowance from the constitutions, by local or imperial legislation, but for a set of cases arising under the Colonial Stock Act, 1900. Under that Act power is given to the British Treasury to make regulations for the admission of colonial securities to the rank of trustee investments in the United Kingdom, and one of the conditions imposed by the Treasury was that any Dominion Government desiring recognition of a new issue must place on record a formal expression of its opinion that any Dominion legislation which appeared to the British Government to alter any of the provisions affecting the stock to the injury of the stockholder, or to involve a departure from the original contract in regard to the stock, would properly be disallowed.[1] The Conference of 1929 frankly recognised that, where any stock had been admitted to trustee rank in reliance on such a declaration, the power of disallowance in respect of such legislation must remain and it could properly be disallowed, and this opinion was not merely accepted by the Conference of 1930, but was expressly approved by the Prime Minister of Canada in the Dominion House of Commons on June 30, 1931. It is

[1] Canadian provincial loans and those of the Irish Free State cannot be given trustee rank because no power to disallow rests with the British Government.

of course obvious that the situation is anomalous and objectionable in theory; it is a direct derogation from Dominion sovereignty and it renders it difficult to abolish the power of disallowance in general, since it would necessitate the formal preservation of the right in this special case. Moreover, the protection to the stockholder is more apparent than real, and it would be satisfactory if the position could be regularised by agreement to abandon the power of disallowance in return for an agreement in any case of dispute for reference to an Inter-Imperial Tribunal and punctual compliance with the award of that body.

(4) With none of the preceding matters—save to a limited extent the issue of reservation—was it found possible or desirable to deal in the Statute of Westminster. But that measure by Section 3 declares and enacts that the Parliament of a Dominion has full power to make laws having extra-territorial operation. The section applies only to Canada, the Union, and the Irish Free State, unless it is adopted by the Parliaments of the Commonwealth, New Zealand, or Newfoundland, and the same rule applies to the other sections of the Statute conferring extensions of power. But any limitation of authority which now remains is voluntarily accepted, and so far as the Imperial Parliament is concerned the full sovereignty of the Dominions is now recognised. The same doctrine has in effect been laid down as applicable apart from the Statute to Dominion legislation by the Privy Council,[1] thus removing grave doubts based on earlier decisions of that tribunal. The effect of the Statute and the decision mean that

[1] *Croft* v. *Dunphy* (1932), 48 T.L.R. 652, where the question of the retrospective effect of the Statute is left open.

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in interpreting any measure of a Dominion the same principles can be applied regarding extra-territorial operation as would be applied in construing an Act of the Imperial Parliament, and it is not to be held that in the case of a Dominion there should be held to be implicit the rule that its legislation cannot have effect save as to matters done within its territorial limits. The exact sphere of authority thus conferred or recognised remains open to doubt and will be discussed later. But the issue of sovereignty is now clear.

(5) Of far greater importance is the provision of Section 2 of the Statute under which "the Colonial Laws Validity Act, 1865, shall not apply to any law made after the commencement of this Act by the Parliament of a Dominion". This provision is repeated and emphasised by the further enactment: "No law and no provision of any law made after the commencement of this Act by the Parliament of a Dominion shall be void or inoperative on the ground that it is repugnant to the law of England or to the provisions of any existing or future Act of Parliament of the United Kingdom, or to any order, rule, or regulation made under any such Act, and the powers of the Parliament of a Dominion shall include the power to repeal or amend any such Act, order, rule, or regulation in so far as the same is part of the law of the Dominion".

The enactment unquestionably extends widely the sphere of operation of Dominion legislative power, so far as theory is concerned. The Colonial Laws Validity Act, 1865, was itself a noteworthy extension of colonial legislative authority. It was passed to make clear the exact force of the vague rule imposed from the beginning of colonial legislation on legislatures that their

legislation was to be in accord with the principles of English law. Difficulties in the application of this doctrine were raised by the perverse decisions of Mr. Justice Boothby[1] of South Australia, and finally it was decided by the British Government to solve the problem by making it clear that repugnance of colonial legislation was to be confined to repugnance to statutory enactments, including orders, rules, and regulations made under such measures, which were explicitly or by necessary intendment applicable to the colonies. Colonial legislatures were thus rendered free to enact measures which contravened the principles of the common law of England or of statutory law when such statutory law had merely been introduced into the colony on its foundation as part of the inheritance of English law, for it was the accepted doctrine that on the settlement of a colony English law, including statutes of general application, became the law of the colony. The legislation with which colonial legislatures could not freely deal was thus limited to measures expressly enacted for the colonies, including such acts as those providing for the treatment of fugitive offenders, for extradition, for foreign enlistment and other international issues, including prize jurisdiction and admiralty jurisdiction. There were obviously strong reasons for removing such questions from colonial competence. They dealt with matters in which the Imperial Government had necessarily a controlling influence, and the use of imperial legislation was imperative for uniformity and effectiveness. But clearly with the development of Dominion status the restriction had

[1] Keith, *Responsible Government in the Dominions* (1912), i. 400-408; iii. 1343-5.

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become out of place and the maintenance of subordination illogical. But a mere repeal of the Colonial Laws Validity Act was out of the question. Not merely was the Act still to remain in force except as regards the six Dominions, Canada, Australia, New Zealand, South Africa, the Irish Free State, and Newfoundland, but the mere repeal of the Act would almost inevitably have revived the doctrine that legislation must not contravene the common law. It was necessary therefore to make the position absolutely clear and also to remove a possible misunderstanding that might arise. It was pointed out by the British Government that, while British Acts were no longer to bind the Dominions as part of Dominion law, the British Parliament must still retain the right to legislate in respect of matters taking place in the Dominions and affecting British subjects when present therein to the same extent as it could legislate regarding events taking place in foreign countries, and effect was given to this principle by the addition of the final words of the clause. The essential difference between the old system and the new lies in the fact that such British legislation as is contemplated as still possible would be enforceable only in British Courts and not, as under the old system, in the Courts of the Dominions.

It will be noted that the rule laid down applies only to any Act existing when the Statute was passed or enacted in future; it does not apply to the Statute itself, which cannot be varied by Dominion legislation. It was partly to meet the objections felt by the Australian Government to this position that Sections 2-6 of the Act were made subject to adoption by the Commonwealth, New Zealand, and Newfoundland, but

they apply absolutely to the other Dominions. As, however, they confer privileges, that fact cannot be said to be a derogation from Dominion sovereignty, though unquestionably that is better preserved by the procedure adopted in the case of the Commonwealth.

(6) The removal of the rule of repugnancy and of any territorial limitation serves one purpose of great importance from a practical point of view. Prior to the enactment the position of British merchant shipping was regulated essentially by imperial legislation, the Merchant Shipping Act, 1894, and its important amending Act of 1906. Under this system the legislative power of the Dominions was normally exercised only in respect of shipping therein registered and their coasting trade, while other shipping, British and foreign, was regulated by imperial measures. The reasons of convenience which supported this plan of action were cogent, so cogent that the Colonial Merchant Shipping Conference of 1907 approved the principle as in itself desirable. But it was strongly felt in the Dominions that this restriction was a derogation from sovereignty; shortly before the Conference of 1926 a decision of the High Court of the Commonwealth[1] emphasised the inability of the Commonwealth to impose its legislation on ships registered in New Zealand and trading in Commonwealth ports. The issue was dealt with by the Conference of 1929, and it was decided that full freedom of legislation must be accorded to the Dominions, the necessary security against confusion in shipping laws being secured by an agreement between the several parts of the Empire which would assure concerted action

[1] *Union Steamship Co.* v. *The Commonwealth* (1925), 36 C.L.R. 130.

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towards the alteration of shipping laws. The Statute therefore was assented to immediately after such an agreement had been duly signed for the United Kingdom and the Dominions on December 10, 1931. It represents an attempt to secure that the Dominions shall accept British standards as adequate for ships registered in the United Kingdom when trading to the Dominions unless engaged in the Dominion coasting trade or in Dominion fisheries. It definitely provides that no part of the British Commonwealth shall deny to ships registered in any other part equal treatment to that meted out to its own ships or to foreign shipping, but this is not to prevent the levy of customs duties on ships built outside that part, or the grant of financial aid to shipping registered therein, or the regulation of its fisheries. In principle, legislation by any part is not to have extra-territorial application to ships registered in any other part without the consent of that part, but this rule again does not apply to regulation of the coasting trade, the sea fisheries,[1] or the fishing industry, and each part may apply its own standards as to safety of ships, their crews, and passengers to any ships trading to their ports, except in so far as the ship complies with regulations which that part deems equivalent to its own. The question of discipline is left chaotic; so far as the question is not covered by the ship's articles it is to be governed by the laws of the part in which the ship is registered, but this need not apply if the ship is engaged in the coasting trade of another part, or trades from a part of the Commonwealth where the principal

[1] Canada, by Act of 1929, c. 42, has taken wide power to restrict her fisheries to British ships registered in Canada and owned by Canadians, *i.e.* British subjects resident in Canada, or bodies incorporated therein.

place of business of her owners is situated but where she is not registered, and does not trade to the part where she is registered. It is clear that there may be considerable evasion of any control in this way. Shipping enquiries are to be conducted on a basis eliminating the former authority of the British Courts. On principle, no enquiry into a casualty is to be made save in the part where the ship is registered, but this does not apply when the casualty takes place on or near the coasts of another part of the Commonwealth, or while the ship is engaged in the coasting trade of such a part. The constitution of courts of enquiry and their procedure are to be similar to those provided for in Part VI. of the Merchant Shipping Act, 1894, and the Shipping Casualties and Appeals and Rehearings Rules, 1923, with the elimination of the former British control. Thus a rehearing can no longer be ordered by any administration save that of the part where the enquiry is held, and the appeal from its finding is restricted to a Dominion Court similar in constitution and jurisdiction to a Divisional Court of Admiralty in England; the cancellation or suspension of any certificate of competency or service granted to an officer by another part of the Commonwealth shall have effect only as regards the part in which the enquiry is held, though the other part may adopt it. Under the former system the Divisional Court in England could give a decision which would have effect in all parts of the Commonwealth.

Of great importance is the effort to secure that there shall remain operative a distinctively British shipping entered on a general registry. Hence it is agreed that no part of the Commonwealth shall register a ship

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therein with the intent that it shall be entitled to the recognition accorded to British ships unless it is owned wholly by persons who are (*a*) recognised by law throughout the Commonwealth as having the status of natural-born British subjects, or (*b*) naturalised under the law of some part of the Commonwealth, or (*c*) made denizens, or by corporate bodies established under the law of some part of the Commonwealth and having their principal place of business in the Commonwealth. Vessels so owned and registered will possess a common status, and a central registry will be maintained in England where particulars of all registered ships shall be kept, and periodically circulated to each part. Each part of the Commonwealth will determine the national flag to be borne by its registered shipping and will penalise the use by such ships of any flag or the assumption without due warrant of colours proper to a man-of-war. There will be common standards for certificates of officers, and inter-imperial recognition.

It is important to note that the obligation imposed by the agreement is modified. It is not in the nature of an agreement, violation of which gives a right of remonstrance and to demand redress if the terms are not carried out in full. The obligation on the governments is merely to propose legislation to give effect to the principles enumerated, and, if the legislature fails to accept the proposals, the government of the part concerned is not affected to the extent that it can be held to have failed to implement the agreement. The point is of crucial importance in the matter of sovereignty. While it is true that a conventional limitation on the exercise of power is no derogation from sovereignty in

the strict sense of the term,[1] the position of the Dominion Parliaments is left very strong. They can, if they think fit, use their newly granted freedom from the application of the Merchant Shipping Act, 1894, to legislate at pleasure regarding any and every ship which trades to their shores and so physically falls within the orbit of their jurisdiction. Any principles adopted are now a matter resting on their wills alone, and this marks the most important extension of power under the Statute. The Merchant Shipping Act, 1894, and its amendments can now freely be dealt with by the Dominion Parliaments as a result of their power under Section 2 of the Statute to repeal Imperial Acts. The Statute adds (Section 5) an immediate release without Dominion action from the rules laid down in Sections 735 and 736 of the Merchant Shipping Act, 1894, under which the bills of Dominion Parliaments dealing with their registered shipping and the coasting trade had in effect to be reserved for the approval of the British Government. Such measures will in future become operative immediately, and in addition the Dominions will be legally free from the restriction that they must accord to British ships engaged in the coasting trade equal treatment whether locally registered or registered in some other part of the Empire, though the moral restriction of the agreement will remain.

It is clear that indiscriminate action under the new powers may be fatal to the welfare of British shipping wherever registered, and Canadian authorities have

[1] Keith, *Journ. Comp. Leg.* xiii. 30; Permanent Court's judgement in the European Commission of the Danube case, *Publications*, Series B, No. 14, p. 36.

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already pressed for the adoption of the system that any deviations from existing law shall only be made after joint consultation and the attainment of common accord. One point of great importance has to be borne in mind. At present under the existing law, which will remain until altered by the Dominions, the enforcement of the Act takes place throughout the Empire, and is carried out by British Consuls and Naval Courts. Dominion legislation cannot impose duties on these authorities, so that co-operation will be necessary, if there are not to be serious defects in regard to the enforcement of regulations affecting ships registered in one part of the Commonwealth which trade in other parts and evade the jurisdiction of the part of registry.

While the parts of the Commonwealth signatory of the agreement do not include the territories dependent on the United Kingdom, it is clear under Article 27 that these parts are to share in the system, for they remain under the supreme legislative control of the Imperial Parliament.

(7) The abolition of territorial limitations and the doctrine of repugnancy again explains the removal of all restrictions on the powers of the Dominions to deal with Admiralty jurisdiction. The Colonial Courts of Admiralty Act, 1890, which conferred on colonial courts the jurisdiction exercised by the High Court in England, as then existing, required the approval of the King in Council for rules made by colonial courts of Admiralty, and the reservation or insertion of a suspending clause in colonial measures dealing with Admiralty jurisdiction. The limits of English Admiralty jurisdiction as existing in 1890 were extended in im-

portant particulars in 1920, but the Privy Council[1] held that the limits of 1890 still remained applicable to the Dominion courts, and left it uncertain whether these limits could be extended by Dominion legislation or by imperial legislation only. It was clear that the doubt could not be left unsolved, and the Statute, by authorising the repeal of Imperial Acts by the Dominions, enables any Dominion to legislate as it pleases. Moreover, by Section 6 it removes the necessity of reservation or the insertion of a suspending clause in Dominion legislation and the requirement of the approval of the King in Council for rules made by Dominion Courts. The sovereignty of the Dominions is thus asserted in a matter of the highest importance, and of international interest, for Admiralty jurisdiction affects vitally foreign as well as British shipping wherever registered.

In the field of Admiralty jurisdiction as of shipping generally there is clearly the utmost desirability of securing uniformity of action in change of law. Just as the Dominions have been urged to make effective the International Conventions reached in 1929–30 on the subject of Safety of Life at Sea and Loadlines, as Canada did in 1931, so they are invited to accept the Brussels Conventions on the Limitation of Shipowners' Liability and on Maritime Mortgages and Liens. It is plain that, if each part of the Empire acts in isolation, there must be serious discrepancy of results arrived at in shipping cases, and it is to be hoped that Dominion autonomy in legislation may evoke a hearty desire to co-operate with the other

[1] *The Yuri Maru, The Woron*, [1927] A.C. 906; Keith, *The Sovereignty of the British Dominions*, pp. 239-42.

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maritime nations in erecting a common law for the seas.

(8) The Colonial Laws Validity Act, 1865, in pursuance of its general tendency to recognise the rights of colonial legislatures, expressly provided (Section 5) that "every representative legislature shall, in respect to the colony under its jurisdiction, have, and be deemed at all times to have had, full power to make laws respecting the constitution, powers, and procedure of such legislature, provided that such laws shall have been passed in such manner and form as may from time to time be required by any Act of Parliament, Letters Patent, Order in Council, or colonial law for the time being in force in the said colony". The constituent power thus recognised is under Section 2 of the Statute no longer applicable to any law made by a Dominion Parliament, but any such Parliament may repeal any Imperial Act applicable to it. The result of this enactment might have been chaotic if it had stood absolutely, and it was from the first recognised that it could not be applied literally to the federations. The provinces of Canada feared lest they should be placed in the position that the British North America Acts, 1867 to 1930, could be altered by the Dominion Parliament alone, whereas prior to the Statute that Parliament had virtually no constituent powers, all alteration depending on Imperial Acts. The Statute, therefore, by Section 7 provides that nothing in it shall be deemed to apply to the repeal, amendment, or alteration of the British North America Acts. Moreover, to make assurance doubly sure, it is made clear that neither the federal nor the provincial legislatures are enabled by the Statute to legislate on

matters not under the constitution in their power already. In like manner Section 8 safeguards the position of the Constitution of the Commonwealth, and Section 9 (1) expressly forbids the Commonwealth to make laws on any matter within the authority of the States and not within the authority of the Commonwealth. The constitution of New Zealand is also safeguarded by Section 8, though in that case no federal issue arose. But the extent of power of change is at present disputed, and it was preferred to leave the matter without change. There is no safeguard for the constitutions of the Union or Newfoundland or the Irish Free State inserted in the Statute.

So far therefore as positive law is concerned, the chief derogation from sovereignty takes place in the case of Canada, and the lack of ability to amend the constitution by local action depends on the inability of the Canadian federation and provinces to agree on a mode of change. In this sense the limitation is self-imposed and therefore not a serious derogation from sovereignty. In the case of the Commonwealth power of change is vested locally, and the same remark applies to the other Dominions. It is another question how far this power extends to a termination of the bond of unity with the other parts of the Empire, and this will be considered later (Chapter IV.).

(9) From the outset it has been the practice for the King in Council to act as the final authority in matters of justice in the colonies. The power which originally rested on the prerogative, that is on common law, was made statutory under the Judicial Committee Acts of 1833 and 1844 under which the Judicial Committee of the Privy Council was created with the duty of

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advising the King in Council as to the decision to be taken on appeals from the colonies. From this right to admit appeals from colonial courts exceptions can be made only by imperial legislation; no such exception has been made in the case of Canada, and it has been ruled definitively that local legislation cannot take away the right.[1] In the case of the Commonwealth the right has been limited to require the assent of the High Court to an appeal being brought in any matter involving a question of the rights of the Commonwealth and a State or States, or of two or more States *inter se*, and the Parliament has been authorised to limit further the appeal, by reserved bill. In the Union right to limit is similarly given, but not in the case of New Zealand or Newfoundland. In the Irish Free State the question whether there is any power to abolish the appeal depends on the interpretation of the treaty of December 6, 1921; it is not now dependent on imperial legislation. Under the general power of alteration of Imperial Acts given by Section 2 of the Statute it is clear that the limitation of Dominion sovereignty in this regard is now reduced to negligible limits. Even Canada, which cannot amend its constitution, could abolish the appeal, though provincial objections preclude any early probability of such action, and in any case it could be really effective only by combined action by the provinces and the Dominion.[2] The appeal, therefore, can no longer be deemed to derogate from Dominion sovereignty.

(10) Since the advent of self-government the King has ceased to exercise on the advice of the British Government the prerogative of mercy to persons con-

[1] See below, Chapter XI.

[2] Keith, *Journ. Comp. Leg.* xiii. 251, 252; xiv. 108.

victed of crimes in colonial courts. The power has been delegated to the Governors-General and has normally been exercised by them on the advice of ministers. It is true that under a practice of long standing instructions are given to the Governor-General to use a personal discretion where the grant or withholding of a pardon might affect the interests of other parts of the Empire, but this instruction[1] has for many years remained a dead letter. In view of the local selection of Governors-General, it is clear that the responsibility for pardons now has passed into the hands of the local ministry, subject to the usual principles of responsible government affecting the relations of the Governor-General with the ministry. The Dominion Parliaments, of course, possess unfettered authority to limit or regulate as they think fit the exercise of this as of any other prerogative of the Crown applicable to Dominion conditions.

(11) A different issue is presented by the question of honours, the grant of which is an essential prerogative of the Crown. In part it has been avoided by the reluctance of certain Dominions, including Canada, the Union of South Africa, and the Irish Free State, to put forward recommendations for the bestowal of these marks of distinction, but the issue is still under discussion. The essential limitation on Dominion action is simple. It is due to the fact that in the past and at present honours have been granted which have imperial validity, for the royal prerogative to grant such distinctions has not been limited in the Dominions by any statute. Under these circumstances the British Government, by constitutional usage, must have a voice,

[1] Still renewed in Canada in 1931.

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and hence the rule that honours are bestowed on residents in the Dominions on the recommendation of the Dominion Governments and on the advice of the British Government. There is no derogation from sovereignty in this. On the other hand, it is open to the Dominion Parliaments to legislate to create local honours which might be bestowed on the request of ministers; nor would it be illegitimate for the Dominion ministry to advise the King to create by the prerogative a local order which he then could award on local advice solely. The Statute of Westminster by its grant of the widest legislative power enables the Dominion Parliaments if they please to negate the use or recognition of titles in their territories. Thus it is clearly open to Canada, if she so desires, to carry out the request long since vainly made to the British Parliament to legislate so as to bring to an end the validity of hereditary titles granted to certain Canadian residents on the death of the original holders. But the essential fact is that no element of subordination now exists in this matter.

(12) The Statute, as has been seen, removes for the future the essential restrictions on the validity of Dominion legislation. But, as was forcibly argued in the Irish Parliament during the discussion of the terms of the Statute, the mere fact that the Imperial Parliament can remove restrictions implies that it can at will reimpose them. There is in fact a fundamental difficulty which afforded no logical mode of solution. It was long ago felt by Bacon when he commented on the Act of Henry VII. to forbid the punishment by Act of Parliament of any person who assisted a King *de facto* and reckoned it more just than legal. "For a

supreme and absolute power cannot conclude itself, neither can that which is in nature revocable be made fixed; no more than if a man should appoint or declare by his will that, if he made any later will, it should be void. And for the case of the Act of Parliament, there is a notable precedent of it in King Henry the Eighth's time, who, doubting he might die in the minority of his son, provided an Act to pass, that no statute made during the minority of a King should bind him or his successors, except it were confirmed by the King under his Great Seal at his full age. But the first Act that passed in King Edward the Sixth's time was an Act of repeal of that former Act; at which time nevertheless the King was minor. But things that do not bind may satisfy for the time." In the case of Ireland in 1782 the mere repeal of the Statute of George I. declaring the legislative subordination of Ireland to the British Parliament was held insufficient by a section of Irish opinion, and the process of relaxation of supremacy was completed, as it was held, by the Act of 1783, which explicitly renounced the right to legislate for Ireland.[1] The assumption, however, of the Irish patriots was that the British Parliament never had had the right to legislate for Ireland and that this was an assumed power. No such possibility existed in the case of the Dominions, for the power to legislate for them was evidenced by their existence and their constitutions, and even in the case of the Irish Free State the Act of 1922 which confirmed the constitution of the State expressly reserved the right of legislation in such cases, as it was legitimate to legislate for the Dominions. It was impossible, therefore, to follow the Irish pre-

[1] Keith, *Const. Hist. of the First British Empire*, p. 381.

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cedent, and any attempt to do so would have been strongly objected to by the majority of the Dominions, including Canada, the Commonwealth, New Zealand, and Newfoundland.

The only method, therefore, of dealing with the issue was a constitutional convention, and this was expressed both in the preamble to the Statute and as a clause in the Statute itself. No doubt the clause may be regarded as invalid, since it purports to hamper the action of future Parliaments by providing that "No Act of Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to a Dominion as part of the law of that Dominion, unless it is expressly declared in that Act that that Dominion has requested, and consented to, the enactment thereof". Unquestionably in strict law, if a subsequent Act of Parliament applied *nominatim* to any Dominion, the omission of the requisite statement of concurrence would be unavailing to prevent it applying to the Dominion. But that is irrelevant. Constitutional conventions are a vital part of the constitutions of the United Kingdom and the Dominions alike, and the possibility of violation of the principle laid down may be regarded as negligible. Moreover, the statutory enactment has a certain limited value as a rule for the construction of statutes, excluding efforts to show that statutes should be understood to have application to the Dominions.

The power given to the Dominions in the section is vaguely expressed, and very properly the Commonwealth Government demanded that the power to be given should be exercised not by the Government of the Commonwealth alone, but by the Government and

the Parliament. It is true that it is hardly probable that any Dominion Government would act in the matter without the assent of its Parliament, but the power to act remains, and it is clear that, whatever the views of the Parliament, an Imperial Act might be made to apply to a Dominion on the request of the Government of the day. It must, however, be noted that there is no compulsion on the British Parliament to act on a mere request from a Government, and that in all probability no Act would be passed save with the assent of the Dominion Parliament. Moreover, any Act so passed can, of course, be varied or repealed by the Dominion Parliament in virtue of the powers granted by Section 2 of the Statute. It cannot, however, be said that this is a complete protection to a Dominion against unwise action by a Government, for the process of legislation is often difficult and lengthy, and, even if the lower house of the Parliament were opposed to the work of a Government, it might be unable to secure repeal through the opposition of the upper house. In view of this fact, the action of the Commonwealth in safeguarding the powers of the Parliament appears to be definitely more satisfactory than the acceptance by the other Dominions of the right of the Government to act. The wording of the clause is curious in demanding both a request and a consent to imperial legislation, but it is clearly not proposed that there should be two stages of the procedure; legislation is to be based on prior intimation of Dominion desire, and not to be brought forward without such intimation.

The necessity of the retention of the power is clear in the case of Canada, whose constitution cannot be

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altered by a Dominion Act, and it is convenient in other cases also. It might be resorted to for legislation on such vital topics as allegiance or prize law, but the attitude of such Dominions as the Union and the Irish Free State negatives any early likelihood of the employment of imperial legislation in any such case, its place being taken by legislation in each part of the Commonwealth. The difficulties of securing effective unity of legislation in such cases is obvious, but on the other hand, this mode of action has the advantage of stressing the distinct sovereignty of the Dominions. There mere existence of the power, no doubt, is of importance as a factor in the judgement to be formed on the character of inter-imperial relations, an issue to be considered below (Chapter IV.).

(13) The essential purpose of the Statute is to deal with the position of the six Dominions, Newfoundland being treated for internal purposes exactly on the same footing as the other Dominions. The relations between the United Kingdom and the States of Australia and the provinces of Canada are in the main untouched by the Act, nor do the other concessions as to the position of the representative of the Crown, and, in the case of the States, the power of reservation and disallowance apply to them. It would have been impossible for the Imperial Conferences to take account of these issues, for at them the States were not represented, and still less the provinces, which never enter into direct relations with the British Government. But the Statute, as has been seen, is careful to secure the States and the provinces alike against any interference with their position as the result of the Statute. Moreover, unexpectedly at the request of Canada, a concession was made to the

provinces by relieving them, in the case of legislation within the ambit of their powers, from the fetters of the Colonial Laws Validity Act, 1865, though practically the issue is of minor consequence, for imperial legislation on the matters within provincial competence is minimal in quantity. In the case of the States a further issue was raised regarding the effect of the rule that no imperial legislation should apply to a Dominion unless the Dominion had requested and consented to the Act. It was feared that this provision might be read to interfere with the right of the Imperial Parliament to legislate on matters within the power of the States without the assent of the Commonwealth Government and Parliament, such as the questions covered by the Fugitive Offenders Act, 1881, and the Territorial Waters Jurisdiction Act, 1878. It is therefore provided by the Statute, Section 9 (2), that "Nothing in this Act shall be deemed to require the concurrence of the Parliament or Government of the Commonwealth of Australia in any law made by the Parliament of the United Kingdom with respect to any matter within the authority of the States of Australia, not being a matter within the authority of the Parliament or Government of the Commonwealth of Australia, in any case where it would have been in accordance with the constitutional practice existing before the commencement of this Act that the Parliament of the United Kingdom should make that law without such concurrence". The failure to ascribe extra-territorial power to the States is important, for, as they control criminal law, the extension of power—if it does not already exist—would be of special value; but in the case of the provinces the withholding of such authority

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is essential, for the whole plan of the Canadian constitution rests on the restriction of the provinces to legislation of a local character, and an alteration of this fact would have meant a serious change in the framework of the constitution, for which no request had been expressed by the Dominion or the provinces themselves.

CHAPTER III

THE EXTERNAL SOVEREIGNTY OF THE DOMINIONS

In the field of external relations the Empire continued to present a marked appearance of unity long after the development of an almost complete autonomy in local affairs. The distinctive character of lack of the treaty power was early recognised in the colonies. A Royal Commission on Federation in Victoria in 1870 adumbrated a scheme under which the colonies might be accorded distinct rank as separate states under the British Crown by the concession of the treaty power, and if possible with recognition by the European powers of their neutrality. In Canada in 1882, 1889, 1892, and at other times the suggestion that the power should be conceded was mooted but never pressed by any government. Though Canada in special attained the power to negotiate treaties of commerce for her own interests, either with the aid of British diplomats as in the case of the treaty with France secured by Sir C. Tupper in 1893, or without such aid as in the case of the treaty of 1907, the treaties arrived at were not merely signed also by British representatives, but the Canadian representatives were formally exactly in the position of British representatives; they were granted full powers to sign by the King on the advice of the Secretary of State for Foreign Affairs, and the treaty

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was ratified by the King on like advice. The full powers and the instruments of ratification were signed by the sovereign on the authority of sign manual warrants countersigned by the Foreign Secretary, so that the responsibility of British ministers was complete.

The first breach in this unity was occasioned before the war by the necessities of two conferences on commercial issues, that on Radiotelegraphy in 1912 and that on the Safety of Life at Sea in 1913–14. These were diplomatic conferences at which a formal treaty was to be evolved, and it was desired that the great Dominions should be recognised as distinct members of the organisations in question. Hence for the first time separate full powers were issued; the British delegates had full powers in the old general form, without mention of any territory for which they were to act; the Dominion plenipotentiaries were to act in respect each of a special Dominion. But the unity of the issue of the full powers and of ratification on the final responsibility of the British ministry remained.

The Peace Conference resulted in the adaptation of the procedure to the signature and ratification of the treaties of peace, the British delegates being given full powers without limitation, the Dominion delegates powers for the Dominions. It must be noted that Sir R. Borden[1] had desired that the British delegates should be restricted in the area for which they signed to the parts of the Empire not separately represented, namely, Canada, Australia, New Zealand, the Union, and India, but this proposal was not acted upon by the British Government. At the same time during the

[1] Keith, *Speeches and Documents on the British Dominions, 1918–1931*, pp. 15, 16.

Peace Conference the Dominions were not merely granted distinct representation on the same scale as that accorded to the minor powers, but they were permitted to share in the deliberations of the British delegation and to act upon it on the system of rotation, thus preserving unity with distinction of parts within the Empire. In the same way the League of Nations Covenant accorded to the British Empire membership of the League with a permanent seat on the Council, but it also permitted the Dominions and India to become members, and it was formally placed on record that the Dominions were to be regarded as eligible for membership of the Council in the same way as other members of the League. At the time no doubt the prospect of such election of a Dominion may have seemed remote, but the increase in the number of members of the Council facilitated the election of Canada to a three years' term in 1927, and in 1930 the Irish Free State succeeded to the vacancy arising from the expiry of the Canadian tenure of membership.

It is clear that the Dominions thus obtained for all League purposes a definite position as, for these matters at least, States of International Law. The fact was emphasised by the procedure followed from the first by the Dominions. Their delegates to the League Assembly, as later their representatives on the Council, were accredited not by the King on the advice of the British Government, but by the Governor-General of each Dominion on the advice of the Dominion Government. Nor did the representatives of the Dominions accept any obligation even to consult the British representatives; from the first they felt entitled to vote against proposals accepted by the British Government,

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and Canada[1] endeavoured resolutely if not with entire success to reduce to the minimum the obligation, imposed by Article 10 of the Covenant, for members of the League to respect and preserve as against external aggression the territorial integrity and existing political independence of all members of the League. Canada in like manner sharply refused to concur in any action of the League tending to assume control of the distribution of raw materials among the members of that body. Similarly the election of Canada to a seat on the Council in 1927 was probably helped by the interest expressed by the Canadian representative in the Assembly on September 12, 1927, in the question of minority rights, and his repudiation of the negative attitude of the British Government towards arbitration and the optional clause of the Statute of the Court of International Justice. It is significant also that the conventions arranged under the Labour section of the treaties of peace have been ratified not by the King but by Order in Council of the Dominion Governments. It is clearly impossible to deny that these facts are inconsistent with the denial of a certain international personality to the Dominions.

More difficulty attaches to the question of the position of the Dominions in matters not controlled by the League and governed by League procedure. Under the auspices of the League important international conferences have been regularly held, and on these occasions the Dominions have been duly represented for purposes of signature by plenipotentiaries holding full powers from the King, and ratification has been expressed in the usual form by the King. This follows

[1] Keith, *Hist. of Peace Conference*, vi. 349, 350.

the precedent of the Peace Conference of 1919. The necessity of such a form of procedure was stressed by the Union of South Africa in 1921, when the United States Government did not send any special invitations to the Dominions to be represented at the Disarmament Conference to be held at Washington. The result of General Smuts' protests was that the formal signature was carried out on the model of the Peace Conference and ratification was expressed in like manner. But the Conference raised one point of great significance. It was made clear that in matters of the type of disarmament, while the Dominions might be separately represented, there must ultimately be unanimity in signature or ratification. Clearly other powers could not deal with parts only of the Empire in questions of this type, however easy it might be in commercial matters to permit the making of compacts affecting only certain parts of the Empire.

In 1923 Canada carried matters somewhat further by securing the signature by a Canadian representative alone of the Halibut Fishery treaty with the United States. Though originally it was thought by the Senate of the United States that the treaty was intended to apply to the whole of the Empire, this view was later recognised to be inaccurate, and the Senate approved the ratification of the treaty. The Imperial Conference of 1923 approved the procedure adopted by enunciating the doctrine that, where one part only of the Empire was concerned, signature should be by a representative of that part, and that ratification should be expressed on the request of that part.

A more serious issue remained, that of the power of the British Crown to conclude and ratify treaties, by

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the instrumentality of British representatives only, which might affect the Dominions. A crucial instance was the conclusion in 1923 and ratification of the treaty of Lausanne, for Canada, which had not been invited to be separately represented at the Conference of Lausanne, declined to hold that it was bound by the treaty arrived at in the same sense as it was bound by treaties concluded through its own spokesmen. Mr. Mackenzie King admitted that the signature and ratification had effect and applied to Canada, thus terminating the war, but he maintained that Canada remained free to decide, in the event of any effort being made by Turkey to disregard the treaty, to what extent Canada should render aid. This incident called prominently attention to the necessity that any Dominion should take part in the negotiation of any treaty by which obligations were to be imposed upon it,[1] and the Imperial Conference of 1926 definitely disposed of the issue. The suggestion of Sir R. Borden in 1919 was revived. The Crown in future was to appoint plenipotentiaries in such a manner as to make it clear what parts of the Empire would be bound by their signature and by ratification, so that a treaty would no longer be capable of interpretation as binding parts of the Empire which were not represented at the signature thereof. The Dominions might of course entrust their interests to the British plenipotentiaries, but in that case the latter would be empowered to sign expressly for the Dominions concerned.

It will be seen that this procedure, which has been

[1] Canada in the *I'm Alone Case* (1929), *Can. Bar Review*, vii. 407-10, admitted the binding force of the treaty of January 23, 1924, with the United States, though it was not signed for Canada. But the Imperial Conference of 1923 had approved the doctrine.

rigidly adhered to since the Conference, emphasises in the highest degree the separate character of the Dominions, and gives them in effect the status of distinct States of International Law. It is, however, true that, under the procedure then contemplated and followed in general, the full powers and the instruments of ratification are still issued with the King's signature affixed on the strength of a warrant countersigned by the British Foreign Secretary. No doubt this formal intervention was a matter of substantial formal importance, and interposed objection to conceding the claim of a distinct sovereignty for the Dominions. But the further step was taken in 1931 by the Irish Free State of freeing itself from the necessity of the intervention of a British Minister, direct access to the King being secured, and the employment of British seals being eliminated. The Minister for External Affairs visited the King on March 19, 1931, and secured approval of a new procedure. The official explanation of the action taken stressed the fact that misunderstanding of the status of the Free State arose abroad from the fact that advice in external affairs to the Crown continued to be tendered through the Secretary of State for Dominion Affairs, and that the full powers and instruments of ratification were sealed by the Great Seal of the Realm, a purely British seal. It was accordingly arranged that advice should be communicated direct by the Irish Government to the King, and that documents issued on that advice should be sealed with the special Seal of Ireland, to be struck, kept, and controlled in the Irish Free State. The vital importance of this arrangement[1] was well understood in Ireland,

[1] Keith, *Journ. Comp. Leg.* xiv. 109, 110.

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where it was hailed as marking the definite emergence of a Kingdom of Ireland as a distinct international unit, though no information on the question was given to the British Parliament, which remained long wholly unaware of the vital character of the change to which the Government had assented. What has been done by the Irish Free State can of course be done by every Dominion, and it is hardly possible to deny that the power to make treaties entirely uncontrolled by the British Government in any direct manner accords to the Dominions the right to claim international status as distinct states. Even when the Great Seal of the Realm is still used, the use is obviously now subject definitely to Dominion control, and it would be unreasonable to regard its employment as any proof of inferiority of status.

A similar conclusion can be drawn from the development of the system of Dominion representation in foreign countries. In the original proposal accepted for Canada in 1920 stress was laid on the unity of the British Empire, and it was contemplated that the Canadian Minister at Washington would act as head of the British Embassy during the absence of the Ambassador. When this proposal was made actual in the case of the Irish Free State in 1924, the latter suggestion was dropped; it would have been strongly objected to by the other Dominions, nor would it have been acceptable to the Free State, which had no desire to be identified with the British Government. It was then made clear that the Irish Minister would take charge of all affairs relating only to the Irish Free State, but matters which were of imperial concern or affected other Dominions in common with the Irish Free State

would continue to be handled by the British Embassy. A further recognition of the autonomy of the Free State and its equality with the United Kingdom is shown by the terms of the proposal for Irish representation made to Germany in 1929. The Irish envoy is not restricted to matters relating only to the Irish Free State, but will deal with any matters relating to it. "The arrangements proposed would not denote any departure from the principle of the diplomatic unity of the British Empire, that is to say, the principle of consultative co-operation amongst all His Majesty's representatives, as amongst His Majesty's Governments themselves, in matters of common concern. The method of dealing with matters which may arise concerning more than one of His Majesty's Governments would, therefore, be settled by consultation between the representatives of His Majesty's Governments concerned." The same year saw an illustration of the procedure in the taking up by Canada through her Minister at Washington of the issue of the sinking of the vessel *I'm Alone* by United States officers.

It is clear that the position of Dominion Ministers to foreign powers is independent of control by the British Government or the British representative to the power concerned in any case. Formally indeed that fact has been obscured by the practice which has existed under which the letter of credence has been signed by the King on the advice of a British Minister, and treaty-making by envoys has been controlled by instruments issued on such formal advice. In the case of the Free State all dubiety has been removed by the elimination of any British intervention. No British seal is now used to seal the envelope containing the letter of credence

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signed by the sovereign, a special Irish seal having been prepared in lieu. While, therefore, it may be convenient for the initial approval by a foreign power of the creation of a Dominion legation to be secured through action by the British Government, all further action lies entirely with the Dominion Government concerned if it so desires. The matter is even simpler in the case of the reception of foreign envoys; they are accredited to the King, but necessarily from the first they have presented their credentials to the representative of the King at the capital of the Dominion concerned.

The Irish Free State has carried progress into the sphere of the exequaturs of consuls. It was agreed by the Imperial Conference of 1926 that such exequaturs for foreign consuls should be countersigned, not by the Foreign Secretary, but by a Dominion Minister, and now the Irish Signet Seal, a new production, is used for the sealing of such exequaturs, eliminating any trace of British intervention.

There is other evidence of the distinct character internationally of the Dominions. In 1924 the British Labour Government, without consultation with the Dominions, recognised the Soviet Government of the U.S.S.R. and accepted a diplomatic agent from that Government. It is clear that the British Government intended to act for the whole of the Empire, as was recognised in August 1924 by the Prime Minister of the Commonwealth, who had been assured that there would be no repetition of action without consultation. In Canada the view taken by Mr. Mackenzie King was that recognition by Canada was also necessary; it was accorded in March 24, and a trade delegation was then received. Similarly, when in May 1927 the British

Government terminated relations with Russia, and the Soviet mission was withdrawn, Canada acted separately and secured the withdrawal of the trade delegation. When again in 1929 the British Labour Government renewed relations with the U.S.S.R., the Dominions remained aloof, and Canada would not accept the suggestion of the reception of any trade delegation. Instead it was made clear that the British action did not in any way affect the attitude of Canada, and it is significant that the Russian Government adopted the same position, suggesting that, following on British recognition of the resumption of relations, further arrangements should be made with the Dominions.[1] So in 1931 recognition of the Spanish Republic was decided upon by the common agreement of the Dominions and the United Kingdom.

The distinct character of the Dominions is again revealed in their right to appoint consuls of their own, as the Irish Free State has done in the case of the United States and France and the Union in the case of Mozambique. These officers are under their sole control, and it rests with their Governments to recall them. Similarly it seems that during the period (1929–32) of strained relations between the British Government and the Vatican over the question of clerical intervention in Maltese politics, it was recognised that, even if the British Government decided to sever diplomatic relations with the Vatican, there would be no possibility of that Government recalling the Irish Free State Minister there, who would remain under Irish control. It has indeed been suggested with plausibility that the British Government may have weighed this considera-

[1] Keith, *Journ. Comp. Leg.* xii. 98, 99.

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tion among others in determining against the policy of terminating relations, though it is on many grounds unlikely that in any event so serious a step would have been taken. Sufficient effect was given to British disapproval by the decision to leave the legation in the hands of a *chargé d'affaires* pending a satisfactory settlement of the issue.

In the face of this mass of evidence of distinctive character, there may be cited as negativing the claim of sovereignty in external matters the fact that the Dominions are probably, as will be seen below (Chapter IV.), not in a position to declare war or make peace or adopt an attitude of neutrality as distinct members of the Commonwealth. Accepting, however, this view, the facts still show that for many important purposes, including the right of legation and of treaty-making, the Dominions are distinct units or States from the point of view of international law. What may be added fairly is that the character of inter-imperial relations is complex and that the type of State represented by the Dominions does not conform absolutely to any type hitherto recognised, but that is no adequate ground for denying international personality or State character. It renders it easy, however, to understand how many different efforts have been made to define in the normal terms of political science the character of the Empire from the international standpoint. Irish opinion would treat it as a personal union,[1] which is clearly inadequate. But to call it a real union[2] necessitates the admission

[1] Smiddy, *Great Britain and the Dominions*, p. 115. Contrast Hurst, *ibid.* p. 54. See M. Rynne, *Die völkerrechtliche Stellung Irlands* (1930); Ewart, *Can. Bar Review*, x. 121.

[2] *Handbuch des Völkerrechts*, ii. 4, 817. Cf. Heck, *Der Aufbau des britischen Reiches* (1927), p. 17.

that it lacks essential features of that type of State. The term confederation (*Staatenbund*) is more popular,[1] and at least recognises that it is not a federation, as suggested by the fact of the pre-eminence in law of the British Parliament. But it lacks the normal sign of such a body, a system of treaty relations *inter se* between the States making up the confederation. Others, stressing the autonomy of the parts, reduce it to an *entente*, or, on the analogy of the League of Nations, to a League of sovereign States of British race.[2] The fact remains that the system of a Commonwealth is too complex to suit any ordinary phraseology; the relations between the parts of the Empire rest on conventions of a constitutional character, not on international law, and the whole Empire and the several autonomous parts have distinctive parts to play in the international sphere.[3]

[1] Hatschek, *Völkerrecht*, p. 41; Berber, *Die Rechtsbeziehungen der britischen Dominien zum Mutterlande* (1929), p. 99; Baty, *Journ. Comp. Leg.* xii. 163.

[2] Löwenstein, *Archiv des öffentlichen Rechts*, xii. 255 ff.

[3] H. Walter, *Die Stellung der Dominien im Verfassungssystem des britischen Reiches im Jahre 1931*, pp. 98, 99; Wheaton, *International Law* (ed. Keith), i. 129-33.

CHAPTER IV

THE CHARACTER OF INTER-IMPERIAL RELATIONS

As against the evidence adduced in Chapter III. tending to emphasise the distinct character and sovereignty of the Dominions, there must be set certain facts which to some extent modify that character. The King often appears to act distinctly and separately for each Dominion on the advice of the Dominion Government, but there remain certain issues on which the Dominions and the United Kingdom are in agreement to act jointly.

(1) The United Kingdom and the Dominions recognise the same sovereign, and the fact is solemnly recorded in the preamble to the Statute of Westminster in accordance with the decision of the Imperial Conference of 1930: "It is meet and proper to set out by way of preamble to this Act that, inasmuch as the Crown is the symbol of the free association of the members of the British Commonwealth of Nations, and as they are united by a common allegiance to the Crown, it would be in accord with the established constitutional position of all the members of the Commonwealth in relation to one another that any alteration in the law touching the succession to the throne or the royal style and titles shall hereafter require the assent as well of the Parliaments of all the Dominions as of

the Parliament of the United Kingdom". The declaration solemnly asserts that any change in the succession must be made by common action, and it is inevitable that the conclusion should thence be derived that the union of the parts of the Commonwealth is one which cannot be dissolved by unilateral action. This was the sense given to the proposed clause when it was accepted by the Conference of 1929 by General Smuts,[1] who naturally insisted that the intention of the preamble was to negative the idea of the right of any part of the Commonwealth to sever itself from the rest, save as the result of common assent. Obvious and indeed unavoidable as this interpretation is, it was necessarily repudiated by General Hertzog, when his attention was called to the fact that the agreement of 1929 seemed deliberately to negate his favourite theory of the right of secession. He obtained, therefore, from the Houses of Parliament a rider to the resolutions accepting the report of 1929 to the effect that acceptance of the clause in question did not affect the right of any Dominion to secede, and he announced his intention of securing from the Imperial Conference of 1930 formal endorsement of this doctrine. The reports of the proceedings of the Conference are silent on this head; it would indeed have been utterly impossible for the British Government or the Governments of any of the Dominions without the prior approval of their Parliaments to homologate in any form the doctrine of the right of secession, and a certain ludicrous side of the contention was illustrated by the *bon mot* of the Secretary of State for Dominion Affairs who assured the press that no one doubted the right of a Dominion

[1] Keith, *Journ. Comp. Leg.* xii. 281, 282.

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to secede any more than one could doubt the right of a man to cut his own throat. The Conference, it seems from General Hertzog's guarded and vague assertion on his return from it to the Union, noted his contention; it could hardly do less. What is obvious and is never denied is that, if any Dominion should really decide to sever itself from the Empire, it would not be held proper by the other parts of the Empire to seek to prevent it from doing so by the application of armed force. This is a doctrine which was recognised as early as 1920 by Mr. Bonar Law, and has often been admitted since. Most recently it was made clear in the discussions of the attitude of the Irish Free State in the matter of the oath and the withholding of the land annuities and other payments due to the British Government that, if the Free State should determine to declare itself a republic, the British Government would not make war to prevent such a result. But that view, of course, has nothing to do with the legal aspect of the case.

From the legal point of view the matter is simple enough. The Dominions were created as organised governments under the British Crown, and there is no provision in their constitutions which contemplates that they have the right to eliminate the Crown, or to sever their connection with it. The language of the British North America Act, 1867, is emphatic; the Act was passed to unite the provinces in a federal union under the Crown of the United Kingdom. The Commonwealth of Australia Constitution Act, 1900, is based, as the preamble states, on the agreement of the people of the colonies of Australia to unite in one indissoluble federal Commonwealth under the Crown of the United Kingdom. The South Africa Act, 1909, was passed in

order to unite the colonies in a legislative union under the Crown of the United Kingdom. The Irish Free State was created by an agreement which assigns to it the same place in the Empire as is enjoyed by Canada, and the Constitution Act, 1852, of New Zealand and the Letters Patent of 1876 giving constitutional government to Newfoundland are clearly ineffective to confer on these Dominions any power to eliminate the connection with the Crown, apart from the absurdity of these Dominions being thought capable of desiring such a result. It is not surprising that in face of these facts General Smuts has consistently maintained that even the King himself could not with due regard to his duty assent to a measure of a Dominion Parliament purporting to destroy the connection with the Crown, and that still less could the Governor-General exercise the power. It is indeed not seriously open to dispute that to effect separation there would in law be necessary an imperial as well as a Dominion measure, and that under the principle enunciated by the Statute of Westminster the concurrence of the other Dominions would also be requisite.

It is clear that this element of indissolubility confers on the connection of parts a distinctive character. It makes the relation very different from the mere personal union between the United Kingdom and Hanover, where the connection could be and was broken as a result of the different laws of descent of the Crowns of the two territories, when Queen Victoria succeeded to the throne in 1837. It is of interest that the compromise offered in 1921 by Mr. De Valera, as a substitute for full membership of the Empire on the part of Ireland, nevertheless contemplated a measure of recognition of

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the King as head of the several parts of the territories with which Ireland would be associated.

(2) Closely connected with the question of the common Crown is that of common allegiance. The issue might rest, of course, on the old decision in *Calvin's Case*,[1] after the union of the Crowns of England and Scotland in the person of James I., that persons born in Scotland after the union were natural-born English subjects, despite the absolutely distinct character of the two kingdoms. The same doctrine was applied during the period of the union of the Crown of England with the Electorate of Hanover. Even were each of the Dominions to be regarded as an absolutely distinct Kingdom, the subjects of the King therein would on that doctrine be subjects in the United Kingdom. Historically, of course, the position is simpler. The nationality of persons in the Dominions has rested on the doctrines of the English common law which have been applied to the Dominions, whether acquired by settlement or by conquest, as in the case of part of Canada and the Union of South Africa. The growth of the Dominions towards sovereignty has, however, inevitably produced the tendency to distinguish by legislation from among the wide class of British subjects specific types of Dominion nationals, a step first taken by Canada, and since adopted by the Irish Free State and the Union, and the Imperial Conference of 1930 felt it necessary to consider the issues thence arising when it was determined to accord by the Statute of Westminster power to the Dominions to repeal even the British Nationality and Status of Aliens Act, 1914,

[1] Dicey and Keith, *Conflict of Laws* (5th ed.), p. 144; *Isaacson* v. *Durant* (1886), 17 Q.B.D. 54.

which defines what persons shall be deemed natural-born British subjects. The Act was intended to have imperial validity, and doubtless that was its true effect, so that prior to the Statute of Westminster it was not possible for any Dominion to vary this essential definition.

The Conference emphasised the importance of maintaining the existence of a common status to facilitate intercourse and the granting of mutual privileges, and recommended that, if any changes were desired in the existing requirements for the common status, provision should be made for the maintenance of the common status, and the changes should only be introduced, in accordance with the existing practice, after consultation and agreement among the several members of the Commonwealth. It recognised that it was for each member of the Commonwealth to define for itself its own nationals, but so far as possible those nationals should be persons possessing the common status, though it was recognised that local conditions or other special circumstances might from time to time necessitate divergencies from the general principle. The possession of the common status in virtue of the law for the time being in force in any part of the Commonwealth should carry with it the recognition of that status by the law of every other part of the Commonwealth. It must be admitted that the principles thus enunciated are not easy to understand with precision. The essential point, in the view of Mr. McGilligan,[1] speaking for the Irish Free State, is that there is no Commonwealth nationality based upon a

[1] Keith, *Speeches and Documents on the British Dominions, 1918–1931*, p. 241.

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single law; there is "not a single Commonwealth nationality at all, or even a dual nationality. The Irish Free State national will be that and nothing else so far as his nationality is concerned. His own nationality law will rule him, and his own State, through its representatives abroad, will protect him. The treaty benefits of our treaties with other countries will accrue to him by virtue of his Irish nationality. And the recognition of his Irish nationality will be Commonwealth-wide and world-wide." In accordance with this doctrine, in the issue of passports to its citizens the Irish Free State is careful to avoid describing them as British subjects, with the result that up to 1930 British consuls abroad were not in a position to take measures in their interests; the form later adopted describes the bearer as "a citizen of the Irish Free State and of the British Commonwealth of Nations", and British consuls can recognise this as a sufficient authority for action.

The essential fact, evidently, is that the Dominions and the United Kingdom have definitely agreed to maintain a common status, so that there will be more than a mere formal union such as might exist between two countries, both of which had the same sovereign, but neither of which recognised that the subjects of the King in the one shared a common status with the subjects of the King in the other.

(3) A further element of unity lies in the deliberate retention by the Imperial Parliament of its absolute sovereignty, attested in the enactment of the Statute of Westminster which no Dominion can alter, and in the declaration by Section 4 of its continued right to legislate for any Dominion with its consent. This con-

stitutes a unique feature of the constitution and attests an intimacy of relation which far exceeds that of a mere personal union. The importance of the power of legislation, however, is not confined to this aspect alone. The fact that the doctrine of a common status exists has also effects on the operation of British legislation. The British Parliament has defined British subjects, and over such subjects when in countries in which the Crown exercises extra-territorial jurisdiction it gives control to British diplomatic and consular officers. Thus Irish citizens who fall within the definition of British subject in the British legislation are in Egypt, China, Ethiopia, Muscat, Morocco, etc., subject to the legislative and jurisdictional control of British officials. It is obvious that the foreign powers which have conceded such jurisdiction to the British Crown neither could nor would be expected to recognise that each Dominion had the right to exercise these rights over its own nationals, nor would the Dominions be prepared to undertake the burden of the necessary action. The only alternative, therefore, would be to leave Dominion nationals under local control, which could not be contemplated so long as circumstances were such as to render it necessary for the British Government to insist on its extra-territorial rights. Suppose, however, that in pursuance of the declared intention of Mr. De Valera to secure the establishment of an Irish Republic, the Irish legislature used its undoubted power since the Statute of Westminster to declare that Irish nationals were not British subjects, in violation of the understanding reached at the Imperial Conference of 1930. It might be claimed that, as Irish legislation under the same Statute has extra-

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territorial competency, the right of the British Government to exercise jurisdiction in such cases would fall to the ground. The answer obviously is that the right of the British Government depends on British legislation which is extra-territorially operative, and that the Statute by Section 2 gives the Irish legislature no right to repeal British legislation save in so far as it is part of the law of the Free State. It remains, therefore, for the British Parliament to decide at its discretion what persons it shall deem to be British subjects when outside the limits of the Dominions, and any restrictions which it may decide upon must rest upon agreement and British legislation, not on Dominion authority.

These considerations answer a problem discussed during the conflict with Mr. De Valera over the proposed abolition of the oath taken by members of the Irish legislature. It was then suggested that, if the Free State declared itself a republic, Irish citizens would automatically cease in the rest of the Empire to be British subjects and would become aliens. It is clear that this is a misunderstanding. The bond of allegiance[1] for those Irish citizens who remained in the revolting territory would doubtless by extra-legal action be severed, but nothing save British legislation could deprive Irish citizens not resident in Ireland of their status as British subjects. This fact is one more reason for holding that secession of any part of the Empire would only be possible by the consent of the British Parliament expressed in legislation. That armed force would not be used to prevent the secession of the Free

[1] Allegiance, of course, depends in no way on the taking of the oath under the Free State Constitution. See Keith, *The Scotsman*, June 14, 1932, accepted by Sir S. Cripps, *Parl. Deb.* cclxvii. 668, and Sir T. Inskip at Stranraer, August 4, 1932.

State is one thing, that British subjects should be relieved of their allegiance when outside the State is another.

It must be remembered also that the theoretic paramount power of the King in Parliament in the United Kingdom has at present a vital meaning for Canada, which must resort to that authority for any change in the federal pact. It is not inconceivable that at some time or other the Commonwealth of Australia might have to appeal to the same authority, especially if it is desired to remove the federal character of the constitution. Nor is there any widespread feeling in favour of the abolition of this paramount power in the Dominions. It may be disliked by certain spokesmen of French Canada, but it is highly approved by the majority of opinion in Quebec; it has been commended heartily by the present Prime Minister of the Dominion, and is regarded as of the highest value by the Attorney-General of the Commonwealth,[1] and never criticised in New Zealand or Newfoundland. Against these views can only be set the opposition of the Union of South Africa, largely Dutch in population and republican in sentiment, and the revolutionary movement in the Irish Free State, which aims at the unattainable ideal of an Irish Republic to include Northern Ireland.

(4) Even more important is the question of the position of the Crown and of the limits of freedom of action for the Dominions in external affairs. The view of the Irish Free State is simple; the one aim, Mr. McGilligan holds, of the Conferences of 1926–30 was to uproot the British Government from the system of the State, and in substitution for that there was

[1] *Australia and the British Commonwealth*, pp. 86-98.

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accepted the British monarch. "He is a King who functions entirely, so far as Irish affairs are concerned, at the will of the Irish Government," and "nobody has dared to say that at present the constitutional relationship between this country and the King is such that the King can deviate in the slightest way from the advice tendered to him on any and every point by the Government of this country". "The situation as accepted is that of a constitutional monarchy in which the monarch definitely obeys the will of the people, and if he ceases to obey, he ceases to be constitutionally monarch." This doctrine[1] he reinforced by insisting that for ten years there had been no instance of the King rejecting any advice tendered. In the same spirit during the King's long illness it was insisted by the Free State that the question of appointing persons to sign official documents for His Majesty should not have been determined by the British Government without consultation, and at its wish all Irish documents requiring the royal signature were signed only by the royal members among those empowered. Further, since 1931 the Free State has discarded entirely the use of the British Government as an intermediary between them and the King, and documents are submitted to the latter either through the High Commissioner in London or by the Irish Minister for External Affairs, the Private Secretary to the King arranging for interviews.

The privileges gained by the Free State are of course at the disposal of any other Dominion, and the normal rule that the King in any matter affecting a Dominion must act on the advice of that Dominion, whether

[1] Keith, *Speeches and Documents*, pp. 247, 248.

tendered direct or through the formal channel of the Secretary of State for Dominion or Foreign Affairs, is clearly enunciated by the Conference of 1926, and is not in dispute. But there are exceptional cases which arise normally in the sphere of external relations, though, as we have seen, there might arise the possibility of the King being advised to assent to a bill for the secession of part of the Empire, if that measure were reserved as beyond his competence by the Governor-General; and in theory he might be advised by the British Government to disallow a bill of this kind, if locally assented to, as *ultra vires*. The real practical problem is how far can the King act separately in international affairs without reaching a point where such action would be inconsistent with the unity which he symbolises. Could he declare war for one part of the Empire without involving the rest, or, putting it more concretely, could he declare war for the United Kingdom and at the same time declare neutral one or more of his Dominions, acting on the advice of the respective Governments?

The right of a Dominion to remain neutral in a war declared by the King on the advice of British ministers is asserted by General Hertzog,[1] though, it is fair to admit, he does not appear ever to have mastered clearly what would be involved in neutrality, including the closing of ports in the Union to British war vessels. In this issue the position of the Irish Free State is rendered difficult by the terms of the treaty of 1921. Naturally it would incline to support the contention of the Union, but the terms of that treaty require it

[1] Keith, *The Sovereignty of the British Dominions*, pp. 467-9. Contrast Latham, *Australia and the British Commonwealth*, p. 29.

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to afford to the Imperial forces certain harbour and other facilities in time of peace, and—what is vital—"in time of war or of strained relations with a foreign power such harbour and other facilities as the British Government may require" for the purpose of coastal defence of Ireland (Article 7). As Mr. De Valera has admitted, the carrying out of this absolute obligation would render an effort of the Free State to declare its neutrality, even if the King were willing to act, meaningless, for no foreign power would be ready to admit the legal right to neutrality of a country which thus afforded facilities to its enemy. The most serious argument against the idea of possible neutrality rests on the common status of subjects of the King and on the personal action of the King. War, it must be taken for granted under the Kellogg Pact of 1928, as well as under the League Covenant, would only be declared by the Crown in a matter of the utmost importance for the safety of the United Kingdom or some part of the Empire, or of some territory whose protection was deemed vital to self-defence, as explained by Sir A. Chamberlain to Mr. Kellogg in connection with the Pact. For the King acting in a vital issue of this sort to dissociate himself at the same time from the action in respect of a Dominion would demand an attitude of mind which it would be difficult to expect or desire, and, if the Dominion pressed the issue, it might be necessary to accept its secession. It must be remembered that, if the British declaration were based on a duty under Article 16 of the League Covenant or otherwise, the refusal of the Dominion to participate would be gravely improper and the King could not properly be asked to homologate it. Moreover, there are strong

reasons which render the possibility of any Dominion desiring to maintain neutrality minimal. The Dominions have never been under any obligation to participate actively in a British war in which they were not themselves attacked or menaced with attack by the enemy. A British declaration of war has indeed most important effects as regards the position of enemy aliens in their territories, and it imposes on them certain restrictions on trade with the enemy and treatment of enemy shipping in their ports. But normally all that a dissenting Dominion need desire would be passive belligerency, such as has been the case in the past in the minor British wars, such as that of 1919 with Afghanistan.

It has, however, been argued that the reluctance of one Dominion to agree to a declaration of war should suffice to prevent the King declaring war at all. Action should be based on common consent, and one negative should prevail. The contention clearly cannot stand; the United Kingdom is deeply implicated in European politics and cannot possibly be bound to persuade, *e.g.*, the Union of South Africa that action is inevitable.

It seems, therefore, that the parallel of Hanover and the United Kingdom often adduced to prove the possibility of neutrality in a British war, as in the case of the Hanoverian proclamation of neutrality in 1803,[1] is inapplicable to a Commonwealth whose subjects have a common status, and the same conclusion is aided by the fact that in the vital issue of disarmament or limitation of armaments it has been held necessary

[1] Cobbett, *Weekly Register*, 1803, iii. 859. In 1715 Hanover and Sweden were at war, but not Great Britain: Chance, *George I. and the Northern War*, p. 101.

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both by the British Government and by foreign powers that there should be agreement on the part of all members of the Empire. That was established at Washington in 1921–22, and again at London in 1930, in the treaties for naval limitation then reached, and it has been assumed throughout the discussion at Geneva on the reduction of armaments. The British Government made it clear, for instance, that it could not assent to the principles proposed by President Hoover in 1932 without the assent of the rest of the Empire. In a similar manner, when the proposal for the Kellogg Pact was placed before the British Government, it immediately insisted that the issue was one in which it could not act by itself. The same attitude was displayed as regards the abortive Geneva Protocol of 1924, which would have strengthened the operation of the aim of the League Covenant to prevent war; even had the Labour Government in the United Kingdom remained in office, it could not have proceeded with the acceptance of the project which it inclined to favour in face of Dominion dissent. In the same way the signature of the Optional Clause of the Statute of the Permanent Court of International Justice was not undertaken by any part of the Commonwealth until it had been agreed to by the whole of the parts, and the acceptance of the General Act of 1928 for the Pacific Settlement of International Disputes was delayed until after the general approval of signature at the Imperial Conference of 1930; though the Union of South Africa reserved consideration of its special position, it took no exception to action by the other members of the Commonwealth.

There is no possibility of deciding in the abstract the

limits within which unity is necessary. Clearly any conventions regulating the laws of war, as by forbidding chemical warfare or regulating the use of submarines, must be accepted by the whole of the Empire, or they would be worthless to other powers. On the other hand, the Locarno Pacts were accepted by the British Government on the condition that the Dominions should incur no obligations under them unless their Governments accepted such obligation, and no Government has so accepted. It is clear that this is a substantial diminution of unity, but it is explicable by the doctrine of passive belligerency. If the United Kingdom had to proceed to warlike measures to safeguard France, Belgium, or Germany from unjust attack, the Dominions would be placed in a position of war as against the aggressor, but they would be clearly exempt from any obligation to render aid to the parties attacked. No other case of such importance of divided attitudes has arisen. But it is worth noting that the United Kingdom, the Commonwealth, and the Irish Free State alone accepted the Convention of 1930 prepared under League auspices to afford financial aid to the victims of unjust aggression. The Canadian refusal is in entire keeping with the view of the Dominion on the undesirability of extending in any way the rule of aid laid down by Article 10 of the League Covenant.

The extent of unity is therefore variable, and there is no possible doubt that for many purposes it cannot be invoked. For instance, it is plain that there may be disputes between a foreign state and a Dominion in which the United Kingdom has no part, and in respect of which it would have no responsibility. Thus the United Kingdom could not be asked to make repara-

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tion for wrongs inflicted on the subjects of a foreign power, for instance by illegal deportation from the Union, or for riots against Japanese or Chinese such as those of 1907 in Vancouver. The responsibility would rest with the Dominion direct, a fact which is brought into clear relief by the form of dealing directly with all international issues by the Irish Free State. There is no doubt whatever that, if such a dispute should fall within the character of those justiciable under the Statute of the Permanent Court, the case would be dealt with by that Court as between the Dominion and the foreign state. Similarly the League Council or Assembly in the exercise of its conciliatory functions would deal with a dispute between a Dominion and foreign state without involving any British responsibility.

It must, however, be recognised that, though this principle should be carried to its full logical conclusion if theory were strictly followed, even here the unity of the Empire in the view of foreign powers obtrudes itself. On the theory of complete distinction, it would follow that, if a part of the Empire were at variance with a foreign state and the Council dealt with the issue under Article 15 of the Covenant, any part of the Empire other than that engaged in the dispute, which was a member of the Council, would be entitled to vote in arriving at the recommendation of the Council. Such a recommendation if unanimous binds the members of the League not to go to war with any party to the dispute which obeys the recommendation. But as early as 1920, Mr. Rowell[1] for Canada, in agreement with Viscount Grey's view, expressly admitted that in such

[1] Keith, *War Government of the British Dominions*, p. 161.

a case the vote of a part of the Empire could not be counted; referring to a possible dispute between the United States and the United Kingdom, he said: "Canada owes allegiance to the same sovereign as Great Britain, and so long as she continues to do so, she would be a party in the interest and disentitled to a vote. If she disclaimed her interest and claimed the right to vote, she should thereby proclaim her independence." Though these arguments were adduced to meet the objections of the United States to the extra voting power of the British Empire, there is no reason to suppose that the argument would not prevail to-day with foreign powers. This is demonstrated by their attitude to the suggestion that, if a case in which a Dominion was concerned came before the Permanent Court, the Dominion could claim to have a judge appointed to sit on the Court despite the presence thereon of a British judge. In theory clearly, if the dispute is one in which the Dominion alone is claimant or defendant, there should be conceded the right to have its own judge, but the feeling that the British judge must virtually also serve as a Dominion judge is an impression which it is hard to eradicate from the minds of foreign jurists, though no official settlement of the question has yet been possible.[1] It may, however, be doubted if the Empire view would convince the Court. Moreover, from the Empire point of view one point is of importance. If the British member of the Court were reinforced by a Dominion member *pro hac vice*, and the two differed in opinion, there is little doubt that there would be strong feeling in the Dominion against the

[1] It was ruled irrelevant during the revision of the Statute, despite the claim of Sir C. Hurst and Mr. Elihu Root's support, March 19, 1929.

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British judge, a contingency which it is desirable to avoid.

A further issue involving a measure of imperial solidarity, contested as usual by the Irish Free State, arises from the practice of the United Kingdom in its commercial treaties to stipulate that the foreign power shall give to products from the Dominions most favoured nation treatment so long as the Dominions treat products from the foreign country in like manner. It is also usual to include in such treaties clauses permitting the Dominions to adhere to them and to withdraw separately from them. These treaties are signed for the United Kingdom and are not signed for the Dominions in general. It is clear that this mode of action, which is of long standing, implies the right of the Crown on the advice of British ministers not to impose obligations on the Dominions, but to secure for them advantages. Even the Irish Free State has on occasion secured most favoured nation treatment in this way, but the official doctrine there is that in reality the grant of most favoured nation treatment was the result of a fresh treaty independent of the British treaty.[1] This attitude is adopted in accordance with the view of Mr. McGilligan that the King, on the advice of British ministers, could no more make treaties for the Free State than could the Mikado of Japan or the King of Italy. This goes beyond the views of the Imperial Conferences, which have indeed stressed the impossibility of any part of the Empire negotiating to impose obligations on other parts, but have never negated the right to

[1] So in 1931 quite distinct agreements were made with Brazil. But the treaty with Hayti of April 7, 1932, still stipulates in favour of the Dominions. See Keith, *Journ. Comp. Leg.* xiv. 110, 111.

secure optional benefits if desired. Strictly speaking, it seems that any part, and not the United Kingdom alone, could, if the foreign state agreed, stipulate for advantages for the rest of the Empire in a treaty signed for that part alone, though in practice it is natural that it is the United Kingdom that normally so acts. The Union[1] also appears to have objections to this procedure, but no formal dissent from it has yet been expressed by the Imperial Conference, and its propriety therefore so far cannot be denied. It is obvious that some at least of the Dominions do not object to this mode of procedure in their interests.

In the same way the British Government in its treaties normally stipulates for advantages for British subjects in general and for British shipping without restriction to shipping registered in the United Kingdom. The Union of South Africa, on the other hand, in its treaty with Germany of 1928, stipulated for advantages for Union registered shipping. Mr. McGilligan again would seem to deprecate this advantage for Irish citizens who are also British nationals, but it seems to be acceptable to the Dominions in general.

It may therefore fairly be concluded that a certain amount of unity must be conceded to the Commonwealth, despite the distinct character which also must be recognised as belonging to the parts. It is impossible for the Empire to insist on acting in certain matters as a unity, and also to demand that the parts are to be regarded as absolutely distinct. Foreign powers cannot be expected to concede any such claim, nor do

[1] Thus in the Russian agreement of April 16, 1930, the Free State and the Union are excluded from the right to adhere and to receive on reciprocity most favoured nation treatment: Keith, *Journ. Comp. Leg.* xii. 293, 294.

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the Dominions other than the Union and the Free State manifest any real desire to establish it.

(5) The element of unity, however, appears most clearly in the case of the relations *inter se* of the parts of the Empire. It is clear that in the view of the British Government, which succeeded in securing virtual homologation of its opinion by the Imperial Conference of 1930, these relations are not relations governed by international law, but are constitutional in character. In the case of a mere personal union of two countries, each having the same King, there is no ground on which the possibility of regulating these relations by international law could be denied. In fact the case of Hanover proves definitely the contrary; as we have seen, the neutrality of Hanover could be declared in a British war just as that of the United Kingdom in a Hanoverian war. Agreements between the King of the United Kingdom in that capacity and in his capacity as King of Hanover could therefore only be regarded as treaties of international law, despite suggestions by Sir S. Cripps to the contrary. This view of the position was naturally taken by the Irish Free State, and its entry into the League of Nations gave it the opportunity to press its view. Article 18 of the League Covenant requires the registration of treaties or international engagements entered into by members of the League with the Secretariat, and lays down that no such treaty or engagement shall be binding until registration. The British Government never regarded the treaty of 1921 with the Free State as falling under this Article, and did not register it. On July 11, 1924, the representative at Geneva of the Free State registered the treaty of 1921, evoking from the British Govern-

ment the formal assertion that "since the Covenant of the League of Nations came into force His Majesty's Government has consistently taken the view that neither it nor any conventions concluded under the auspices of the League are intended to govern relations *inter se* of various parts of the British Commonwealth". The Irish Free State rejoined denying the validity of the British contention, but without adducing reasons,[1] and the Imperial Conference of 1926 took up the matter in connection with the question whether general treaties concluded under League auspices applied to the relations *inter se* of parts of the Commonwealth. In fact it had been felt necessary in certain cases, the treaties being concluded between states by name, to provide expressly in the treaty that it was not to apply between parts of a state under one sovereign. It was now agreed that treaties should be concluded in the name of the King as the symbol of the special relationship between the different parts of the Empire.[2] "The making of the treaty in the name of the King as the symbol of the special relationship between the different parts of the Empire will render superfluous the inclusion of any provision that its terms must not be regarded as regulating *inter se* the rights and obligations of the various territories on behalf of which it has been signed in the name of the King. In this connection it must be borne in mind that the question was discussed at the Arms Traffic Conference in 1925, and that the legal committee of that Conference laid it down that the principle to which the foregoing sentence gives expression underlies all international conventions." Now it is true that this

[1] Keith, *Speeches and Documents on the British Dominions*, pp. 347, 348.

[2] *Ibid.* p. 382.

interpretation of the discussions at the Arms Traffic Convention may be incorrect, for the doctrine there enunciated may merely mean that the terms of a convention have no application as between the various territories of a member of the League, *i.e.* between the United Kingdom and the Crown Colonies and Protectorates; but that is irrelevant, for the Conference of 1926 accepted unanimously, and no Dominion Parliament dissented from, the view that relations of the parts of the Commonwealth *inter se* are not relations of international law. No doubt the Free State later repented of its admissions at the Conference of 1926, and it took the opportunity to raise the issue indirectly in connection with the signature of the Optional Clause of the Statute of the Permanent Court of International Justice in 1929.[1] The British and the other Dominion Governments accepted that clause which renders reference to the Court compulsory in certain circumstances with the express exclusion of disputes with the Government of any other member of the League which is a member of the British Commonwealth of Nations, "all of which disputes shall be settled in such manner as the parties have agreed or shall agree". The Irish Free State acceptance was absolute on the sole condition of reciprocity, and it was energetically denied that the British reservation was valid within the terms of the Statute, and the claim was made that the Irish Government would be able in any case under the Statute with the British Government to apply to the Court in defiance of the British reservation. It is clear that the

[1] Keith, *Speeches and Documents on the British Dominions*, p. 414. In 1929 Mr. McGilligan admitted that the Kellogg Pact could not be deemed to apply between the parts of the Empire.

claim was untenable, for, whether or not the rules of international law could be invoked as applicable to inter-imperial relations, the British reservation could not be overriden by the Court. A like divergence of view was expressed by the British and Irish Governments regarding the acceptance of obligations to arbitrate under the General Act of 1928 for the Pacific Settlement of International Disputes. It must be added that in the case of the Optional Clause the Union Government expressed the view, not that the Permanent Court could not deal with inter-imperial disputes, but that it was preferable that resort should not be had to it for that purpose.

The British view must under all the circumstances be held to be binding, and with it fall to the ground many complex and delicate issues. Had the terms of the Covenant applied as between the members of the Commonwealth, it would have been possible to argue that secession was forbidden by Article 10, which compels all members of the League to preserve the territorial integrity and existing political independence of members of the League. Delicate issues would also arise in the case of disputes in which any member of the Commonwealth was engaged and fell under League disapproval, so that, for instance, the Council required action against the defaulting member under Article 16 of the Covenant, and so forth. Consideration of the gravity of the inconvenience of holding that the Covenant applies between the members of the Commonwealth *inter se* doubtless outweighs the arguments which might be based on the mere wording of the Covenant. The Dominions on the whole have not pressed the point, partly, no doubt, because they do

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not contemplate with any satisfaction the possibility of finding the issue of immigration and treatment of immigrants made an international question as between them and India, also a member of the League. It is true that immigration has so far been held to be a matter of domestic jurisdiction in which the League or the Court is unable to interfere, but it is also clear that international law is not static, and that there is no certainty that the classification of immigration in this manner will permanently endure.[1] Not less important[2] is the issue of inter-imperial preferences such as those agreed on at Ottawa, for, if relations between the Dominions and the United Kingdom were international, foreign states could demand the advantage of them under most favoured nation clauses in treaties.

(6) The same determination of the parts of the Commonwealth to secure elimination of foreign intervention in any shape is seen in the decision of the Conference of 1930 as to inter-imperial arbitration. It is a signal fact that, while compulsory arbitration of disputes with foreign states had been undertaken by the whole Empire in 1929, it proved impossible to secure agreement to any compulsion or even to the establishment of a permanent body to deal with such disputes, though it was obvious that the existence of such a body was almost essential, if disputes were to be dealt with judicially. In lieu, arbitration *ad hoc* of a voluntary character was decided upon, and all that could be done was to make suggestions for the competence and composition of the Court to arbitrate. It was agreed that only differences between Governments

[1] Wheaton, *International Law* (ed. Keith), i. 574.

[2] See below, Chapter XXI.

could be referred to it and only such differences as were justiciable, thus excluding the possibility of India raising the immigration issue. Suits by individuals or companies against Governments were thus excluded, unless the matter came to a point in which a difference arose between Governments. The tribunal was to be selected for each dispute, and to consist of five members, none of whom might be selected from outside the Commonwealth. One member of the tribunal was to be selected by each party to the dispute from some part of the Commonwealth not involved in the dispute, the choice being limited to persons who had held high judicial office or were distinguished jurists; one member was to be selected by each party with freedom of choice; and the four were to select at will their chairman. The tribunal, at the will of the parties, might be assisted by assessors. Nothing was agreed upon as to the principles to be applied by the tribunal, not even the vital issue whether it was to be guided in the main by international law doctrines or whether it was to seek to arrange a settlement *ex bono et aequo* or as a mere compromise.

The unsatisfactory character of the agreement of 1930 was revealed at once when the question was raised in 1932 of the right of the Irish Free State without the assent of the British Government to eliminate from the Constitution the oath imposed under the treaty of 1921 on members of the legislature, and to withhold payments of certain land annuities, pensions to members of the Royal Irish Constabulary, former civil servants, etc. When the British Government finally made it clear that it was prepared to arbitrate on the lines of 1930, it was met by the absolute refusal of

Mr. De Valera to accept arbitration unless a foreign element was permissible.[1] There was a minor issue as to the scope of the arbitration, namely, the number of payments to which it might extend, and at one time the British Government seems to have proposed to limit arbitration to the annuities. But ultimately it appears the offer of that Government was to accept any tribunal so long as it was an Empire tribunal, even if it did not comply precisely with the principles laid down in 1930. The refusal of Mr. De Valera, therefore, was based on this aspect essentially, and may be regarded as a revival of the claim of 1924, that the relations between the Free State and the United Kingdom are relations of international law, and therefore suitable for reference to a tribunal whose members may include foreigners. The British insistence on refusing this proposal rests in turn on the belief that it is vital to maintain the doctrine that the relations of the parts of the Commonwealth *inter se* are not relations of international law, since otherwise the Ottawa Conference agreements for trade preferences would be rendered nugatory by the operation of most favoured nation treaties.

The chance of the necessity of authoritative settlement of inter-imperial disputes is naturally increased by the prospects of trade arrangements between parts of the Empire already achieved and contemplated. It is clear, though the proposal was not accepted at Ottawa,

[1] Mr. J. H. Thomas, House of Commons, June 17, 1932. On the refusal of the State to accept an Empire tribunal, and the withholding of payments, British duties were imposed on Irish Free State imports, and were met with retaliatory duties, and the creation of an emergency fund of £2,000,000 to foster Irish industry and wheat-growing to create an economically independent State.

that the insertion in future arrangements of an agreement to refer differences to an inter-imperial tribunal would be a convenient and wise step, and would follow the analogy of treaties between states which often provide for reference to the Permanent Court or other tribunal of differences which arise. It is clear that in practice inter-imperial disputes must be determined on much the same principles as apply to international disputes, for these, after all, rest in the main on the law of contract, and for other issues, such as the treatment of residents, the analogies of international relations[1] would have to be resorted to, the tribunal making such changes as are held by it necessary to adapt the rules prevailing between states under different sovereigns to states owing allegiance to the same sovereign.

In certain cases, of course, the tribunal would be able to apply the ordinary rules of international law without qualification. Though normally international treaties are, under the ruling of 1926, not to apply to the relations *inter se* of parts of the Commonwealth, on occasion they may deliberately be made so applicable, as is now proposed to be the case with the Convention as to Air Navigation,[2] and, when this is done, whatever the form adopted, the tribunal would naturally treat the issue as if the parts of the Empire were distinct states.

[1] Baty, *Journ. Comp. Leg.* xii. 163, holds that inter-imperial relations are subject to international law; cf. Rynne, *Die völkerrechtliche Stellung Irlands*, pp. 342 ff. Sir S. Cripps' denial (*Parl. Deb.* cclxvii. 667) that one sovereign can enter into relations with himself goes too far; the Elector of Hanover could clearly make a treaty with the King of the United Kingdom.

[2] The Protocol of December 11, 1929, gives each Dominion a distinct vote, in lieu of giving one vote to the whole Empire, on the understanding that the Convention applies between the parts of the Empire.

PART II

THE GOVERNMENT OF THE DOMINIONS

CHAPTER V

THE SOURCES OF DOMINION CONSTITUTIONAL LAW

UNDER this head we have to consider (1) the statute law and the prerogative as the basis of the Dominion constitutions; (2) the conventions which give life to these constitutions; and (3) the mode of constitutional change when conventions are insufficient to bring harmony into the working of the state.

The title Dominion owes its origin to the Colonial Conference of 1907, when it was chosen as a means of distinguishing the parts of the Empire enjoying responsible government from the dependent Empire. It then denoted the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, Newfoundland, and the South African Colonies which in 1909 formed themselves into the Union of South Africa. In 1921–22 the Irish Free State was added to the list, ranking in official precedence before Newfoundland, the least populous of the Dominions. Of these Dominions there are two federations, Canada and the Commonwealth; the Union of South Africa is a unitary state whose constitution makes some slight concession to federal sentiment; the other Dominions are purely unitary states. The Canadian provinces and the Australian States enjoy responsible government within the federal limits, and the principles applicable

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to the Dominions in general normally apply to them also, whether in the sphere of executive government or legislation or judicature.

The Dominions, of course, are parts of the British Empire,[1] and according to the terminology of the Imperial Conference of 1926 Great Britain and the Dominions as autonomous units may be regarded as forming within the Empire the group known as the British Commonwealth of Nations. That term emphasises the existence of a number of parts of the Empire which have equality of status, and has a certain convenience. But it must be remembered that Great Britain is not a term of art; the real unit is the United Kingdom of Great Britain and Northern Ireland as determined by the Royal Proclamation of 1927 under the Royal and Parliamentary Titles Act, 1927. Moreover, the United Kingdom is an imperial power, and exercises final control over a vast area. Thus, when the Statute of Westminster contemplates legislation by the United Kingdom as part of the mode of changing the succession to the throne, it expects that the United Kingdom shall legislate for the whole of the dependent Empire, for the change must affect the whole of the Empire and not the self-governing parts alone. It is necessary, therefore, on occasion to accept the identity of the Empire and the Commonwealth as is the case in the Irish Constitution, and in the Commonwealth agreement of 1931 as to Merchant Shipping. For practi-

[1] They are technically colonies as defined in the Interpretation Act, 1889, subject to the fact that for certain purposes powers of Colonial Governors must be deemed to apply to Governors of the States of Australia, not of the Commonwealth. Under the Statute of Westminster, 1931, the term "colony" will not in future Acts include Dominions, States, or provinces. They are technically British possessions and part of the British dominions (the double use of the term is inconvenient).

cal purposes the importance is slight, but it is necessary to guard against the assumption of Mr. J. H. Thomas that the United Kingdom is a Dominion, or that of Sir Thomas Inskip that the Commonwealth includes only the Dominions, without the United Kingdom. Even apart from the Dominions the United Kingdom has imperial rank in international law; that England is an Empire was asserted by Henry VIII., and since then the Crown has always been imperial. No excuse, therefore, is necessary, as Mr. Latham has observed, for the use of the term Imperial Government or Parliament.

(1) A fundamental distinction is drawn in the common law of England[1] between the legal position of colonies acquired by settlement and those obtained by conquest or cession. The rights of Englishmen, it was held, must accompany them when they fared to settle overseas, but otherwise when the case was one of a conquered or ceded colony. When settlements were made by Englishmen among savage peoples or in empty lands, the common law of England and such statutes as might be held to be of general character must be applied to their legal relations; they could not evade the sovereignty of the Crown by absence abroad, but equally the Crown could have no greater power over them than if they had been in England, nor could settlers be induced to go abroad if they were not promised such rights. On the other hand, if territory under a civilised system of law were conquered or ceded, then it would be monstrous that such law should be abrogated automatically by conquest. Yet conquest gave the King absolute power over the conquered,

[1] Keith, *Constitutional History of the First British Empire*, chap. i.

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subject to the moral restraint of the terms of cession and the international right of the ceding power to claim their observance. What the King pleased to order then was law, and, if the English settled in such colonies, they must acquiesce in falling under the system continued or altered by the King. Applied to the form of government, the principles yielded two clear doctrines. (1) In the case of a settled colony the royal prerogative extended only to the creation of a constitution analogous as far as practicable to that of the mother country. Legislation and taxation, therefore, could only be passed by the aid of a legislature of which one-half at least was elective. (2) In the case of a conquered or ceded colony the King might lay down by his own authority such form of government as he thought fit, and the legislative and taxing power could be exercised by him without the assent of a representative legislature. But by a vital addition it was held (3) that the grant to a conquered or ceded colony of such a legislature deprived the King of his legislative and taxing power, unless in the instrument of grant he had specifically reserved such power. Hence it was ruled by Lord Mansfield that through inadvertence in creating first representative government in 1764 in Grenada and then imposing an export tax the King had mismanaged his powers,[1] so that the tax was invalid and the King could not raise it unless he could persuade the legislature to concur.

Applying the doctrine of settled or conquered or ceded colonies to the Dominions, it is clear that Australia and New Zealand stand obviously on the

[1] *Campbell* v. *Hall* (1774), 20 St. Tr. 239. See Keith, *Journ. Comp. Leg.* xiii. 126, 127; xiv. 118; *Abeyesekera* v. *Jayatilake*, [1932] A.C. 260.

basis of settlement, and that despite its chequered history Newfoundland can claim like rank. In the case of Canada, the maritime provinces, the area once in the hands of the Hudson's Bay Company, the western provinces, and the lands recently discovered in the extreme north may be deemed settled, but the old Quebec area was acquired by cession. In South Africa the Cape was ceded, the Transvaal and the Orange Free State conquered, and Natal might be reckoned a colony by conquest or cession. The Irish Free State stands in a category by itself, unaffected by a distinction based on colonial conditions. But it must be admitted that the idea of settlement is vague, and in a sense New Zealand was acquired by the cession of authority of the native chiefs by the treaty of Waitangi in 1840, though such a cession cannot be equated with a cession by a recognised state of international law.

On the principles laid down, as applied to these areas, it might have been expected that wide use of the prerogative would have been made, and that the constitutions would largely rest upon it. But in fact, save in the case of Newfoundland, the prerogative has been found inadequate, and the constitutions of all the other Dominions, States, and provinces rest upon statute. Newfoundland itself was for a considerable time subject to statutory enactments which aimed at treating the island as a mere fishing base and denied it regular civil institutions. These, however, were swept away in 1832 in order to permit of regular government, and a representative legislature was created. In 1855 responsible government was conceded, and now rests on Letters Patent of 1876.

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In the case of Quebec the right to control by the prerogative was sacrificed by the Royal Proclamation of 1763 promising the grant of an Assembly, and, when it was decided to undo this promise with its accompanying assurance of the substitution of English for French law, Parliament had to intervene and to pass the Quebec Act, 1774. Further change could be effected only by the same means; the Constitutional Act, 1791, divided Quebec into Lower and Upper Canada, while the Act of 1840 reunited them. The maritime provinces, Nova Scotia, New Brunswick separated from it in 1784, and Prince Edward Island, were granted representative government by the prerogative; but when in 1867 federation was decided upon an Imperial Act was necessary. Apart from the difficulty of concurrent legislation, it was clear that even thus no federation could be achieved, for no province could legislate to have effect outside its own area or to set up institutions with powers far exceeding its own mandate. The federation itself created, under powers granted by Imperial Acts of 1868 and 1871, the new provinces, Manitoba in 1870 and Saskatchewan and Alberta in 1905, out of lands once administered by the Hudson's Bay Company. In the west, Vancouver Island enjoyed from 1856 to 1866 representative government under the prerogative; it was then merged with British Columbia, which had been given a restricted form of administration by Imperial Act in 1858; the united province became in 1871 part of the federation.

Australia was first chosen to be a penal colony; hence its administration was wholly autocratic. But settlement was unavoidable; by 1819 it was realised that to legislate without a representative body was impossible,

and, as such a body could not wisely be created, Parliament in 1823 provided for Crown Colony rule. This intervention was necessarily followed by further Acts, especially those of 1842 and 1850; under the latter New South Wales, Tasmania, and Victoria were enabled to frame constitutions; of these the first and last were confirmed with alterations by Imperial Acts of 1855; the second received sanction for its local Act in the same year. In 1859, under Imperial Act, Queensland was created by Order in Council with responsible government. South Australia, which had never been, like these colonies, an integral part of New South Wales, was created by imperial legislation of 1834; it obtained responsible government under a local Act of 1855–56; while Western Australia, first created by Imperial Act of 1829, was finally given responsible government by Imperial Act of 1890. Federation of the six colonies was effected in 1900 by Imperial Act.

New Zealand at first, from 1840, was treated as part of New South Wales, but a series of Imperial Acts resulted in 1852 in the grant of representative government, which in 1855–56 was transformed into responsible government. The native question was one of the causes why at first representative institutions were withheld and therefore recourse was had to imperial legislation.

In the case of South Africa the prerogative to provide constitutions for ceded colonies enabled the Crown to provide for the government of the Cape, ceded in 1814, and Natal, made a distinct colony in 1845. Representative government was accorded to the former by local Ordinance authorised by Order in Council in 1853, to the latter by an Imperial Charter of

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Justice in 1856. Responsible government was created by local Acts of 1872 and 1893. On the conquered colonies of the Transvaal and the Orange River, after a period of complete control, responsible government was conferred in 1906–7 under the prerogative. So far Parliament had not been required to intervene, but the need of federation evoked the Union of South Africa by an Act.

The Irish Free State, on the other hand, was created as the result of an agreement styled Articles for a Treaty of December 6, 1921, between the British Government and a body acting as the Government of Ireland, but without any actual legal status. The treaty was approved by Parliament and by a meeting of the members elected to the lower house of Southern Ireland provided for by the Government of Ireland Act, 1920, which as a whole had been rejected by the rebels. Moreover, a constitution was framed by a like body which stands as the Constitution of the Free State, and which was also approved by an Imperial Act. While, however, in the case of the Dominions it has been frankly conceded that the constitutions rest without exception on the basis of Imperial Acts, the Irish view has always been that the Constitution was valid apart from the Imperial Act, on the ground that all power in Ireland came from the people of Ireland, and not from any British grant, a doctrine not naturally accepted in the United Kingdom.

In all these cases save that of the federation of Canada the power granted to the Parliaments includes a measure of power to make constitutional changes. This power has been freely exercised, and the constitutions rest therefore on the basis of Imperial Acts

freely amended in detail and often even in matters of high importance, such as the constitution of the legislature and the relations of the two houses.

While the doctrine regarding the power of legislation in settled colonies necessitated, as has been seen, Parliamentary intervention to modify its operation, it was always held that in matters of executive concern the prerogative was adequate to provide for the conduct of government. In fact the Imperial Acts and the earlier Acts of the colonies were specially framed to avoid interfering with the exercise of the prerogative. The creation of the federations and the Union, however, raised doubts as to the power of the Crown to create executives by the prerogative for these artificial aggregations. The doubt seems unfounded, but the Acts all provide for the constitution of the executive, and in other cases from time to time provisions on this head have been inserted in local Acts. Yet in the great majority of instances the office of Governor is still the creation of the prerogative Letters Patent, and similar Letters Patent have been issued for the federations and the Union, though the office of Governor-General there rests on statute. The relation between prerogative and statute is now clear. Statute can regulate prerogative, and, if a field is fully covered by statute,[1] prerogative will be assumed to be superseded; but, if this is not the case, prerogative may be relied upon and, even when there is statutory authority, prerogative may supplement it.

The character of the prerogative does not substantially vary in the Dominions. It is true that the common law of the Union is Roman Dutch law and

[1] *A.-G.* v. *De Keyser's Royal Hotel*, [1920] A.C. 508.

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in Quebec the old French law, but the prerogatives of the Crown are based on English common law, and as such were introduced on the acquisition of these territories, superseding, in so far as they were inconsistent, the former law. It is clear that it would be impossible for the British Crown to accept by conquest prerogatives inconsistent with the principles of English law. This rule, however, applies in strictness only to the essential political prerogatives. The English prerogative inevitably includes certain minor matters which may be negatived in their application to territories under a different system of legislation. This consideration, however, is of minimal importance in its application to the Dominions. But, when powers of government exist under local law which are not inconsistent with the British prerogative, they can be exercised on behalf of the Crown.

The extent of the prerogative rights effective in the Dominions is very large. The Crown enjoys exemption from criminal or civil liability save in so far as it has been waived by statute.[1] All land is vested in it as ultimate owner, and all waste land is its absolute property;[2] gold and silver mines belong to it;[3] escheats of land, treasure trove, and the estates of persons dying intestate without kin fall to it.[4] It enjoys priority for its debts in bankruptcy and the winding up of com-

[1] It rests with the Governor-General of Canada to allow a petition of right to be brought: *Lovibond* v. *Governor-General of Canada*, [1930] A.C. 717. For Western Australia see *R.* v. *McNeil*, [1927] A.C. 380; for South Australia, *Laffer* v. *Gillen*, [1927] A.C. 886.

[2] *A.-G. for Saskatchewan* v. *A.-G. for Canada*, [1932] A.C. 28.

[3] *Hudson Bay Co.* v. *A.-G. for Canada*, [1929] A.C. 285.

[4] *A.-G. for Ontario* v. *Mercer* (1883), 8 App. Cas. 767; *A.-G. for Alberta* v. *A.-G. for Canada*, [1928] A.C. 475; *bona vacantia* of companies, *R.* v. *A.-G. for British Columbia*, [1924] A.C. 213.

panies;[1] its ships are exempt from seizure in respect of salvage claims or claims for damage done by collision.[2] Local law may abandon [3] or diminish these claims, but, failing that, they can be asserted on behalf of the Crown by the Government and the Courts will give effect to them when pleaded.[4]

(2) Neither statute nor prerogative, that is common law, explain much that is vital in the government of the Dominions. That government rests essentially, as in the United Kingdom, on conventions of the constitution which are not law in the sense that any of them can be directly enforced by legal action. From the first the British Government was most reluctant to hamper the growth of Dominion autonomy by efforts to transmute into law the constitutional practice of the United Kingdom. In the colonies, of course, there was a certain reluctance to adopt this point of view. It was felt that the change from imperial control to virtual self-government ought to have a counterpart in law, and, if the constitutions of the colonies had been framed entirely to meet their wishes, there would have been some effort to embody in them the rules of constitutional practice as law. But the British objec-

[1] *Liquidators of Maritime Bank of Canada* v. *Receiver-General of New Brunswick*, [1892] A.C. 437. What is to be regarded as a representation of the Crown is discussed in *Metropolitan Meat Industry Board* v. *Sheedy* [1927] A.C. 899.

[2] *Young* v. *S.S. Scotia*, [1903] A.C. 501. No suit can be brought in England against a Dominion Government by treating it as a corporation: *Sloman* v. *Government of New Zealand* (1876), 1 C.P.D. 563.

[3] *Commonwealth* v. *New South Wales* (1923), 32 C.L.R. 200: suit in tort by Commonwealth against New South Wales authorised by Judiciary Act.

[4] As to privilege against disclosure of documents, see *Robinson* v. *South Australia*, [1931] A.C. 704; Keith, *Journ. Comp. Leg.* xiii. 261. 262; *Rayner* v. *R.*, [1929] N.Z.L.R. 805.

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tions gradually came to be appreciated in the colonies, and in most of the Dominions the legal provision to compel responsible government is minimal. It is significant that, even when the Commonwealth constitution was being adumbrated, some of its framers held that federalism and responsible government were incompatible, and that even at so late a date the provision for responsible government was far from sufficient.

Applied to Dominion conditions, responsible government demands that the powers of the Crown or its representative, whether resting on the prerogative or on statute, must be exercised on the advice of ministers. Ministers must be members of the legislature, and possess the confidence of the majority thereof, save that, if such confidence is withheld, they may be permitted to remain advisers pending the result of an appeal to the political sovereign, the electorate. A ministry depends on the leadership of the Prime Minister, who is selected by the Crown as commanding the support of the majority of the lower house and who recommends his colleagues for office. On defeat in that house on any important issue a ministry must resign unless it is granted a dissolution. A ministry must observe solidarity of action and of responsibility to the lower house.

Of these and minor rules there is little expressed in Dominion constitutions. In Canada convention is relied upon. The British North America Act, 1867, s. 11, provides for the existence of a Privy Council to assist the Governor-General, but its composition is not defined by law, and in 1926 the Privy Council was actually for a time composed of only one minister who had definitely been appointed to office, the other members being

acting ministers only, a device adopted to prevent them having to face the necessity of re-election, then required in the Dominion on acceptance of ministerial office. It was on the advice of this body that millions of dollars were authorised to be spent without sanction of Parliament, which was dissolved, and in fact the electorate inflicted a crushing defeat on the then ministry. Yet no action in law was possible to prevent such expenditure being incurred, and the new Parliament had to acquiesce in what had been thus done. The provinces have gone little further; to the Executive Councils, which their statutes set up, are assigned certain ministers, but there is nothing in law to secure that they shall represent the majority in the legislatures or even be members thereof. Newfoundland was granted responsible government entirely under the prerogative, and it rests wholly on convention. In the case of the Commonwealth the political heads of departments are to be appointed by the Governor-General, and are to be the King's Ministers of State and members of the Executive Council; if not already members of the legislature, they must become so within three months after appointment; but there is nothing in law in any of these cases to provide for the command by the ministers of the majority of the lower house, nor even to prevent the Governor-General swamping the Council by his own nominees. The Union Constitution of 1909 follows the Commonwealth model. Moreover, in the two federations and the Union, as also in the States of Tasmania and Victoria, the Councils include ex-ministers, appointment being deemed to be for life as in the case of Privy Councillors in the United Kingdom, though again by convention only those members

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attend meetings of the Governor in Council who are specially summoned. New Zealand, again, relies on convention; its Executive Council contains ministers but is not limited by law to them, and they need not in law be even in Parliament. In all cases, that ministers should be in Parliament is tacitly recognised by the rule forbidding persons holding office under the Crown other than political office to sit in Parliament.

In the Australian States convention in the main governs, as was seen in 1907 when the Governor of Queensland carried on the government for months with a ministry which had never had a majority in the legislature, and which spent money without sanction of Parliament. New South Wales and Tasmania, as well as Western Australia, are likewise content with convention; it is significant that in 1925 the acting Governor of Tasmania actually contemplated consulting ex-ministers as members of the Executive Council, and only desisted on the protests of the then ministry. Victoria has gone so far as to require that four out of eight ministers must be in Parliament and that no minister can hold office longer than three months unless he obtain a seat in one or other house. South Australia demands membership of Parliament on appointment or within three months, and by a unique provision enacts that no warrant of the Governor for payment and no appointment or dismissal shall be valid unless countersigned by the Chief Secretary, a most interesting legal affirmation of the doctrine of counter-signature which has been established in the United Kingdom by convention reinforced by the action of the Courts based on that convention.

How in the absence of legislation is obedience to the

principles of responsible government secured in practice? No doubt largely it rests on the political sense of the people, which condemns straining of authority, and, as in the case of Queensland in 1907–8 and Canada in 1926, censures by the voice of the electorate the action of any government which misuses its power. More technically, the necessity of obtaining supply is a powerful check on disregard of the legislature; failure to consult Parliament, whose annual meeting is provided for by law, would involve inability to collect much of the revenue, and expenditure would be in the main illegal, and, though there is difficulty in legal proceedings in such cases, might indirectly at last be dealt with by the Courts. But it is also clearly the duty of the Governor in the last resort to intervene to secure the observation of the conventions of the constitution, as will be shown later, just as it is his duty to intervene in the far more difficult case, when a ministry supported by a majority in the legislature insists on defying the law, or desires to extend the life of the legislature and thus to deprive the electorate of its effective control of its representatives.

In the Irish Free State, in view of the dangers of mere convention, a most elaborate effort has been made to stereotype as law the conventions of the constitution. The constitution creates the Executive Council and declares its responsibility to the Dáil Eireann, the lower house. The selection of the President of the Council, *i.e.* the Prime Minister, is expressly given to the Dáil, excluding any discretion on the part of the Governor-General; the President selects his colleagues, but with the approval of the Dáil. The ministry thus chosen must retire from office if it ceases to command

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a majority of the Dáil, holding their posts merely until a new ministry is installed. The Dáil fixes the date of the conclusion of each session and of the reassembling of Parliament. It is expressly forbidden to the Governor-General to dissolve the Dáil on the advice of a ministry which does not command a majority of that body. This provision, of course, is a complete violation of precedent, for the grant of a dissolution to a defeated ministry to try the temper of the electorate and allow it to decide is a procedure accepted as proper not merely in the United Kingdom but in every other Dominion. It was the refusal of a dissolution in analogous circumstances to Mr. Mackenzie King in 1926 which was regarded in Canada as a grave breach of constitutional propriety and had an important effect on a redefinition of the functions of the Governor-General. It must remain a matter of doubt how these provisions could in law be enforced; very possibly the Courts would feel entitled to use their powers to issue writs of mandamus or prohibition, but this must remain conjectural, for no effort has been made to depart so far from the letter of the law.

(3) The Colonial Laws Validity Act, 1865, granted, as we have seen, to the colonies constituent power even if it had not existed before. But the grant was accompanied by one essential condition: the bill to amend the constitution must comply with such "manner and form as may from time to time be required by any Act of Parliament, Letters Patent, Order in Council or colonial law for the time being in force in the said colony". This condition imposed a vital limitation on the powers of colonial Parliaments as opposed to those of the Imperial Parliament. The latter cannot bind any

successor; if it prescribed a mode of altering the constitution, that could be disregarded by its successor, and the Courts would obey the later law. In the case of the colonies, any law must conform to any conditions as to manner and form required by the existing constitution. If it does so, then it is valid. But it is not necessary that a formal alteration of the constitution should be announced. If an Act by necessary intendment or mere reference clearly is meant to alter the constitution, it can effectively do so. Thus the Privy Council[1] overruled the High Court of Australia when it held that Queensland could not without a deliberate alteration of the constitution provide for the appointment of a judge with seven years' tenure of office, life tenure being the rule laid down in the constitution. Nor, of course, is it any alteration of the constitution to impose income tax on judicial salaries,[2] even though the remuneration of judges under the constitution is not to be altered during their tenure of office, a necessary safeguard for their impartiality.

The effect of the rule of 1865 has been most clearly shown by the decision in 1932 of the case *Attorney-General of New South Wales* v. *Trethowan*.[3] The Parliament of the State by Act No. 28 of 1929 provided that the Legislative Council should not be abolished save after a referendum to the electors, and that the provision to this effect should be subject to the same rule. To secure this end any bill to abolish the Council or repeal the clause was not to be presented to the Governor for assent until approved by the referendum.

[1] *McCawley* v. *The King*, [1920] A.C. 691.

[2] *Cooper* v. *Commissioner of Income Tax for Queensland* (1907), 4 C.L.R. 1304.

[3] (1932), 48 T.L.R. 514; (1931), 44 C.L.R. 394.

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In 1930 the Labour Government of the State, determined to undo the work of its predecessor, passed two bills, one to repeal the clause and one to abolish the Council. The Supreme Court granted an injunction forbidding presentation of the bills for assent; this decision was upheld by three judges out of five on appeal to the High Court, and by the Privy Council. It is plain indeed that the meaning of the proviso to the Act of 1865 was exactly to cover such an action as was intended by the Act of 1929, despite the ingenuity with which the contrary view was argued.

The decision makes it clear that in the main the existing restrictions on change are effective. The conditions imposed on the Australian States by the Imperial Parliament under Acts from 1842 to 1862 were complex; they were swept away in 1907, and the only rules required by Parliament involve the reservation of bills to alter the salary of the Governor or the constitution of the legislature or either house. But this does not apply to bills to alter electoral districts, the number of members, their qualifications, or electoral procedure. In Victoria, South Australia, and Western Australia the States have imposed on themselves the requirement of absolute majorities on the second and third readings. It must be noted that it might be very difficult in a Court of law to prove that the necessary majorities had not in fact been secured.[1] How wide the power of change is is shown by the successful abolition of the Legislative Council of Queensland[2] in 1921–22, for despite the necessary reservation of the

[1] See Colonial Laws Validity Act, 1865, s. 6; *Bickford Smith & Co.* v. *Musgrove*, 17 V.L.R. 296.

[2] *Taylor* v. *A.-G. for Queensland*, 23 C.L.R. 457.

measure it was duly assented to by the King on the advice of the Colonial Secretary on the ground that it was a local matter.

New Zealand was given by the Constitution Act of 1852 a limited power of repeal, but on the whole it seems probable[1] that the limitation was removed implicitly by the general terms of the Colonial Laws Validity Act, 1865, and that it has full power of change. But, until it exercises it, bills to alter the Governor's salary or the sum secured for native affairs must be reserved. The Statute of Westminster, 1931, expressly leaves the matter in *statu quo*, and the issue whether it is possible for the Parliament to abolish the Legislative Council must remain undecided unless and until that proposal is proceeded with. The Statute, however, has no restriction as to Newfoundland, and, if the Parliament applies Section 2 of the Statute, it will become possessed of full constituent powers, for the only restrictions on its authority are provisions contained in Imperial Acts authorising the Crown to impose qualifications for membership of the Assembly, residential qualifications for electors, simultaneous holding of elections, and the recommendation of money votes by the Governor. The Canadian provinces are given freedom to modify their constitutions save as regards the federal office of Lieutenant-Governor.

The position of the Dominion of Canada is very different from that of the provinces. Neither, of course, can alter the distribution of powers or the federal scheme as laid down in the British North America Acts, 1867–1930, but Canada is denied the authority

[1] Keith, *Responsible Government in the Dominions* (ed. 1928), i. 354, 355.

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to deal with any important part of the frame of government. Even to appoint a deputy Speaker an Imperial Act was requisite, and it cannot change the rules as to the executive or the relations of the two houses or the composition of the Senate; though it may provide as to electoral qualifications for the Commons, it is bound to provide for the number of seats so that Quebec shall have sixty-five and the other provinces a proportionate number, based on population. It is natural that the passing of time should have rendered the position difficult. The fathers of federation believed that the distribution of powers in the Act of 1867 would be effective and sufficient; it is in fact inadequate and inconvenient, but no authority exists to change it save the Imperial Parliament, and the vital question, therefore, is, On what grounds can that Parliament act? Formally its numerous changes in minor matters have been carried out on addresses from the two houses of the Dominion Parliament, but the real issue is what amount of agreement as the basis of these addresses would suffice for British action. Would the British Parliament be justified in enacting a change in the constitution desired by the Dominion Parliament but strongly objected to by the province of Quebec or some other province or provinces? It must be remembered that Canada falls for practical purposes into four clear groupings, the maritime provinces, Quebec, Ontario, and the western provinces, and that there is often sharp cleavage of interests.

In the extreme form it has been claimed apparently by Mr. Ferguson, when Premier of Ontario, that no change of importance can be made without provincial consent; apparently any great province, possibly any

province, by withholding assent could block change. This view is based on the idea that the federal bond is the result of a compact or treaty, a term which admittedly was often used in the debates in the Canadian legislature when that body in 1865 approved the agreement achieved with the maritime provinces in 1864. To this view it is objected that in fact the Quebec agreement was never accepted by the legislatures of Nova Scotia and New Brunswick, and that in fact in certain matters the constitution prepared in 1864 was modified under imperial auspices before enacted in 1867, while as regards the other provinces, especially those created by the Dominion, Manitoba, Saskatchewan, and Alberta, any idea of a compact is absurd. The most effective answer to this contention is the fact that in 1907, when an Imperial Act was passed to vary the then existing state of provincial subsidies from the federation, it was based on the assent of all the provinces, for, while British Columbia demanded better terms, its Premier did not refuse finally to agree to the Act being passed. It is useless to ignore the importance of this precedent, whether it was wise to create it or not.[1] What is clear is that amendment by the Imperial Parliament would be a very delicate matter, if it was opposed by any substantial body of Dominion opinion and by one or more of the provincial legislatures, and it is natural that repeated efforts should have been made as in 1927 to enable Canada to amend her own constitution without appeal to the Imperial Parliament, a necessity which involves

[1] The theory of contract is clearly recognised by the Privy Council in the *Aeronautics Case*, [1932] A.C. 54. Contrast Ewart, *Can. Bar Review*, ix. 726-8.

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a clear diminution of formal if not of real status. Any such system itself would have to be authorised by Imperial Act but then could operate independently of it. It would involve safeguards for language and religious questions, so that Quebec could negative any proposal which in her opinion menaced the present safeguards; it would necessitate also provisions by which changes in other matters of legislative authority could be made only when to the approval of the Dominion Parliament by perhaps two-thirds majorities of either house was added the assent of the majority of the provinces, including Ontario and Quebec. It is, however, clear that the utmost difficulty lies in achieving agreement, and so far provincial discussions with the Dominion have succeeded only in displaying the profound divergencies of view prevalent.

In the case of the Commonwealth, neither the Commonwealth nor the States alone can alter the federal distribution of powers or the constitutional position in general. The States, as has been seen, can amend their own constitutions, and the Commonwealth has certain powers, in a limited but not unimportant field. Thus it was permitted after ten years to determine the mode of contribution to State expenditure, a power which has proved of the utmost importance in controlling relations with the States. Similarly the franchise has been determined freely by the Commonwealth. But in vital matters the procedure is more elaborate. The measure must be passed by absolute majorities in both houses, and then submitted to a referendum of the electorate not earlier than two or later than six months after its passage. If the two houses disagree, and one passes it twice with an interval of three months in the

same or a subsequent session, then the Governor-General may submit the measure to the electors. This, however, has been interpreted in practice to mean that the power to submit is to be exercised on ministerial advice, which means that normally the Senate cannot force a reference to the electorate, since the ministry, being responsible to the House of Representatives, would refuse to advise submission, as was the case in 1914. The measure to become ripe for submission for the royal assent must be approved by a majority of electors and by a majority of States. Moreover, there must be a majority in any State if any provision altering the proportional representation of the State in either house of Parliament, or the minimum number of members in the lower house, or the limits of the State, or in any way affecting the provisions of the constitution in relation thereto, is to be valid. The proviso is rather vague, but it must clearly mean that consent is necessary only as regards changes affecting specific provisions in favour of the State.

The extent of the power of alteration is disputed. But clearly it must include the right to vary the clauses setting forth the powers of the Commonwealth and the States. Can it abolish the States? There are difficulties in holding that the abolition is within the power to alter. It is pointed out that the Commonwealth of Australia Constitution Act, 1900, was passed to unite the colonies in an indissoluble federal Commonwealth, and that it is improper that the power of change should extend to destroying the federal character of the constitution. Section 106 of the constitution provides that the constitution of each State shall, subject to the federal constitution, continue until altered by

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the Parliament of the State, and it is possible to argue that this clause is not within the power of alteration given by Section 128. The matter is clearly open to dispute, but it is clear that any attempt at unification would necessitate the concurrence of all the States in the referendum, since a single rejection would render the scheme impracticable of operation, so that, if unification is ever to be accomplished, it would seem that an Imperial Act will be necessary. The Statute of Westminster expressly leaves the matter as at present, negating the claim that was about to be made in Australia that the Commonwealth Parliament could annul the constitution at pleasure by repealing the Imperial Act of 1900 in which it is embodied.

The Statute, however, left the Union unfettered, and the position, therefore, is delicate. Under the South Africa Act, 1909, and the Colonial Laws Validity Act, 1865, there were certain restrictions on the constituent power of the Union Parliament, though of a simple kind. In part these have expired by efflux of time, and those essentially remaining are restricted to the rule that any alteration of Section 152 regulating the right of change, or of Section 35 safeguarding the Cape native franchise, or of Section 137 providing for the equality of English and Dutch (now also Afrikaans) as languages, shall require the assent of the two houses of Parliament in joint session, and on the third reading a majority of two-thirds the total number of members of both houses. It was naturally suggested that the cessation of application of the Colonial Laws Validity Act, 1865, meant that the Parliament could repeal these rules by simple Act, and doubtless a strong legal argument could be made out in this sense. But the two

houses in 1931, when approving the proposed enactment of the Statute, expressly put on record the view that neither of the Sections 35 or 137 could be repealed or altered except under the condition specified. The justification for this ruling is clear;[1] the Union was based on a compact arrived at between the representatives of the colonies, and to violate it would be dishonourable, even assuming that it was legal. In the face of the resolution it may be surmised that the South African courts would succeed in finding a legal ground for denying the validity of any measure which ignored these resolutions. The reservation of certain bills under Section 64 of the Act is now a mere formality, as explained above, and will doubtless formally be removed from the Act in due course.

The case of the Irish Free State presents very interesting considerations. Article 50 of the constitution provided for alteration by an Act of the Parliament in which the Senate has only a power of delay, not of negating a bill passed by the Dáil, followed by a referendum of the electorate. To pass, a measure must be voted on by a majority of voters on the register—so that abstentions might defeat it—and be approved either by such a majority or by two-thirds of the votes cast. It was, however, recognised that, as the constitution was experimental, this process might be unadvisable in the first instance, and therefore alteration by ordinary legislation was permitted for the first eight years. A safeguard, however, was provided, for any such bill was made subject to the provisions of Article 47, which provided for a referendum if demanded by three-fifths of the members of the Senate or a twentieth

[1] Keith, *Journ. Comp. Leg.* xiii. 247, 248.

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of the voters on the register within ninety days after its passage, provided that its suspension had been demanded either by two-fifths of the Dáil or a majority of members of the Senate. But this rule was not to apply to bills declared by both houses to be necessary for the immediate preservation of the public peace, health, or safety. The attempt to safeguard the rights of the people proved to be illusory by reason of this addition, for under it an Act, No. 8 of 1928, was hastily passed which repealed Article 47 and left the Parliament free to alter the constitution at will by simple Act. A logical sequel of this decision was the passing of an Act, No. 16 of 1929, which extended to sixteen years the period of freedom of change, and it may be doubted if there is any chance of the constitution ever becoming rigid as was originally proposed.

There is, however, one essential condition affecting change; Article 50 sanctions only amendments of the constitution within the terms of the scheduled treaty of 1921, and, what is still more important, the constitution itself owes its being to an enactment of the Dáil Eireann sitting as a Constituent Assembly. That body by its Constitution of the Irish Free State (Saorstát Eireann) Act, 1922, expressly gave legal effect to the terms of the treaty and provided that "if any provision of the said constitution, or of any amendment thereof, or of any law made thereunder, is in any respect repugnant to any of the provisions of the scheduled treaty, it shall to the extent only of such repugnancy be absolutely void and inoperative, and the Parliament and the Executive Council of the Irish Free State shall respectively pass such further legislation and do all such other things as may be necessary to implement

the scheduled treaty". These provisions raise a fundamental difficulty as regards the measure which was passed in 1932 by the Dáil with a view to eliminate from the constitution Article 17 prescribing the form of oath to be taken by members of the Parliament. It was apparently felt that this would be impossible if the restriction of amendment within the terms of the treaty applied, and so the bill provided for the elimination from Article 50 of reference to the treaty and the repeal of the provision of the Act of 1922 cited above.[1] The issue, of course, then arises by what right the Parliament can eliminate a condition imposed on its activity. The Parliament of the Free State owes its existence in Irish eyes solely to the activity of the Constituent Assembly; that Assembly representing the will of the people of Ireland deliberately limited the constituent power of the Parliament, but its creation now asserts that it is entitled to act as a fully sovereign power and to disregard the essential conditions of its operation. There seems from the standpoint of English law no possibility of the courts upholding such power, but the enactment is proposed, doubtless, in a deliberate attempt to establish the sovereign character of the Parliament and may be deemed a quasi-revolutionary suggestion. It is important to note that no question of imperial control is involved. The Statute of Westminster clearly gives the Irish Parliament right to act without regard to the Imperial Act of 1922 establishing the Irish constitution; the point is the Irish constitution itself, and no intelligible argument on legal grounds to defend the proposal of Mr. De

[1] Keith, *Speeches and Documents on the British Dominions*, p. 469; *Journ. Comp. Leg.* xiv. 107.

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Valera has been adduced. The objection that a treaty should not be made part of municipal law is clearly irrelevant; the point is that it has been made part of that law by a Constituent Assembly to which the Irish Parliament on Irish theory owes its being, and by which it was accorded only limited powers. The solution would rather have consisted in the creation of a new Constituent Assembly representing the people to revise their mandate to the legislature. Such action, though extra-legal, would not have been subject to the serious legal objections of the present procedure.

CHAPTER VI

BRITISH AND DOMINION NATIONALITY

(1) FROM early times the British doctrine as to nationality connected it essentially with birth on British territory, which carried with it natural allegiance. Other persons, such as the children of British subjects born abroad, could obtain nationality as British subjects only by imperial legislation. But to meet the needs of the colonies permission was finally granted for local naturalisation under colonial Acts, such naturalisation having effect only within the limits of the colony, the person so naturalised being an alien in any other British territory. Naturalisation could also be granted in the United Kingdom, first by special Act and from 1844 by a general Act, and on the whole it was held that persons so naturalised were British subjects throughout the Empire. The rather chaotic condition of matters as to naturalisation resulted in 1914 in the enactment of an agreed measure which had been approved by the Imperial Conference of 1911, and under which it was hoped that, while local naturalisation might have to be maintained, in the main it would be superseded by an imperial naturalisation to be granted in any part of the Empire to persons complying with certain conditions. At the same time the Act defined authoritatively who were to be

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deemed throughout the Empire natural-born British subjects.[1]

The status of a natural-born British subject is ascribed to every person born within the British dominions (not being the child of a foreign diplomat or alien enemy in occupation of British territory) or on a British ship wherever it is. Moreover, the child of a British subject father is a natural-born British subject, though born out of the British dominions, in certain conditions. It is necessary that the father should be alive at the time of the child's birth, and be either a natural-born British subject born in the British dominions, or born in a place where the King has extra-territorial jurisdiction, or have been naturalised, or have become a British subject by annexation of territory (as in the case of the South African Republics), or have been in the service of the Crown at the time of the child's birth. If none of these conditions is fulfilled by the father, the child's birth may be registered within a year at a British consulate, and he will be able to retain British nationality provided that within a year after attaining age twenty-one he asserts his retention of such nationality and where possible divests himself of any foreign nationality which he may also have.

Naturalisation can be acquired on proof of residence for five years within the eight preceding years in the British dominions, the last year having been spent in the part of the Empire in which he applies for naturalisation, and of intention to reside in the British dominions. Service under the Crown may take the place of past or proposed residence. Knowledge of English,

[1] Dicey and Keith, *Conflict of Laws* (5th ed.), chap. iii.

or in Canada French, or in the Union Dutch including Afrikaans, is requisite, and good character, and the power to grant is absolutely discretionary. A grant may on certain conditions be revoked. Naturalisation normally gives British status to the wife and may be extended to include minor children.

British nationality is lost by naturalisation in a foreign country, though this is impossible during war, and any person who, though born in the British dominions or on a British ship, also acquires under foreign law another nationality on birth, or who though born out of the British dominions is reckoned a natural-born British subject, may make, when of full age, a declaration of alienage and so cease to be a British subject. Women married to British subjects are British subjects, those married to aliens, aliens. But if a man during the marriage changes his nationality from British, his wife may declare her desire to retain British nationality, and, if her alien husband is a subject of a state at war with the Crown, she may resume British nationality. If a naturalised British subject has his naturalisation revoked, the revocation may in certain cases be extended to the wife and children. As a general rule, if the parent of a minor loses British nationality by declaration of alienage or otherwise (though not by the marriage of a woman to an alien), any minor child, if it acquires foreign nationality by the act of the parent, becomes an alien, but may resume British nationality within one year after majority.

(2) Like rules of nationality are in force throughout the Dominions, the terms of the Imperial Act having been followed by those Dominions which have held it desirable to make it absolutely clear that the provisions

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of the British Act are applicable to the Dominions. The British Act was intended to provide a code automatically applying to the Empire, save as regards the second part dealing with naturalisation which was subject to Dominion acceptance, but this effect was doubted in some Dominions, and in any case re-enactment was convenient and harmless. But in 1910 Canada found it necessary to distinguish for immigration purposes between different classes of British subjects and to create Canadian citizens for the purposes of that Act. The provision, as subsequently amended,[1] provides that Canadian citizen means: (i.) a person born in Canada who has not become an alien; (ii.) a British subject who has Canadian domicile; and (iii.) a person naturalised under the laws of Canada who has not become an alien or lost Canadian domicile. But the wife or children of Canadian citizens who have never landed in Canada do not acquire citizenship through the husband or father or mother. Domicile is attained by five years' residence in Canada as a permanent home; it is lost by voluntary residence outside Canada with intention to make a permanent home outside Canada; in the case of naturalised persons or non-Canadians a year's residence outside is presumptive proof of loss, and five years' residence conclusive proof. The aim of the measure was primarily to determine what classes of persons were entitled to enter Canada despite the immigration restrictions. It was felt that there must be a time when it was impossible to deport persons who had definitely settled in Canada, and the Act gives effect to this view.

In 1921 a further step was found necessary. The

[1] *Revised Statutes*, 1927, c. 93.

Dominion had decided to accept membership of the organisation of the Permanent Court of International Justice. It was entitled under the Statute of the Court to suggest four candidates for election as judges, but suggestions are limited to not more than two nationals. If Canadians were reckoned as British nationals, only two British subjects could be nominated as candidates; moreover, as Article 10 (2) of the Statute provided that, if two members were elected, both subjects of one member of the League, the senior was alone to be allowed to serve, there would be no chance of any Dominion judge ever sitting. The Canadian Nationals Act, 1921, therefore ascribes Canadian nationality to any British subject who is a Canadian citizen, the wives of such citizens, and children, born out of Canada, whose fathers at the date of birth were Canadian citizens or would have been so if the Act had then existed. But Canadian nationality may be disclaimed by any person who though born out of Canada is a Canadian national, and by any person who though born in Canada is also by birth or becomes during minority a national of Great Britain or any self-governing Dominion.[1]

The Canadian model is followed by the Union of South Africa, which in an Act, No. 40 of 1927, defined Union nationals to include (i.) any person born in the Union who is not an alien or a prohibited immigrant; (ii.) any British subject who has lawfully entered the Union and has been there domiciled for two years,

[1] *Revised Statutes*, 1927, c. 21. In 1931 Canada legislated to provide that marriage of a woman would not deprive her of nationality where she does not acquire her husband's nationality; see *Speeches and Documents on the British Dominions, 1918–1931*, p. 216. The other parts of the Empire will follow suit.

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while so domiciled; (iii.) any naturalised person under the laws of the Union whose entry was legal, and who has been three years domiciled in the Union, while so domiciled, provided he does not become an alien; and (iv.) any person, born out of the Union, whose father at his birth was a Union national or would have been a national if the Act had been then in force, and was not in the service of an enemy state, provided that such person would not be a prohibited immigrant. The wife of a Union national has that status; if he loses that status she may declare her retention of it. The wife of a non-national normally loses her Union nationality. Minor children lose nationality with a parent save in the case of a widow's loss of nationality on remarriage, but may recover it on attaining full age. A Union national may declare his renunciation of Union nationality as in the case of Canada.

In the Irish Free State the constitution contained a curious and very ambiguous provision defining citizenship. It gives, by Article 3, citizenship to every person domiciled within the Free State area when the constitution took effect, if he or either parent were born in Ireland or he had been resident for seven years in the Free State area. But any such person who is a citizen of another state may elect not to accept Irish citizenship. Further provision was to be made by law, and it is clear that the provision actually made is wholly defective and decidedly ambiguous. But while most of the persons included would be in any event British subjects, it is clear that a certain number of citizens, born of foreign fathers and Irish mothers, such as Mr. De Valera, would be made citizens even if not already British subjects.

The Free State at the same time inaugurated a change of system by providing that citizenship should be the basis of political rights. This was not imitated by Canada, and was only followed by the Union of South Africa in 1931, when it was found desirable to extend the franchise on the basis of adult suffrage for non-natives.

Canada and the Union have in addition passed legislation on the model of the Imperial Act regulating British nationality in its relation to these Dominions, and this has been done by the Commonwealth, New Zealand, and Newfoundland, none of which have as yet defined their nationals.[1]

A certain importance attaches to the new definition of nationals. It can obviously be made a sound basis of extra-territorial legislation by the Dominions under the powers granted by Section 3 of the Statute of Westminster. A further use is possible for international purposes. If the Dominions contract treaties securing special advantages for their subjects, the distinction of nationals could be employed as the criterion. The British Government for its part, like the Governments of the other Dominions, has shown no desire to narrow the definition of British subjects in any way and still in its commercial treaties secures privileges for all British subjects. Nor does it desire to exclude from political rights any class of British subject.

From the point of view of jurisdiction in private international law the new departure has importance. It is probable that the English courts would recognise

[1] Flournoy and Hudson, *Nationality Laws*, pp. 73-129. Persons naturalised in a Dominion, but not on the terms of the Imperial Act, are not British subjects outside the Dominion: *Markwald, Ex parte; R.* v. *Francis*, [1918] 1 K.B. 647; *Markwald* v. *A.-G.*, [1920] 1 Ch. 348.

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that the courts of a Dominion have jurisdiction over nationals of that Dominion on the analogy of the doctrine that foreign courts have jurisdiction over nationals of those States. But in the case of Canada there is difficulty in applying the doctrine, for it is not easy to see why the courts, say of Alberta, should have jurisdiction over a person domiciled in Ontario simply because he might be a Canadian national.[1]

(3) The issue of nationality is closely connected with that of the use of a distinctive national flag. The Union Jack is the common flag of all British subjects, while the Merchant Shipping Act, 1894, has so far regulated the use of flags at sea. The normal rule is that armed vessels of oversea territories fly the British blue ensign with the special arms or badge in the fly, and the pendant, but the Dominion navies are authorised to fly besides the Dominion flag at the jackstaff the white ensign at the stern. Merchant ships belonging to British subjects registered in an oversea territory fly the red ensign without badge, unless, as has been done for Canada, Australia, New Zealand, and the Union, this is specially authorised by Admiralty warrant; they may bear other flags with the badge so long as they do not violate Section 73 (2) of the Act of 1894 by suggesting error as to their status. It is now open to the Dominions to regulate the matter as they deem wise under the British Commonwealth Merchant Shipping Agreement of 1931 above mentioned.

For general purposes the adoption of a specific flag was carried out in New Zealand by an Act of 1901, while the Commonwealth adopted by regulation a flag

[1] Keith, *Zeitschrift für ausländisches u. internationales Privatrecht*, 1932, p. 308.

for its military forces and its government offices. The Irish Free State similarly has by executive order adopted a quite distinctive flag, not, as in the case of the Commonwealth and New Zealand, one based on the Union Jack. In Canada suggestions of a national flag have been received with indifference or opposition for the most part.[1] Newfoundland in 1931 definitely adopted the Union Jack with badge as the national flag of the Dominion.

In the Union the issue aroused bitter disagreement, because it was felt that the proposal was instigated by the republican element in South Africa which desired thus to abolish the use of the Union Jack. The Labour party on whose alliance the Government had then to depend for its majority was divided in sentiment, and the Senate, in the exercise of its power of delay, compelled the carrying over of the issue into a second Parliamentary session. This gave time for reflection and compromise, and an agreed solution was achieved in Act No. 40 of 1927. A new flag was created which may be open to heraldic censure but gratified republican sentiment by including with the Union Jack the old republican flags in miniature in the central of the three stripes of the flag. This is the national flag, but the Union Jack is also a flag of South Africa to denote the association of the Union with the other members of the Commonwealth. Both flags must be flown from the Houses of Parliament, the principal government buildings in the capitals, at Union ports, and on government offices abroad, while the Governor-General in Council

[1] The Union Jack remains the national flag, but the red ensign with Canadian arms is used on the High Commissioner's Office in London and the Canadian legations in the United States, France, and Tokyo.

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may fix the manner in which the flags may be flown on ships on the high seas. There has been some complaint on the mode of carrying out the further power granted to the Government to fix other places in the Union where both flags shall be used, but in the main there is justification for the King's telegram of October 27, 1927, expressing his heartfelt satisfaction at the solution of the flag question, though not so much of the spirit of toleration, conciliation, and good will then evinced has managed to survive to control the actions of the parties in the Union in the contentious issues which confront them. Happily, throughout the discussions the issue did not arise of restriction on Union legislative power, so that the matter was decided on its merits, and the retention of the Union Jack for a definite purpose was accepted by the Nationalists as a fair way of meeting the concession of the South African party of the right of the Union to have a flag which would continue the memories of the days of the independence of the Transvaal and the Free State.

(4) It is in keeping with the existence of national sentiment in the Dominion that special provision should be made as to the use of language. In Canada in the British North America Act, 1867, s. 133, provision is made that either English or French may be used in the debates of the Parliament of the Dominion and the legislature of Quebec; both languages shall be used in the respective records and journals, and either may be used by any person or in any pleading or process in any court of Canada established under the Act and in any Quebec court. The Acts of the federal Parliament and of Quebec shall be printed in both languages. In the other provinces French is not,

by the Act of 1867, given an official position.[1] On the other hand, the utmost duplication prevails in the federation, and complaints have been made at times of efforts to enforce bi-lingualism on federal employees; for example, on the railways. At any rate there is no doubt that French receives in the fullest measure the recognition it is promised, and French ranks with English as a qualification for naturalisation.

In the Union the South Africa Act, s. 137, provides that both the English and Dutch languages shall be official languages of the Union and shall be treated on a footing of equality and possess and enjoy equal freedom, rights, and privileges. All records, journals, and proceedings of Parliament shall be kept in both languages, and all bills, Acts, and notices of general public importance or interest issued by the Government of the Union shall be in both languages. This enactment has been literally followed, and greatly strengthened by legislation of 1923, which imposes bi-lingualism on public servants, with the result of rapidly strengthening the Dutch element in those services. As Dutch proper is far removed from the patois of the Union, it was wisely provided in 1925 that it should include Afrikaans, and determined efforts are being made, as a matter of Nationalist policy, to secure the elevation of that speech to the rank of a written language of culture. No doubt it is inevitable, but it cannot but be deemed unfortunate that British South Africans should have to spend so much time in endeavouring to acquire a speech of so minor a value.

In the Irish Free State the Constitution by Article 4

[1] See Taylor, *Can. Bar Review*, ix. 277-83, as to the language of the courts of Saskatchewan.

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provides that the national language is the Irish language, but the English language shall be equally an official language. Special provision may be made by Parliament for districts or areas in which only one language is in general use. This provision would have been usefully included in the Union constitution in view of the conditions of Natal and of many parts of the northern provinces where only one speech is current. It has been decided by the Irish Governments that Irish must be made the dominant speech, and that practice in the law courts will be denied to those unable to conduct a case in that language. It is therefore unfortunate that the language itself is one largely in the making for use in politics, in law, and in science, and that nothing has been done to relieve it of the reproach of having the worst of all systems of spelling. Moreover, to encourage its employment imposes a serious burden on Irish youth by compelling them to spend on the recreation of the tongue time which much more usefully might be spent in acquiring familiarity with one or other of the great European speeches, not to mention English, the speech of so large a section of the Irish race as the Irish Americans. It seems on the whole that it is delusive to suppose that nationality must demand a distinct speech, but Ireland can hardly be blamed for succumbing to a tendency which has rejuvenated moribund tongues all over Europe.

CHAPTER VII

THE GOVERNMENTS—THE CROWN AND ITS REPRESENTATION

OF the work of government in the Dominions much is inevitably assigned to local bodies and subordinate officers of many kinds, but the supreme direction is vested in the Crown. The functions of the Crown are performed in part by the King personally, in part by the Governor; in both cases the advice of the ministry is the governing factor, and the ministers who direct the affairs of the state are aided by the civil service.

(1) As is expressly declared in the British North America Act, 1867, s. 9, the Commonwealth Constitution, s. 61, the Irish Free State Constitution, Article 51, and the South Africa Act, 1909, s. 8, the executive government of each territory is vested in the King. But the Union alone expressly provides that the government may be administered by the King in person. In practice, of course, it is necessary that the executive government should be exercised by a local representative of the Crown, and thus the activity of the King is restricted to a few definite subjects, in the main connected with external affairs. In internal affairs, in addition to the appointment of the Governor-General, the King possesses, as has been seen, the formal power to assent by Order in Council

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to reserved bills of the Dominions and to disallow Acts. These matters as regards the Dominions are now regulated by the decision of the Imperial Conference of 1930. The advice of the Dominion ministries must guide the King, despite the necessity of the formal use of procedure by Order in Council. There has already been noted the assertion of General Smuts that, despite the advice of a ministry in the Dominion, the King could not constitutionally assent to a bill to sever the connection of the Crown with the Dominion.[1] This contention may doubtless be accepted as correct; the resolutions of the Imperial Conference do not touch on such a contingency, and for a ministry to tender such advice would be revolutionary and could properly be met by the refusal of the Crown to misuse a power which was never granted for that purpose.

In the case of the Australian States the position remains that both reservation and disallowance remain in the power of the Imperial Government to control, and that the King is still advised in these matters by that Government, pending any possible extension of the Dominion system to the States.

The King acts also on the final responsibility of the Imperial Government in regard to honours for residents in the Dominions, the function of Dominion and State ministries being confined to recommendations. As pointed out above, this rests on the imperial character of such rewards.

In external issues the King acts in the main personally. The delegation of the royal prerogative to the Governor-General has not been extended to the extent of granting such a fundamental prerogative as that of

[1] Keith, *War Government of the British Dominions*, p. 168.

declaring war or neutrality or making peace, nor is even the power of making commercial treaties conceded. In the case of war or neutrality it is easy to see that the special character of such action which still is performed for the whole Empire dominates the situation, but there is nothing essentially necessary in the withholding of the power to conclude commercial treaties and minor engagements. Again there is no delegation of the power to accredit envoys to foreign states, though the Governor-General is empowered to receive foreign envoys appointed to the Dominion, a procedure inevitable of course on practical grounds. In these matters of foreign relations it has been the practice for the King to act on the formal advice of a British minister, and issues of war or neutrality still are decided on the final authority of the British Cabinet. In the minor matters of international intercourse the procedure adopted by most of the Dominions[1] employs the formal assistance of a British minister, though the real advice is that of the Dominion. But, as has been seen, the Irish Free State has eliminated even the formal participation of any British minister, and has with the permission of the King secured the creation of its own seals for such purposes.

A point of great importance arises from the new departure. Under the older form of action the British Government was necessarily informed of the wishes of the Dominion, so that the resolutions of the Imperial Conferences of 1923 and 1926 enjoining such information were automatically complied with. Under the new procedure, while the obligation of prior communication of the intention to negotiate is unimpaired, it remains

[1] For Canada's view in 1929 see Keith, *Journ. Comp. Leg.* xii. 100.

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possible for a Dominion which uses the Irish Free State procedure to submit to the King action which might be injurious to British interests. It is clear that the position of the King in these matters is of peculiar delicacy. But it is obvious that it is incumbent on his private secretary to secure that the British Government shall be informed by the Dominion of the proposed action, so that it may be in a position to offer observations to that Dominion if it thinks it desirable. If the Dominion, after discussion, persists in desiring certain action, a grave position might arise, for it would be very distasteful to the King to assent to Dominion action in the face of the knowledge that the British Government deprecated the proposed step.[1] It is claimed by Mr. McGilligan that in such a case the King must act as desired by the Dominion, and it is clear that, if he refused to do so, a crisis might arise. On the other hand, the King's position in the United Kingdom would be seriously affected by assent to action aimed at imperial interests, such as an Irish Free State treaty of commerce giving marked preferences to the detriment of British goods to some foreign power. For the King to refuse ratification in such a case on the advice of British ministers would be a negation of the doctrine of equality, and any action must be taken on his own responsibility, which again runs counter to the doctrine that royal action should, save in the most abnormal conditions, be based on ministerial advice. The proper mode of resolving such a conflict would clearly be the advice of the Imperial Conference to the disputants, but there is no way of compelling any

[1] Keith, *op. cit.* xiii. 255; *The Sovereignty of the British Dominions*, pp. xvii, xviii.

Dominion to wait for or to accept such advice, and the only conclusion possible is that normally assent would be necessary, it being made clear that the King had finally acted merely on the advice of the Dominion. In the highest issues of war or neutrality it has already been said that the time has not yet come when the right of a Dominion to insist on having its own way in either issue has been conceded. To declare war or make peace or assert neutrality separately from the rest of the Empire would virtually be an act of secession, and the preamble to the Statute of Westminster is a definite assertion by all the Dominions as well as by the United Kingdom that that issue is not one to be dealt with by isolated action.

The issue, of course, might arise in a minor form. A Dominion might desire diplomatic representation in some country where for special reasons division of British representation was undesirable. In such a case the British Government might use its influence with the foreign power to make it difficult for the project to be carried into effect, but it is clear from the resolutions of the Conference of 1930 that the British Government is prepared to further Dominion desires for distinct representation when that is desired.

Certain other prerogatives of the Crown have never been delegated, but are now obsolete, such as the coinage prerogative, having regard to Dominion legislation covering the field.[1] The prerogative to annex territory at one time reserved to the Crown, which refused to exercise it in 1883 in respect of New Guinea

[1] Until 1931, under imperial legislation, the Coinage Act, 1870, an Ottawa branch of the Royal Mint was retained in Canada, but then was discontinued, Dominion legislation superseding it. The Australian and Union branches still exist.

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and disavowed an effort of Queensland to annex without authority, has been delegated to Canada [1] and has been used to secure the annexation of the various northern lands lately discovered, and now conceded by Norway to be Canadian. It has been used to secure the annexation of lands in the Antarctic region for the benefit of Australia and New Zealand at the request of these Dominions.

As we have seen, it does not rest with any Dominion to deal in isolation with the succession to the throne or the royal style and titles. So far the expense of the Crown has been defrayed entirely by the United Kingdom. The new position of the Crown as regards the Dominions has evoked the logical suggestion that part of the cost should be defrayed from Dominion funds, but it is unlikely that this suggestion will mature into action at any early date.

(2) The actual control of the functions of executive government normally rests with the Governor-General, styled Governor in Newfoundland, and with the Governors of the Australian States and the Lieutenant-Governors of the Canadian provinces. In the case of the Governors-General and Governors the appointment is made direct by the King, in that of the Lieutenant-Governors by the Governor-General of Canada on the advice of his ministers.

Prior to 1922 the selection of officers was made by the King on the advice of the British Government, which consulted the Government of the territory concerned, and allowed it to negative any proposed ap-

[1] By Order in Council, July 31, 1880, Canada was given the territories of the Crown in the north. It was relied on to secure the Sverdrup group in 1930; *Canadian Annual Review*, 1930–31, pp. 364, 365.

pointment. In that year the Irish Free State insisted effectively on securing the selection of its own nominee, Mr. T. Healy, as Governor-General, a precedent followed in the selection in 1928 of Mr. James McNeill. The Imperial Conference of 1930 conceded the Dominion right of choice, which was followed by the appointment of Sir Isaac Isaacs as Governor-General of the Commonwealth despite his great age and the objections of the opposition, and by the selection by Canada with general approval of Lord Bessborough as Governor-General. Canada, like the Union, which has also secured its own way in the matter, is opposed to the selection of local men, on the sound ground that accusations of partisanship are inevitable, as was shown in the Australian case. Where, as in the Union, racial feeling runs high such a selection is specially open to difficulty. In the provinces Canadians naturally are regularly selected, but the office is of less consequence, and even so instances have occurred in which it has been necessary to remove Lieutenant-Governors before the expiry of the normal term of office, five years, on the score of partisanship.

In Australia the States have repeatedly raised the question of appointment of local men. No agreement has ever been reached among the States or even consistently by any State Government. But there is obviously serious risk of partiality in local selections. What might happen is shown by what has happened when Governors have been absent and the government has been in the hands of local men acting in their place. In 1920 the acting Governor of Queensland, a Labour nominee, swamped unconstitutionally the Legislative Council of Queensland in order to secure

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the passage of legislation of a confiscatory character. In 1924 an acting Governor of Tasmania assented quite illegally to a bill passed by one house only in flat defiance of his duty to preserve the law. In 1932 a grave conflict between the Commonwealth and the State in New South Wales was avoided only by the action of the Governor in dismissing the ministry when it defied the law; such action would have been impossible for a local nominee if appointed by the Labour Government in question. It is an additional objection to local selection that the Governor in the States still has imperial duties to perform in the shape of the reservation of State bills under the royal instructions, and still acts as an agent of the Imperial Government in addition to his normal function as constitutional head of the State.

Provision for the case of vacancy in the office of Governor is regularly made; to avoid partisanship the Chief Justice is normally selected, but not invariably; in the case of the Commonwealth the senior Governor of New South Wales or Victoria usually is appointed to act. In case of temporary absence and for other purposes the power to appoint deputies is accorded now usually by statute, and is freely exercised, especially in the federations, for specific purposes. The salaries and expense of the Governors-General and Governors are defrayed from local funds; Canada is the most generous, maintaining a semi-regal state and imitating the forms of the British Court in some respects; at its request the Governor-General has been received in Washington on a ceremonial visit with the same respect as would be accorded to the King himself.

The office of Governor-General is constituted by

Letters Patent under the Great Seal, accompanied by Instructions under the royal sign manual and signet, while the actual appointment is made by commission under the sign manual and signet. The commission of Sir Isaac Isaacs was countersigned by Mr. Scullin as the formal mode of expressing the fact that the appointment was advised by that minister. In the case of the States the instruments clearly are still necessary; in the case of the Dominions the instructions are now obsolescent and the procedure may be revised. But it is necessary to make it clear that the King delegates to the Governor-General the prerogative in so far as that is proper for exercise in a Dominion. This issue unquestionably has been affected by the progress of Dominion autonomy. Formerly the extent of the delegation of the prerogative in the case of the Dominions had to be judged on the basis of their subordinate position; now that equality of status has been asserted, it may be argued that *prima facie* every royal prerogative has by necessary intendment passed to the Governor-General. But, as we have seen, this is not accepted law as regards the vital external prerogatives, nor does it apply to the prerogative of honour. In all probability, however, without special delegation there may be held to be implicit in the office of Governor-General all such prerogatives as are necessary for the government of the territory concerned, leaving it for convention to determine what prerogatives must thus be deemed to have passed, and which the King still will exercise in person. As has been seen, in certain cases the King still acts, and no doubt the difficulty of determining what division should be made deters action.

This position has clearly dominated the attitude of

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the Canadian Government in 1931 when it obtained a revision of the Letters Patent creating the office of Governor-General and of the Royal Instructions. Its action was in precise accord with the Imperial Conference resolution of 1930 regarding the position of Governor-General, and what is noteworthy is the limited amount of change desired. Letters Patent were still issued under the Great Seal of the Realm, not under the Dominion seal, necessitating the intervention of a sign manual warrant, countersigned by a British minister, though the warrant innovated by stating that proceedings were being taken at the request of and on the responsibility of the Prime Minister of Canada. No reference is now included as in the former instrument to the possibility of instructions being given by the King by Order in Council or through a Secretary of State,[1] and leave of absence to the Governor-General now is to be given through the Prime Minister of the Dominion and not through a Secretary of State. In essentials, however, the old form remains, and there is no attempt to increase the delegation of the prerogative. Indeed it is still enjoined that in the exercise of the prerogative of mercy the Governor-General, in any case where pardon or reprieve might affect the interests of the Empire or any place outside Canadian jurisdiction, shall take these interests into his personal consideration in conjunction with the advice of ministers. This retention of a quite obsolete rule is wholly unintelligible on principle, and most embarrassing to the Governor-General if he attempted to act upon it. Yet it has the latest ministerial sanction, and the comedy

[1] Instructions can be given under the sign manual and signet, which would involve formal British action.

is evolved of the Governor-General being required by ministers to disregard on his personal responsibility their own advice on an issue of government. The point is chiefly of value as a reminder of the fact that even the Crown in the United Kingdom is not merely an instrument in ministerial hands.

It remains, therefore, even under the latest model, to determine by usage and legal decision what prerogatives can be exercised by the Governor-General or Governor when they are not specially delegated. The rule that a Governor[1] is not a Viceroy is established law, for the case of *Musgrave* v. *Pulido*,[2] though decided as regards a Crown Colony, is of general application, and its validity is not open to question. What may be debated is the extent to which by constitutional usage and the resolutions of the Imperial Conference, coupled with the Statute of Westminister, the delegation may be assumed to have developed. Thus at one time it was assumed to be certain that the Governor without special delegation had no power to grant a charter of incorporation, but the Privy Council most unexpectedly ruled that even the Lieutenant-Governors of Canada had a delegation tacitly of this authority.[3] There is no evidence that the coinage prerogative passes to a Governor and the issue in view of legislation is never likely to arise. The Governor has no right to award honours, and when he holds investitures it is by special authority from the King. Far more important is his inability to declare war, make peace, or declare neutrality, or conclude treaties or ratify them in cases where, as is

[1] The term is conveniently used to cover Governor-General.

[2] (1879), 5 App. Cas. 102.

[3] *Bonanza Creek Gold Mining Co.* v. *The King*, [1916] 1 A.C. 566. At pp. 586, 587 the doctrine of *Musgrave* v. *Pulido* is evidently reaffirmed.

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normal, compacts are made in the names of sovereigns. Where, on the other hand, they are made in the name of Governments, the Governor in Council is the normal authority for ratification. Nor so far has the Governor-General been authorised to accredit envoys to other powers, though he in Council is the authority under which delegates from the Dominion to the League Council and Assembly perform their functions. The position is clearly complex and unstable.

How far in time of war the minor royal prerogatives can be assumed to pass to the Governor-General is uncertain. In the Australian case, *Joseph* v. *Colonial Treasurer of New South Wales*,[1] the issue was raised whether action taken by the State under the Wheat Pool scheme infringing private rights could be justified under the war prerogative, which it was suggested was being exercised by the State Government under delegation from the Governor-General of the Commonwealth. The contention ultimately failed to convince the High Court, which was clearly of opinion that, if the imperial war prerogative could be exercised in such a way in Australia without special delegation from the Crown, it could only be exercised by the Governor-General and could not be delegated in such a way as to validate the action taken in the case before the Court. A definite opinion in favour of the possession by the Governor-General of Canada of some measure of delegation can be found in Sir R. Borden's contention[2] in 1917, that it rested with the Dominion Government and not the British Government to decide as to the propriety of the requisitioning in the United Kingdom of

[1] (1918), 25 C.L.R. 32.

[2] *Canadian Constitutional Studies*, pp. 121, 122.

Canadian registered shipping. This implies that, had the shipping been physically present in Canada, it could have been requisitioned under governmental authority there at the discretion of the Dominion Government. Naturally the British Government relied on the fact that the shipping was British though of Canadian registry.

In certain matters the issue as to the extent of the delegation necessarily implied has been evaded by the grant in advance of authority to Governors-General as in the case of war emergencies. So also the constant grant of the prerogative of pardon, maintained still in the Canadian instruments of 1931, disposes of that issue; in the case of the provinces the Supreme Court of Canada[1] has ruled that, while the legislatures can properly confer power to pardon offences against provincial legislation, as in fact they have done, the power was not implicit in the office of Lieutenant-Governor representing the Crown. So again delegation of the power to keep the seal of the Dominion or other territory disposes of an issue which otherwise, as a long controversy in Canada shows, has elicited much variety of judicial opinion. On the other hand, it is clear that the appointment of King's Counsel is a necessary function of Governors-General, Governors, and Lieutenant-Governors, falling under the power to appoint and remove officers, which, though usually delegated, really necessarily appertains to the Governor.[2]

In some respects it may be assumed that since the Statute of Westminster the powers of Governors-General are extended. Thus, while it is clear law that a

[1] *A.-G. for Canada* v. *A.-G. for Ontario*, 23 S.C.R. 458.

[2] *A.-G. for Dominion of Canada* v. *A.-G. for Ontario*, [1898] A.C. 247.

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Dominion Government is capable of excluding an alien from British territory[1] as a matter of common law, it would appear that the Governor-General should now be deemed to have the power to authorise an act of state committed on a foreigner beyond the territorial limits of the Dominion, though the issue permits of doubt.

The fact that the Governor-General or Governor is not a Viceroy renders his position from the legal point of view anomalous. There is abundant authority that at present even a Governor-General is liable in the courts of the territory both civilly and criminally for any acts done in his private or his public capacity if these acts are illegal. In the United Kingdom he is subject to liability on contract or tort, and, despite the normal rule of the local character of criminal jurisdiction, two Imperial Acts[2] are definitely aimed at punishing crime or misdemeanour by colonial Governors. Moreover, a Governor might be brought under the terms of the Imperial Act of 1861 punishing murder committed overseas by any British subject. There are strong reasons why this legal liability for official actions should be wiped out, and that complete immunity in the United Kingdom and in the territory alike should be accorded just as it is enjoyed by the Crown. This might no doubt be brought about by judicial legislative decision, based on the new status of Governors-General under the Imperial Conference resolutions of 1926–30, but these do not apply to State Governors or provincial Lieutenant-Governors, who also deserve protection. The matter fortunately is not of high importance, and, while the Imperial Acts clearly are not within the

[1] *Musgrove* v. *Chun Teeong Toy*, [1891] A.C. 272.
[2] 11 & 12 Will. 3, c. 12; 42 Geo. 3, c. 85.

power of the Dominions to repeal under Section 2 of the Statute of Westminster, the effort to make use of them to bring to justice a Governor of Natal for permitting the exercise of martial law and the execution of natives proved a fiasco.[1]

In matters of contract for governmental purposes the Governor is exempt from personal liability by reason of the general rule that as a servant of the Crown he cannot be supposed to bind himself. But on the same ground he cannot permit the bringing of a petition of right against the Crown, for he has no delegation of that power. Fortunately the necessity of securing the royal authority is obsolete, as local legislation normally makes full provision for dealing with alleged breach of contract by the Government. But in theory in any territory subject to the English common law, where the ground is not so covered by statute as to exclude the operation of the prerogative, it seems clear that the King could authorise the bringing in the local courts of a petition of right in respect of any matter which under English law could justify the bringing of such a petition. It is clear also that a claim cannot be brought in the English courts in respect of an obligation of the Crown in respect of some territory outside the United Kingdom, such as the Irish Free State.[2] By analogy, under Dominion legislation no claim against the Crown in its imperial capacity could be dealt with in a Dominion court in such a manner as to impose a liability which could be recognised by the Crown in the United Kingdom.

[1] Keith, *Responsible Government in the Dominions* (ed. 1928), i. 97.

[2] *A.-G.* v. *Great Southern and Western Ry. Co.*, [1925] A.C. 754; Dicey and Keith, *Conflict of Laws* (5th ed.), p. 205.

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The liability of the Governor in tort is rendered of minor importance in normal circumstances by the rule that, when an official action is tortious, responsibility for it lies neither on the Crown, which can do no wrong, nor on the official superior of the tort-feasor, unless it can be proved that he identified himself with the wrong committed. Hence normally an official act regarded as tortious would result in proceedings against a minister or inferior officer, not against the Governor personally. In a certain number of cases Dominion and State legislation has placed responsibility for tort[1] on the Government in substitution for the British practice under which the Government pays the expenses and damages, if any, awarded against an officer who acted in execution of supposed official duty, but the liability of the Crown in such cases is neither complete nor wholly satisfactory to enforce.

(3) The prerogative power of the Crown though exercised by the Governor is in the same position as regards ministers as statutory authority. Statutes vary greatly in the mode in which they distribute power. Ministers individually may be authorised to do certain things, or boards, or officers, and it is only more important issues that are ascribed to the Governor or the Governor in Council. In some cases, as in those of the Commonwealth of Australia, Tasmania, and the Union of South Africa, the Governor-General or Governor in statutes is defined to mean that officer acting with the Executive Council. But in all cases alike the principle prevails that for official actions the Governor must under normal circumstances act on the advice of

[1] *Robinson* v. *South Australia State*, [1929] A.C. 469; *Commonwealth* v. *New South Wales* (1923), 32 C.L.R. 200.

his ministry or of an individual minister, according as the case demands.[1] The duty of acting, it must be noted, is a legal duty, but one of imperfect obligation. Even when a statute imposes on a Governor an express obligation, as opposed to merely authorising action as is the more normal course to take, it is clear that his action cannot be enforced by mandamus by the courts. This was decided as regards the Governor of South Australia[2] by the High Court of the Commonwealth when an effort was made to secure the issue of a mandamus to the Governor to issue a writ for an election of a Senator for the State. It was ruled that it had never been held that mandamus lay to compel a Governor to issue a writ for State elections, and that it was impossible to make a precedent. The Governor could not act without the aid of his ministry, and it might not be willing to have the vacancy filled. The same court[3] ruled that no mandamus lay to the Governor in Council of Victoria to compel him to consider the claim of a convict to release under prison regulations. There is clearly sound reason for these and other rulings. It is not for the courts to seek to control the highest form of executive authority, though in certain cases, as in the United Kingdom, mandamus may be issued to officials of inferior status to compel them to perform definite duties owed to individuals as opposed to public functions.

[1] So the Privy Council in the Irish Boundary Reference, Cmd. 2214. That the Governor-General has no discretion where statutory power is given to the Governor-General in Council is laid down in *Schierhout* v. *Union Govt.*, [1927] A.D. 94. See also *Buckley* v. *Edwards*, [1892] A.C. 387.

[2] *R.* v. *Governor of South Australia* (1907), 4 C.L.R. 1497.

[3] *Horwitz* v. *Connor* (1908), 6 C.L.R. 38.

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The rule of action on ministerial advice applies equally to statutory duties imposed on Governors by Imperial Acts, such as the functions imposed by the Pacific Islanders' Protection Acts. So also while a prosecution of an alien for criminal acts done in territorial waters requires under the Imperial Act of 1878 the authority of the Governor, in granting it he would act on ministerial advice; in fact the exercise of authority seems to take place without special reference to that Act, which may merely have reinforced the common law.

The necessity of acting on ministerial advice does not preclude, of course, the right to discuss and advise. It is essential that the Governor shall be given his due place; it is illegal to assume that he will assent, and action based on the assumption so that his formal concurrence has not been given is invalid.[1] The ministry advises either as individual members or, when the law so requires and in important issues, as the Executive Council. Normally matters are passed formally in Council where, except in Canada, the Governor is normally present in person, but any issue of importance must be explained to the Governor in advance, and similarly ministers must explain any issue on which information may be requested. The Imperial Conference of 1926, in insisting on the position of the Governors-General as parallel to that of the King, stressed the necessity of ministers affording that officer the same treatment as regards consultation and information as is accorded to His Majesty. No doubt it is difficult to insist on complete effectiveness of this rule, but there are many instances of its observation on

[1] *Mackay* v. *A.-G. for British Columbia*, [1922] 1 A.C. 457.

record, and there is no doubt of the right of the Governor-General to demand strict observance of it. It is significant that in the Irish Free State, where the determination to exclude any royal intervention has been from the first dominant, the practice is to give whenever possible legal powers, not to the Governor-General in Council, but to the Executive Council itself,[1] a procedure which effectively eliminates the Governor-General from any interference or knowledge of current affairs. It must be added that, if the practice of appointing partisans as Governors-General were adopted in the Dominions, the result might be serious in inducing ministries to withhold knowledge from the representative of the Crown which would have been gladly given to an impartial appointee.

If after discussion the Dominion ministry declines to modify its proposed line of action, there is normally no option for the Governor but to assent, for the responsibility belongs to ministers, not to him. But in certain cases mere assent may be impossible, and in the past there has existed a marked difference between British and Dominion practice as regards the necessity of taking ministerial advice. That a Governor should act on ministerial advice has been admitted in the Dominions, but with an important proviso: a Governor may reject advice if he can secure, in the event of the resignation of the ministry in consequence of his action, a new ministry which will accept responsibility *ex post facto* for his rejection of advice. The doctrine of course is familiar to English politicians, for it is the principle announced by Sir R. Peel as binding on him when he

[1] Even the power of pardoning offences under the Constitution (Amendment No. 17) Act, 1931.

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took office under William IV. in the belief that Lord Melbourne had been dismissed, though later research has shown that this belief was an error. While in England this view has almost died out, it was regularly in use in the Dominions and States as regards dissolutions of Parliament. A ministry was not held to have an automatic right to consult the electorate if it asked for a dissolution out of normal course, on the score that it had been defeated or that it was uncertain of being able to carry on the administration effectively without a fresh mandate. It was deemed to be the duty of the Governor to determine, after careful investigation of the position, whether he could not find a new ministry which would carry on the government without a dissolution.[1]

Though this doctrine was well established, and had been applied three times in the first decade of the Commonwealth itself, it happened that in the federation of Canada as opposed to the provinces it had not been tested in practice. A crucial issue therefore arose in 1926 when Lord Byng was asked by Mr. Mackenzie King for a dissolution, at a time when a debate was in progress on the issue of a motion of censure directed against the Government on the score of irregularities in the customs administration. To Lord Byng the situation presented itself in the light of an effort to avoid a decision on the vote of censure, and he had regard also to the fact that the normal dissolution in 1925 had failed to give the Liberal party a clear lead, so that it had to rely on the wavering support of the Progressives. It seemed to him, therefore, just to give the opposition the opportunity of dissolving Parlia-

[1] Keith, *Imperial Unity and the Dominions*, pp. 85-112.

ment and seeking a mandate. In his action he clearly went beyond any relevant precedent. Mr. Mackenzie King was prepared to regard his action as justifiable if he could have secured a ministry able to carry on without a dissolution, but naturally he could not see how it could be fair to refuse to an undefeated Prime Minister a dissolution, and to give it to a new Prime Minister who was unable to avoid a hostile vote in the Commons. Moreover, the Governor-General was compelled to assent to carrying on the government with a Council composed of acting ministers with the exception of the Prime Minister himself, as the appointment of the others as ministers would have vacated their seats and left the party in a hopeless Parliamentary minority. Very possibly the Governor-General thought that a dissolution could be avoided; if so, he completely miscalculated, and so unconstitutional was his action that the Liberals, by stressing the issue, succeeded in effacing the painful effect of the disclosures of maladministration in the customs, and in winning a majority which most competent judges held would not have been achieved had a dissolution been given simply to Mr. Mackenzie King. The latter's exposition of constitutional doctrine[1] was justly admired in Canada, and evoked only a feeble and evasive response from Mr. Meighen, who had to argue that the Governor-General had only acted as the King would have done in like circumstances—an impossible thesis.

As noted above, the effect of the episode was seen in the fact that the Imperial Conference of 1926 stressed the position of the Governor-General as the counter-

[1] Keith, *Speeches and Documents on the British Dominions*, pp. 149-159.

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part of the King, and to emphasise this took away from him the function of agent of the British Government. There is no doubt as to the meaning to be given to this declaration, which, it must be remembered, has no application to the Governors of the States or Lieutenant-Governors of the Provinces. Assimilation of Dominion to British usage in the matter of dissolutions was clearly pointed out, and British usage had been rather remarkably demonstrated in the grant of a dissolution by the King to Mr. R. MacDonald in 1924, despite the opinion of Mr. Asquith that on the defeat of the Labour Government an effort should be made to find a ministry ready to carry on and avoid a fresh dissolution of Parliament so soon after the election of 1923. The matter was early put to the test in the Commonwealth of Australia, where precedent had asserted the right to refuse a dissolution; though, on the other hand, in 1914 the Governor-General had followed the British practice and had given a dissolution to a ministry which might probably have been easily replaced without such action. Mr. Bruce in 1929, being defeated by the revolt of a section of his followers, instigated by Mr. Hughes, on the issue of the abandonment of the federal system of conciliation and arbitration, asked for a dissolution on the strength of the principle asserted at the Conference of 1926, and was accorded it. The precedent was deliberately followed, with special stress on Lord Byng's case and the opinions of the writer, by Sir Isaac Isaacs in 1931, when on a defeat in the lower house Mr. Scullin advised a dissolution.

It is, of course, too much to say that the Governor must grant a dissolution inevitably on a request from his Government. It is obvious that only one dissolution

can be asked for by the same ministry within a limited period; if it fails to secure a majority at a dissolution, it cannot imitate continental practice and endeavour to secure a complacent legislature by a series of dissolutions. The King in a like case would clearly be compelled to refuse dissolution and would then find a new Government to support his action. But it may be hoped that neither in the Dominions nor the United Kingdom will any Government venture to disregard the result of an election. If a ministry at an election secures only a slight majority and after a substantial period seeks again a dissolution, the issue would be different and must be decided according to circumstance. Absolute rigidity is impracticable, especially in the case of such a Dominion as Newfoundland, where constitutional usage is far from settled on normal lines. What is clear is that it is always advantageous to grant a dissolution where that will clear up issues. Thus in 1924 the Governor of Newfoundland gave a dissolution despite strong objections by the opposition to the Premier, and this resulted in the effective assertion of the will of the electorate in choosing a new Government, thus terminating the confusion prevailing. In 1932 fresh trouble developed in that Dominion, accompanied by rioting on such a scale as to compel the temporary absence from the capital of the Premier, and it was only on a dissolution that a clear decision was reached, rejecting utterly Sir R. Squires as head of the Government.

While the States of Australia and the Canadian provinces are not subject to the rule laid down in 1926, it is clear that practice there tends to be assimilated to that in the Dominions, as in the case of the dissolution

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granted in 1932 to the acting Premier of Victoria on the defeat of the administration in the lower house. It must, however, be remembered that the duration of a State legislature is only three years, which renders a premature dissolution objectionable, if it can be possibly avoided. The same disadvantage does not apply with equal force to the provinces where legislatures endure for five years, but the attitude of Sir James Aikins in Manitoba in 1920 is a good example of the importance attached to avoiding hasty dissolutions, but at the same time securing the consultation of the people under conditions likely to assure a definitive vote.

Dissolutions, of course, are not the only matters in which the Governor may have difficulty in deciding whether to act on the advice of ministers. The situation becomes very difficult when a ministry is defeated at an election but holds office pending the decision of Parliament. Such a course is perfectly legitimate, but the ministry is bound in fairness to perform only routine tasks and not to fetter its successor. If it seeks to do more, it may become the duty of the Governor to refuse its advice, as did Lord Aberdeen in Canada in 1896 when he practically forced Sir C. Tupper's resignation by rejecting his advice as to appointments and contracts after his defeat at the election was certain. In this regard, however, modern practice points to neutrality on the part of the Governor-General; after the defeat of Sir J. Ward in 1911 the Governor-General made no effort to press for the clearing up of the position, which was one of deadlock. In the difficult conditions of 1923–24 in Newfoundland, and again in 1932, the Governor refrained from any striking action, con-

tenting himself with moderate pressure to bring about the observance of constitutional principles. How far a Governor-General should acquiesce in action by his ministry which is high-handed and irregular was hotly discussed in Australia during the Great War,[1] when on two occasions Mr. Hughes effected ministerial changes in a drastic manner, but the Governor-General's acceptance of his action, though no doubt partly explained by war conditions, pointed directly in the favour of the principle laid down in 1926. The electorate can after all normally be trusted to give due weight to any irregularities of ministers when they appeal to them at the next election, and in Australia that time is never long delayed.

A case of great delicacy, however, arises when the ministry with a majority in the Parliament desires to extend the period of its existence. That such a step is legal does not determine the issue. It represents a grave intrusion on the rights of the electors, who chose their representatives for a definite period, and who may have since repented of their decision. After all, it is common knowledge that many elections are decided on chance issues and do not represent the permanent wishes of the majority. It seems clear, therefore, that in these circumstances a Governor is bound to weigh beside the advice of the ministry the welfare of the territory and their probable wishes. There is little precedent to guide; the action taken in 1916 when the Governor of New South Wales hesitated to agree to the extension of Parliament for a year, and on that among other grounds was recalled from his office, can be explained rather than excused by the anxiety of the British Government

[1] Keith, *War Government of the British Dominions*, pp. 209 ff.

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to help the ministry of the moment in its effort to co-operate with the federal Government in recruiting for war purposes. It is significant that, though the Imperial Parliament in 1916 extended at the request of Canada the duration of Parliament for a year, the existence of strong dissent in the country prevented any request for an extension being brought forward in 1917. There was also in 1932 in New Zealand strenuous opposition because the Government in its efforts to economise decided to extend the life of the existing Parliament by one year. Yet clearly in such a case the Governor-General could not wisely refuse to aid by assenting to the bill.

Constitutional changes necessarily raise difficulties. Can a Governor assent to action which alters the constitution if there is no very clear mandate from the electorate? In 1892 a ruling of the Secretary of State approved the addition to the upper house of New Zealand of extra members to strengthen the position of the new Liberal Government in that house. Though the upper house was hardly swamped, the precedent was adduced successfully to secure a number of additions to the New South Wales upper house by Admiral de Chair and Sir P. Game.[1] Reluctance to go as far as was desired by the State Premier, Mr. Lang, in both these cases led to embittered attacks from the Premier's party, while, on the other hand, the opposition held that the Governor had neglected an obvious duty to maintain the upper house as a serious legislative instrument. There can be no question of the excessive number of appointments, which rendered the upper house more numerous than the lower. The added members,

[1] Keith, *Journ. Comp. Leg.* xiii. 255-7.

however, on each occasion proved disappointing to the Labour party, for they showed no exact obedience to the appointing power, and they did not give the Labour administration the full support of their numbers. An effort to secure the dismissal of the Governor on the score of his refusal to act to the full extent was made in Admiral de Chair's case, but the Colonial Secretary negatived the suggestion on the ground that the Royal Instructions expressly contemplated the possibility of the Governor acting against the advice of his ministers. The formal reason is of negligible importance; it is the mere expression of a principle inherent in the position of the Governor or Governor-General, but clearly the refusal was sound. As the result of the election held in 1927 proved, the electorate was far from anxious to see the uncontrolled predominance of the extremist views of Mr. Lang.

On the other hand, in Queensland in 1920 the upper chamber was deliberately swamped by the acting Governor under circumstances which made his action definitely unconstitutional. He was a nominee of the Labour Government and formerly a Labour minister, and his appointment as Lieutenant-Governor was clearly improper, since necessarily he was a partisan. But what made his action indefensible was the fact that after a constitutional crisis an Act of 1908 decided that in cases of dispute between the two houses the question should be decided by referendum, and further that the electorate by a great majority, on having placed before it by referendum the issue of abolishing the upper chamber, had decided for its retention, as a real part of the State machinery. By swamping the house it was rendered possible to carry legislation so

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confiscatory in character that the London market was closed to Queensland borrowing, until later concessions were made and part of the wrong undone, and this was followed by the agreement of the house to its abolition. The whole of the advantage of an upper house was thus lost through the unconstitutional neglect of duty by a political partisan.

More serious still is the question of the position of the Governor when he is advised to act in such a manner as to violate the law. If there is doubt, of course, regarding the legality of action, he is entitled to demand a legal opinion, but he may rely on it when given, unless it is so obviously wrong as to render it farcical, and few issues are so clear as to make such an event probable. The case of having to sanction the use of martial law has often arisen, especially in Natal in 1906–8, and repeatedly in the Union, as in 1914 and 1922 in special. It is obviously difficult, if not impossible, for a Governor to refuse action in such a case. For one thing, martial law is not necessarily illegal; it may amount merely to exercise of the common law right of the Crown to suppress rebellion or disorder, and in any case it would involve a grave responsibility to decline to agree to what was represented to be essential in the public safety. But it is instructive that Lord de Villiers, when acting as Governor-General of the Union in 1914, was unwilling to exercise any power beyond what was legal, such as the imposition of a censorship of news or the forbidding of the export of food-stuffs, or even the mobilisation of the local forces, without summoning Parliament to meet in thirty days as required by the Defence Act, 1912.

Financial issues raise like questions, but it is seldom

easy for the Governor to refuse assent to irregular expenditure, for he is normally assured of later legislation, just as in the case of martial law he is sure of an Act of Indemnity in due course. It is, however, usual for Governors before granting a dissolution to seek assurances that supply has been granted sufficient to tide over the period until Parliament meets, and the fact that supply cannot be obtained is one reason for hesitating to accept the advice to dissolve. The dangers of action without supply were seen in 1907 when Lord Chelmsford granted a dissolution to Mr. Philp in Queensland and authorised expenditure without sanction of Parliament; the defeat of the ministry was followed by great reluctance to secure supply and threats to move the Crown for the removal of the Governor, and the crisis was avoided only by a change of political alignment which ended in a coalition between Mr. Philp's party and the leader, Mr. Kidston, of the victorious opposition, as against the more extreme Labour members. Similarly in 1926 Lord Byng's action in allowing expenditure without sanction was resented strongly in Liberal circles, and Parliamentary sanction was accorded with great reluctance.

Much more serious as a violation of law was the episode of 1924 in Tasmania[1] when the acting Governor, the Chief Justice, actually assented to an Appropriation Bill which had been passed only by the lower house, the upper house insisting on amendments which the lower house would not adopt. The absolute illegality of the course followed was patent, and it is most unfortunate that the acting Governor should have been advised that he could constitutionally assent if so

[1] Keith, *Journ. Comp. Leg.* vi. 205, 206; xi. 127-9.

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advised by his law officer and asked to do so by ministers. This precedent was shortly afterwards followed by a like assent by the newly arrived Governor to the Land and Income Taxation Bill, from which the upper house had deleted an important clause. It was recognised at the time in Australia that the action taken might have been successfully challenged in the courts, but for various reasons nothing was done, but the widespread disapproval expressed renders the precedent of minor importance. The Colonial Secretary, however, cannot well be excused for his action, since it was a direct encouragement wholly to violate the constitution. It must be added that the acting Governor failed further in his duty by not sending to the Colonial Secretary the protest of the Legislative Council, and by leaving the new Governor in ignorance of essential information, facts which only later became public.

Fortunately very different views of his duty were held in 1932 by Sir P. Game, Governor of New South Wales. Under the arrangement for the taking over by the Commonwealth of State debts certain payments were due to the Commonwealth from the State, and the Premier decided to withhold the sums due. Legislation by the Commonwealth followed which asserted that the Commonwealth Government could secure for itself certain revenues of the State in order to recoup itself for the sums which it had to pay to bondholders of New South Wales stock. Mr. Lang, after contesting vainly in the courts the validity of the Commonwealth legislation, endeavoured to defeat the levy of taxation for the benefit of the Commonwealth by issuing orders to State officers forbidding them to aid the Commonwealth in the matter of recovery, thus deliberately

defying the Commonwealth law after its legality had been asserted by the High Court. Mr. Lang was then asked by the Governor to withdraw his illegal instructions, and on refusal was removed from office, and a new Government appointed which was triumphantly upheld by the electorate. It was clear that in addition to his duty to the law the Governor owed a clear duty to the electorate to give them the decision whether or not they would defy the Commonwealth and refuse to pay their debts to holders of State stocks. No such proposal had been before the electors at the election of 1930, when a great majority was given to Mr. Lang on the strength of wild promises of prosperity under his régime, and there was overwhelming evidence in the results of the elections in the State for the Commonwealth Parliament at the dissolution at the close of 1931 that the opinion of the electorate was not in favour of the Government's policy of repudiation. Marked skill was displayed in the handling of the situation by the Governor, who had refused to be induced to act until the issue of illegality became quite clear. Obviously so long as he was not asked to acquiesce in illegal action it would have been unconstitutional to dismiss his ministry, and any such action might have defeated its own purpose by rallying to the Government the votes of many electors who would object to the Governor's intervention in the affairs of the State.

The precedent is of interest in its bearing on the problem presented by the passage by the Dáil Eireann of a bill to eliminate not merely the oath required by Article 3 of the constitution, but also the rule of the constitution that the treaty of 1921 binds the Free State and governs all the terms of the constitution.

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The assent of the Senate to the omission of the oath was made conditional on negotiation with the British Government, and the deletion of the supremacy of the treaty was negatived. In these circumstances it is normally assumed that the assent of the Governor-General must automatically be given. But this conclusion is not wholly justifiable. In fact the Governor-General might properly withhold assent on the obvious ground, already explained, that the bill purports to violate the power entrusted by the constitution to the legislature and therefore is null and void, and that its nullity is so clear that assent would be improper.[1] The issue is a delicate one, but clearly to accept a measure contrary to the constitution which it is the duty of the Governor-General to uphold is a grave step, which certainly should not be asked of a Governor-General.

(4) In the States of Australia and the provinces of Canada the Governors and Lieutenant-Governors are still able to act as agents of the British and the Dominion Governments. Moreover, in the case of New Zealand and Newfoundland the same principle is observed, as neither Government has shown any desire to act on the resolution of the Imperial Conference of 1926. In none of these cases, however, is there much important work to be done, save that the Governments of New Zealand and Newfoundland are thus kept in effective touch with the views on foreign affairs of the British Government. The Australian Governors and the Governor of Newfoundland have also the duty of reserving certain classes of bills. The Newfoundland

[1] In such a case the King could doubtless advise his representative through his Private Secretary. The removal of Mr. McNeill from office on October 3, 1932, secured Mr. De Valera control over the Governor-General's assent.

list of 1876 illustrates the subjects over which control was long exercised: divorce; the grant of any sum to the Governor; paper currency; differential duties; matters contrary to treaty rights; interference with the discipline of imperial forces; bills previously refused assent or disallowed; and bills of an extraordinary nature and importance affecting the prerogative, or the interests of British subjects not resident in the colony, or British trade and shipping. But the assent might be given if a suspending clause were inserted, or in case of urgency where no treaty right or repugnancy to English law was involved. The Australian States have a similar list, omitting differential duties and interference with imperial forces, and the rule of reservation is subject to the possibility of obtaining prior authority to assent. In the provinces the Governor-General does not now issue instructions to the Lieutenant-Governors; any control exercised over provincial legislation is carried out through the power of disallowance merely.

The decision that the Governor-General should be merely the representative of the King and not an agent of the British Government had a very important effect in the case of South Africa. Previously the Governor-General had been High Commissioner for South Africa, in which capacity he controlled absolutely the administration of the colony of Basutoland, and the protectorates of Bechuanaland and Swaziland. But clearly the union of offices in the hands of an officer who was no longer in subordination to the Crown was illogical, and accordingly the connection was terminated in 1930, when the British representative in the Union was given the function of controlling these territories, and of exercising the limited authority which is reserved to

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the Crown in respect of the government of Southern Rhodesia under its constitution. The separation was inevitably a matter of some regret to the Union Government, and was criticised by Lord Buxton, a former Governor-General. But it was obvious that the interests of the native territories were not necessarily those of the Union, and, although the South African Act, 1909, contemplated the transfer of the control of these territories to the Union, clearly that could not well take place without the assent of the natives. Their view is notoriously and probably justifiably hostile, as the Union policy of subordinating native to European welfare, however natural and in South African eyes laudable, cannot be expected to appeal to the natives.

(5) The functions taken from the Governors-General have been transferred to High Commissioners, of whom the first was appointed to Canada in 1928, with duties in part political, to keep the Canadian Government in personal contact with British policy and foreign affairs, in part economic, to control the agencies employed to keep the Board of Trade and British industry informed of Canadian openings. He corresponds, therefore, in some degree to the Ministers of foreign powers, accredited to the Dominion, but with greater insistence on the commercial side of his work. In all respects he is practically the counterpart of the High Commissioner for the Dominion in London. The appointment has been followed by a like appointment for the Union in 1930, and on the selection of an Australian as Governor-General it was in 1931 decided to create a High Commissionership for the United Kingdom in the Commonwealth and an acting appointment was made to that post.

CHAPTER VIII

THE GOVERNMENTS—MINISTERS, PARTIES, AND CIVIL SERVICE

WHILE the representative of the Crown plays a vital if mainly formal part in the machinery of government, the main burden of control rests on the ministry, which shares it with the civil service. The existence of the ministry is bound up indissolubly with the party system, through which the lower house of Parliament and the ministry are kept in vital touch.

(1) Dominion practice differs from the British usage in that the ministry in the sense of Cabinet is normally identical with the Executive Council. There are exceptions to this rule in the federations and the Union, but elsewhere only in Victoria and Tasmania, where ex-ministers are nominally still members of the Council, but not under summons. The Council itself rests on statute in Canada and the provinces, the Commonwealth, and the Union; elsewhere it rests on the prerogative. Appointments to it are made by the Governor-General, or Governor, or Lieutenant-Governor, but in the more rigid constitutions, those of the Commonwealth, the Union, South Australia, and Victoria, certain ministers must be in the Council. Western Australia requires that one Executive Councillor shall be taken from the Legislative Council, and New Zealand

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provides that ministers shall be in the Council. In the few cases above noted only must ministers be or find seats in Parliament. The position in the Irish Free State is very different, for ministers must be members of the Dáil, or, as regards one of them, the Senate. It is true that the constitution contemplates the appointment of ministers not members of the Council and not jointly responsible, but this venture proved unfortunate, and in 1927 was laid aside in practice, though it is still possible in law. Ministries are established regularly by law, for legislation is necessary to confer powers, as in Ontario in 1931 in respect of the Ministry of Public Welfare; but this does not apply to ministers who are merely to be members of the Council without portfolio, of whom a fair amount of use is made. They serve in some degree to make up for the lack of Under-Secretaries. Rarely are there ministers not in the Council, though this is normal in Newfoundland, and in Canada such a position was once assigned to the Solicitor-General.

Though legal compulsion is often lacking, convention urgently demands the presence in Parliament of ministers, and the most important must be in the lower house; indeed the upper house may have not a single minister if the majority in the lower house is Labour. Occasions where ministers remain in office without seats in the legislature occur, as in Prince Edward Island in 1930–31, when the Attorney-General had no seat; but even so useful a minister as Mr. P. J. Glynn in the Commonwealth had to resign when in 1919 he failed to achieve re-election. It is possible in the case of nominee upper houses to appoint a rejected minister to that chamber, and occasionally in the larger lower

houses, such as Canada, a place can be found for a defeated minister by the resignation of a loyal supporter, as was done when Mr. Mackenzie King was defeated in 1925. But the inability to provide an honour for a zealous friend renders this process far less easy than in the United Kingdom.

The essential feature of the ministry is the Prime Minister, the person invited by the representative of the Crown to form an administration when the office is vacated by death, resignation, or, rarely, dismissal. In his choice of a successor to a retiring Prime Minister the Governor's discretion is often guided by the advice of the outgoing Premier. This is normally tendered, contrary to the English rule observed by Mr. Gladstone that it should be given only if asked for. But of course, whether offered or asked for, it is in no wise binding. On the other hand, the choice is normally limited by the essential facts. It is seldom that more than one leader of the majority party could succeed in forming a Government. The Governor, however, can offer the chance to whomever he thinks fit, and, if he can secure colleagues, can formally appoint him. The Premier's resignation dissolves the ministry in the sense that ministers merely hold office until they are either relieved by the appointment of others or are asked by the new Premier to remain at their posts or to accept other offices. In coming to a decision on this point the Premier has normally no need to take into account the issue of re-election, for the practice of requiring re-election on accepting office when in Parliament has been almost entirely eliminated from the Dominions, where it was abolished in Canada in 1931, leaving it to survive for the moment in Newfoundland and pro-

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vinces like Saskatchewan, in both of which re-election is not requisite on the first formation of a new ministry after a general election. A strong protest was made by Mr. Mackenzie King against the innovation, and the desire was expressed that it should be restricted to the formation of a ministry within nine months after an election, as under the British Act of 1919, but the complete abolition was successfully defended on the strength of the British Act of 1926. The real objection is the possibility of ministerial office being awarded as the price of political conversion to a man elected as a supporter of the opposition. The argument which carried the day was the inconvenience of having to deny office to able men because they might risk defeat on standing for re-election.

The Premier has, of course, to secure the Governor's approval of his selection, but that is practically formal, though the Governor has the right to object on personal grounds to any unfit person, and no doubt this power has been used in some cases to prevent unsuitable selections. In the Labour Governments of Australia, however, the selection of ministers is done by the Parliamentary caucus, and this is extended even to the Premier, though the form of selection by the Governor remains. In these cases the Premier's right is reduced to allocation of portfolios, if even so much is conceded. To get rid of a minister who will not conform with the Cabinet views is simple. The Governor could be advised to remove him under his absolute right to dismiss, but normally the more elegant and courteous course is taken of resignation by the Premier, who is then commissioned to form a new Government whence the offender is omitted. This plan was used by General

Botha against General Hertzog in 1912, and General Hertzog similarly rid himself of Mr. Boydell in 1929 when they disagreed as to native policy. Normally, of course, the dissident minister resigns, more or less reluctantly.[1]

The degree of Cabinet unity varies. In theory it should be complete, and Canada has had a long series of strong Premiers, whose control has been nearly absolute—Sir John Macdonald, Sir W. Laurier, Sir R. Borden, and last not least Mr. Bennett, whose Cabinet has been freely derided as wholly subservient. Sir O. Mowat, the great protagonist of provincial rights, dominated Ontario for twenty-four years, and Mr. Ferguson in that province and Mr. Taschereau in Quebec are recent instances of imperious control, paralleled by Mr. R. Seddon's rule in New Zealand which won him the sobriquet of "King Dick". Generals Botha, Smuts, and Hertzog have been masters in their own houses. In Australia, Mr. Hughes dominated his Cabinet until resentment secured in 1923 a coalition of forces against him and deprived him of any following. Mr. Lang in New South Wales and Mr. Theodore in Queensland were clearly far superior in power to their associates. But many Cabinets in the Dominions have been weak and divided, and in Newfoundland, since Sir R. Bond fell from power, conditions have been utterly unstable and distinctly unsatisfactory, proving how important is the control of an effective ministerial head. In the Free State, Mr. Cosgrave's long rule and the control exercised by Mr. De Valera are undoubted.

[1] For the case of Mr. Blair in Canada in 1904, see Skelton, *Sir Wilfrid Laurier*, ii. 203 ff.; for the demand of Mr. Tarte's resignation in 1902, see *ibid.* ii. 176-84, where the doctrine of solidarity is emphasised.

In the Free State, as we have seen, the rule of law provides that the President of the Council shall be the choice of the Dáil, not of the Governor-General, who merely confirms the choice, while the President can choose his colleagues but must obtain the approval of the Dáil. On loss of the confidence of the Dáil the ministry must resign, holding office only until their successors are appointed.

(2) The relation of the ministry to the lower house, which is thus clearly emphasised in the Irish constitution, rests elsewhere on convention, a far more convenient course. A ministry must in the beginning have a working control of the lower house, though it happens occasionally that it can carry on with amazingly little foundation. In 1913–14 the Commonwealth Government had a majority of one in the lower house and was in a hopeless minority in the Senate. Where, as often, the Government is a coalition or it rests on the grudging support of a critical though not opposition section, its position is especially delicate. Mr. Mackenzie King's ministry in 1925–26 was grievously hampered by having to rest on the aid of the Progressives. Mr. De Valera's Government in 1932 was similarly dependent on the votes of its Labour allies, and the first Government of General Hertzog similarly was sustained by a coalition with Labour. It follows that the rigidity of the British rule of regarding any defeat on an issue of importance as fatal is not accepted in the Dominions; a Government will not be discredited if it announces that it regards a matter as of consequence, and yet overlooks a defeat. The small size of the legislatures and accidents of attendance necessitate recognition that incidents of this sort are inevitable.

If the control of the house passes from the Government, through internal dissension or coalition of opposition elements or other grounds, it can choose between resignation or a dissolution, and normally the latter course is preferred, for the former, as in the case of Mr. Balfour's resignation in 1905, must be regarded as an admission of failure. In 1924 the loss of a bye-election proved the final impetus to General Smuts to put his waning fortunes to a test which proved fatal. Apart from loss of authority, a dissolution may be induced by a change of policy which is deemed to require popular endorsement. On that subject it must be admitted that dissolutions have been generally avoided. The federation of Canada was approved by Canada and Nova Scotia without a dissolution, and in both cases with the approval of the representative of the Crown and of the British Government. It cannot be said as regards Nova Scotia that the precedent is a fortunate one, for the injury thus done to the province has never ceased to cause bitterness. In the case of the Union of South Africa all the colonies save Natal agreed to union without reference to the electorate, but Natal insisted on a referendum. It is noteworthy that despite this fact the result of union has been so unsatisfactory as to create a strong secession movement in that province. The same thing must be recorded of Western Australia, which likewise accepted federation by a decisive majority at a referendum. The issue when the people should be allowed a voice has never been settled. A conspicuous course of action without regard to electoral pledges was that of Mr. Lang in New South Wales when he advised repudiation of debt obligations and a generally confiscatory policy which ran counter

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to his attitude when he asked for the mandate of the electors. Nor were there lacking bitter complaints by the Labour party of New Zealand against the policy of the ministry in 1931–32 for which it was declared it had received no possible mandate. To extend the life of a legislature without a mandate is clearly a strong step justified, if at all, only by war. To impose conscription was held impossible in Australia; the device of a referendum was resorted to in lieu of an election with the inevitable result of failure in 1916 and 1917 alike. In Canada the necessary measure was passed in anticipation of the election of 1917, thus giving the opportunity of popular disapproval. But it was accompanied by the War Time Elections Act, which enfranchised nearly half a million women and others interested in securing aid for the forces overseas, and this was denounced vigorously by Sir W. Laurier as the creation of a special electorate for an election. The abolition of the Queensland Council in 1921–22 certainly could not be said to have been approved by the electorate. In the case of the attempts to abolish that of New South Wales the claim was made by Mr. Lang that the question had been before the electorate in the general election. This raises the always difficult issue how far the inclusion of one topic among many induces the vote of the electorate, and the fair interpretation of the mandate given—an issue much discussed in the United Kingdom regarding the safeguarding measures of the period 1925–29 and the protection legislation of 1931–32.

The question naturally is often raised of the propriety of referring to the people, otherwise than in the confusion of a general election, issues on which there is

widespread divergence of view, and which deeply affect the popular interest. The most important cases in which this step has been taken affect questions of control and prohibition of the liquor traffic, an issue which always divides deeply popular opinion. In Canada the question came to a height during the war as a result in part of the contemporaneous prohibition movement in the United States, and for a period popular referenda resulted in a régime of prohibition throughout the Dominion, save in Quebec. After the war the tide flowed in the opposite direction; by referendum after referendum the provinces affirmed their decision to prefer state regulation, the more rigid rule being almost by 1931 extinguished throughout the country. In Australia, on the other hand, referenda in the States on the issue showed a resolute determination not to deprive the populace of the pleasures of alcohol whether in moderation or otherwise. New Zealand likewise has had to make prohibition a matter of local option, and in its wider aspect of periodic referenda which have so far failed, with increasing decision of late, to effect complete prohibition, though that was nearly achieved under war conditions. The other topic which has been thought specially fitted for such treatment is that of religious education in the schools, and a certain success has attended the effort thus to inculcate officially the principles of Christianity into the children of Queensland. Still less use has been made of the initiative and referendum, as will be seen later. The general tendency of ministers in the Dominions as in the United Kingdom is to prefer to keep issues under normal Parliamentary control and to seek authority in the multifarious appeals made at a general election.

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The position of ministers on defeat at an election is not more clearly defined than in the United Kingdom. In the Dominions as in the United Kingdom the old practice of holding office until ejected by a vote of no confidence has given way normally in favour of resignation. All depends, of course, on what is not always easy to decide, whether the opposition parties can form an effective government. If there is doubt, it is quite legitimate to wait and see. Thus in 1925 Mr. Mackenzie King, though his party had no majority over the Conservatives and the Progressives, properly refused to resign despite his personal defeat, but waited until the opening vote showed a majority for the administration of 125 to 115. Where the result is to defeat the ministry and it resigns either before or after meeting the legislature, there is no absolute rule binding the representative of the Crown to send for the leader of the largest of two or more opposition groups. He must be determined in his action by the paramount consideration who is most likely to be able to form an administration by some form of coalition or working agreement which can carry on for a reasonable time the administration of the territory.

(3) The essential basis of the working of responsible government in the Dominions as in the United Kingdom is the existence of the party system, which has been adopted on every hand. The party serves to secure agreement on a course of action, the selection of candidates for election, the education of the electorate in the purposes of the party, for which purposes public meetings, distribution of literature, and canvassing are regularly employed, and the persuasion of voters to cast their suffrages at the elections for the candidates

selected by the party organisation. Without parties there would clearly be no possibility of effective cohesion or the working of the machinery of legislation or government, and in the national interest there is always pressing need that parties shall not be too many or degenerate into groups. Such a state of affairs deprives the State of directing energy and force. It leads to temporary arrangements between groups for limited purposes, and dissipates the energy which should be exhibited by Government. These considerations are fully realised in theory in the Dominions; in practice they are subject to difficulties of exercise which are only in part overcome.

From the United Kingdom the parties of Canada borrowed their names, but little else. But it is impossible to exaggerate the importance in the history of the Dominion of the tendency given by English practice to consolidate members of the legislature into effective sections. The vast distances, the racial, religious, and linguistic differences among Canadians might easily otherwise have resulted in the presence in Parliament of a mass of groups with warring plans. The early days of the united province of Canada, from 1841, were marked by the difficulty of carrying on responsible government with a mass of groups, the advanced reformers of Upper Canada, the still more advanced French Liberals of Lower Canada, the extreme Conservatives of Upper Canada, and the more moderate reformers of Lower Canada, whose true character was Conservative and who by 1856 had formed effective connections with the Upper Canadian Conservatives, now reconciled to realise that to be French was not to be a rebel or Republican. The creation of the Dominion

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in 1867 with the addition of the maritime provinces and later of the west fortunately did not upset the system of the parties, though it added to their complexity, and confused their principles, so that the cynical Sir J. Macdonald could declare—perhaps with remembrance of American conditions—that party is merely a struggle for office. Certainly the lines of party have one merit: they cut across province, race, religion, and economic conditions; though the Roman Church has at times been definitely a supporter of the Conservatives up to 1896, then of the Liberals, it showed in 1930 that it was sensible of the danger of being supposed to be definitely attached to any party and gave the Conservatives 24 seats in Quebec itself. The Church, of course, dominates Quebec, and its long zeal for Conservatism was due primarily to the fact that leading French Liberals were accused with some truth of being Liberals not merely in politics but in clerical matters. Clerical influence was therefore freely used against the Liberals, but the excesses of the movement brought retribution in the fact that the Supreme Court of Canada insisted on reversing the views of the Quebec courts that a priest might threaten his flock with excommunication if they voted for Liberals and vacated elections where such intimidation was proved.[1] The Pope himself intervened to moderate such unseemly misuse of spiritual power, and the worst symptoms subsided, affording a curious contrast to the less statesmanlike attitude of the Curia in the case of Malta in 1929–32. But another factor in keeping Quebec Conservative was the great ability of Sir J. Macdonald's ally, Sir George Cartier, a consummate master of elec-

[1] Sir J. Willison, *Sir Wilfrid Laurier*, chap. xi.

tioneering. The advent of Sir Wilfrid Laurier to the leadership of the Liberal party in 1891 proved a turning-point in its fortunes, for he was a loyal son of the Church and a French Canadian, and when, despite clerical intervention, his party won in 1896 the way was clear for Quebec turning to Liberalism. The reaction in 1930, though not by any means complete, was largely evoked, it is believed, by the feeling of the hierarchy in Quebec that the cause of French Canadianism was suffering in the rest of Canada from the belief that it was too deeply engaged with the fortunes of one political party, so that influence was exerted both in Quebec and outside to induce Catholic voters to cast their votes for the Conservatives.

On no vital issue are the parties now divided on principle. Autonomy was in essence the aim of Sir J. Macdonald, despite his effective appeals when necessary to British sentiment; Sir W. Laurier was probably no more an autonomist than Sir John, and Sir R. Borden was responsible for the most decisive acts of Canadian autonomy, the demand for separate signature of the peace treaties, and for membership of the League, though the Conservative leader won his place largely because British feeling was excited against Laurier in 1911 on the suggestion that his reciprocity agreement with the United States would facilitate merger in the United States. The present Liberal leader is clearly as autonomist as his Conservative antagonist, Mr. Bennett, but the paradox is that French Canada, while absolutely determined on self-government, is extremely nervous about any relaxation of the British North America Acts lest the religion and language which they so much admire should be weakened

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by exposure to interference by the British majority in Canada as a whole. Again the Liberal party was at first the champion of the provinces against the unifying policy of Sir J. Macdonald, who had hoped to see a united, not a federal Canada, but when in power Sir W. Laurier denied full autonomy as regards religious education to Saskatchewan and Alberta, and every movement in these provinces to control this issue has been denounced by Liberals in Quebec. On fiscal policy the Liberals were once devoted to free trade, but in office they found it necessary to favour protection to meet the views of their supporters in the east and to buy off Ontario hostility. There remains, however, a certain distinction on this head; the Liberals have clearly a stronger hope for lower tariffs than their rivals, for they are more in touch with the western farmers' efforts to release themselves from the shackles of the high prices exacted under protection by the manufacturers of the east.

Party organisation in Canada should logically affect only the federation, and parties in the provinces should be based on different lines. But in fact they prevail throughout the provinces, though in the west they have had to yield in recent years to another movement. The organisation, such as it is, rests on the British model of local branches of central parties, the provinces forming an intermediate unit between constituency and federation. American influence is seen in the practice which has become recently [1] general in federation and province alike of choosing the party leader by Convention, in lieu of election by the party caucus in the legislatures. At these Conventions also the party policy

[1] First adopted in Nova Scotia in 1930 by the Liberal party.

is discussed and in some degree decided. But it must be remembered that British tradition is strong, and that in very large measure policy, whether formally approved or not at Conventions, is really the work of the leaders of the party, though they endeavour to keep themselves in touch with their followers and to divine as well as may be how far and in what direction they can safely lead them. The introduction of compulsory service during the war is an excellent example of the mode in which a decision is reached by a ministry after long preliminary consideration of the position and its possibilities, and even so the party which had to make it effective to effect a coalition with those Liberals who put patriotism first suffered severely among the farmers for its attitude. Needless to say, in the provinces local issues provide little possibility as a rule of effective grouping on a permanent basis, a fact which has told in favour of the maintenance of the traditional federal party grouping as the dominant factor in party struggles.

While the parties are founded on a territorial basis and are open to all voters, and the policies arrived at at the annual Conventions or otherwise are based on general considerations, the war produced the phenomenon of a party movement based on sectional interests. The United Farmers of Ontario, resting on the support of Farmers' Clubs, from 1919 to 1923 governed Ontario, but in the result failed to retain power. The United Farmers of Alberta, however, won power in 1921 and have since retained it; the movement was successful in 1923 in Manitoba, and a like movement has produced a strong influence in Saskatchewan. The kindred federal party, the Progressives, were at the

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election of 1921 the second strongest party, but their policy was soon divided by doubts as to whether to continue, as do the Farmers of Alberta, as a purely sectional movement, or to extend their ranks by an appeal to general interests. Hence since 1926 their power in the federal sphere has been negligible. Much in the same position is the Labour party, which is frankly based on economic position considerations, and has formally existed since 1921. It fails to appeal strongly to workers in a land where opportunity exists for rapid promotion from the ranks of labour and where individualism is still strong. Nor has Labour the advantage, as have the Farmers' parties, of drawing on a fairly solid mass of immigrant farmers without any special reason to attach themselves to either of the historical parties. Negligible is the Communist party of 1922.

In Newfoundland party rests on no intelligible basis, save the struggle for office. From time to time religious feeling has weight, and efforts to secure federation with Canada have caused deep cleavages of opinion. Otherwise parties have been fluid and disputes have centred in discussions of the best way to develop the considerable resources of the territory, many of which have been unwisely disposed of.

In Australia the traditional two-party system, borrowed from the United Kingdom and sometimes given reality by divergence of view on free trade or land policy, has been hopelessly confused since 1890 by the appearance of a strong Labour party. It is based on a definite organisation of Trade Councils and similar bodies, and it presents features which differentiate it markedly from the older parties, though the latter

endeavour rather ineffectively to imitate its methods. The essential feature is the rigidity of discipline. The vote to be given on any issue is determined by caucus of the members of the party in Parliament, and no member may infringe the decision arrived at. What is more unsatisfactory is the fact that the party policy, whether in the Commonwealth or the States, is determined as far as possible by the central organisation in the Commonwealth and the States respectively, and members are held to be bound to give effect to it. Strictly speaking, this should deprive members of any real freedom, but in fact they do succeed in showing some independence of outside authority, though this varies with place, time, and individuals. Unquestionably the value of debate is thus rendered minimal; no arguments can move Labour members, whose loyalty is assured by the fact that politics is their means of livelihood and disobedience will mean loss of a seat and of income.

The effect of the emergence of Labour has gradually been to consolidate the old parties against it, but this movement has been crossed by the development of the Country party as a factor in the Commonwealth and the States. Its existence is due to realisation of the fact that neither Labour, which relies on the support of the workers in the towns, nor the orthodox anti-Labour party has any real interest in the primary producers in the country, for the latter represents the views of capital in the towns. The net result of this intervention of a sectional party is on the whole to the advantage of Labour through the splitting of anti-Labour votes. But the sad confusion of Australian finance under Labour auspices in 1930–32 has resulted

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in more effective coalition of the forces opposed to it, as shown in the return of anti-Labour Governments in the Commonwealth, New South Wales, and Victoria, and the coalition of the same forces in South Australia. On the other hand, Queensland has reverted to Labour control, though with a comparatively small majority in comparison to the pluralities which for many years marked the Labour domination there.

New Zealand was long faithful to the Liberal party, whose victory in 1891 gave them office to 1912. It then yielded place on the minor issue of freehold against leasehold tenure to the Reform party, while from 1915 to 1919 a National Government was formed. The Reform party then resumed control until defeated in 1928; since then Mr. Forbes has found it necessary to effect a coalition, which as against Labour aims at rehabilitation of the national finance and retrenchment. Labour has grown in strength; it is essentially a sectional party, whose left wing is of very advanced opinions.

In the Union of South Africa the division of parties was based unquestionably in the main on the different attitude adopted towards the Anglo-Boer war. Botha and Smuts headed the predominantly Dutch South African party, which aimed at achieving unity of feeling and equality between British and Dutch; the British Unionist party and the Dutch Nationalist party stood for racial interests primarily. The death of Botha in 1919 weakened the South African party, and its continued tenure of power was rendered possible only by the merger in it in 1920 of the Unionist party as against the hostility of the Nationalists and Labour, and an election of 1921 gave a substantial majority.

But it was weakened because the Nationalists could now assert that General Smuts had gone over to the side of the British element and the Labour party could reproach him with subservience to capitalism, and the decline of the fortunes of the ministry led in 1924 to a general election and the return of a Nationalist-Labour coalition to power. The final cause for hostility on the part of Labour had been given by the stern repression of unrest on the Rand in 1922, and coalition was made possible by the agreement of General Hertzog not to take up the issue of secession. Moreover, the path of the new Prime Minister was made more easy by the visit of the Prince of Wales in 1925, which conciliated Dutch feeling to some degree, and his success in securing the declaration of Dominion equality at the Imperial Conference of 1926. The election of 1929 gave him an absolute majority, relegating Labour, which had split into two fragments, one hostile to the Government and both weakly represented in Parliament, to a position of complete dependence. The most unfortunate feature of the situation is the strong racial character of the party division, the marked Republicanism of a section of the majority, and the systematic use of patronage to flood the public service with Dutch as opposed to British officers, a policy only in part justified by the advantage of making good the initial discrepancy between the numbers of British and Dutch in that service. Rigid insistence on bi-lingualism has necessarily told in favour of the Dutch, to whom the advantage of learning the greatest of world languages is infinitely greater than it is for English speakers to study Afrikaans, a debased form of Dutch, only now being created as a language of literature. The latest of party develop-

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ments is the rise of a group in Natal who aim at secession if the constitution cannot be remoulded on the federal basis, while the leanings of General Hertzog are to unification with the extinction even of the small measure of individuality left to the provinces. Yet a further element may be contemplated if South-West Africa, now under mandate, fulfils the destiny asserted by General Hertzog and becomes a fifth province, for the German population there has a solidarity of political views which would not render it easy for any of the existing parties to assimilate it.

In the Irish Free State parties have been determined from the first by the split over acceptance or rejection of the treaty of 1921. The party for acceptance triumphed by a small majority, and enjoyed until 1932 unquestioned control, though it had for this purpose to rely on the co-operation of independent members and members representing farming interests. The election of 1932 saw the triumph of the opposition party of Mr. De Valera, Fianna Fail, with the aid of Labour, though the plurality is small. The vital difference between the two parties has lain in the desire of the former Government to work with the United Kingdom while asserting to the utmost the distinct personality of the Free State, as opposed to the admitted desire of Mr. De Valera to secure complete independence and a republican constitution. Labour, it must be said, is adverse to a republic, and the opposition now asserts that the real power behind the throne is the Irish Republican Army, whose activities the late Government sought to destroy by a measure of the utmost severity, overriding in 1931 the constitutional guarantees for civil trials of suspects. The policy of the Government is

to develop to the utmost the industrial possibilities of the State so as to render it as far as practicable self-supporting and independent of British economies and political relations.

Party involves expenditure, and few parties can flourish without contributions from wealthy men and firms, who must be repaid in the form of contracts and privileges, honours if possible, and senatorships in Canada. A striking example of the system is seen in the statement that the Beauharnois Power Corporation and its officers gave 700,000 dollars to the Liberal party before an election in order to secure favours to come in the matter of the development of power from the St. Lawrence. Mr. Mackenzie King insisted that he never knew the source of party contributions, and asked for an investigation into the sources of party funds, which was not conceded. In striking contrast is the fact that the Progressives during their brief activity raised funds by local subscriptions of small amount —the method now vainly advocated by Liberals and Conservatives in the United Kingdom though often practised by Labour. In the case of Newfoundland scandals on this head are innumerable. More refined is the regular practice under which Parliaments confer benefits on localities at the public expense to meet the claims of loyal constituencies. In Australia, New Zealand, and the Union also funds must be raised in similar ways; the plan of protection throughout the Dominions means that there are always industries which can afford to expend large sums in providing the parties which favour them with the necessary sinews of war. The Labour parties, on the other hand, have to rely on small contributions enforced from individual

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members and funds provided by Trade Unions and like bodies. But they enjoy the enormous advantage of almost unlimited unpaid service at elections. The chief advantage enjoyed by their opponents is the power of the press, a fact which explains, though it does not justify, the illegal effort[1] of Mr. Lang to place an excise on newspapers carefully calculated to secure that the opposition newspapers would be shunned on the score of cost by all workers.

Party serves the purpose of keeping members amenable to the instructions of the Government. In no place is the man who changes his politics after election approved, and even alterations of outlook in a national crisis such as the moves made in 1915–16 by Mr. Hughes evoke an amazing and enduring bitterness of spirit, comparable with the indignation felt in 1931 when the more moderate section of Labour in the Commonwealth broke away from Mr. Scullin's feeble guidance and formed a new party with the opposition on the score that it was essential to save Australia from bankruptcy and repudiation of liabilities.

(4) While ministers in the Dominions do far more detailed work than is requisite in the United Kingdom, it remains essential that the chief work of the state should fall on the civil service. The history of that service has followed that of the British Civil Service, though at a considerable interval of time. The principle of official independence of political influence and loyal obedience to changing ministries is now far more widely recognised than in the past. The struggle has been prolonged, especially in Canada under American in-

[1] *John Fairfax & Sons* v. *New South Wales* (1927), 39 C.L.R. 139.

fluence, but even there much progress has been made.[1] Under the system prevailing before 1908 patronage was political, officers were far too numerous, inefficiency predominated, good work was discouraged through political promotions. In 1908 the service at Ottawa and in 1919 the service outside were brought under the control of an independent body of Civil Service Commissioners, and in 1923 a pensions scheme was started. The Commission is independent of political control, the members being removable only by addresses from both houses; they have wide powers of examination, and promotions are in theory in their hands, though a voice is given to the deputy head of the department. The system is not perfect; there is a tendency to restrict too much entrance to those who go in in the lower grades, thus excluding the profitable employment of university candidates; promotion examinations re-imposed in 1919 seem unwise; the promotion system, if it avoids political pressure, works with dubious satisfaction and seems to obscure responsibility, but the improvement on the old régime is enormous. The problem of the employment of women has proved as incapable of satisfactory solution as elsewhere, while railway employees are placed under the control of the Railway Commissioners and not under ordinary civil service rules. One strong objection to leaving such employees under civil service conditions is the insolubility of the problem of removal for inefficiency in the case of civil servants. While the power to remove exists amply, it is seldom taken advantage of save in cases of flagrant misconduct, and in fact the Canadian civil servant now enjoys much of the permanency which

[1] R. M. Dawson, *The Civil Service of Canada* (1929).

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is the lot of the British civil servant despite the theoretic tenure at the pleasure of the Crown, which remains embodied in the law of the Dominion.

The question of political activity on the part of civil servants has vexed Canada greatly; under the old régime dismissals on this score after each general election were wholesale and discreditable. Under the new régime the principle is laid down emphatically that any civil servant may record his vote, but must not "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". The penalty for violation of this rule is dismissal at the pleasure of the Governor in Council. Of the necessity and utility of the rule there can be no doubt, nor would Canadian conditions permit any such relaxation as is sometimes suggested in the United Kingdom in the case of minor officers, such as country postmasters, lighthouse-keepers, etc.

The example of the Dominion has gradually been followed by the provinces; thus Saskatchewan placed its servants in 1930 under an independent commission. In Newfoundland, however, partisanship is rife, and political influence predominates.

In the Commonwealth, on the other hand, from the first measures were taken to safeguard the efficiency and purity of the service. The service is controlled by an independent Commission, which deals with most issues affecting it, including promotions, and the servants are given securities against removal for any but substantial reasons and a legal right to claim pay due. The same general features are accepted in the States where the English rule of tenure at pleasure has

been largely modified by statute. It is still retained in the Commonwealth for defence forces, and has been held applicable to police forces. There is, of course, no absolute possibility of removing all political influence; special posts may be created, the Commissions may be influenced by a minister, temporary appointments may be made outside normal rules, and special powers vested in the Governor-General in Council or Governor in Council are sometimes abused. But in the main the civil service is adequately safeguarded. The chief defect lies in the failure to offer careers to university graduates, in the comparatively poor salaries, and the rather unsatisfactory conditions for superannuation. Special arrangements are applied normally on the State railways, as employees in such cases are obviously not properly subjected to rules which after all protect inefficiency rather than promote competence.

Political activities on the part of civil servants are regulated very ineffectively in Australia. Labour ministries in effect desire that employees should work in their interests, and have not hesitated to declare their approval of such action. It is significant that in 1903, after a railway strike of much severity, Victoria attempted to segregate railwaymen and civil services into special constituencies, but abandoned the effort in 1906. As there is adult suffrage, such action is practically useless, for the relatives of those affected could be trusted to vote as they desired.

New Zealand also accepts the principle of a Commissioner to control appointments and promotions, but excludes, as usual, the railwaymen, police, and defence from his jurisdiction, making special arrangements for railwaymen, and providing superannuation

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funds. Political action has become of late a most serious issue, and in the Finance Act, 1932, it was necessary to provide, in regard to the civil service, the teachers, and railway employees, that, if the appointing authority is satisfied with respect to such a person that he has been guilty of conduct calculated to incite, procure, or encourage grave acts of injustice, violence, lawlessness, or disorder, or that by public statements, or statements intended for publication in New Zealand or elsewhere, he has sought to bring the Government of New Zealand into disrepute, or that in any other manner his conduct has been gravely inimical to the peace, order, or good government of New Zealand, it should be lawful for the appointing authority, with the concurrence of the Governor-General in Council, to terminate his employment without notice. The clause was vehemently attacked in Parliament, but the circumstances seem to have rendered necessary a distinct warning to employees of their obvious duty of loyalty to the Government which they serve.

In the Union, as required by the constitution, the public service is controlled by a Commission of three members, who, however, only hold office for five years. They have wide powers in respect of appointment, promotion, grievances, grading, etc. They are, however, subject to the control of the Governor-General in Council, and in the period since 1924 the policy of the Government has been to insist on bi-lingualism in all officers and in the preference of Dutch to British. It is significant that so many dubious appointments have been made of late that the Speaker has ruled that questions in Parliament suggesting improper action are not to be allowed—a rather frank confession of the

truth of the feeling expressed in 1930 by the Bishop of Johannesburg that Englishmen are not wanted in the public service. Employees of the railways, ports, and harbours fall under the control of the Railway Administration, at the head of which is the minister aided by a Board of three Commissioners, while the executive power rests with a General Manager. The policy of this régime has been to secure wide employment for Dutch landless subjects, despite the fact that the work done by them costs much more than like work performed by natives. Needless to say, the political advantages to the ministry of this factor have not been ignored nor have they passed without criticism, as the Act of 1909 requires administration on business principles, which plainly are not being observed.

The Irish Free State appoints a Board of Civil Service Commissioners, but it holds office at the pleasure of the Executive Council, and while it normally decides on appointments, the head of any ministry with the assent of the ministry of finance may except posts from its control. It can therefore be held that evasion of exclusion of political influence is possible, but the standard of selection appears to have been high, nor does political activity on the part of the civil service appear to have been objectionable.

(5) The intimate relations of the Dominions with the United Kingdom attach special importance to Dominion representation in London. In 1879 an effort was made by Canada to establish representation on a basis comparable to diplomatic status; the British Government compromised on the style of High Commissioner, but both Sir A. Galt and Sir C. Tupper in that office were anxious to develop the political side of

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their activities as well as care of commercial business. All the Dominions have since then established High Commissionerships, and have employed the holders to perform political functions. Their importance in this regard has been enhanced by the decision taken after the Imperial Conference of 1926 to eliminate the Governor-General as a channel of communication in the case of Canada, the Commonwealth, the Union, and the Irish Free State. While communications pass direct from minister to minister, it is easy also to use the High Commissioner as a link. The importance of the office has been recognised by the grant of precedence in 1931 immediately after Secretaries of State (save when Dominion ministers are present), while the Finance Act, 1925, relieves High Commissioners and Agents-General and their staffs of liability to income tax, and by administrative action High Commissioners are accorded the same exemption from taxation in general as is accorded to Ambassadors of foreign powers.[1]

A slightly different proposal was made by Mr. Harcourt in 1912—the stationing in London of a Dominion minister, member of the Dominion Cabinet, who would act as a means of keeping the British and Dominion Governments in the closest touch on all aspects of foreign and imperial policy. To some extent effect was given to this idea in the position in 1914 of Mr. Perley as representative of the Canadian Cabinet in London. But the proposal has never been generally adopted. In 1932, however, it was decided by the Commonwealth Government not to fill up the vacancy

[1] High Commissioners are still denied ambassadorial exemption from suit: *Isaacs & Sons* v. *Cook*, [1925] 2 K.B. 391.

in the office of High Commissioner, but to station Mr. Bruce as a liaison minister in London. Canada, however, in 1930 contented herself with appointing Mr. Ferguson, formerly Premier of Ontario and one of the chief architects of the Conservative triumph in the election of 1930, to the High Commissionership. As the post had been given to Mr. Massey by the Liberal Government, strong exception was taken by Mr. Mackenzie King to the new step, and he claimed that the office of High Commissioner should be kept out of politics. Mr. Bennett, however, insisted that the post was quite different from the office of Minister to foreign states, which should be regarded as non-political. The Government required at London a person in the closest touch politically with its views. It may be added that doubtless the removal of Mr. Ferguson from Ottawa was a considerable convenience to the administration, which regarded with complacency the efforts of the opposition to censure his excursions into the political field.[1] The appointment recalls in some degree the position occupied by Sir C. Tupper, who from time to time was formally High Commissioner and so far a civil servant, and at other times was a minister in the Dominion Cabinet though present in London. There are no doubt advantages in the mode of action chosen by Canada and Australia, for the danger of unwise assurances being given by the minister in London may now be deemed to be a thing of the past.

The States of Australia are represented by Agents-General, who combine in their limited sphere both political and economic functions, but naturally under the present conditions the Agents-General are mainly

[1] *Canadian Annual Review*, 1930–31, pp. 81, 326, 327.

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concerned with commercial and financial questions. The same remark applies to the Agents-General of the Canadian provinces, but they are not accredited to the Dominions Secretary, and he maintains, in accordance with the Canadian constitution, relations only with the High Commissioner.

CHAPTER IX

THE LEGISLATURES—COMPOSITION AND RELATIONS OF THE HOUSES

THE bicameral system prevails in the Dominions. In the States, Queensland abandoned it in 1922; in the provinces of Canada it never existed for Ontario, British Columbia, Saskatchewan, and Alberta, and has been abolished by Prince Edward Island—which has created a composite house, one half of its members elected on a higher franchise — by Manitoba, New Brunswick, and Nova Scotia,[1] so that it survives only in Conservative Quebec.

(1) The lower houses are normally styled Legislative Assemblies, but Houses of Assembly in South Australia, Tasmania, Newfoundland, and the Union; House of Representatives in the Commonwealth; House of Commons in Canada; Chamber of Deputies (Dáil Eireann) in the Irish Free State. The upper house is styled Senate in the federations, the Union, and the Free State; Legislative Council elsewhere.

The franchise for the lower house normally approaches manhood and womanhood suffrage. It is accorded to British subjects only, natural-born or naturalised, and only after a period of residence in the territory and a shorter period of residence in the registration districts. The usual disqualifications are

[1] *A.-G. for Nova Scotia* v. *Nova Scotia Legislative Council*, [1928] A.C. 107.

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merely for unsoundness of mind and conviction for crime, where the sentence has not been undergone or a pardon granted, but the details vary greatly. In Canada, the federation and the provinces control their own franchises, but the federation excludes from the vote persons who are not permitted to vote at provincial elections. These include North American Indians in New Brunswick, British Columbia, Saskatchewan, and Alberta; Chinese in Saskatchewan; British Indians, Chinese, and Japanese in British Columbia. Women are granted the vote save for provincial elections in Quebec, despite the fact that they exercise it in federal elections. Quebec clings to a small property qualification, as in Nova Scotia. In the federation the number of members is determined by the rule that Quebec shall have 65, and the other provinces a number proportional to relative population as ascertained by the decennial census. At present the House of Commons has: Ontario, 82; Quebec, 65; Nova Scotia, 14; New Brunswick, 11; Prince Edward Island, 4—the number is preserved by an Imperial Act of 1915 giving each province as a minimum the same number of members as it has Senators; Manitoba, 17; British Columbia, 14; Saskatchewan, 21; Alberta, 16; and the Yukon Territory, 1. The rule of single-member constituencies prevails, and redistribution once was a mere matter of gerrymandering; it is now more fairly carried out by a Commission representing both parties. The provinces have in the main single-member constituencies,[1] but with certain exceptions.

[1] Ontario, 112; Quebec, 90; Nova Scotia, 41 (at next election, 38); New Brunswick, 48; British Columbia, 48; Prince Edward Island, 30; Manitoba, 55; Saskatchewan, 63; Alberta, 63.

Newfoundland now enjoys womanhood suffrage at age twenty-five, and there were 40 members, six in two-member constituencies, the rest in single-member constituencies, but in 1932 a redistribution reduced the number to 27.

The Commonwealth has adult suffrage, excluding only aboriginal natives of Australia, Asia, Africa, or the Pacific islands, but not Maoris nor, since 1925, British Indians, and if any of the excluded persons is entitled under State law to vote at State elections, he has the federal franchise. The number of members is 75 for the States, based on a periodical assignment according to population under the constitution; New South Wales has now 28 members, Victoria 20, Queensland 10, South Australia 7, Western Australia and Tasmania 5 apiece. One member without vote represents the Northern Territory. The States adopt single-member constituencies as a rule. New South Wales, under an Act of 1929, has 90 such constituencies redistributed to give the country areas 42 seats, future delimitations to be carried out by a Commission. Victoria has 65, Queensland 62, Western Australia 50. Tasmania has 30 in groups of five, and South Australia 46, eight constituencies returning three members and eleven two apiece. Queensland and Western Australia disqualify aboriginal natives of Australia, Asia, Africa, and the Pacific, but Queensland has exempted from this British Indians.

New Zealand has adult suffrage for white persons and half-castes, with 76 single-member constituencies. Maoris have four seats of their own, thus securing full regard for their rights.

The Union of South Africa has now simplified its

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franchise for white persons by according in 1931 the vote to all adult males and females, without property qualifications of any kind. This step was deliberately intended to strengthen the Government of General Hertzog by enfranchising women, especially Dutch women, and the poor Dutch whites. No change is made in the native and coloured franchise of the Cape, which is not extended to women. The vote can only be obtained by ability to write name, address, and occupation, and by twelve months' occupation of property worth £75 in the registration district or three months' residence and earnings of £50 a year. By the new system the old equality goes for ever, and a strong criticism was made against the change based on the fact that it contradicted the repeated declarations of General Hertzog's policy. That policy, it was asserted, had definitely promised to place coloured and white on one plane, with votes, and to exclude natives from the vote in the ordinary way, substituting a limited representation by elected white persons chosen by native constituencies; a system to be applied also in Natal and the northern provinces, where the natives have no vote, while in Natal the number qualified is nominal. The Cape vote can be abolished or altered under the constitution[1] only by a two-thirds majority of the total number of both houses at a joint session of the houses, and so far this condition has not been fulfilled. Even coloured persons, it is now clear, are to be placed in a position of complete inferiority, for their votes will be of no importance in comparison with white persons' votes. The number of seats is determined by population from time to time; the present House has 148—

[1] *R.* v. *Ndobe*, [1931] A.D. 484.

58 for the Cape, 55 for the Transvaal, 18 for the Orange Free State, and 17 for Natal.

The Union Act of 1931 introduces for the first time the demand that the vote shall be confined to Union Nationals, thus imitating the Irish Free State rule assigning it only to citizens. The Free State has 153 seats, divided over 30 constituencies of from three to nine members. It is governed by the principle of one member for not less than 20,000 voters, and redistribution is to take place at ten-year intervals.

Membership is normally permissible to any elector, but it is usual to disqualify persons holding contracts from the government, save as members of limited companies, and all kinds of civil servants as opposed to ministers. Various other grounds exist from place to place; conviction for crime is often a bar, and seats are vacated by bankruptcy, absence without leave, loss of nationality, conviction for crime, or for corrupt practices, etc. Naturalised persons sometimes need to have been resident for two years at least. The Union requires that members of the Parliament should be European British subjects of five years' residence, thus negating the old right of natives or coloured persons to be elected in the Cape. Newfoundland demands a small property qualification. Judges and members of the defence forces on full pay, and, in the Irish Free State, of the police, are ineligible. Resignation is always permitted, at least if the member's conduct is not under Parliamentary investigation. In Canada the Dominion and the provinces exclude members of the provincial or federal legislatures from election to the other, and in the Commonwealth there is a like exclusion between States and Commonwealth.

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Payment of members is the universal practice; the maximum is £1000 for Canada and the Commonwealth —now reduced in the latter as an economy measure. The leader of the opposition is normally paid a salary.

The duration of the lower house is five years in Canada and the provinces, except Prince Edward Island, where it is still four, as in Newfoundland. The Australian rule is three, but for the present Parliament New Zealand has extended it to four. The Union has five, as has the Irish Free State, the constitution allowing a maximum of six.

Electoral procedure is based on the British model. Writs are issued in the case of a general election by the Governor, otherwise by the Speaker. Nomination, polling, and counting of votes are carried out as in the United Kingdom. Registration of voters is largely compulsory. In the great majority of cases the simple rule of awarding the seat to the candidate with the largest number of votes prevails. It works most unfairly everywhere from the numerical point of view, giving exaggerated majorities of members to parties, and occasionally allowing a party with a minority of votes to secure the control of the house. But in Canada, where the evils of the position are not denied, and where in Quebec they are often seen at their worst, sentiment still prefers the old-fashioned manner of voting. It on the whole is held to have given workable houses, and no doubt this feeling has been helped by the normal absence of more than two great parties. Yet the disproportion in the size of constituencies in the interests of the country areas is carried too far, and it is hardly satisfactory that, as in 1896, a minority of 11,000 votes as compared with the Conservatives yet saw the

Liberals with thirty more seats, or that in 1926 the Liberals in Manitoba with 38,000 votes as against 83,000 captured seven seats to none. Nevertheless it is argued successfully against proposals to adopt proportional representation that it would be impossible to expand the western constituencies to the necessary extent to suit the system without making them utterly unwieldy, and it is feared that the new system would bring into existence groups which would render the task of administration even more difficult than it necessarily must be in a federation. Mr. Mackenzie King has championed the alternative vote, but in vain. Manitoba has, however, proportional representation for Winnipeg as a ten-member constituency, and Alberta has the system for two six-member constituencies with the preferential transferable vote for the rest. Newfoundland naturally is old-fashioned.

In Australia preferential voting in single-member constituencies has been adopted by the Commonwealth, by New South Wales, which has given up proportional representation, Victoria, Queensland, and Western Australia. The system of the Commonwealth is to compel the voter to mark his preferences; if no person has an absolute majority, the candidate lowest in the list is discarded and his second preferences distributed, and so on until one candidate has the absolute majority. It is not a satisfactory system, and Tasmania since 1909 has been faithful to proportional representation proper with six five-member constituencies. The system works out with admirable mathematical accuracy and is popular. If it makes weak governments, that is inevitable, because the State is more or less equally divided in political views between

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supporters and critics of labour views. New Zealand has tried and dropped (1908–13) the second ballot, but cannot be persuaded to try even the preferential vote. The Union contemplated the possibility of proportional representation which was urged by the delegates of the Transvaal, but finally dropped it, save for elections of Senators and of members of the Executive Committees of the Provincial Councils. As the distribution of seats is distinctly unsatisfactory and makes for much inequality in favour of the Dutch districts, the result is unjust to the South African party. The Irish Free State, on the other hand, adheres to proportional representation, which has served it in good stead. It was by reason of it, in all probability, that the treaty was accepted in 1922, and since then no party has obtained an exaggerated majority, giving the independents and the representatives of labour and farming the opportunity of checking the action of the government of the day.

Limitation of electoral expenditure has been attempted in several cases, and the need for it is doubtless often strong. In the Commonwealth a candidate is limited to £250 for a Senate election and £100 for a House of Representatives election. Moreover, every association or other body which spends money to influence elections must return that expenditure, and newspapers must reveal what payments have been made for publicity. In Canada a seat costs from 2000 to 4000 dollars to the candidate, and the Conservatives are said to have spent 100,000 dollars to secure the defeat of Mr. Mackenzie King in one election.

Corrupt practices are penalised much as in the United Kingdom, and the Courts now normally are

entrusted with the decision of electoral petitions, from which the Privy Council,[1] and in Australia the High Court of the Commonwealth,[2] accept no appeals. But it remains possible for governments to bribe the electorate, especially at bye-elections, by promises of public works to be performed, and Canada in special affords much ocular demonstration of such works undertaken with no higher object than to win the favour of the electors at the cost of the public purse. In Newfoundland the employment of funds on roads is one regular mode of securing local favour.

(2) The constitutions of the upper houses are, as regards the federations and the Union, vitally affected by considerations of federal character; those of the other houses are essentially the outcome of the early distrust of extreme democracy which marked the framing of colonial constitutions. Hence they have been the mark of attack, to which the upper chambers of the Canadian provinces have succumbed save in the case of Quebec, and even in Australia Queensland is now unicameral. The other houses have resisted onslaughts either by reason of their elective character or by a certain readiness to yield to the lower houses.

In Canada the Senate, under an Imperial Act of 1915, consists of 96 members. The federal principle applies in so far as the provinces are grouped into four groups, Ontario, Quebec, the maritime provinces, and the western provinces, each with 24 Senators. Nova Scotia and New Brunswick have 10 apiece, Prince Edward Island 4, and the great provinces of the west must be content with 6 apiece. Obviously this is far from an

[1] *Théberge* v. *Laudry* (1876), 2 App. Cas. 102.
[2] *Holmes* v. *Angwin* (1906), 4 C.L.R. 297.

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ideal division, and is explained only by historical grounds. Selection is by nomination of the Dominion Government and appointment by the Governor-General in the royal name. A Senator must be thirty years of age, male or female,[1] own property worth 4000 dollars above all debts, hold land worth the same amount, and be resident in the province. Seats are vacated on loss of property or cessation of residence, as well as in the usual cases of bankruptcy, crime, absence, or resignation. The powers of the Senate are not defined by law, save in so far as it is laid down that any appropriation bill or taxing bill must originate in the lower house. Nor is there any provision for deadlocks save the right of the Crown, which would be exercised now on Canadian advice without hesitation, to add either four or eight members in equal proportions from the four divisions of Canada in order to overcome a deadlock, a provision never yet employed.

The Senate obviously from the outset was not based on true federal principles, for, apart from the lack of equality of representation of the provinces, the mode of appointment secured that the members selected would be men not likely to champion provincial rights, and the Senate has never shown any special activity in this regard. It has failed also to carry out the idea that it might be the home of elder statesmen whose calm prudence would be a valuable aid to the lower house. As it has none of the authority in treaty matters and appointments of the United States Senate, it has attracted none of the younger politicians. Membership is the reward of party services, normally in old age; it

[1] *Edwards* v. *A.-G. for Canada*, [1930] A.C. 124. Women are eligible for all the other upper houses, save New Zealand.

may be given to generous benefactors of party funds, or to business men whose presence there is expected by some great corporation to further their interests in legislation. Appointments are purely party; Sir J. Macdonald once deviated from this rule, Sir W. Laurier, Sir R. Borden, and Mr. Bennett never.

The purely partisan character of the Senate has resulted in the rule that it accepts the legislation of the party without serious dissent, and that it attacks when there is a change of régime the legislation sent up to it with a vigour which dies away as the members, usually old, die off and are replaced by nominees of the new government. Hence in 1913 the Senate destroyed the proposal of Sir R. Borden to contribute 35 million dollars in emergency to the British Navy as retribution for the defeat of Sir W. Laurier in 1911. In due course the majority became Conservative and the Liberals suffered retribution. Not content with rejecting a money bill as in 1913, the Senate set up the claim and exercised it successfully to amend such bills. It rejected in 1922 and 1924 the proposal to build branches of the Canadian National Railway, which it doubtless correctly deemed a mere bait to the electorate, and in 1925 it drastically amended the bill making appropriations to relieve the sufferers from the disaster affecting the Home Bank, and the lower house had perforce to acquiesce. Many other measures both financial and general have since been examined critically though not so drastically by the Senate, which delayed for a long time the relief of the establishment of a divorce court desired by Ottawa in lieu of divorce by Act of Parliament, a proceeding in which the Senate had taken upon itself the business of examining the justice

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of claims. It still must exercise this function for Quebec.

That the Senate is satisfactory no one claims, but to amend its constitution is practically hopeless. An Imperial Act could only be based on an agreed scheme, which has never been approached. Election by the provincial legislatures, or nomination by their governments, or as regards a third by the leader of the federal opposition or by various interests, learned institutions, and so on, has been mooted, but the chance of change is negligible as matters stand.

In the case of the Commonwealth the federal principle is in form preserved. The Senate consists of thirty-six Senators sitting for six years, one half retiring every three years, elected by the whole of each State as a single electorate on the system of preferential voting, each elector being compelled to vote for one more than double the number of seats to be filled, or for the whole of the candidates if fewer, in order of preference. There is no property qualification, and the rules as to the electors and members are as for the House of Representatives. The powers of the Senate are normally equal with the lower house. But it may not originate any taxation or appropriation measures; it may not amend any bill imposing taxation or appropriating moneys for the ordinary annual services of the government, nor any bill so as to increase any proposed charge on the people. But it may suggest amendments to any bill which it cannot amend, and its power of rejection is unimpaired. Nor can it be affected by the tackling of irrelevant matter; bills for the ordinary annual appropriation must not deal with anything else; taxation bills must contain no extraneous matter on pain

of invalidity, and must deal with one subject of taxation only unless customs or excise duties are concerned.[1] Hence the Senate has come to exercise the widest powers in tariff matters, for it need not yield if its suggestions are objected to, and matters are normally settled by compromise. The Senate, therefore, has virtually power to amend. For deadlocks between the houses there is the provision that if a bill is rejected twice, with an interval of three months intervening, by the Senate, the Governor-General may dissolve both houses; if the bill is then rejected, the issue may be laid before a joint session, at which it will pass if it secures an absolute majority of the total numbers of both houses. The procedure has once been used, in 1914, when the result was to inflict a crushing defeat on the Government of Mr. Cook. In constitutional proceedings either house in theory can secure a reference to the people, but in practice only the lower house can exercise the power, as we have seen above.

The Senate has completely failed to act as a protector of the rights of the States, nor has it attracted politicians of any high order, who prefer the lower house, in which reputation and office can be won. The mode of election has turned out quite unsatisfactorily; the number of seats won corresponds very poorly as a rule to the number of votes cast for the different parties, so that there is a permanent possibility of strong discrepancies in the size of the government party in the houses. If the government has a majority in both, the upper house is of little service; if it is in a minority, there is constant risk of serious friction, as under

[1] Cf. *Osborne* v. *Commonwealth* (1911), 12 C.L.R. 321, which suggests the invalidity of Acts contravening section 55.

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Mr. Scullin's Government when he contemplated seeking a double dissolution to secure a majority if possible in the Senate. In its early days Labour, by its superior organisation, captured an undue proportion of seats, but from 1919–22 it had but a solitary representative, and, even though things improved in 1922, it has never since been in a position in accordance with its strength in voters. It has thus been possible for the Senate to exercise a wise restraint on the measures of Labour; it improved in 1930 considerably the legislation as to conciliation and arbitration and opposed an effective refusal to the more unsound of the Labour financial proposals in Mr. Scullin's administration. Moreover, its financial powers have secured the adoption of the system of referring all projects involving expenditure of over £25,000 to a Public Works Committee representing both houses, where the matters involved can be properly sifted and the issue decided with proper knowledge of the financial issues.

Despite doubts expressed by Sir R. Baker and Sir S. Griffith, the Senate has acquiesced in the constitutional usage for the lower house to control the ministry, though it is perhaps not too much to say that it has succeeded only in avoiding difficulties by ceasing to be a States house.

The Union of South Africa, despite the fact that it is not a federation, made in the constitution of the Senate a remarkable concession to the federal ideal. Under the constitution the selection of Senators now lies with the members of Assembly for the province in joint session with the Provincial Council, presided over by the Administrator, voting being on the preferential system with the single transferable vote. Senators hold office

for ten years or until the next dissolution of the Senate; it may be dissolved simultaneously with the lower house or within a hundred and twenty days thereafter, thus giving a new government elected as the result of a general election an opportunity to get rid of a hostile Senate. The number of members for each province is eight, and qualifications include age thirty at least, residence for five years, and ownership of land to the value of £500 at least. There are further eight Senators nominated by the Governor-General in Council, of whom four are to be selected on account of their thorough acquaintance, by reason of official experience or otherwise, with the reasonable wants and wishes of the coloured races in South Africa. These Senators hold office on the same terms as their elected colleagues, but need not comply with the property holding. Moreover, they can be changed on each advent to office of a new government, a provision devised to secure that General Hertzog should not be compelled to accept as Senators men who shared the more enlightened views on native policy of General Smuts.

The powers of the houses are in the main nominally equal. But the Senate may not originate or amend money bills, nor any bill so as to increase any proposed charge. On the other hand, the bill appropriating money for the ordinary annual services must not contain other matter, a provision intended to leave intact the right to reject a bill containing an unusual proposal. In case of disagreement, however, the Governor-General may summon a joint session of the two houses in the same session after two disagreements in the case of money bills, and it may be carried by a simple majority; if the bill is not a money bill, a joint session

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is possible only after the bill has twice been rejected or unacceptably amended in two sessions. In either event the power of the Senate is minimal, for with 40 members against 148, and with the certainty that eight of the forty will be governmental nominees, the chance of the lower house being defeated is never very large. The only case where the Senate has more weight is when the issue is the Cape native franchise or the equality of official languages, for then a two-thirds majority of the total members of both houses is requisite to pass a constitutional amendment.

There is no doubt that the Senate has proved of no great importance. It was not intended to be more than a house of review, and in that capacity it serves fairly well. But it does not attract talent, and its most useful work was done when immediately after the defeat of General Smuts it was able to oppose obstacles for the time in the way of such legislation as the measure which ultimately was passed as the means of excluding by law persons of colour from skilled employment at governmental discretion. Since the change in its position under the legislation of 1926 it has been more in accord with the lower house.[1] Plans to strengthen its personnel as opposed to its powers have been mooted. None has won any general acceptance.

(3) Of the non-federal houses Quebec preserves a nominee house of 24, the members holding office for life, and having the same qualifications in general as in Canada. Its work is unobtrusive and it has escaped serious attack or commendation. The Newfoundland

[1] For the avoidance of seeking its concurrence in ratification of the Kellogg Pact, 1928, and the German treaty of that year, see Keith, *Journ. Comp. Leg.* xi. 252, 253.

Legislative Council has had a very different history from the early days of its creation when it quarrelled steadily with the lower house. It is nominee, and, though formerly the Imperial Government controlled the increase of its membership, that practice is now obsolete. Its legal powers originally rested on the supposed analogy of the British House of Commons. In 1917 a quarrel over an Excess Profits Tax bill resulted in the enactment of a measure which places it in precisely the same legal position as is occupied by the House of Lords under the Parliament Act, 1911.

The Legislative Council of New Zealand now rests on the basis of nomination, members holding office for seven years, with the possibility of reappointment. It is left to convention to regulate its powers; the lower house claims that it is possessed of sole control over money bills. In 1914 an elaborate measure was passed to provide for the election of a house of 40 members by proportional representation, with provision for solution by joint session of disputes over bills other than money bills, which were to be in the sole power of the lower house, but the Act has never been made operative, and it seems improbable that any such change is now desired. The Council, which includes men of ripe experience like Sir F. Bell and Sir James Allen, acts most usefully as a revising body; it has long since ceased to contend with the lower house on matters of principle as opposed to detail. It has recently shown itself sensitive to the encroachments of the lower house under the assertion of privilege by appointing a Committee to aid the Speaker of the Council in countering such claims when unduly pressed.

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The weakness of New Zealand is not seen in the case of Australia save as regards New South Wales. The Council there was constituted on the basis of nomination, without limit of numbers, with the inevitable result that of late years the practice of swamping has been resorted to. The result has been to render the Council larger than the lower house as opposed to the proportion of a half once held wise. It is clearly impossible for such a body to resist the lower house; though its legal powers are limited only by convention,[1] and it is clear that it must be replaced if possible by a body based on election of some kind. Failing such action, it must clearly follow the fate of the Queensland Council abolished in 1922.

In the other States the upper houses rest on election. The principle is to have an electorate of more restricted character than the lower house, and to exact special qualifications of members. Thus Victoria requires ownership of freehold worth £50 a year from members, and electors, if not graduates or professional men, must own freehold rated at £10 or occupy leasehold rated at £15 a year. There are 34 members elected, two for each district, holding office for six years, one half retiring every three years. South Australia requires age thirty and three years' residence from members, while electors must be at least occupiers as owners or tenants of a dwelling-house, or own a £50 freehold, or be £20 leaseholders, etc. There are 20 members elected, four for each district, for six years, half retiring every three years. Tasmania demands age thirty from members, and electors must be possessed of professional qualifica-

[1] For a controversy in 1928 over amendments of money bills see Keith, *Journ. Comp. Leg.* xi. 255, 256.

tions, or be holders of freeholds of £10 a year or leaseholds of £30. The number of members is 18, for fifteen districts, three retiring annually, and the term being six years. West Australia also requires age thirty of members, and electors must be £50 freeholders, or leaseholders, or occupiers of £17 value, or Crown leaseholders of £10 value. The number is 30, elected for ten districts, the term six years.

In all these cases the upper house is strongly entrenched and its power has normally been freely used. Victoria was the scene of two famous controversies in 1865–68 and 1877–79, when the Imperial Government insisted on the right of the Council under the constitution to reject, though not to amend, money bills, and censured efforts to evade this right by tacking or by paying out money without sanction of law, or by submitting to judgement in the courts in claims for salaries of civil servants, and paying on the strength of these submissions. In 1903 a compromise was arrived at. The Council made concessions as to franchise and lowered the high qualification for members. In return it was allowed to deal freely with clauses in bills imposing penalties, or enacting fees or appropriating such fees, and to suggest amendments to money bills. Moreover, a deadlock provision was made. The Governor may, if a deadlock occurs, dissolve the Assembly on that account, and then, if the Council still remains recalcitrant, may dissolve both houses, but not in the case of a constitutional change. This clumsy procedure is no check on the Council, and it has ever since freely exercised its discretion as regards rejection of unsound financial proposals, as in 1925 when it refused to be moved by threats of resignation from rejecting re-

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peatedly the unwise financial proposals expedients of Mr. Allan's ministry.

South Australia in 1913 provided an ingenious rule as to the powers of the Council. An appropriation bill which, like every other money bill or money clause in a bill may only be introduced in the Assembly, must not contain proposals not relating to purposes previously authorised, *e.g.* by inclusion in a previous Appropriation Act, if it is to be exempt from criticism by the Council. Otherwise, while the Council may not amend a money bill or clause, it may suggest change or additions, and it may send down a bill with a money clause in erased type asking for insertion by the Assembly, and the Assembly may comply with any such request. But if a bill receives the Governor's assent, it is valid, whether or not there has been irregularity in its passage. For deadlocks it is provided that if the Council rejects a bill, and after a general election it again rejects the measure, the Governor may either dissolve both houses or summon ten members to the Council, two for each division. This machinery has not yet been put into operation, and its elaboration secures the Council against any prospect of being easily overridden.

In practice the Council has maintained a steady control; the Act of 1913 represents a concession of minimal importance made after two vain attempts in 1906 and 1910–11 to induce the Imperial Government to introduce legislation to override the opposition of the Council to reforms which would weaken its power of control. The British Government naturally refused to act, on the sound grounds that the request for change had no sufficient majority to support them, and

that the constitution had not in fact proved unworkable, so that interference could be justified on the only possible ground, necessity. Hence the Council maintains still its unassailable position. It has refused to render the franchise lower so as to change its complexion; it has refused to enact deadlock provisions enabling the Assembly to override it by thrice passing a bill, and it has even refused to allow the lower house to reconstitute itself on the basis of proportional representation. It cannot be said that its action has been seriously unpopular. The upper houses in the States are calm business-like bodies, representing a certain degree of property and they act as a wise check on the more reckless proposals of the lower houses.

The same remark applies to the upper house of Tasmania, where the constitution left undefined its powers. On the score of its elective character the Council exercised control over money bills, until in 1924–25 occurred the events already referred to when an Appropriation bill and an Income Tax bill were both assented to by the representative of the Crown though the Council had passed neither. The utter illegality of this course has been pointed out, but the crisis was solved by the adoption of a compromise between the houses. An Appropriation bill may not contain any clause not dealing with the ordinary annual supply; if any other provision is contained in it, it shall be void. Income Tax and Land Tax Rating Acts shall contain no other provisions, or they shall be void. Bills of these kinds the Council may not amend, nor may it amend any other measure so as to increase or impose any burden on the people or appropriate revenue. But it may suggest amendments where it can-

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not make them. The Act is clearly, it may confidently be asserted, without real legal value, for on the principle laid down by the Privy Council in the case of *McCawley* v. *The King*[1] it appears that the Courts could not refuse to give effect to measures which were passed by the two houses, merely because in so doing they had disregarded these rules. They must therefore be deemed to be constitutional principles which the upper house is entitled to enforce, but which it is bound to respect as based on an accord between it and the Assembly. In all other matters the Council retains its authority unimpaired. Moreover, with proportional representation, it can hardly happen that the lower house can be in such serious opposition to the upper house as to justify drastic measures against the latter.

In Western Australia in 1921 the same rules as regards the relations of the two houses as are in force in the Commonwealth were adopted, but the value of the measure is open to the gravest doubt. In the case of the Commonwealth the validity of the enactments was secured by the doctrine of repugnance to imperial legislation, and the maintenance of the *status quo* as regards the constitution seems to be secured by the Statute of Westminster, though this is not wholly free from doubt. The Western Australia Act, however, is a local Act, and it can, on the principle of *McCawley's* case, presumably be overridden by any subsequent Act, at any rate expressly if not by mere implication, as may well be the case. In fact the upper house is immune from coercion by the lower, and it has continued to

[1] [1920] A.C. 691. It is different in the Commonwealth, for the constitution rests on an Imperial Act and cannot be amended by ordinary legislation either expressly or tacitly.

exercise a moderating influence on the lower house when under Labour auspices that house has endeavoured to advance too far on the path to State Socialism, which in Western Australia, as in Queensland, has been operated with singularly little profit to the State and much expense to the taxpayers through the inability of the government effectively to manage business undertakings.

(4) The Senate of the Irish Free State stands in a category of its own, for, while other Senates have real powers, in the long run the Irish Senate can merely be regarded as an advisory body whose advice must be listened to in certain spheres, but need never be taken if it appears unsound to the lower house. Its membership is confined to persons over thirty years of age, and they are elected by the two houses together on the principle of proportional representation, names being first placed on a panel constituted according to Acts of 1927–28. The scheme contemplates the number as 60, the tenure nine years, and a third retiring each three years. But for the time being, as the result of the changes since 1922, the actual tenure varies. Over money bills the Senate has no power save of recommendation, which must be made within twenty-one days of receipt of the bill from the Dáil. The Chairman of the Dáil decides what is a money bill, but two-fifths of either house or a majority of the Senate may demand reference to a Committee of Privilege, sitting under a Supreme Court judge, which may decide the issue. In the case of other bills the Senate may delay the measure only; if it does not accept it either as sent up or with amendments which the Dáil agrees to within eighteen months, the Dáil may send it up again, and

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the Senate can only delay it for sixty days unless both houses agree to prolong the period. Even this delay may be cut down, for, if there is a dissolution, the Dáil may act immediately on reassembling, so that by a special dissolution the period might be reduced to negligible proportions. The procedure thus laid down is that which Mr. De Valera resolved upon on the rejection of the bill to remove the oath from the constitution by the Senate in July 1932.

The actual power exerted by a house of this type must be small. The value of it lies in the proposal of useful amendments which the Dáil often has the sense to accept, and, since the advent to power of Mr. De Valera, it has enabled the Free State to have a more dispassionate discussion of the issues regarding Anglo-Irish relations than could be expected from the Dáil with its clash of contending personalities. That the Senate has rendered useful services is not open to doubt, but whether it is worth while having an upper house with such restricted functions is a matter which admits of more dispute.

CHAPTER X

THE LEGISLATURES—POWERS, PROCEDURE, AND PRIVILEGES

As in the United Kingdom, though legislation is the essential work of the legislature, it has the vital function of control of the ministry and thus of the executive government of the country. Over the judiciary it has the power of securing the removal of peccant judges—happily its use is minimal; moreover, it can remedy the defects of the law as revealed in judgements, or the errors of judges in interpreting the laws, by legislative enactment, altering the law or declaring its true meaning.

(1) As we have seen, the existence of the ministry depends on the goodwill of the lower house of Parliament. This tradition has remained effective even in the federations, despite the suggestion of experts that the scheme was incompatible with the authority of an elective Senate, as in the Commonwealth, and the proposal of Mr. Playfair that the ministry there should be subject to the control of both houses—an idea which reappeared at the Indian Round Table Conference. On the other hand, the power of the ministry over the lower house cannot be ignored. The ministry may feel that it owes its position rather to the party in the country than to the legislators. They are sent to the

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house not to choose but to follow the leader of the party. The ministry has the right to allocate Parliamentary time, to decide the order of measures to be dealt with; it can in many ways help a loyal and punish a negligent supporter; if he continues recalcitrant, the party will reject him as its candidate at the next election, and the ministry can normally threaten malcontents with a dissolution, involving termination of pay and the prospect of a new contest without party funds to back him.

Formally there are, of course, sufficient opportunities for members to challenge ministers. The British practice of an address from the throne, followed generally, though not in the Irish Free State, affords opportunities of hostile amendments; finance measures are, as in the United Kingdom, made the subject of discussions based, not on detail, but on principle; motions for the adjournment can lead to debate, and on occasions of urgency a debate may be brought on with but short notice to the ministry. Or formal motions of no confidence may be proposed, in which case they will normally be allocated an early date for debate. Questions equally serve to harass ministers, and to extract from them damaging admissions of irregularities in finance or treatment of personnel, or halting explanations of imprudent speeches or suggestions that governmental favours may be purchased by votes. But normally the parties are too clearly defined to make such demonstrations count much in influencing votes; it is only when a party has begun to doubt the wisdom of its leader, as was the case in 1929 with Mr. Bruce's administration in the Commonwealth, that an adroit amendment may detach doubters and precipitate the

resignation of the ministry, or, as in that case, an unsuccessful appeal to the electorate for a mandate to force through the threatened measure. The control of the Labour parties by the caucus system, and to some extent of the parties in Parliament by forces outside, add to the rarity of changes of political allegiance in consequence of debate.

The actual choice of a ministry is not granted to any lower house, for, though the Dáil elects the President of the Council, it accepts his nominees for the other ministries without insisting on voting separately on each name proposed. But the Dáil has the power of preventing itself from being dissolved by a ministry which it dislikes, for a dissolution can only be advised by a ministry which commands the support of the Dáil, and it is dubious if the Governor-General could properly dissolve if he knew that the Dáil had in fact objections to dissolution. In the crisis of 1927 it was clear that Mr. Cosgrave was not prepared to ask for a dissolution until he had made it clear that the Dáil still had for him a majority, however slight. In the other Dominions no such power exists or is likely to exist, for the analogy of the British usage insisted on in 1926 by the resolution of the Imperial Conference gives a ministry a right to a dissolution after one defeat.

How far ministers will submit to the house their proceedings depends on their control of the house and on their ability to evade inconvenient demands of their opponents. Most ministries naturally desire as little comment as possible on the weak spots of their administration. Foreign issues seldom are made subjects of debate, unless legislation is necessary to secure

carrying out of treaties, when it is insisted that the terms concluded must be accepted *en bloc* or rejected. Efforts of members to suggest amendments are as futile as in the United Kingdom, even in the case of the more informal agreements with other Dominions. Virtually in such cases the matter is not one of legislation so much as of confidence in the work of the executive which has had to reconcile its own desires with the conflicting claims of the other party. Nevertheless such issues may raise serious difficulties, a fact which has resulted in the agreements between Canada and Australia and New Zealand of 1931–32 of ingenious provisions for allowing part to be abrogated without the destruction of the whole.

(2) The legislative powers of the Dominions have unquestionably been left by the Statute of Westminster in a somewhat complex position. The sweeping effect of that Act in its fullest sense would have left the Dominions with complete legislative power subject only to such limitation as arose from their status, for the Act by Sections 3 and 2 sweeps away (1) the territorial limitation of Dominion laws, and (2) the repugnancy of these laws to Imperial Acts. But this wide doctrine is immediately and drastically cut down by Sections 7-9, which safeguard the constitutions of Canada, the Commonwealth, and New Zealand, and by Section 10, which renders the changes in Sections 2 and 3 dependent on adoption by the Commonwealth, New Zealand, and Newfoundland. Moreover, the States of Australia are unaffected by the Statute, and the provinces are given no extra-territorial power, though the Colonial Laws Validity Act, 1865, ceases to apply. The only territories which thus have new constituent

powers are the Union, Newfoundland, and the Irish Free State, but the latter is bound by the treaty of 1921, so that, as has been seen, in this vital aspect of legislative power the Statute has introduced but little change. Further, the Union has limited definitely its power by asserting that the terms of the Union Act restricting the mode of alteration are binding as being the outcome of the agreement of the provinces when still colonies to unite.

(i.) The question then arises: Are there any forms of legislation which may be regarded as prohibited by the essential status of the Dominions? The answer to this enquiry is speculative, because it is not governed by any authority, and the effect of the resolutions of the Imperial Conferences, 1926–30, and the passing of the Statute must be regarded differently from conflicting standpoints. It must, however, be remembered that the legislature includes the Governor-General, and that as representative of the Crown he cannot with propriety assent to anything which severs from the Crown the Dominion. It seems, therefore, that, for this reason among others, the Governor-General should not assent to bills which would alter the succession to the throne, and this is confirmed by the Statute of Westminster, which makes it clear that any such bill should be based on agreement between the United Kingdom and the Dominions. If assent were given, the measure, it may be held, would not be a legitimate enactment but a declaration of independence. In the same way one should probably treat an Act to declare war—as does the Congress of the United States—or to make peace, if these measures were taken contrary to the action of the United Kingdom. They would be, even if assented

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to, extra-legal measures rather than exercises of the legislative power under the constitution. The same consideration applies to a measure to ensure the observance of neutrality, for it would forbid British subjects to give aid to the Crown contrary to their allegiance; it would authorise the officers of the ports to treat British vessels as belligerent and to refuse them entrance or limit their stay; it would prevent the supply of provisions or munitions to such vessels for purposes of the effective continuation of their attack on the enemy, and so on indefinitely. Such a measure would mean that the Dominion, however reluctantly, had decided to break away from its connection with the Crown. There are many steps short of these actions which might well be compatible with the continuance of allegiance. In all wars there have been mitigations of the severity of the measures applied against the enemy, and a Dominion legislature might easily think it fit to legislate to undo the effect of the common law in placing enemy subjects in a relation of non-intercourse and in forbidding trade with the enemy. The Crown, by the prerogative in the United Kingdom, has wide discretion, and the Dominion Parliament could vest such discretion in the Governor-General though none of the prerogative may have been delegated.

Beyond such instances as these there can be nothing in the status of a Dominion to justify doubt of its authority. The idea that there are other matters, connected with the prerogative, which are beyond Dominion competence, as, for instance, the view that the right to pardon could not be taken away from the Governor-General, is founded on older conceptions of the relations of parts of the Empire.

(ii.) In the case of the Irish Free State, however, there are certain fundamental principles laid down as to the liberties of the subject. These will be dealt with below, but it is clear that a difficulty arises as to their effective protection by the constitution, now that the Statute of Westminster has enabled the Irish Parliament to repeal the Imperial Act of 1922 approving the Irish Free State constitution. The constitution thus rests on its own foundations, and this is formed by an Act of the Constituent Assembly of 1922. It may therefore be held that the constitution is a document superior to the legislature which it creates, and that the Courts can give effect to any doctrine therein laid down by holding *pro tanto* invalid any enactment which violates it. Fortunately in the main the Articles are so expressed as to be capable of being overridden by an ordinary law, and it must be remembered that the constitution itself can be altered by an ordinary Act for at least sixteen years from its taking effect. It is sufficient then to enact what is desired and to state that it is a constitutional amendment so as to oust the rule that the enactment must be read subject to the constitution.

This view, it may be suggested, is contrary to the doctrine of the Privy Council in *McCawley* v. *The King*,[1] but that judgement deals with a case where the issue was one of repugnancy to an Imperial Act, and it was held that the power to alter the constitution given by the Colonial Laws Validity Act, 1865, was absolute and could be exercised by necessary intendment as well as by express change. That principle cannot be applied as necessarily or probably valid as regards a

[1] [1920] A.C. 691.

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constitution whose value lies in the fact that it was enacted by an Assembly claiming to determine for the people of Ireland the mode of exercise of legislative power and the limits confining it.

(iii.) The rule of repugnancy, as noted above, still applies to the Australian States, and, until formally extended in its operation by the Parliaments of the Commonwealth, New Zealand, and Newfoundland, was left operative by the Statute of Westminster for these territories. The essential doctrine of the Colonial Laws Validity Act, 1865, reduces repugnancy to the case where a Colonial Act is repugnant to an Imperial Act or a rule under it which extends expressly or by necessary intendment to the colony. It has been suggested in the Commonwealth[1] that the Act does not apply to Dominion legislation enacted under the constitutions passed subsequent to the date of the Act, and it was actually held that an Order in Council as to appeals under the Judicial Committee Act, 1844, was not superior in validity to the Commonwealth Judiciary Act made under the powers of the constitution of 1900. This view, however, is not that of the Privy Council, nor can it even be said to represent the view of the High Court. Sir A. Knox, C.J., and the four other justices had no doubt in the important case of *Union Steamship Company of New Zealand* v. *The Commonwealth*[2] that the Colonial Laws Validity Act was of general application to the legislation of the Commonwealth.

There remains, however, the difficulty that repug-

[1] *Commonwealth* v. *Limerick Steamship Co.* (1924), 35 C.L.R. 69, 95, 96, 116. See also *Commonwealth* v. *Kreglinger & Fernau, Ltd.* 37 C.L.R. 393.

[2] (1925), 36 C.L.R. 130.

nancy is not always easy to define. In the *Union Steamship Co.'s Case* the tendency of the majority of the High Court was to extend rather than limit the doctrine by making the decision rest on the broad ground that the Merchant Shipping Act, 1894, provided a code which it was not possible for a Dominion Parliament to alter in detail, even if the two measures could to some extent be made to work together. Mr. Latham [1] has stressed the similarity of this judgement to that adopted in dealing with the powers of the Commonwealth and the States in regard to industrial arbitration. At one time it was deemed that both State and Commonwealth awards might be upheld if they could be worked; an employer ordered by the State to pay one rate and by the Commonwealth to pay a smaller rate could comply with both by paying the higher rate as the greater included the less.[2] But in the dispute [3] between the New South Wales law providing for a 44-hour week and the Commonwealth award of a 48-hour week, the High Court adopted the view that the Commonwealth award must be deemed to cover the whole field and to require obedience to a 48-hour week standard. The issue depends clearly on each individual case, and does not admit of any simple doctrine, but the more sound view probably is that the repugnancy must be necessary and clear to invalidate the terms of a Dominion or State Act. There are very few cases where in the field of such legislation, apart from constitutional problems in the federations and the Union, the doctrine of repugnancy has been effect-

[1] *Australia and the British Commonwealth*, chap. vi.
[2] *Whybrow's Case* (1910), 10 C.L.R. 266.
[3] *Clyde Engineering Co., Ltd.* v. *Cowburn* (1926), 37 C.L.R. 466.

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ively pleaded. It has naturally often been invoked in vain, as when it was claimed that the Commonwealth could not levy land tax on leasehold lands,[1] because the States had by Imperial Act power to regulate the dealing with their lands; or that the New South Wales Government could not deal with Garden Island, because an Order in Council of 1899 had mentioned that Garden Island had been dedicated in perpetuity for defence purposes.[2] Or again an effort was made to show that Commonwealth collision regulations were incompatible with imperial regulations,[3] and Magna Carta has, needless to say, vainly been invoked to control the legislation of the Commonwealth on immigration.[4]

(iv.) The territorial limitation has caused considerable difficulty, for in the Commonwealth High Court it has been interpreted rather strictly in accordance with the doctrine apparently contained in the decision of the Privy Council in *Macleod* v. *Attorney-General of New South Wales*,[5] and it is not clear how far the latest views of the Privy Council alter the trend of decisions of the High Court. The decision in *Macleod's Case* referred to the power of the legislature of New South Wales to provide for the punishment of bigamy committed outside the colony. The conviction was held invalid, and of course it must be contrasted with the decision in *Earl Russell's Case*[6] where effect was duly

[1] *A.-G. for Queensland* v. *A.-G. for the Commonwealth* (1915), 20 C.L.R. 148.

[2] *Commonwealth of Australia* v. *New South Wales*, [1929] A.C. 431.

[3] *Hume* v. *Palmer* (1926), 38 C.L.R. 441.

[4] *Chia Gee* v. *Martin* (1906), 3 C.L.R. 649. In 1918 it was asserted in Quebec that only the Imperial Parliament could suspend the Habeas Corpus Act: *Blanshay, In re*, 24 R. de J. 578.

[5] [1891] A.C. 455.

[6] [1901] A. C. 446.

given by the House of Lords to the British Act of 1861 making bigamy committed outside England by a British subject a criminal offence. The restriction thus laid down was met in part in the preparation of the Commonwealth constitution by giving powers which clearly must be extra-territorial in effect: control of lighthouses, etc.; of fisheries in Australian waters beyond territorial limits; immigration and emigration; influx of criminals; external affairs; and relations of the Commonwealth with the islands of the Pacific. Moreover, by Section 5 of the Constitution Act the laws of the Commonwealth were to be in force on all British ships, save the King's ships of war, whose first port of clearance and port of destination were in the Commonwealth.

None the less the High Court has not shown any inclination to extend unduly the ambit of power. The Privy Council in *Attorney-General of Canada* v. *Cain* [1] in 1906 laid down a more generous doctrine that Canada had all powers necessary to deal with deportation of immigrants, including such measure of extra-territorial restraint as might be requisite. This was followed by the High Court in *Robtelmes* v. *Brenan*,[2] where it held that the Commonwealth had power to expel the Pacific islanders from Queensland; and during the war both New Zealand [3] and the Commonwealth [4] were held by their courts to have authority to legislate for their troops overseas, though this power could have been based on the specific power in this regard given by the Imperial Army Act.[5] New Zealand, however, in

[1] [1906] A.C. 542.
[2] (1906), 4 C.L.R. 395.
[3] *Semple* v. *O'Donovan*, [1917] N.Z.L.R. 273.
[4] *Sickerdick* v. *Ashton* (1918), 25 C.L.R. 506.
[5] Section 176 (11).

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Lander's Case,[1] reaffirmed the doctrine of *Macleod's Case* as regards bigamy committed outside New Zealand, overruling the argument of Sir J. Salmond in favour of a wider power, and the decision of the Chief Justice in the *Wellington Cooks' and Stewards' Union Case*[2] in favour of the power of New Zealand to regulate the actions of employers and employees on a New Zealand ship overseas. The High Court ruled in *Wienholt's Case*[3] that a Queensland Stamp Act could not, or at least must not be construed, to apply to a deed which was executed in England and had never when operative been physically in Queensland. But it is not clear whether this doctrine is more than a rule of construction rather than an absolute negation of power to legislate by apt words, and the same difficulty applied to other judgements on taxation issues. Thus in the important[4] decision that the Commonwealth cannot tax a dividend on shares situate in England under its Income Tax law, the issue is not so much one of extra-territorial authority as the effect which in England is to be given to an attempt to tax property which is truly English; even if the Commonwealth has the fullest power of a foreign state, is it right to give effect to it in England? The problem is not solved by the Statute of Westminster, for it does not touch on the effect in England of Dominion legislation, but the effect in their courts.

It has also been found that the rule can easily be evaded. Thus, if it is not possible to forbid the break-

[1] [1919] N.Z.L.R. 305.
[2] (1906), 26 N.Z.L.R. 394.
[3] (1915), 20 C.L.R. 540.
[4] *London and South American Investment Trust, Ltd.* v. *British Tobacco Co. (Australia), Ltd.*, [1927] 1 Ch. 107.

ing of customs seals on stores on the high seas, still it is an offence to enter Commonwealth waters with the seals broken;[1] if it is not legal to punish bigamy committed outside Canada, still it is legitimate to punish persons who leave Canada in order to commit that offence abroad;[2] if persons not resident in the Dominion are parties to contracts to be performed there, it is legitimate to give judgements against them and execute them, even if these judgements would be refused execution in England as improperly obtained.[3]

To these considerations falls now to be added the strong view of the Privy Council in favour of the validity of the Canadian decision[4] to punish offences against Canadian customs legislation committed on Canadian registered shipping with twelve miles of the coast of the Dominion. On many grounds it might have been possible to approve such legislation, including the right of the Dominion under the Merchant Shipping Act, 1894, s. 735, to regulate her registered shipping. But the Privy Council accepted the wide view that the only question was one which would apply equally to the United Kingdom, of the proper construction of a measure legitimately intended and in accordance with the practice of many countries, including the United Kingdom,[5] to make legislation against customs

[1] *P. & O. Steam Navigation Co.* v. *Kingston*, [1903] A.C. 471.

[2] *Bigamy Sections, Criminal Code, In re* (1897), 27 S.C.R. 461. A like control is used in Fishery Acts, *e.g.* c. 42 of 1929.

[3] *Ashbury* v. *Ellis*, [1893] A.C. 339.

[4] *Dunphy* v. *Croft*, [1930] 4 D.L.R. 159; in Privy Council, 48 T.L.R. 652 as *Croft* v. *Dunphy*. See also *Trenholm* v. *McCarthy*, [1930] 1 D.L.R. 674.

[5] See Wheaton, *International Law* (ed. Keith), i. 367. The Canadian Supreme Court has exercised jurisdiction over an American vessel captured in "hot pursuit"; *The Ship "North"* v. *The King* (1906), 37 S.C.R. 385; *Can. Bar Review*, ix. 182-5.

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offences operative within that limit of area. Thus it lays down clearly that in this matter and analogous cases there is no implication in the status of a Dominion, apart altogether from the Statute of Westminster, of inferior power to the United Kingdom.

It must be remembered that in the case of the provinces the local limitation is inherent in the Canadian constitution under Section 92 of the British North America Act, 1867, and that it remains despite the Statute of Westminster. The exact effect of the limitation is not easy to discern, but in respect of the power to levy death duties it is decided by *Brassard* v. *Smith*[1] that, where the only ground of taxation is presence of property in the province, as distinct from the presence therein of the legatee, the property cannot be taxed, unless on the principles of private international law it is there situate. So Quebec cannot levy a tax on shares in a Quebec bank if they are duly registered at Halifax, Nova Scotia, and transferable there, for the *situs* of a share is where it can effectively be dealt with. So in a famous case, that of the *Alberta and Great Waterways Railway Co.*,[2] it was ruled that Alberta could not confiscate by legislation funds in the Royal Bank at Edmonton because such action would mean depriving certain lenders of money of the right to secure payment from the bank at Montreal where their debt was situate, and thus was beyond provincial jurisdiction.

(v.) Subject to these limitations, the plenary power of the various Parliaments, including even provincial legislatures, is as extensive as the Imperial Parliament in its plenitude of power could convey. They are in no

[1] [1925] A.C. 331. See Keith, *Journ. Comp. Leg.* xiii. 280.
[2] [1913] A.C. 283 as *Royal Bank of Canada* v. *R.*

sense delegates of the Imperial Parliament and they therefore are not bound by the rule affecting subordinate legislative bodies that *delegatus non potest delegare*.[1] They have wide discretion to choose to what extent their enactments are to depend for their operation on declarations by the executive. Thus in the *Welsbach Light Company of Australasia* v. *The Commonwealth*[2] it was energetically contended that the Commonwealth could not pass an Act penalising trading with the enemy which allowed the Governor-General to prohibit any act. It is clear that the attack could at most touch only the validity of the view taken of what might constitute such trading by the Governor-General, and that to attempt to declare the Act invalid because of such a provision was impossible. So again it is for the Parliament to decide what measures it should enact for the peace, order, and good government of the territory, the words used in the constitutions to give authority to the Parliaments. Vainly in *Riel's Case*[3] was it pleaded that it must not be assumed that the Dominion of Canada was given authority to tamper with the law of treason or diminish the safeguards provided for the accused in such cases by English law. No doubt in the High Court of Australia there have been dicta suggesting that it is the Court's opinion of what falls within a power that is to determine the validity of legislation, but that is clearly not the true doctrine. All that can be claimed for the courts is that, if they find a Parliament with defined powers, like that of the Common-

[1] *Hodge* v. *The Queen* (1883), 9 App. Cas. 117; *Powell* v. *Apollo Candle Co.* (1885), 10 App. Cas. 282; *Baxter* v. *Ah Way* (1909), 8 C.L.R. 626; *Riel* v. *The Queen* (1885), 10 App. Cas. 675, 678.

[2] (1916), 22 C.L.R. 268.

[3] (1885), 10 App. Cas. 675.

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wealth, dealing with a topic under the claim that it falls within a power when it certainly does not, the opinion of the court prevails.[1] It is not enough, as many Canadian cases show, that the Parliament should claim to be exercising a power, if in substance it does something else; for example, if it endeavours under cover of enacting criminal law to arrogate to itself the power of regulating the business of insurance. Nor again may it impose taxation merely in order thus to compel obedience to its efforts to control by licence that important occupation.[2]

The limits of the power of legislatures to create subordinate bodies with legislative authority are hard to determine. The question has been raised in regard to Manitoba legislation[3] to provide for the initiative and referendum, and it was held that the Manitoba Act attacked was invalid, because it was provided that, if a petition for the repeal of an Act were initiated, and under the procedure in such cases approved by the legislature, the Act would stand repealed without the assent or veto of the Lieutenant-Governor being obtained; still less, of course, would the Governor-General have any power to disallow. This meant, in short, that an Act could be repealed without the assent of the Crown. As the province cannot alter its constitution as regards the office of Lieutenant-Governor, the Act was clearly an invalid effort to change his position vitally. On the other hand, incidentally it has been indicated by the Privy Council that Alberta legislation

[1] *Whybrow's Case* (1910), 11 C.L.R. 311; Holman, *Australian Constitution*, pp. 8-10.

[2] *A.-G. for Canada* v. *A.-G. for Alberta*, [1916] 1 A.C. 588; *A.-G. for Quebec* v. *A.-G. for Canada*, [1932] A.C. 41.

[3] *Initiative and Referendum Act, In re*, [1919] A.C. 935.

for enactment of laws by the initiative is valid.[1] The argument is that the legislature is intended to enact what the people desire; if, therefore, a measure is prepared and approved by the electorate, it is proper that it should be passed by the legislature without the right to alter or reject. The objection that a legislature is intended to discuss and clarify the views of the electorate may be met by two considerations. In the first place, the bill prepared by initiative is discussed by the legislature and may be rejected once; only then does it go to a referendum, thus giving the electorate the advantage of studying the legislature's opinions. Secondly, an Act of 1923 enables the legislature to decide several questions to be placed before the electors at the referendum when the voting is preferential, thus securing them a substantial measure of legislative guidance. How much further this process could be carried without finding the courts opposed, it is impossible to conjecture. A legislature for a Dominion, it seems to be held, cannot properly extinguish itself, so that presumably it cannot hand over all its powers to another body, except by way of transforming itself by a constitutional change, and in the case of the Canadian provinces the power of change exists.

It is of course entirely within the power of any legislature to decide that issues shall be settled by referendum, or to allow local option as regards the application of liquor control.[2] A classical example of the two systems is afforded by New Zealand, where the referandum has been employed triennially to decide the issue of prohibition or continuance or governmental

[1] *R.* v. *Nat Bell Liquors, Ltd.*, [1922] 2 A.C. 128.
[2] *Official Year Book of the Commonwealth*, xxii. 1005-8.

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management for the whole Dominion, while a system of local option is in operation. The referenda have so far failed to give the majority desired for prohibition.

The legislatures are not delegates of the people any more than of the Imperial Parliament, and accordingly there are no legal limits on their power to legislate without reference to the electors. This is illustrated above all in the power to extend the life of Parliament, the latest example of which, the action of New Zealand in 1932, elicited the strongest protests, although the decision was merely dictated by the extreme financial difficulties of the time. But the danger to the electorate of this exercise of sovereignty is clear, as has been insisted upon above.

The plenitude of legislative power cannot, it is certain, be restrained by any principles of morality. Confiscatory Acts are valid if their intention is clear,[1] and judges will no doubt follow the English rule of not assuming that any Act is intended to take property without compensation, unless it is clearly so expressed.[2] In the Commonwealth efforts have been made to restrict legislative authority on the plea that it infringes the judicial sphere, but with little effect. It has been the rule that to expropriate property from an enemy subject[3] in pursuance of statutory regulations is not a judicial act, and it seems clear that the Commonwealth can enact retrospective laws. If it cannot reverse a judgement of the High Court, as that would perhaps infringe judicial power, it can declare the law to be

[1] *Florence Mining Co.* v. *Cobalt Lake Mining Co.* (1908), 18 O.L.R. 275; for change of wills, *Hammond, In re* (1921), 51 O.L.R. 149; Riddell, *Canadian Constitution*, pp. 14-16.

[2] Cf. *North Charterland Exploration Co.* v. *R.*, [1931] 1 Ch. 169.

[3] *Roche* v. *Kronheimer* (1921), 29 C.L.R. 329.

otherwise than the interpretation of the Court, though it is doubtful if this could be done when litigation depending on the meaning of a statute was pending so as to oust the jurisdiction of the court.[1] The Irish Free State affords an example of legislation to declare that the Copyright Act, 1911, must be deemed to have been in force in the State during a period when its existence as law there was denied by the Supreme Court. At the same time proceedings in respect of infringement of copyright in that period were forbidden on the score of Article 43 in the constitution which forbids Parliament to declare acts to be infringements of the law which were not so at the date of their commission.[2] But in the Constitution (Amendment No. 17) Act, 1931, when the question was one of punishing *ex post facto* offences against the government of the day, the provisions of Article 43 were deliberately overridden. Yet it is fairly clear that its purpose was to apply not to civil rights but to criminal law, and that its use in a civil issue was unconstitutional.

Another limitation which is apparently suggested as possible by the Privy Council in *Croft* v. *Dunphy*[3] is the view that a Dominion is not conceded the right by the Imperial Parliament to legislate contrary to international law. The issue was not decided in that case, for the Council held that the terms of the customs legislation impugned were in accordance with inter-

[1] Kerr, *Law of the Australian Constitution*, p. 33. In *Smith* v. *City of London* (1909), 20 O.L.R. 133, it was laid down that the province could stop any litigation once begun and any future litigation on a stated subject.

[2] The Copyright (Preservation) Act, 1929, Sections 1 and 4; *Performing Right Society, Ltd.* v. *Bray Urban Council*, [1930] A.C. 377.

[3] (1932), 48 T.L.R. 652.

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national law, even apart from the fact that the vessel offending was registered in Nova Scotia and no foreign element was thus involved. But the suggestion itself is clearly untenable. An implied limitation of this sort is really out of the question, for the simple reason that international law is too ill defined to act as a criterion, and that no case has yet been decided on the basis suggested, while the duty of the British courts to give effect to British legislation despite objections on the score of international law is unquestioned.[1] As in England, Dominion courts doubtless will not interpret a statute as ignoring international law if possible, but that is a rule of interpretation, not of limitation of power. Precisely in like manner Dominion courts will assume that their laws of descent on intestacy, though absolute in terms, do not apply to persons domiciled outside their jurisdiction.

(vi.) In addition to the legislation of the Parliaments, as in England, there is much legislative activity by the executive under delegated powers. There has not perhaps developed so strong a feeling against that form of action as has been displayed in the United Kingdom, but there are many occasions in which it is necessary for the courts to interpret exercises of delegated authority and to limit action. In the United Kingdom this issue has been in part evaded by enacting that rules shall be read as part of the Act under which they are made, a provision which exempts them from examination by the courts beyond the fact that

[1] *Mortensen* v. *Peters*, 8 F. (Just.) 93, 101. Treaties must be approved by legislation to alter law: see *Walker* v. *Baird*, [1892] A.C. 491; *A.-G. for New Brunswick* v. *C.P.R. Co.* (1925), 94 L.J.P.C. 142; *Re Arrow River Co.*, [1932] 2 D.L.R. 216; Keith, *Journ. Comp. Le* . xii. 106, 107.

the rules must actually fall within the ambit of the powers given by the Act.[1] This method has not been adopted normally in the Dominions. But the courts there are ready to admit the validity of delegated powers where clearly within the terms of the authority conferred. In *Baxter* v. *Ah Way*[2] the issue arose whether the Governor-General in Council could validly issue a proclamation under the Customs Act, 1901, prohibiting the importation of opium in a condition fit for smoking. The High Court[3] accepted the delegation as just, for the Act is not restricted in terms so as to make operative the rule of limitation to articles *eiusdem generis*, which was fatal to the attempt in England to use a general power under the customs legislation to exclude any articles thought suitable for exclusion by the ministry.[4] Similarly the delegation to the Governor-General of power to determine by proclamation the issue of trading with the enemy has been held valid.[5] On the other hand, the Supreme Court of Canada[6] has ruled that it is illegal for the Minister of Fisheries in Canada to lay down as a condition for a licence to use an otter trawl under the Act of 1929 that the vessel must be built in the Dominion, for the Act specifies merely that the vessels must be registered in Canada and owned by Canadians or Canadian companies. During the war period, of course, the power of delegated legislation was used very widely in the Dominions

[1] Parl. Paper, Cmd. 4060 (1932). For the limits of this action, see *The King* v. *National Fish Co., Ltd.*, [1931] Ex. C.R. 75.

[2] (1909), 8 C.L.R. 626.

[3] It negatived the claim that Section 1 of the constitution gave sole legislative power to the Parliament.

[4] *A.-G.* v. *Brown*, [1920] 1 K.B. 773; [1921] 3 K.B. 29.

[5] *Welsbach Light Co.* v. *Commonwealth* (1916), 22 C.L.R. 268.

[6] *R.* v. *National Fish Co., Ltd.*, [1931] Ex. C.R. 75.

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as in the United Kingdom, and no doubt the courts accepted as valid much that would not otherwise be permissible. Thus the Commonwealth[1] was held not merely as a matter of defence, able to pass a measure in wide terms allowing exercise of the power to make War Precautions Regulations, but the action of the Governor-General in fixing prices for commodities was upheld. So in Canada it was ruled that an Order in Council under the War Measures Act, 1914, properly authorised a procedure to secure the fixing by government authority of the cost of news-print paper supplied to publishers.[2]

(3) The control of the Parliaments over finance rests essentially, as has been seen, in the lower houses, for the upper chambers, despite the fact that they have in general wider powers than the House of Lords, nevertheless as a rule exercise them with moderation and restraint. It was felt on all sides in 1913 that the refusal of the Canadian Senate to homologate the policy of granting 35 million dollars to strengthen the British navy was an action rather of partisan bitterness than of justifiable caution in the use of public funds.

In form the lower house has the fullest control of supply; it decides the expenditure to be incurred, and the means by which it is to be made good. The procedure follows the established British precedents in principle. The house resolves itself into Committees of

[1] *Farey* v. *Burvett* (1916), 21 C.L.R. 433.

[2] *Fort Frances Power and Pulp Co.* v. *Manitoba Free Press*, [1923] A.C. 695. For an invalid Ordinance as to capital territory of Australia, see *Federal Capital Commission* v. *Laristan Building, etc., Co.* (1929), 42 C.L.R. 582. A general power under a mining law does not validate a colour bar against native skilled workers: *R.* v. *Hildick Smith*, [1924] T.P.D. 69.

Supply and of Ways and Means on the British model. Moreover, the British conventional rule, which rests at Westminster on resolutions of the Commons, that no money measure can be considered save on the recommendation of the Crown, is formally enacted as law in the Dominion constitutions, as is the principle of the annual session of Parliament. The smaller size of the Dominion Parliaments, and the less complex character of the operations which they control, enable the members to exercise a more intelligent criticism over the estimates, but it must not be assumed that this is necessarily a wholly good thing. In fact the pressure of electors on members and that of members on the Government are continuously exerted to enforce expenditures of unwise and wasteful character on various forms of public works, especially when an election is near. A Canadian member has been able to assure his electorate at a by-election that there is a schedule of what will be done for the district if he is returned, and that if he is not nothing will be expended; and the application of money for roads was long a decisive factor in securing popularity and re-election in Newfoundland. Some efforts have had to be made to counter this evil; thus in the Commonwealth and in New South Wales, as has been seen, the fact that the upper house must be consulted has led to the evolution of the system of setting up Committees on which both houses have representation to which all proposals for public works exceeding £25,000 or £20,000 must be referred, so that the projects may be examined dispassionately and carefully with full investigation of the estimates submitted by the departmental chiefs and experts. The Union has the plan of establishing a

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separate and self-contained financial system for the Railways, Ports, and Harbours with the intention that they should be managed on business lines. The theory is that these public utilities should be so controlled as to bring in returns to meet the expenses of operation and interest and sinking fund on debt. New construction of railways cannot be provided for blindly by Parliament, for the administration must lay before it an estimate of the deficit on working, if any, which may be expected, and this must be made good from the Consolidated Revenue Fund as distinct from the Railways and Harbours Fund, and Parliament must make good to that fund any services which it requires it to undertake gratuitously or under cost. But, though Parliament thus cannot be blind to consequences, that does not mean that it need refrain from action, and in fact, as the Auditor-General pointed out in 1925, the new policy of the employment at high wages of unskilled white labour in lieu of natives contradicts the purpose of the constitution that railways and harbours shall be managed on business principles. The answer, of course, is that national well-being must take precedence of mere economy when the two clash.

Just as it is difficult for governments to control expenditure, as New Zealand found when it had to adopt the most drastic of Parliamentary methods to force through economy in 1931–32, so it is difficult to secure revenue, for taxation is as unpopular in the Dominions as in the United Kingdom. But this is to some extent countered by the fondness for the use of customs duties as the mode of securing revenue, for then there will always be an interested group of members who desire in the interests of manufacturers and

employers to obtain higher protection for some business of importance which it is desired to extend. No doubt an individual group would have little weight, for its selfish ends might be easily denounced, but there are numbers of such groups, whose natural action is to unite to secure tariffs by agreement that each party shall support the others in their application to the government. The process is carried out in the most complete form in the Commonwealth, where the power of Senators to suggest increases of duties proposed by the House results in the duties being finally fixed, in the past, at ever-increasing amounts by agreements arrived at privately between interested members. The moderating influence, of course, in such cases consists in the fact that, while the representatives of primary producers dislike increases, they have the assistance of members interested in such secondary industries as require fairly cheap raw or semi-manufactured material as a basis for their output. Not less important is the pressure of manufacturers in Canada, where they have succeeded since 1879 in forcing up duties steadily, aided no doubt by the similar action taken in the United States. New Zealand has had exactly the same experience, and the Union of South Africa has more recently developed the policy of fostering secondary industries, a plan declared vital to the Free State by Mr. Cosgrave's ministry but even more energetically pressed by Mr. De Valera.

Obviously to meet these conditions some serious consideration of tariff changes is essential if there is not to be chaos. Hence in the Commonwealth a Tariff Board Act of 1921–29 secures that all proposals for new rates, or for bounties, or the application of the

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British preferential tariff to other Dominions or of the intermediate tariff to foreign countries, which normally are exposed to the general tariff, and complaints against undue charges by manufacturers under protection, shall be dealt with by a Board, now of four members, whose advice is made available to Parliament; while by requiring that enquiries shall be held in public and evidence given on oath the electorate is afforded means of realising the effect of tariff changes. The Board also makes enquiries on which may be based the imposition of anti-dumping duties, a policy followed in all the Dominions. In Canada, from 1926, an Advisory Board on Tariff and Taxation was set up under the Supply Act by Mr. Mackenzie King. In 1931 its members were deprived of their functions by Mr. Bennett, and in lieu an Act was passed to establish a Tariff Board, whose three members hold office for ten years and are not eligible for election to the Commons for two years thereafter. The Liberals claimed that tenure should be at pleasure, as the Board should be in harmony with the government of the day, but this was rejected as well as the proposal that all requests for tariff increases must be referred to it, and that it should investigate the capitalisation, salaries and wages, and hours of labour of companies applying for increased rates of duty. The Board has the duty of recommending the rates to be levied to equate costs of production as between Canadian and imported goods, and it serves an important part in maintaining the excessive height of Canadian imposts on imports from the United Kingdom. The Irish Free State by the Tariff Commission Act, 1926, established an excellent system. The Commission has three members who are

nominated by the Ministers of Finance, Agriculture, and Industry; each hold office for two years but may be re-elected. They have the powers of a court as to securing evidence and examining witnesses on oath. To the Commission is referred any application for increase or change or abolition of tariffs, and the report of the Commission is accorded the greatest weight by the government and Parliament.

Control over the use of the funds approved by Parliament is ensured by the adoption of a system similar to the British. Thus in the Commonwealth the duty of the Treasury is to prepare estimates of requirements, submit them to the Auditor-General, who, if satisfied, certifies that appropriation has been made, and the Governor-General then signs a warrant authorising the Treasury to issue cheques on the public account in the Commonwealth Bank into which receipts are paid. The Auditor-General is an official independent of the government, who can be removed only on addresses from the two houses. As in the United Kingdom, it is his business to scrutinise the expenditure carried out through the Treasury department. He must satisfy himself that expenditure is duly vouched, that it is charged to the proper heads of the estimates, and that it is duly authorised. So also he supervises the correctness of the collection and accounting for revenue, trading accounts, and stores. He has the right to surcharge, but the Governor-General in Council may remit. A reasonable discretion in charging excess expenditure against other subdivisions in the estimates is given to the Treasurer. Parliament, by means of a Public Accounts Committee, examines the accounts in the light of the advice of the Auditor-General, but it may be

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feared that, as in the United Kingdom, these *ex post facto* inquests are of minor importance as encouraging economy, and that the most important work is that of the Auditor-General, whose function, however, is after all one of securing correctness of account and due authority, but not of criticising financial methods, still less objects.

All expenditure, of course, cannot be foreseen, and it may be that sums must be paid before an Act is passed. The Governor-General then issues a special warrant, and on occasion enormous sums are thus spent, as in Canada in 1926 when the grant of a dissolution to Mr. Meighen without supply having been passed rendered it imperative to expend millions on warrants only. The practice is far from rare, but in some cases it has been mitigated by legislation which permits expenditure either of sums up to a fixed amount or sums based on the expenditure authorised for the previous year pending Parliamentary sanction. Such warrants, of course, diminish the power of the upper house, for money spent cannot well be refused sanction, nor could it *de facto* be recovered in the majority of cases. The Governor-General's position in these matters is governed by the consideration that he cannot, unless in a very flagrant case of illegality, refuse to accept the assurance of ministers that funds must be provided to carry on the administration. Of course, if a Government like that of Mr. Lang in New South Wales were indifferent to law, and sought to govern for any length of time without the support of Parliament, refusal to issue warrants would bring its activities to an end. Though this mode of expending money by special warrant is available, it must not be

supposed that the necessity of the sanction of Parliament can in law be evaded. It has been made clear by the Privy Council[1] that money expended without due sanction can be recovered from the recipient, that a government has no right to pay out money without a clear legal duty to do so, and that a government cannot force the hands of Parliament by making a contract and then allowing judgement of a petition of right to be awarded against it, so that the administration becomes indebted to the person concerned.[2] Even in such a case the funds to pay the debt must be appropriated by Parliament. It is not legal to pay off such claims from funds actually in the Treasury; the judgement implies a moral duty on the ministry to secure the approval of Parliament, but Parliament is not bound to implement an obligation undertaken by a ministry which is dishonest, and those who contract with ministers must bear in mind that they do so subject to the necessary condition that they cannot secure payment unless and until the legislature provides the funds.[3] No doubt ministers may act and obtain an appropriation later on, for it seems a very dubious suggestion of the High Court of the Commonwealth that a commitment by the executive not previously authorised by the Parliament cannot be put right by a subsequent appropriation.[4]

The Dominions have countered the same difficulties as the United Kingdom in respect of the rule of the lapse of appropriations not expended by the close of

[1] *Auckland Harbour Board* v. *R.*, [1924] A.C. 318.
[2] *Alcock* v. *Fergie*, 4 W.W. & A'B. 285 (Victoria).
[3] *Commonwealth* v. *Colonial Combing, etc., Co.* (1922), 31 C.L.R. 421.
[4] *Commonwealth* v. *Colonial Ammunition Co.* (1924), 34 C.L.R. 198.

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the financial year, the date of which does not normally agree with the British. Hence the Commonwealth has set up, in addition to the Consolidated Revenue Fund, which is the normal fund to receive revenue and to provide for expenditure, a Loans Fund and a Trusts Fund into which may be paid unexpended balances of grants or sums which are to be spent over several years, and the plan has been also followed less systematically elsewhere. Its legality was duly contested in the Australian courts, but without success.[1]

The sources of revenue differ little from those normally adopted by administrations, British and foreign. Greater importance attaches to customs duties and excise; the war compelled a wide use of income tax and of death duties; land taxation is of much importance, and entertainments yield considerable sums, while excess profits are usually taxed. Licences, stamp duties, and, in the Union, native taxes of various kinds, are levied. From public services are realised considerable sums, especially from postal services and railways, though these may now result in a deficit. Rents of government property, especially mining property, are an important item in the Union, and there are fines and forfeitures. Interest on advances from the government to settlers is of consequence in Australia in particular. Expenditure includes a heavy burden of interest on loans, and is increased by the wide activities of governments in providing such benefits as old age pensions, and in public works of all kinds, including railway and harbour development, on a generous scale.

(4) Procedure follows closely the British model, in special the rule of three readings of bills with com-

[1] *State of New South Wales* v. *Commonwealth*, 7 C.L.R. 179.

mittee and report stages is imitated more or less closely, and the standing orders follow in principle the rules of the House of Commons; even in the Irish Free State the divergences are not fundamental, and, while the speech from the throne has been abandoned, some substitute has been attempted in a declaration of ministerial policy. The formal ceremonial, which is an inheritance from the earliest days in Canada, has not been relaxed; rather it has been preserved and developed in the laudable desire to impress on legislators and the public alike the serious character of their functions.

The Governor-General or Governor has the right to summon, prorogue, and dissolve Parliament under the Constitution Acts, though the Letters Patent even of Canada in 1931 still give the power as if *de novo*. In such action he must be governed by ministerial advice; if he feels that a dissolution is essential, as in New South Wales in 1932, he must dismiss the ministry before he acts, so that he can have a new ministry to advise him. The Premier may advise and the Governor act, even against the wishes of the Cabinet, as in the same State in 1927. There too in 1911, when the Assembly refused to adjourn, he had to prorogue, because he could find no ministry able to relieve his advisers of their task. His power to dissolve is dependent in the Irish Free State on the Executive Council possessing the confidence of the Dáil; in that case he has no discretion. He is bound also in law by the rule of annual sessions; where, as in the Cape during the Boer war, this is violated, his action must *ex post facto* be validated. But, though Parliament must meet, it need not be allowed to do any business, though this is normally impracti-

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cable in view of the need of supply. After a dubious general election, as in Canada in 1925, an early meeting of the legislature is clearly constitutional, and Mr. Mackenzie King so advised.

In the Commonwealth, Victoria, South Australia, Tasmania, and New Zealand, the Governor may return a bill to Parliament with suggestions; this action is done on ministerial advice in order to remedy oversights. The Union has the same rule.

The Speaker of the lower house is elected by its members; in New Zealand the appointment requires confirmation by the Governor-General. The President or Speaker of the upper chamber is appointed by the Governor-General where the house is nominated, but in New Zealand elected subject to his confirmation; in the elective houses he is elected, in Victoria subject to confirmation by the Governor. Under an Act of 1927 the Chairman of the Dáil was exempted from the necessity of re-election to that body, but in 1932 Mr. De Valera's party refused to agree to following the British principle of re-election as Chairman. It has been rejected in Canada and the Union on principle. The Speaker, however, in office is expected to be impartial, but he is entitled to vote on party grounds, and frequently in the small houses of the Dominions and close party divisions his vote has been decisive. Normally the presiding officer of both houses votes only to break a tie, but in Canada and Quebec and the Commonwealth the president of the upper house has an ordinary vote; if the votes are equal, the result is to negative the proposal under debate.

Ministers may speak in either house in the Union and the Irish Free State, but, though the concession

has been mooted in Canada, it has not been conceded. In the Free State it has been freely and very usefully employed by Mr. Cosgrave and Mr. De Valera alike.

All members before they take their seats must swear an oath of allegiance or make an equivalent declaration. The Irish Free State oath is unique in being one of true faith and allegiance to the Irish Free State constitution and also to the King and his successors in virtue of the common citizenship of Ireland and Great Britain and her adherence to and membership of the British Commonwealth of Nations. Needless to say, allegiance does not depend in the least on the oath, and its value as a preventive of republican sentiments and aims is shown by the fact that Mr. Tielman Roos and Mr. De Valera have both consented to swear allegiance. It is not surprising that Irish opinion discounts its value completely, and had the issue been approached more tactfully by Mr. De Valera, the conflict of 1932 need never have occurred.

Debate has gradually had to be closured with more frequency than in earlier times. Sir W. Laurier dissolved in 1911 rather than use the closure to force the bill to accept the reciprocity agreement with the United States through the Commons, but in 1913 Mr. Borden carried his Naval Aid Bill by this means, and in 1926 it was adopted to terminate on March 2 the debate on the reply to the address from the throne which began on January 11. In 1923 and 1925 the Commonwealth had to legislate under stringent urgency conditions involving the free use of the guillotine, and in 1931 New Zealand had to resort to most drastic restrictions to pass her economic legislation. For ordinary purposes time limits have generally been adopted. In Canada in

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1927 the rules were revised to give members no more than forty minutes, save for the Prime Minister and the Leader of the Opposition, the mover of the order of the day and the member in reply, the mover of a vote of no confidence and the member in reply. The rules can usually be waived, and they do not prevent much repetition and vague generalities of argument, nor is the standard of debate high.

The drafting of governmental bills is provided for by the appointment of professional draftsmen, but private persons are, as in the United Kingdom, compelled as a rule to rely on their own resources. In the Commonwealth, New South Wales, and South Australia a bill may, by the consent of the house in which it originated, be taken up by the other, or it may be continued in the house of origin if it has not yet passed all its stages. This excludes the case where there has been an election of the upper chamber in the interim.

Private bills are, as in the United Kingdom, carefully distinguished from public bills; they are defined to include local no less than personal measures, and they are subjected to consideration by committees which take evidence for and against, and can award costs to or against the promoters and opposers of the measure. Due provision is made for notice to parties interested, and the right of opposition is accorded to those who can properly be held to be directly affected and not merely as members of the public. As in the British Parliament, this procedure is of high value in protecting public interests and saving public time.

In disputes between the houses the use of conferences between representatives is not rare in the Commonwealth, the States, and the Union. It has been less

used in Canada, but it was employed in 1928 over the question of Old Age Pensions, not without utility. The principle is recognised in the Irish Free State constitution.

The mode of enacting Acts is formally expressed to be by the King with the advice and consent of the two houses, though the Commonwealth omits "advice and consent" as needless. In Newfoundland, New Brunswick, Nova Scotia, Prince Edward Island, South Australia, and Tasmania the Governor takes the place of the King; in New Zealand the General Assembly, which includes the Governor-General, enacts. But in all cases the effect is the same. Assent may be given in person, or by commission, or at the Government Offices; in most cases the Acts are signed by the representative of the Crown. In the Union and Canada the Governor-General is not bound to sign the English rather than the French or Dutch or Afrikaans version. In this case the signed copy decides which version prevails if there be discrepancy; there is no rule in Canada, but in Quebec it has been laid down that harmony with the context and, in the case of a consolidation, the language of the original can be taken into consideration. In the Irish Free State the Governor-General may sign either version, but in fact the Irish rendering is made from the English original, as the members of the Parliament are not yet as a rule competent to debate in the neo-Irish speech.

(5) The privileges of Parliament have played a considerable part in Dominion political and legal history. Save in the Commonwealth, it is normal for the Speaker still to ask for them as in the British Parliament. But there is the essential difference that in the United

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Kingdom they rest on the *lex et consuetudo Parliamenti*, whereas in the Dominions they depend on express enactment. The early view in Canada no doubt claimed that the legislatures were in the same position as the House of Commons and the House of Lords, and they sought to impeach offenders by the British procedure. But the Privy Council has definitely negated any such claim, and, if a legislature has not legal provision for privileges, it will find itself treated as having only powers to preserve decorum and good order,[1] forbidden to commit officials for refusing to appear before it,[2] or punish its own members by indefinite suspension for insulting behaviour. Needless to say, in the great majority of cases—New South Wales being the chief exception—early steps were taken to secure by law the same privileges as the House of Commons. This determination was long opposed in Canada by the federal government, which denied to the legislatures the power to treat themselves as analogues of the Dominion Parliament. But in *Fielding* v. *Thomas*[3] the Privy Council definitely admitted the power of the legislature to legislate for the right to summon witnesses and punish for contempt. The authority lies on the right of the provinces to alter their constitutions if they think fit. As regards Australia, it has been laid down[4] that Victoria can commit for contempt in the form of a libel, and that, if the Assembly does not express the ground of

[1] *Doyle* v. *Falconer* (1866), L.R. 1 P.C. 328; *Willis* v. *Perry*, 13 C.L.R. 592; *Barton* v. *Taylor* (1886), 11 App. Cas. 197.

[2] *Kielley* v. *Carson* (1842), 4 Moo. P.C. 63; *Fenton* v. *Hampton* (1858), 11 Moo. P.C. 347.

[3] [1896] A.C. 600; *Payson* v. *Hubert*, 34 S.C.R. 400.

[4] *Speaker of the Legislative Assembly* v. *Glass*, L.R. 3 P.C. 560. Cf. *The Case of the Sheriff of Middlesex* (1840), 11 A. & E. 273.

contempt, it is not open to the judiciary to investigate the issue, a view in harmony with English doctrine.

It is the practice in the constitutions or the Acts conferring privileges to assimilate them to those of the House of Commons for the time being, and no effort is made to treat the upper chambers to the wider rights of the Lords. But by the constitutions of Victoria and South Australia as well as of Canada, the houses were limited to the then existing privileges of the Commons. That was altered in 1875 for the Dominion by Imperial Act, so that the Dominion must now be content with the measure of privilege claimed by the Commons from time to time, as it cannot alter an Imperial Act on the constitution. The States, however, have power freely to extend their powers even beyond the British model, nor is it incumbent on the Union, the Commonwealth, or the provinces to restrict their powers by the model of the Commons, still less is the Irish Free State concerned with that precedent.

Apart from general legislation, it is possible to deal by a special Act with any special violation of the honour of members. This was established in 1922–23 in Quebec when a publication was made reflecting on the conduct of two unnamed members of the legislature in connection with the failure of the police to discover the perpetrators of a murder. The person responsible, Mr. J. H. Roberts, was ordered to be imprisoned for a year, and the courts refused to intervene; nor was he released until he had given satisfaction to the Assembly. The Dominion Government, though applied to, refused to disallow the Act, doubtless because it fell within the power of the province.

The privileges which are claimed in the Irish Free

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State are those normal. Members are exempt from arrest[1] save for treason, felony, or breach of the peace while going to or returning from Parliament, or in its precincts. They cannot be made liable outside the house for their spoken words. Parliamentary debates are privileged, as are publications authorised by the houses.[2] Each house can by standing orders provide for the maintenance of freedom of debate, for securing the safety of its official documents and the private papers of members, and for ensuring itself against attempts to molest, interfere with, or corrupt members. While little use has been made of this authority in the Free State, in other cases detailed rules have been enacted. In the Union the power to fine, which is obsolete in the United Kingdom as regards the Commons, is taken, which is much more to the point than the system of commitment to the end of the session, as in the United Kingdom. In most cases, as in New Zealand in 1931, it proves that an admonition administered by the Speaker after consideration by a Committee would be the utmost penalty possible for an attack on the action of members, and that it is often better to leave such matters to the operation of public opinion.

Dominion history is not unfurnished with instances of the violation by the public of the sanctity of the

[1] Arrest is possible if there is no legislative protection; see *Norton* v. *Crick*, 15 N.S.W.L.R. 172.

[2] Legislation to protect papers is regular: that it is not effective outside the Dominion appears from *Isaacs and Sons* v. *Cook*, [1925] 2 K.B. 391 (alleged libel in report to Commonwealth Government by High Commissioner in London may be published in England through circulation in Australian newspapers available at High Commissioner's Office). The effect of the extra-territorial power given by the Statute of Westminster, Section 3, is uncertain.

Parliamentary buildings, though nothing has equalled the events at Montreal when Lord Elgin's most significant vindication of the rule of responsible government was signalled by the burning of the chamber. But in 1932 mob violence in St. John's forced the Premier to leave both the houses of Parliament and the capital until order was restored, and, in part owing to the arrival of H.M.S. *Dragon*, business could be resumed by the government.

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THE JUDICIARY

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IT is a fundamental principle in every Dominion that the judiciary should be enabled by reason of security of tenure to exercise fearlessly its functions. The essential function of the judges is to interpret the statute law of the territory and to expound—incidentally no doubt to extend—its common law; English in the Dominions in general, but French in Quebec, and Roman Dutch in an attenuated and sublimated form in the Union of South Africa. True to English conceptions, there is normally no provision in Dominion constitutions to define the nature of judicial power, but there is an exception in the case of the Commonwealth of Australia, where a faint reflection is found of the American doctrine of the separation of powers.

(1) The rule of judicial tenure is in principle good behaviour, with, as a mode of removal, representations from the two houses of the legislature to the Crown or to its representative in the territory. Thus in Canada judges of the superior courts may be removed by the Governor-General on addresses from the two houses under the British North America Act, 1867, s. 99. There is no age limit, so that resignation on incapacity has been enforced by the ingenious device of providing by Act for the cessation of salary on incapacity duly

attested. Supreme Court judges by Canadian Act have like tenure, but retire at age seventy-five. In Newfoundland an address from the houses to the Governor is the prescribed method; in New South Wales, Queensland, and Western Australia an address to the Crown, while in Victoria, South Australia, and Tasmania an address to the Governor is required. The divergence of form may now be deemed to be of no importance, though in Mr. Justice Boothby's case in South Australia in 1862 the British law officers held that the Crown in such a case should be advised by the Privy Council and could not act automatically. It is clear that in these States and in Newfoundland the procedure of Burke's Act,[1] namely, amotion by the Governor in Council subject to approval by the King on the advice of the Privy Council, is legally possible, but it may be dismissed now as obsolete.

The Commonwealth adds to the addresses from the houses the requirement of proved misbehaviour or incapacity, but the Parliament is clearly the only judge, and the Union constitution omits the qualification "proved" as inconvenient. In both cases the final authority is the Governor-General in Council. In New Zealand the Crown can remove on address from the houses, but the Governor-General in Council may suspend on address or provisionally if the legislature be not in session. The Irish Free State provides for removal on resolutions of both houses for stated misbehaviour or incapacity. It gives seventy-two as the age of retirement as in New Zealand, while Queensland and New South Wales fix age seventy. The Common-

[1] 22 Geo. III. c. 75; *Montagu* v. *Lieutenant-Governor of Van Diemen's Land*, 6 Moo. P.C. 489.

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wealth cannot compel retirement, for salaries may not be diminished during tenure of office, but it encourages it by pensions, and Victoria, Tasmania, and Western Australia act likewise.

It is clear that judicial independence is not destroyed by the fact that, though the salary may not normally be reduced while in office, income tax is levied.[1] But it would be dangerous if the Governor-General in Council, who has the power to appoint, could make valid appointments to the bench without securing Parliamentary salary grants, for such nominees could not be deemed independent. The Privy Council has therefore ruled that the power to appoint officers in the Governor's Letters Patent does not give the right to add a judge for whom no salary is provided.[2] In Queensland, unfortunately, the importance of security of tenure has been sometimes ignored, and judges have been given only a seven years' tenure, which is clearly legally possible as a tacit amendment of the normal rule.[3] The High Court of the Commonwealth, in an effort to safeguard judicial status, had held that any such appointment being contrary to the rule of the constitution should be made by a formal alteration of the constitution and not incidentally.

The Irish Free State constitution expressly enacts the maxim of the independence of judges and enforces it by forbidding them to hold other positions of emolument, while, as in the rest of the Dominions, it disqualifies them from sitting in Parliament. In the Dominions as in England they enjoy a wide measure

[1] *Cooper* v. *Commr. of Income Tax, Queensland*, 4 C.L.R. 1304.

[2] *Buckley* v. *Edwards*, [1892] A.C. 387; *Cock* v. *A.-G.* (1909), 28 N.Z.L.R. 405.

[3] *McCawley* v. *The King*, [1920] A.C. 691.

of immunity[1] for judicial actions, whether within or without their powers.

In the Dominions as in England the employment of judges on Royal Commissions has been discussed with some liveliness. The argument against the practice is that a judge may thus be distracted from his true duties and embarrassed if later he come to be concerned judicially with issues which have been before him as a Commissioner. Objections have also been raised to the use of judges to enquire into matters raised in Parliament; in the famous Pacific scandals of 1873 the proposal to refer the allegations against the Conservative leaders to three judges was denounced by Mr. Huntington as unconstitutional, and judges in difficult and delicate cases of this kind are exposed to the abuse which sometimes is lavished on their activities in the delicate matter of hearing electoral petitions, though experience has proved that they deal better with the latter than do any other tribunals.

(2) The functions of the superior courts of the Dominions are similar to those of the British courts, and they include the important work of controlling executive governmental authorities, especially in the sphere of local government, by the use of the prerogative writs of mandamus,[2] certiorari, and prohibition. The essential power of the High Court of Australia to resort to the use of these writs has been asserted with special reference to attempts to subtract from its control the operations of the Commonwealth Court of Conciliation and Arbitration. But the High Court has held

[1] *Scott* v. *Stansfield* (1868), L.R. 3 Exch. 220; *Anderson* v. *Gorrie*, [1895] 1 Q.B. 668.

[2] For the possibility of mandamus to a State officer, see *The King* v. *Registrar of Titles for Victoria* (1915), 20 C.L.R. 379.

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that the legislature cannot take from it the inherent right to investigate whether the circumstances, which have been alleged as the ground of the jurisdiction of that court being put into operation, are such as to justify that action.[1] No doubt there is some tendency of late years to endeavour to lessen the power of the superior courts to intervene, but the same tendency is well known in the United Kingdom and arises from reasons of equal weight in the Dominions.

The organisation of Dominion courts follows lines similar to those of the English courts, apart from the principle that in general from a superior court there is but one appeal, instead of the appeal first to the Court of Appeal and then to the House of Lords in England in civil cases. The appellate court may or may not be formally styled Court of Appeal or Appellate Division or consist merely of a full bench of the Supreme Court. The Irish Free State sets at the head of the judicial system the Supreme Court of three judges, subordinate to which is the High Court of six judges, who sit also in the Central Criminal Court for specially serious offences, while Circuit Courts perform in the circuits much of the business of the High Court, subject to appeal. The policy of decentralising the Supreme Court was also adopted in 1921 by Queensland, when the District Courts were abolished and Supreme Court judges sent to exercise jurisdiction in their place.

In the Union of South Africa the organisation is based on the old provincial system. There are Provincial Divisions of the Supreme Court with in addition two Local Divisions for the Cape, Eastern Districts, and

[1] *The Tramways' Case* (No. 1) (1913), 18 C.L.R. 54. For the sphere of certiorari, see *Minister of Health* v. *R.*; *Yaffé, Ex parte*, [1931] A.C. 494.

Griqualand West, and for the Transvaal the Witwatersrand Local Division at Johannesburg, with a Native High Court in Natal. Above them all is the Appellate Division at Bloemfontein, with a Chief Justice and four Judges of Appeal.

(3) In addition to jurisdiction derived from Dominion legislation, the Supreme Courts of the Dominions and States are by the Colonial Courts of Admiralty Act, 1890, given — subject to Dominion legislation — the powers of admiralty jurisdiction which at that time were possessed by the Admiralty Division of the High Court of Justice in England. But the powers of such courts were restricted as regards powers under the Slave Trade Act, 1873, and the Naval Prize Act, 1864, to such authority as in these measures is conferred on Vice-Admiralty Courts, and the courts have no power to act in prize without special authorisation, for which provision is made in the Prize Courts Act, 1894, and subsequent legislation. Moreover, such powers only as are granted by Order in Council may be exercised over the Royal Navy, and no crime which may be tried in England on indictment may be tried under the powers given by the Act. The Dominion legislatures may create inferior courts of admiralty with limited jurisdiction, but any Act either declaring a Supreme Court a court of admiralty or creating inferior jurisdictions must contain a suspending clause or be reserved, and rules of court under the powers given by the Act must be approved by the King in Council. The Statute of Westminster, s. 6, takes away the necessity of reservation or a suspending clause and that of confirmation of rules by Order in Council, while the restriction of authority to the power of the English Admiralty

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Division in 1890 is now no longer binding under Section 2 of the Statute.

In Australia the State Supreme Courts have exercised admiralty jurisdiction, though their right to do so has recently been questioned by Mr. Latham[1] on the ground that the High Court in *John Sharp & Sons* v. *The Katherine Mackall*[2] has laid it down that the Commonwealth is a British possession under Section 2 of the Colonial Courts of Admiralty Act, 1890, so that the High Court has admiralty jurisdiction under that Act in view of the grant of such jurisdiction by the Judiciary Act, 1903–20, s. 30 A. In that case the States' position is questionable, but it seems impossible to deny the validity of a jurisdiction so long exercised. The States are still bound by the Colonial Laws Validity Act, 1865, and their laws as to jurisdiction are subject to the restrictions above mentioned.

Criminal jurisdiction in respect of crimes committed within the jurisdiction of the Admiral in English law when the accused are found in the Dominions is granted under the Admiralty Offences (Colonial) Act, 1849. This jurisdiction applies to British ships even in foreign territorial waters, including navigable rivers, even in the case of foreigners.[3] But in *R.* v. *Keyn*[4] it was ruled that the Admiral's jurisdiction did not apply to foreigners who committed an offence from a foreign ship on

[1] *Australia and the British Commonwealth*, p. 108.

[2] (1924), 34 C.L.R. 420.

[3] *R.* v. *Anderson* (1868), L.R. 1 C.C.R. 161; *R.* v. *Carr* (1882), 10 Q.B.D. 76; Stephen, *Hist. Crim. Law*, ii. 4-8.

[4] (1876), 2 Ex. D. 63. The extent of British jurisdiction is for the Crown to declare in case of doubt: *The Fagernes*, [1927] P. 311. No doubt this would now be done in Dominion courts by a Dominion minister. Canada claims Hudson Bay as territorial waters; Wheaton, *International Law* (ed. Keith), i. 365, 404.

persons in a British ship in British territorial waters. This decision, which is probably unsound, was rendered innocuous by the Territorial Waters Jurisdiction Act, 1878, which is a declaratory Act, but by it, while offences of this kind are within Dominion jurisdiction, the consent of the Governor is required for prosecutions. The power, however, to prosecute in such cases is regularly assumed as part of the local law and exercised without formal assent. By an Act of 1874 the local penalty or the English penalty may be applied in respect of crimes punished under admiralty jurisdiction.

The Merchant Shipping Act, 1894, s. 686, confers a general power to punish any British subject committing an offence on any British ship anywhere or on any foreign ship to which he does not belong, and any alien committing any offence on any British ship on the high seas only. By Section 687 a rather wide power is given against any master, seaman, or apprentice for any offence committed ashore or afloat, if within three months he has been a member of the crew of a British ship. Section 478 of the same Act authorises Dominion legislatures to make provision for enquiries into shipping casualties when a vessel is registered in the Dominion or the accident has happened in its vicinity or to a British ship *en route*. From such enquiries and orders of cancellation of certificates of officers an appeal lies to the High Court in England,[1] and the Board of Trade may order a rehearing, but these powers do not apply if the vessel were registered in the Dominion and the certificate is one granted there. But the Board may order the return of any certificate or the reduction of the period of its suspension. These powers are now

[1] *The Chilston*, [1920] P. 400. See S.R. & O. 1923, No. 752, s. 19.

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subject to repeal by the Dominions under the Statute of Westminster, and the principles laid down by the British Commonwealth Agreement of 1931, noted above, are applicable.

Further powers are also conferred on Dominion courts under the Slave Trade Acts; the Pacific Islanders Protection Acts, 1872 and 1875; the Foreign Enlistment Act, 1870; the Fugitive Offenders Act, 1881, as regards crimes committed on the boundary of Dominions or on a sea voyage between them; the Army Act; the Official Secrets Act, 1911; the Acts as to treason,[1] and as to coinage offences; the Extradition Act, 1870; the Geneva Convention Act, 1911; and the Act of 1912 to enforce the quadripartite sealing convention of 1911. Ascertainment of law is provided for by the British Law Ascertainment Act, 1859, and the Foreign Law Ascertainment Act, 1861, and foreign evidence by the Foreign Tribunals Evidence Act, 1856. Under the Statute of Westminster the Dominions, as opposed to the States, have full power now to repeal or alter these measures as they desire, so far as they constitute part of the Dominion law.

It is open to the Crown by Commission under the Great Seal to authorise the Admiralty to establish Vice-Admiralty Courts, even when Colonial Courts of Admiralty exist, but in the Dominions and States such courts can only exercise jurisdiction in prize, as to the navy, the slave trade, foreign enlistment, the Pacific Islanders Protection Acts, and issues involving treaties or international law.[2] Dominion jurisdiction in prize

[1] Local legislation is also normal; for the Irish Free State see the Treasonable Offences Act, No. 18 of 1925.

[2] In the local Admiralty Court at Victoria, British Columbia, in 1930, four American vessels were condemned for illegal presence in Canadian

was conferred in certain cases during the war, but the question of prize jurisdiction and the other matters involved may now be dealt with by the Dominions under the Statute of Westminster, though the Imperial Conference of 1930 agreed that action on this head should be deferred until agreement on principles was reached. It is clearly desirable that there should be uniformity throughout the Empire in this issue. The settlement will no doubt carry with it the disposal of all questions of the treatment of the sums raised from condemnations of vessels and property as prize, an issue which after the war was settled by agreement between the British and Dominion Governments.

The new powers of the Dominions as to admiralty jurisdiction will enable them to extend that jurisdiction according to their view as to what is fit. The limits of the past situation have unquestionably been inconvenient, especially in Canada, where the Exchequer Court[1] exercises the full jurisdiction usually vested in the Supreme Courts of other territories. But it is important that in this matter as in prize the extent of jurisdiction should be assimilated as far as possible to the British model.

(4) The principle that an appeal lies to the King in Council from all judgements of colonial courts is an old one.[2] The prerogative right to hear appeals was made

waters, vainly claiming the benefit of the treaty of 1818, which was held not to apply to the Pacific Coast: *The May* v. *R.*, [1931] S.C.R. 374; *The Queen City* v. *R.*, *ibid.* 387 (on appeal).

[1] With local judges in the provinces. This renders Imperial creation of Vice-Admiralty Courts needless. For the disadvantage of limited jurisdiction, see *Bow, Maclachlan & Co.* v. *Ship Camosun*, [1909] A.C. 597; *The Yuri Maru, The Woron*, [1927] A.C. 906; Keith, *Journ. Comp. Leg.* ix. 254; xi. 262, 263. Piracy is triable in any Admiralty Court by the law of nations: *A.-G. of Hong-Kong* v. *Kwok-a-sing* (1873), L.R. 5 P.C. 179.

[2] Keith, *Constitutional History of First British Empire*, pp. 305-11.

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statutory in 1844; after that it could be limited only by Imperial Act,[1] as was done in the case of the Commonwealth of Australia and the Union of South Africa, as has been seen above, until by the Statute of Westminster power was given generally to abolish the appeal if desired. But the States of Australia have not this authority.

The system of appeals[2] which has been set up is simplified by the activity of the Privy Council Office after the Colonial Conference of 1907, when the issue was discussed. The general doctrine is now laid down that appeals shall normally be contemplated only from the highest court in each territory. From it, it shall lie either (1) as of right when certain conditions are fulfilled, or (2) by special leave of the local court when in its opinion the question involved is one which, by reason of its great general or public importance or otherwise, ought to be submitted to the King in Council for decision, or (3) by special leave obtained from the Judicial Committee itself. The use of the special power applies both to cases where the local court has not seen fit to grant leave to appeal, and to appeals from inferior courts, which are normally not permitted, but which it is within the power of the Judicial Committee under the Act of 1844 to admit. The condition for an appeal of right is normally that the matter in dispute is of the value of £500 or upwards, or where the appeal involves directly or indirectly some claim or question respecting property or other civil right of the value of £500 or upwards. The sum varies from the normal in certain cases; it is £300 in New Brunswick, 4000 dollars in

[1] *Nadan* v. *R.*, [1926] A.C. 482.

[2] N. Bentwich, *Privy Council Practice* (1926).

Ontario and Saskatchewan, £1000 in Alberta and Manitoba, and 12,000 dollars in Quebec. In New Zealand an appeal lies not merely from the Court of Appeal but from the Supreme Court; in the latter case it may be brought only by leave of that Court or by special leave of the Privy Council. In the case of the Union no appeal lies save from the Appellate Division, and then only by special leave from the Privy Council. Appeals from the High Court of the Commonwealth lie only by special leave, or in cases involving the constitutional rights of the Commonwealth and the States *inter se* or of the States *inter se* on a certificate from the High Court. From the Supreme Court of Canada appeal lies only by special leave of the Privy Council, and so with the Court of Exchequer in part of its jurisdiction. In the Irish Free State appeal lies only from the Supreme Court by special leave of the Council. It must be added that as regards admiralty jurisdiction an appeal lies of right under the Colonial Courts of Admiralty Act, 1890 (which the Dominions but not the States can now repeal in this regard), from all such courts to the Privy Council, and no local legislation could bar this right of appeal.[1]

The principles on which the Privy Council will grant special leave are quite indeterminate. It will not do so in electoral appeal cases,[2] on the score that there are pressing reasons of convenience that such appeals should not be allowed and that the reference of these issues to courts is really a surrender of the right of the legislature to determine such issues itself, and is there-

[1] *Richelieu and Ontario Navigation Co.* v. *Owners of S.S. Breton*, [1907] A.C. 112.

[2] *Théberge* v. *Laudry* (1876), 2 App. Cas. 102; *Strickland* v. *Grima*, [1930] A.C. 285.

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fore of a special character, to which the ordinary rules of appeals should not apply. Moreover, if a court is established to deal with land questions on the basis of equity and good conscience, no appeal will lie.[1] It is otherwise if the court is appointed generally to deal with the land rights of natives in New Zealand, which is a normal judicial function and performed on judicial lines. But no appeal will be allowed from a Court Martial under martial law, for such a body is clearly not a judicial body in the proper sense.[2] Nor will leave be granted in criminal cases under normal conditions, but only when "it is shown that by disregard of the forms of legal process or by some violation of the principles of natural justice or otherwise, substantial and grave injustice has been done".[3] From the Dominions cases of this kind are of negligible consequence. Moreover, the importance of the rule of refusing leave is emphasised by the fact that the Council has declined to grant leave when the action impugned as criminal was merely so under the terms of a provincial Act in Canada, where the provinces are by the constitution denied the power of enacting criminal law in the normal sense of the term.[4] An appeal, however, has been heard, though dismissed on the merits, from the

[1] *Moses* v. *Parker*, [1896] A.C. 245, as against *Wi Matua's Will, In re*, [1908] A.C. 448.

[2] *Tilonko* v. *A.-G. of Natal*, [1907] A.C. 93, 461; *Mgomini, Ex parte*, 22 T.L.R. 413.

[3] *Dillet, In re* (1887), 12 App. Cas. 459 (British Honduras); *Deeming, Ex parte*, [1892] A.C. 422; *Kops, Ex parte*, [1894] A.C. 652 (New South Wales); *Tshingumuzi* v. *A.-G. of Natal*, [1908] A.C. 248; *Badger* v. *A.-G. for New Zealand* (1908), 97 L.T. 621. See also *Arnold* v. *King Emperor*, [1914] A.C. 644, and contrast *Knowles* v. *R.*, [1930] A.C. 366.

[4] *Chung Chuck* v. *R.*, [1930] A.C. 244. Cf. *Fong, Ex parte*, [1929] 1 D.L.R. 223, on the nature of habeas corpus as civil: Keith, *Journ. Comp. Leg.* xii. 105, 106.

decision of a special court in Natal dealing with a charge of treason; the nature of the defence, the issue of the position of an alien resident in British territory on its occupation by alien enemies, no doubt explains the action taken.[1]

The constitution of the Privy Council for judicial purposes has been determined by a series of Acts, each enlarging the field of Dominion judges who may be members. The net result is that the Council is composed of the Lord Chancellor and ex Lords Chancellor, the Lord President and ex Lords President; present and past members of the Supreme Court in England, and the seven Lords of Appeal in Ordinary if Privy Councillors are members, and also any judge or ex judge of a superior court in the Dominions, States, or provinces, provided he is a Privy Councillor.[2] The right to appoint Privy Councillors still rests and must rest with the King on the advice of the British Government, which thus no doubt controls the composition of the court. Moreover, no salaries are provided for Dominion judges by the British Exchequer. Under an Act of 1915 the Council may sit in more than one division.

To the appeal many objections have been raised by critics in the Dominions, but it is clear that on the whole legal opinion there still favours the appeal, though, no doubt, the consideration that it affords a valuable source of profit to leading counsel has some weight in this preference. The merits of the appeal should not be denied. Unquestionably in the opinion of the major portion of Canadian lawyers it has served

[1] *De Jager* v. *A.-G. of Natal*, [1907] A.C. 326.

[2] The number has reached ten. For Indian appeals two judges are provided by the Appellate Jurisdiction Act, 1929.

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as a most valuable means of dealing with impartiality with the contests which have raged round the interpretation of the Dominion constitution, especially questions affecting religion, language, or race. It cannot be denied that it is difficult for Canadian judges to deal with such acute problems dividing political parties without the risk of being accused of partisanship by one side or the other. Again the Council has laid down a common basis of interpretation of the royal prerogative, a matter on which Canadian decisions once showed much confusion of thought. It has also enforced the similarity of interpretation of Acts adopted by the Dominions from British Acts. Under its judgements the courts of the Dominions should follow the interpretation put on such measures in England by the Court of Appeal[1] or the House of Lords.[2] In view of the otherwise inevitable deviation between parts of the Empire in construing the same statutes, this influence must be admitted to be of value. In the past also it has enforced the true interpretation of Imperial Acts applying to the Dominions, and upheld the supremacy of imperial legislation, but this function is now important only as regards the States. More valuable is the work done in interpreting the common law which lies at the base of the legal system of all the Dominions, save Quebec and the Union. When it is remembered that the different States of the United States are free to

[1] *Trimble* v. *Hill*, 5 App. Cas. 342; cf. *Fed. Commr. of Taxation* v. *Hipsleys, Ltd.* (1926), 38 C.L.R. 219, 234; *Stuart* v. *Bank of Montreal* (1909), 41 S.C.R. 516, 548.

[2] Even if this differs from an earlier view of the Privy Council, *e.g.* as to the degree of care in drawing cheques: *Will* v. *Bank of Montreal*, [1931] 3 D.L.R. 526, which followed *London Joint Stock Bank* v. *Macmillan*, [1918] A.C. 777, against *Colonial Bank* v. *Marshall*, [1906] A.C. 559; see *Robins* v. *National Trust Co., Ltd.*, [1927] A.C. 515.

interpret their common law in very different ways, the advantage of a common interpretation is not negligible, though, on the other hand, the Dominions are more active in amendments of that law than the United Kingdom has been in the past. Nor should there be ignored the sentimental value attaching in many minds in the Dominions to the appeal to the King as in some way a link of Empire, especially at the time when such links are being reduced almost to invisibility. The fact that the finding of the Judicial Committee is not strictly speaking a judgement, but is promulgated as an order of the King in Council, has an effect which is not unimportant, however much it may be deemed irrelevant from the purely logical standpoint.

The objections[1] are many and of very varying weight. The constitutional objections that the appeal is a sign of Dominion dependence on the United Kingdom has been deprived of value by the Statute of Westminster, which puts in legal form the right of the Dominions to choose their own final Court of Appeal. The objection to the personnel of the court means in essence that it is in fact essentially constituted of British judges, since no salaries are provided either imperially or locally for the services of such Dominion members as there are. That could be remedied by Dominion or British action if it were the only issue involved. The objection that the court may contain a Lord President is based on the mistaken idea that the Lord President ever sits to hear judicial appeals; the presence of the Lord Chancellor is a different matter, but English legal tradition denies that sitting on such an appeal the Chancellor can be influenced by political grounds. It may be admitted

[1] H. Hughes, *Judicial Autonomy in the British Commonwealth* (1931).

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that on one or two occasions that view may be over-generous. That the judges are affected by patriotic[1] bias cannot be supported by any evidence, still less that they are more subject to class bias than Dominion judges or that they favour money as against poverty. More substantial complaints are based on expense. It is certain that the system gives a great advantage to the wealthy litigant and the great company or corporation which can coerce an opponent into surrender or compromise by the power to take him to the Privy Council. Delay, again, is a very grave factor, though the delay lies normally in the acts of the parties, one or both of whom may desire to postpone a decision. The absence of local knowledge unquestionably is a disadvantage, both to the court and to counsel, while it is often very expensive to send local counsel to England, and even then they may find the court insufficiently in touch with the facts of Dominion life to appreciate the Dominion point of view. A more serious objection still is the fact that the court is apt to dispose of issues on some ground which, however valid, does not touch the heart of the matter, and thus leaves unsolved the very problem which it was the desire of the parties to raise and have determined as guidance in subsequent cases. It is sometimes objected that the fact that only one decision is given without indication of dissenting views is objectionable, but that is not apparently the opinion of the Dominion Governments, for a decision to allow the presentation of dissents adopted by the Imperial Conference of 1911 was

[1] This is alleged in the Irish Free State, but unproved, and it was not exhibited in prize cases in the war of 1914–18. The same accusation has been made of Irish Free State judges.

promptly repudiated by the Governments on further consideration. Nor is it of importance that the court is not strictly bound by precedent.[1] It would, of course, be deplorable if it were lightly to vary judgements, but all that it has ever asserted is the right to reconsider an early ruling in the light of much fuller knowledge of the relevant circumstances, and the cast-iron rule of the House of Lords as to precedent would be even more inconvenient than it is, if it were not for the remarkable ingenuity which their Lordships can show when it comes to distinguishing subsequent cases from earlier decisions. It is perhaps better in such cases frankly to admit a change of view, as does the Supreme Court of the United States, and even on the most vital principle of the interpretation of the constitution the High Court of the Commonwealth of Australia. Much more serious is the fact not usually made a subject for criticism that the principles on which appeals are admitted for consideration or leave refused on application are far from intelligible. As the judgements do not give reasons for dismissing applications to appeal, this defect is less noted than otherwise it would be; worst of all is the fact that appeals may be held admissible by one division, and when the matter comes up for discussion on the merits the issue may be reopened and the appeal ruled inadmissible as in the Maltese case of *Parnis* v. *Agius*,[2] where an appeal from a decision on an electoral petition was held applicable by the Council, but later ruled to be invalid.

[1] *Transferred Civil Servants (Ireland) Compensation, In re*, [1929] A.C. 242; *Ridsdale* v. *Clifton* (1877), 2 P.D. 276; *Read* v. *Bishop of Lincoln*, [1892] A.C. 644.

[2] 99 L.J.P.C. 81; *Strickland* v. *Grima*, [1930] A.C. 285; Keith, *Journ. Comp. Leg.* xii. 289.

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The most serious objection to the appeal is one which has been stressed by Dominion critics, the implication, on the one hand, that Dominion judges are not capable of dealing satisfactorily with appeals, and the tendency, on the other hand, to neglect in composing Dominion courts the very best intellects of the bar. The general opinion in the Dominions appears to be that the final courts of appeal must be strengthened in composition if they are to be regarded as satisfactory substitutes for the Privy Council. The salaries offered in Canada are clearly too low to attract men of first-class ability, unless they deliberately prefer judicial ease. When it was objected by the United States that the Canadian arbitrator in the case of the ship *I'm Alone* was not a judge, it could conclusively be explained that Mr. Lafleur had a reputation unequalled by any Canadian judge for legal knowledge. In the contest regarding the appeal from the Irish Free State it has effectively been pointed out that the Supreme Court of the State is exceptionally weak in numbers, three in all, and that it would be very difficult seriously to assert that its members could dispassionately be compared favourably with the galaxy of legal talent which can be used to constitute a full division of the Privy Council to hear an important constitutional case when five judges sit.

Various suggestions have been made to eliminate the difficulty. Lord Haldane suggested the creation of a single Imperial Court of Appeal representing the United Kingdom and the Dominions effectively, with the power to sit in divisions and the possibility of a division sitting in succession in various Dominion capitals. The proposal has never aroused any great

attention, either in the United Kingdom where the intervention of Dominion judges in British appeals arouses no enthusiasm, or in the Dominions which seem content to let matters stand, unless and until abolition is preferred. Canada meantime has encouraged the presence of her judges from time to time on the Council, and a Canadian judge sat on the important reference as to the right of the British Government to appoint a member of the Boundary Tribunal on the Irish boundary, in view of the refusal of the Government of Northern Ireland to nominate a member.

This power of reference is one of the semi-judicial functions of the Council, which serves important ends. The King may refer to it any matter at his discretion, though, of course, the Council might point out that the subject matter was not suited to such treatment. Under this power have been decided important boundary issues [1] such as that between Ontario and Manitoba,[2] and the contest between Canada and Newfoundland over Labrador.[3] The issue between the Legislative Council and the Assembly of Queensland as to the power of the former over money bills was thus pronounced upon.[4] But the procedure is not available when the issue is one which properly could be made the subject of ordinary judicial proceedings, and the reference in the case of the question of the ownership of land in Southern Rhodesia [5] was made because the

[1] So also the question of the composition of the Irish Boundary Tribunal in 1924. Cf. Parl. Paper, Cmd. 2214. Questions under the constitution of Northern Ireland can be referred to it under the Government of Ireland Act, 1920, by the local Government.

[2] Ontario *Sess. Paper*, 1885, No. 8.

[3] 43 T.L.R. 289.

[4] *Queensland Money Bills Case*, Apr. 3, 1886.

[5] [1919] A.C. 211.

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issues involved were emphatically such as no court could properly decide, involving *inter alia* the obligations of the Crown towards a chartered company when the latter claimed to have a right to reimbursement of expenditure on administration which had not been defrayed from local revenue and to have acquired property in all ungranted lands by conquest or otherwise. A reference will be refused also if the advice given would not be effective, as when the Colonial Secretary in 1879 declined to refer to the Council the issue of the right of the Dominion Government to dismiss the Lieutenant-Governor of Quebec on the score that the Dominion Government would not be bound by the advice.

The question has naturally been raised,[1] arising out of the power of reference, whether disputes between Governments might not be made the subject of disposal by the Privy Council. The issue became of serious consequence in 1914 when the illegal action of the Union Government in deporting agitators from the Union might have caused serious difficulty as between the British and the Dominion Governments. It was pointed out that, if the agitators had been foreign subjects, their Governments might have raised the issue of the legality of their expulsion, and as between parts of the Empire some mode of settlement of difficulties should apply. The project has finally taken shape in the conception of an Inter-Imperial Tribunal of a voluntary character to deal with justiciable disputes arising between the Governments, which has been described

[1] Keith, *Imperial Unity and the Dominions*, pp. 165, 166; so as regards the confiscatory legislation of Queensland in 1920; *War Government of the British Dominions*, pp. 260, 261.

above. The Privy Council, however, may remain for a considerable period the arbitrator of Canadian constitutional issues, which might continue to be brought to it, even if appeals on ordinary points of law were, as they might well be, completely cut off.

(5) The relations of the Free State and the Privy Council have, unhappily, proceeded on a very different basis from those between the Council and the other Dominions. It was unquestionably the intention of the British Government to secure the maintenance of the appeal, and it thought that by making Canada the model of Irish status the result was assuredly attained. Accordingly, when all mention of appeal was carefully omitted from the constitution as first presented, it was insisted that the appeal must be preserved, and this was duly done in the constitution. It was, however, provided that the appeal would lie by special leave only from the Supreme Court, and that the Parliament might regulate appeals from the High Court to which the interpretation of the constitution is confided, but could not shut off the appeal in matters relating to the validity of any law. The British Government in effect permitted the exclusion of ordinary matters from appeal but not the cutting off of constitutional appeals, though the matter has been strangely misunderstood. At first the Privy Council showed a marked reluctance to hear appeals, insisting [1] that it was normally the intention of the constitution that Irish decisions should be final, but in *Lynam* v. *Butler*,[2] an issue on the Irish land law, not of constitutional importance, it gave for no very clear reason leave to appeal. The Parliament then legislated to declare that the law as set out by the

[1] [1926] I.R. 402.

[2] [1925] 2 I.R. 231.

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Supreme Court was the correct view, so that the appeal became useless and was dropped.

This was followed by the decision of the Council in *Wigg and Cochrane* v. *Attorney-General of the Irish Free State*[1] that under Article 10 of the treaty of 1921 British civil servants who retired in consequence of the change of government were entitled to better terms than were conceded by the Irish Government which adapted English usage to their cases. The judgement was based on statements of fact which in part proved erroneous, and the whole issue was reconsidered by the Council with the same result.[2] The arguments of the Council seem clearly sound in law, but it is clear also that the Article was not intended to have the legal effect which it turned out to imply. It would have been reasonable simply to legislate in both countries to give effect to the real intention, but the British Government, to the detriment of the unfortunate taxpayers, accepted the liability to refund to the Irish Government the excess payments due under the judgement, and the Free State, on this basis, agreed to pay the sums on certain conditions as to future retirements, which were formally accepted by both Governments and enacted by the two Parliaments as supplements to the treaty of 1921.

Finally, in 1930, an acute position arose in the case of the *Performing Right Society* v. *Bray Urban District Council*.[3] The Council allowed the performance of music in which the Society claimed copyright under the British Copyright Act, 1911. The Supreme Court negated the claim on the score that the Copyright Act

[1] [1927] A.C. 674.

[2] [1929] A.C. 242; Keith, *Journ. Comp. Leg.* xi. 129-31, 256, 257.

[3] [1930] A.C. 377; in Supreme Court, [1928] I.R. 506; Keith, *Journ. Comp. Leg.* xii. 287-9; xiv. 108, 109.

ceased to apply to the Free State when it became a Dominion under the treaty. This disclosed a complete lacuna in the Irish Law, revealing Ireland as failing to give protection under a copyright system which internationally certainly bound her,[1] and the Parliament in 1929 declared that copyright had existed during the period when the Supreme Court stated it was non-existent, but that no remedy was to lie for infringement prior to 1929. The injustice of this enactment was clear, and the only excuse for it was that under Article 43 of the constitution Parliament has no power to declare acts to be infringements of law which were not so at the date of their commission. Even if this section refers to civil law, and not as probable to criminal law,[2] it would of course have been simple to amend the constitution so as to do justice. In fact, the Privy Council on appeal held that the Supreme Court was wrong and that copyright had always existed, but it was precluded by the Act of Parliament from giving any remedy save that it could exonerate the unfortunate society from payment of costs as ordered in the Supreme Court. The episode was deplorable, for it could have been prevented had the Supreme Court not made a palpable blunder, inflicting a grave wrong on an unpopular Society.

The result was a complete divergence of view between the Free State and the British Government. But the Imperial Conference of 1930 could not dispose

[1] In law the State is certainly bound by all British treaties up to 1921, though it has been contended that the State has a right to ask for freedom, and no doubt in most cases this could be arranged. The State was recognised as a distinct member of the Permanent Court. See Keith, *Journ. Comp. Leg.* xiv. 110, 111.

[2] As in the United States; Kerr, *Law of the Australian Constitution*, p. 33.

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of the issue by simply recommending the dropping of the appeal, for a strong protest was made from the Protestant minority in Southern Ireland, which stressed its belief that the appeal was essential to preserve the rights in religious matters accorded by the treaty. The passing of the Statute of Westminster leaves the matter in *statu quo*, for the real question is whether the appeal is so implied in the treaty that it cannot be abolished without breach of that instrument. It may be, despite the doubts of the Attorney-General, that, as Canada could abolish the appeal from the Supreme Court, it is open to the Free State so to act without violating the treaty which is the governing power over her constitution under the Act of 1922 of the Constituent Assembly giving to the Parliament legislative power.[1]

In fact, however, the abolition of the appeal from Canada, as in the case of the Commonwealth, is complicated by the existence of the federal system.[2] For Canada to abolish the appeal from the Supreme Court would be only a source of confusion if the appeal direct from the provinces, which it did not create and which it cannot control save in the matter of criminal law, remained operative, for then, if one issue were decided in one sense by the Supreme Court, nevertheless it could still be decided in the opposite sense by the Privy Council, and chaos would result, for the Supreme Court could not be compelled to adopt the Council's view nor the Council that of the Supreme Court. Nor would the action of the provinces, which also can abolish the

[1] On June 20, 1932, the Privy Council refused leave to appeal against a decision of the Supreme Court asserting the right of the State to reduce the pay of the police as being officers transferred with statutory rights from the British service.

[2] Keith, *Journ. Comp. Leg.* xiii. 251; xiv. 108.

appeal, be effective unless all complied with the suggestion of abolition, and the dissent of Quebec would again ruin the effect of action elsewhere. In the Commonwealth a like difficulty presents itself outside the constitutional sphere reserved to the High Court by the constitution, and in that case the matter is even more unfavourable to abolition, since the States have not so far been accorded the power to abolish the doctrine of repugnancy by repealing the Colonial Laws Validity Act in its application to them. In the case of Ireland the matter is far more simple from the legal point of view, and it is obvious that it would be far more useful for the minority if the place of the present appeal could be taken by an agreement by the State to arbitrate before an Inter-Imperial Tribunal any grievance of that minority which the British Government should think sufficiently important as to justify the suggestion that a breach of the treaty of 1921 was involved.

(6) The prerogative of mercy at one time formed the subject of considerable friction between the British and colonial Governments. But it was soon realised that, if the theory of responsible government were not to be rendered untenable, it must be admitted that a local ministry was the proper authority to control the prerogative. In the case of Canada the contest was carried on by Mr. Blake, who succeeded in persuading the Colonial Secretary that it would suffice if the Governor-General were required to exercise discretion, after hearing ministerial advice, in any case in which the grant of a pardon or reprieve might directly affect the interests of the Empire or of any place outside Canada. In 1888 the resignation of the Government of

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Queensland on the refusal of the Governor to accept the argument that the exercise of the prerogative should be based on their advice, and the inability of the Governor to find a ministry to take its place, showed that the principle of independent discretion was untenable, and in 1892 the Colonial Secretary was finally persuaded to abandon the instruction that the Governor should exercise a personal discretion by the argument of the Governor of New Zealand, who pointed out that in fact the Governor had no option but to act on advice, and that the responsibility was one which ministers should face. Hence for New Zealand and the Australian colonies, now States, the Canadian principle was adopted. It was accepted by the Commonwealth as proper. But Newfoundland was left with the old rule of discretion in the case of capital sentences enjoyed by the instructions, and it was only under Sir W. Macgregor (1904–9) that in practice ministers began to take any responsibility for the prerogative, which in effect the Governor had been allowed to exercise—an invidious position explained by the difficulties felt by ministers in a tiny community in resisting appeals for clemency for friends and supporters in politics.

In the case of the Union the question of the feeling which might arise in cases involving natives resulted in the adoption of the rule requiring in capital cases personal discretion to be exercised after consideration of the question in Executive Council. The Governor-General must, however, if he reject the advice of the majority of members, enter the grounds of his dissent in the minutes. The procedure, it is clear, is incompatible with the modern view of responsible government, and no doubt in the Dominions and States the

rule may be taken in effect to be that the ministry controls, though the principle of 1878 is still retained in the new instructions issued for Canada in 1931. One omission, however, has been made: the British Government at one time discouraged the grant of pardons conditional on exile unless the crime was one of a political character unaccompanied by violence; but any limitation of this kind is obviously a matter for local views, and it is now left to the Governor-General to act on any advice the ministry tenders.

Advice in matters of pardon is normally given by one minister, the Minister of Justice or Attorney-General, but capital cases are brought before the Cabinet in most cases. In accordance with British practice, efforts have been made, not always successful, to prevent Parliamentary discussion of the use of the prerogative, on the broad ground that its exercise is essentially a matter for executive discretion with full knowledge of all the facts and not for party recriminations in the legislature. It is, however, inevitable in small communities that much pressure should be exerted on members by constituents and by members on ministries.

In the case of Canada it was originally the intention of the British Government that the prerogative should be restricted to the Governor-General, even in respect of provincial cases of violation of regulations made by the legislatures. But, since it was determined that the legislatures could confer the pardoning power on the Lieutenant-Governors, the exercise of the prerogative in respect of these matters is manifestly inappropriate, and the delegation of it disappeared in 1905. In the case of Canada, the Commonwealth, and the States the

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division of authority manifestly should be that the Governor-General should pardon for offences against Commonwealth laws and the State Governors for offences against State laws, including the criminal law. In general the power has been delegated to pardon persons condemned in the Dominions for offences committed outside them but triable therein by reason of the admiralty jurisdiction of their courts, and in any case a pardon given would not be questioned in the Dominion.

To grant an amnesty is clearly now a matter of ministerial discretion, and it rests with Parliaments to decide how far convictions of treason or other crime are to be treated as disqualifications for office or membership of Parliament. A generous treatment has had to be accorded to persons convicted of high treason in the Union whose offences have been remitted by Union Act.

Apart from the right of pardon of actual offences, it is always open to a Dominion government to refrain from prosecution and to stay proceedings on non-governmental prosecutions by entering a *nolle prosequi*, which, as in England, bars further action and is a matter entirely within ministerial discretion.

CHAPTER XII

THE FEDERATIONS—ORIGIN AND STRUCTURE

THE Canadian and Australian federations are indebted essentially to the United States for the main features of their constitutions. But the circumstances of their origin have caused both of them to deviate greatly from their model, and that in different directions.

(1) It was inevitable that the presence of the United States in immediate vicinity to Canada and in constant contact should have suggested from the outset the desirability of federation. But in the United States federation was brought about only by external pressure, and for a prolonged period there were no reasons sufficient to induce co-operation on the northern side of the frontier. The British Government itself, by dividing New Brunswick and Prince Edward Island from Nova Scotia, and by severing Quebec into Upper and Lower Canada in 1791, seemed eager to rule by division. Though Lord Durham was at one time attracted by the ideal of a federal Canada, practical considerations made him drop the project, for which the maritime provinces were unripe, and concentrate instead on the preliminary of turning a reunited Canada into a true English province. The time for that, however, was over, and it was the absolute impossibility of continuing to carry on effective government in the

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united province that afforded the dominant motive for federation. Canadian politics after 1858 rapidly approached a deadlock; the growing disproportion of population made the equal number of members for each part of the province an intolerable anomaly, while change would menace the swamping of French nationality in Canada. The solution lay in a federation in which French Canada could enjoy autonomy in local matters, while no longer hampering national policies. Skilled diplomacy secured the concurrence of the maritime provinces, which had themselves planned a measure of union, as was suggested by the homogeneity of their population and their common interests. The causes which induced these provinces to concur in federation and which strengthened Canada in her desire to attain it were varied. The growth of a great power on the southern border, animated, through causes partly not connected with Canada, by feelings of something approaching hostility to the British provinces, invited attention to the defenceless position of the country. The British Government felt that the defence of the provinces when disunited offered a burden impossible to sustain, and pressed for adequate local action. Considerations of safety therefore impelled men's minds to some form of union, and unquestionably the presence of Fenians on the border operated powerfully in 1866 in inducing New Brunswick to acquiesce in federation. A further motive was due also to the hostility of the United States. The reciprocity treaty of 1854 had opened up an era of prosperity for Canada, and the denunciation of the compact by the United States menaced the province with commercial stagnation. It became urgent, therefore, to obtain access to the

markets of the maritime provinces, and to abolish the tariff barriers between them. A further economic factor was furnished by the efforts of British and Canadian companies and financiers interested in railway development to secure the possibility of the opening up of railway communication with the maritime provinces on the one hand, and the west on the other. Only thus could it be hoped to secure sufficient additional traffic to make the many lines already constructed or contracted for in Canada itself a paying proposition. Much less important was the realisation of some men of insight, such as George Brown, that it was vital for Canada to secure the west before it should be occupied by American immigrants and the possibility of retaining it under British control, despite the boundary treaty of 1849, pass away. There were other grounds which could be urged for federation, but these were the vital matters, which overcame reluctance in North America, and induced the British Government, which had long been indifferent, to accept the project with alacrity and to use all its influence to bring it to successful fruition.

In the case of Australia there were lacking the essential arguments to induce federation. Four of the colonies, New South Wales, Tasmania, Victoria, and Queensland, had once formed a unit; they had prospered by division, and each soon acquired a distinctive standpoint which it was reluctant to surrender. South Australia has been from the first absolutely independent and free from the convict strain; Western Australia was equally distinct, though it later succumbed to the fascination of cheap convict labour and was the last in 1868 to surrender the privilege. Had they been isolated communities without a common source of sup-

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port in the shape of the United Kingdom, they might easily have been driven to unite for protection; but, as it was, the well-meant efforts of Lord Grey in 1849–50 to insert federal clauses in the constitution then granted as a preparation for self-government were bitterly criticised. Gradually the advantage of federation became visible, strengthened, of course, by the coming into being of the Canadian federation. External danger counted for comparatively little, though as early as 1870 the Franco-German war had evoked in Victoria thoughts of neutrality. The tension with Russia in 1877–78 and 1886 counted for something, still more the defeat of China by Japan in 1894, but the more practical foreign issue was that of the exclusion of Chinese and Japanese immigrants, and with that went the exclusion of British Indians. Defence would be more effective, British experts reported, if there was federation, and the pious belief prevailed that it might even be cheaper. Economic issues loomed much larger. It would be excellent to abolish all customs barriers and to create within the new unit freedom of trade with protection against the rest of the world. The substitution of one great community for six weaker bodies would bring a great impetus to trade and commerce. Money could be borrowed more cheaply on federal security, and the Australians were prodigious borrowers. The war of railway rates on the frontiers of the colonies by which each sought to secure business for itself at the expense of its neighbours would be ended. The disputes over the use of the river Murray for irrigation and navigation would become capable of solution. The divergence of legislation on a multitude of commercial and industrial topics would be ended with all that meant in the

interests of business. The problem of old age pensions could be solved by a federation. Enthusiasts promised the regulation of trade disputes on a uniform basis in place of conflicting decisions in each colony on issues which were common to the whole of Australia. Others, too sanguine, thought that the federation might dispose of the lands which the colonies had been unable to develop and to take over the vast northern territory which South Australia nominally owned. Lawyers suggested that the establishment of a federation would facilitate the settlement of legal disputes without the cost of a reference home, and would bring about assimilation of the interpretation of laws in the several jurisdictions.

But, beside this long list of arguments of an economic character, there was present in the movement the growing sense of nationality. It alone in the long run really prevailed over obstacles and secured the establishment of the federation. The British Government was throughout sympathetic, but the time had passed when it could have exercised any decisive influence on the course of events, as it undoubtedly had done in the case of Canada. It served, however, a useful purpose in securing the accession of Western Australia to the federation, though it may be feared that the State now regrets its decision. This sense of national destiny had been injured by the refusal of the British Government in 1883 to secure New Guinea for Australia and to prevent the establishment of France in the New Hebrides, and this had something to do with the energy with which in some quarters stress was laid on the necessity of the Australian colonies freeing themselves from a position in which they could not

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successfully make representations to the United Kingdom on issues of vital importance to them, but of negligible interest to a government which had no eyes save for the spectacle of European affairs. This element of critical hostility had no counterpart in the Canadian and maritime province attitude in 1864–67.

(2) So different were the circumstances that the methods of achieving federation inevitably differed in essentials. The Canadian federation was produced largely in secrecy and was the work of a number of determined individuals who carried with them the people rather than were guided by their wishes. The initial step was taken in 1864 by a coalition including men who had never hitherto seriously desired federation, but who had realised that deadlock in Canada was complete and could not be solved by ordinary means. The statesmen of the maritime provinces, whom they met at Charlottetown and invited to Quebec, had no mandates from their legislatures or peoples for federation. The Quebec resolutions were accepted by Canada alone; neither in Nova Scotia nor New Brunswick were they formally agreed to. Nova Scotia was never allowed to express the views of the people, the legislature assuming power to act without a dissolution. In New Brunswick a dissolution gave a majority to the opponents of federation, but the new government mismanaged the position, and a change of opinion was achieved, which allowed New Brunswick to send her delegates to settle with those of Nova Scotia and Canada the details of the constitution. That instrument was thus finally determined upon at London, and enacted by the Imperial Parliament in 1867, in a form which was not in detail that approved in

Canada. Nova Scotia now had to be allowed an election and it repudiated by its vote federation, but relief was denied and it sullenly acquiesced. After that no chance of change remained. British Columbia in 1871 and Prince Edward Island in 1873 accepted federation on the basis of the existing constitution; the other three provinces, Manitoba (1870) and Saskatchewan and Alberta (1905), were created by the Dominion from the enormous areas under the administration of the Hudson's Bay Company which passed to it in 1869–70. Moreover, the federal Act itself created Ontario and Quebec as distinct provinces out of Canada, and before it took effect constitutions of the two provinces were settled upon by the Parliament of the united province. There was, therefore, a minimum of free determination in the whole proceeding as far as the people were concerned.

In the case of Australia federation was the outcome of a movement which in its later stages was far more popular than governmental. No doubt it was due to governmental action that a Conference of delegates from the colonies in 1884 adumbrated a measure to secure a degree of co-operation which was passed in 1885 as the Federal Council of Australasia Act, and which, though utterly defective, did something to accustom Australians to common action on a legal basis. Ministers again attended the Melbourne Conference of 1890, which led to the selection of delegates to frame at Sydney in 1891 a draft constitution. But after that ministerial energy languished and the driving power passed to the people, among whom enthusiasts promoted federation leagues and kindred bodies, and the *Sydney Bulletin* set about its task of educating the back-

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blocks to the necessity of a united Australia by the use of arguments intelligible and striking, if often crude and misleading. It was this popular movement which drove ministers to meet at Hobart in 1895, and to agree to legislate for the selection, not by Parliament, but by popular vote, of delegates to a Convention at Adelaide in 1897. The work of this Convention in 1897–98 proved decisive. The constitution was referred as agreed upon to the people; New South Wales failed to give the necessary size of majority, but it was placated by concessions made by a Premiers' Conference, and the bill was then passed in 1900 by the British Parliament virtually in the form in which it had been approved in Australia, Western Australia deciding at the last moment to refer the question of acceptance to the people with a decisive result. The people, therefore, supplied in large measure the driving power to achieve the goal; moreover, it was by the people that the constitution, after the fullest exposition by its supporters and critics, was deliberately and decisively ratified in every colony.

(3) In both cases the federal structure in essentials bears similarity to that of the United States, which was essentially the chosen model. It shares with it the characteristics of being set out in a written instrument, in providing for the supremacy of the constitution over the governments and legislatures, in dividing power between a central and local authorities, and in assigning to the courts the duty of defining the measure of authority to be exercised by the federation and its members. But in very important matters both constitutions depart from the United States model, and in certain matters the Australian constitution adheres

more closely to the United States precedent than does the Canadian. The cause of this is unquestioned. Canadian federation grew up under the shadow of the great conflict between north and south in America. The danger to a federation of the undefined powers of the States was manifest, and the fathers of federation for that reason were determined not to repeat the error made in the framing of the American constitution. Moreover, some of them, including Sir John Macdonald, were at heart supporters of union, and, while they perforce yielded to the necessity of a confederation as the only means to please Quebec and to make up for the lack of local institutions of government in the maritime provinces, they were anxious to limit as closely as possible the degree of autonomy of the parts. In the case of Australia no such motive was effective. The colonies were autonomous, and the effort to bring them into federation meant serious surrender of authority. It was therefore necessary to omit from the federal pact all that savoured of undue centralisation.

Both constitutions differ from the United States constitution in the greater detail which they contain. They differ also in the vital fact that they make no provision for the rights of the subjects. They were prepared by men who were not afraid of Parliamentary despotism, and did not see, as perhaps they should have seen, that legislatures are capable of infringing the moral law. The fact that sanctity of contracts and due process of law are required of American State legislation, and not of the legislation of the provinces, explains the many differences between the judicial interpretation of the two systems. Thirdly, the federations presuppose the existence of responsible government while the United

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States constitution negates it. In the United States ministers may not sit in the legislature; in Canada and Australia they cannot in effect be ministers unless they so sit. Similarly the head of the federations is a representative of the Crown who acts as constitutional monarch, as opposed to an elected President who actually governs and whose ministers are his instruments and subordinates with whom at pleasure he can dispense. So also the head of the Government has in practice no veto on legislation as has the President, for it is not he but ministers who govern, and Parliament is in accord with their views. Fourthly, the States of the United States had been independent states before they federated, and they preserve as a result a wider measure of authority than is allotted to the States of Australia and still more than is given to the Canadian provinces. It is significant that the Australian States can delegate powers to the federal Parliament, implying a relation foreign to the conceptions of the United States. Finally, the scheme of judicature shows essential differences. The States in America were not prepared to submit the judgements of their State courts to alteration by any federal court, and therefore on all State issues these courts are supreme, and, if an issue of this kind falls to be decided incidentally in a federal court, it normally will follow State decisions. In both Canada and Australia one aim of federation was to secure unanimity of decision on points of law, and appeals lie to the Supreme Court and the High Court respectively from the local courts on purely local issues involving no federal element. Again, the United States demands a separation of jurisdictions, so that federal courts administer federal law and State courts State law. In the

British federations, though in different ways, jurisdiction can be exercised in federal matters by State or provincial courts.

From the Canadian constitution that of the Commonwealth differs in form in the important particular that, as it was necessary to separate Canada into two provinces, the British North America Act, 1867, makes provision for the constitutions of Ontario and Quebec. Moreover, Manitoba, Saskatchewan, and Alberta were given constitutions by Dominion Act. On the other hand, the Commonwealth constitution leaves the States to enjoy their own constitutions subject to the federal scheme. The Canadian provinces, however, have power to amend their constitutions despite the grant by the Act of 1867 and federal legislation. Secondly, the appointment of the head of the State rests in Australia with the King, and the States are in direct relations with the British Government; their Agents-General are accredited to the Dominions Office. In Canada the Lieutenant-Governor is appointed by the Dominion Government, which can remove him, though the power is not used for federal ends, as it might have been. Thirdly, the Australian Senate is in structure based on the equality of the States and on election by the people, a device now adopted by the United States. Canada departs from the federal principle both by the unequal treatment of the several provinces and by the method of appointment by the Dominion Government. Fourthly, the States in Australia, like those in the United States, retain all the powers not expressly denied to them and can exercise them concurrently with the Commonwealth, though subordinate to Commonwealth legislation in such cases as are also within

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Commonwealth jurisdiction. In Canada the residuary jurisdiction rests with the Dominion, but judicial interpretation has greatly restricted the force of this rule. Fifthly, the power to disallow provincial Acts is given to the Dominion Government, and it was long used to protect Dominion interests, though its use is now largely in abeyance. In the Commonwealth State Acts can be disallowed only by the King, and there is no instance on record in which disallowance has been expressed on the wishes of the Commonwealth. Sixthly, the Canadian federation authorises the creation of federal courts, but assumes that, unless deprived of jurisdiction, the provincial courts are competent to deal with all federal questions. The Commonwealth constitution provides for the exercise of federal jurisdiction by federal courts, and for the assignment to State courts of federal jurisdiction.

(4) The intention of Sir J. Macdonald was as far as possible to reduce the status of the provinces to that of local government authorities. This explains the deliberate determination to prevent appointment of the Lieutenant-Governors by the Crown. They would then be deemed to have a delegation of the royal prerogative, while, if appointed by the Governor-General on the advice of his ministers, they would be servants of the federal government. Similarly the legislatures were to be under control; their bills were to be subject to reservation on Dominion instructions, and it was early determined that, in exercising the power to disallow, the Governor-General was to act on Dominion advice. As the Crown was not to be really present as part of the legislature, their competence would virtually be that of local government bodies. Access to the British

Government was entirely denied, and representations from provincial governments need not be forwarded to London unless it pleases the Dominion.

But, while the Lieutenant-Governor and the legislature are thus in a sense placed under Dominion control, the courts soon dispelled the idea that the provinces were mere local government instrumentalities. The Dominion sought to deny the power of the legislatures to empower the Lieutenant-Governors to create Queen's Counsel and award them precedence in the courts; it denied that they could provide for alteration of the seals of the province; they denied that they could authorise the remission by the Lieutenant-Governors of fines and imprisonment imposed for breach of provincial legislation. On all these points the courts held them wrong. Again on the same view that the prerogative was not (unless by special enactment of the British North America Act) applicable to the provinces, the Dominion claimed that escheats of land passed to it, but the Privy Council in *Attorney-General for Ontario* v. *Mercer*[1] negated that view, and in *Maritime Bank of Canada* v. *Receiver-General of New Brunswick*[2] it asserted that the priority of the Crown in bankruptcy applied to the province. In the same way the Privy Council has established the most important doctrine that the land in each province is so vested in the King that, if Indian tribes are induced by the Dominion Government, which has charge over them, to surrender their claims in return for annuities, the land vests in the province, not the Dominion, and the annuities cannot be recovered by the Dominion, unless, of course, the Dominion has had the good sense to secure an

[1] (1883), 8 App. Cas. 767. [2] [1892] A.C. 437.

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agreement from the province to pay for the rendition to it of the beneficial control of former Indian reserves.[1] In the same way the legislatures have been allowed by the Privy Council[2] to assume such privileges as they deemed necessary, although Sir J. Macdonald contended that bodies of their limited scope and position had no right to treat themselves as entitled to rights belonging only to a true Parliament.

As a Dominion officer the position of Lieutenant-Governor is withheld from provincial power of constitutional change, but that does not mean that the provinces cannot confer upon him new powers, such as the right to appoint deputies. What it means is that the provinces cannot legislate so that a bill can be passed by the initiative or otherwise without being submitted to him for the royal assent.[3]

The position of the Lieutenant-Governor as representative of the Crown was thus shown to be very different from that of the chief officer of a local institution, and the Dominion Government has refrained from any effort to make use of him as a means of controlling policy, save in so far as on occasion advice can be given to him as regards representations to be made as to bills likely to inconvenience the central authority. But such issues are normally dealt with direct between ministers, federal and provincial. Nor, despite their selection by the Dominion Government, have Lieutenant-Governors normally abused their office to effect political aims. When they have been suspected of such action, they have been removed by

[1] *A.-G. for Dominion of Canada* v. *A.-G. for Ontario*, [1897] A.C. 199; *Dominion of Canada* v. *Province of Ontario*, [1910] A.C. 637.

[2] *Fielding* v. *Thomas*, [1896] A.C. 600.

[3] *Initiative and Referendum Act, In re*, [1919] A.C. 935.

the federal ministry, as in the cases of Mr. Letellier de St. Just in Quebec in 1879 and Mr. McInnes in British Columbia in 1900. For all practical purposes the Lieutenant-Governor is now expected to act as a constitutional sovereign, and in this respect the Dominion differs in reality very slightly from the Commonwealth, where the Governors are directly appointed by the Crown.

The provinces, however, are subject to disallowance of legislation by the Dominion, but this issue, which has played a considerable part in Canadian history, has now diminished in importance, as the practice has been reduced to minimal proportions. Sir J. Macdonald and Conservatives in general were not reluctant to disallow bills deemed to be unconstitutional as arrogating to the provinces powers they did not possess, and Acts have been disallowed because they conflicted with imperial interests as restricting immigration of orientals, or with Dominion obligations, as was the case in 1908 with a British Columbia Act denying to Japanese the privilege of entry given by Canadian Act. Mr. Aylesworth, when Minister of Justice, approved in 1909–10 the disallowance of Acts which extended wrongly, in his opinion, the competence of provincial companies to act outside the province, a view which was afterwards proved erroneous by the decision of the Privy Council in *Bonanza Creek Gold Mining Co.* v. *The King.*[1] But, unlike the Conservatives, the Liberals normally declined to interfere with Acts merely because they were unjust or even confiscatory of private property without due compensation. This was Mr. Aylesworth's attitude in the famous Cobalt case and the Hydro-Electric Com-

[1] [1916] 1 A.C. 566.

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mission case in 1909, both instances where the legislature took upon itself to dispose of private rights in a manner which many held inequitable.[1] Mr. Doherty in the Conservative Government from 1912 was less opposed to disallowance on this ground, and a British Columbia Act was disallowed in 1918 because it ran counter to a contract in which the Dominion had a share. But the Conservatives did not hesitate to denounce in 1923 the next case of disallowance on moral grounds, that of a Nova Scotia Act determining as to the disposition of certain property contrary to a ruling of the Supreme Court of the Dominion. Perhaps too much stress has been laid on this case, which was that of a private member's bill which the local government evidently was not particularly pleased to see passed, so that its opposition to disallowance was no more than formal. Everything, however, points to the conclusion that disallowance has now become an instrument which will not be used to decide constitutional issues between the provinces and the Dominion.

The provinces, however, have no control over the foreign policy of the Dominion. In this sense they are absolutely subordinate, as recent decisions of the Privy Council have at last proved. The power of the federation rests on the terms of Section 132 of the British North America Act, 1867, which gives to Canada the power to legislate to implement the obligations of Canada or any province under treaties of the Empire with foreign countries. No doubt the section did not contemplate the time when Canada would make her

[1] "The prohibition 'Thou shalt not steal' has no legal validity upon the sovereign body": *Florence Mining Co.* v. *Cobalt Lake Mining Co.* (1909), 18 O.L.R. 275, 279, *per* Riddell, J.

own treaties, but the Privy Council has had no trouble in overriding so technical a point as that by basing legislative power on the general legislative authority of the Dominion. When a province legislates in accordance with its powers, that legislation may be overridden by a Dominion Act based on the treaty, as in the case of British Columbian efforts to hamper the employment of Japanese, despite the right of equal treatment in such matters given to them by the Canadian compact with Japan.[1] So the Manitoban legislation as to game can be overridden by the Migratory Birds Convention, 1916, with the United States when given effect to by Dominion law.[2] The issue is vital for control of aviation,[3] Canada being a party to the Air Navigation Convention of 1919 and its amendments, and it is of importance for radiotelegraphy.[4] Moreover, it renders it possible for the Dominion, by legislation to give effect to the St. Lawrence Treaty of 1932, to override any objections of the provinces based on ownership of the river-bed or otherwise. It is clear, of course, that this power might be used to destroy the rights of the provinces, but it may safely be assumed that it will not be pressed unwisely. It has long since been laid down by the Supreme Court of Canada,[5] and accepted as just, that labour conventions arrived at under League of Nations Labour Organisation auspices shall be presented for approval or otherwise to the

[1] *Attorney-General for British Columbia* v. *A.-G. for Canada*, [1924] A.C. 203.

[2] *The King* v. *Stuart*, [1925] 1 D.L.R. 12.

[3] *Regulation and Control of Aeronautics in Canada, In re*, [1932] A.C. 54; Keith, *Journ. Comp. Leg.* xiii. 122-4; xiv. 114, 115.

[4] *Radio Communication in Canada, In re*, [1932] A.C. 304.

[5] *Legislative Jurisdiction over Hours of Labour Reference, In re*, [1925] S.C.R. 505.

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provincial legislatures, and that it is not desirable that Canada should conclude treaties on her own responsibility on these topics, and then legislate to give them effect. When, however, a treaty is concluded, the Privy Council has given the view that the normal mode of implementing its terms is legislation by the Dominion, even supposing that the subject-matter is within provincial control; but such cases are probably not likely to arise, for the Dominion should not be anxious to make any inroad on the provincial sphere if that can be avoided.

(5) The States of Australia enjoy the right of direct appointment of their Governors by the Crown, their laws are subject only to the almost obsolete control of the British Government, with which they communicate direct through their Governors or Agents-General in London. No question has ever arisen of the issue of the prerogative being effective in the State as a source of authority, but there has been a controversy of importance regarding the extent to which the States have any standing in issues of foreign affairs. The Adelaide Convention deliberately decided not to accept the suggestion that the Governor-General should be the channel of correspondence with the Governors, so that it was left to the British Government in 1902 to rule that, where any representation was made by a foreign government regarding matters affecting a State, the British Government could proceed to investigate the issue through the Governor-General. The ruling was evoked by the complaint of the Dutch Government that South Australia had failed to arrest the seamen of the ship *Vondel*,[1] as the State was bound to do under the

[1] Keith, *Responsible Government in the Dominions* (ed. 1912), i. 796-804.

Anglo-Dutch treaty. The State repelled the contention, urging that it alone possessed the necessary power to execute the treaty and should be approached direct, while the Commonwealth and Mr. Chamberlain argued that the Commonwealth for all external issues must be treated as a unit. The matter remains in principle undecided in the sense that, while the British Government can insist on acting through the Commonwealth or with the advice of the Commonwealth on issues raised by the States, *e.g.* of unfair treatment of their citizens, the actual means of carrying out treaty obligations often rest with the States alone. The power of the Commonwealth to deal with external affairs by legislation is not held to extend to the enforcement of treaties on subjects affecting the States. It is necessary, therefore, to secure State legislation for acceptance of conventions falling in their sphere, or, as in the case of aviation, to induce the States to confer, as they can do, under the constitution legislative power on the Commonwealth. Similarly the recognition of Consuls is a matter on which States and Commonwealth must concur, and the Commonwealth can regulate such issues as the landing of armed seamen from foreign men-of-war only with State concurrence.

On the other hand, the British Government has negatived effectively the claim of the States to be invited to the Imperial Conference. But, as a result, issues which affect the States can be dealt with only by correspondence, for the Commonwealth cannot bind the States. The States protested in several cases against the passing without their consent of the Statute of Westminster, and not only was a clause put in to safeguard their interests, but the Commonwealth gave

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assurances that before it legislated to put the Statute into operation for the Commonwealth it would hold a Conference with the States. The States too still retain the right to make recommendations for honours, though the Governor-General of the Commonwealth has been consulted by the British Government before these recommendations are dealt with.

In internal affairs there has been a conflict of judicial opinion[1] in Australia whether it is proper or not to speak of the sovereignty of the States, but the issue seems of minor importance. What is clear is that the Crown in the Commonwealth and the Crown in the States are different aspects, and thus it has been ruled by the High Court that legislation by the Commonwealth Parliament may be expressly or by necessary intendment made to bind the Crown in the States, and that the State Parliament may in matters within its sphere bind the Crown in the Commonwealth; thus a Commonwealth customs duty binds a State Government and is not void as taxation of State property;[2] or a State regulation as to motors binds a defence officer, though by appropriate legislation under the defence power the Commonwealth Parliament might exempt such officers from State regulations.[3] The Crown in the State is subject to Commonwealth regulation of industrial disputes,[4] though if a Commonwealth award was applied to State civil servants there might be no means by which they could secure payment if the State Parliament declined to make provision, for there is

[1] *Commonwealth* v. *New South Wales* (1923), 32 C.L.R. 200.
[2] *R.* v. *Sutton* (1908), 5 C.L.R. 789.
[3] *Pirrie* v. *McFarlane*, 36 C.L.R. 170.
[4] *Engineers' Case* (1920), 28 C.L.R. 129.

grave doubt whether a court could issue a mandamus to a Parliament, and still more doubt if the Parliament could be expected to obey. The courts have already ruled that mandamus lies neither to the Governor of a State nor to the Governor in Council.[1]

The Crown in the Commonwealth and in the State are so distinct that one can sue the other not merely on contract, but also even against its will in tort under the constitution, as when a State vessel inflicts injury on a Commonwealth vessel.[2]

Powers under Imperial Acts must be exercised by the Governor-General or Governor of a State according as they fall within the sphere given to the Commonwealth or not. Thus the Governor of a State is the proper authority to act under the Fugitive Offenders Act, 1881,[3] for on that head the Commonwealth has not authority, and the Governor would be the person to sanction proceedings against foreigners under the Territorial Waters Jurisdiction Act, 1878.

(6) In the judicial arrangements of the federations the distinction between them comes out clearly. The Commonwealth insists on attempting to distinguish judicial from executive and legislative power, vesting the three in the courts, the Crown, and Parliament. The result of this determination is inconvenient, for judicial power by Section 71 of the constitution can be vested only in courts, either federal courts created by the Parliament or other courts, and in federal courts the

[1] See p. 145, *ante*.

[2] *Commonwealth* v. *New South Wales*, 32 C.L.R. 200. The Crown is not to be regarded as several juristic persons: *Commonwealth* v. *Colonial Combing, etc., Co.* (1922), 31 C.L.R. 421, 439; *Engineers' Case* (1920), 28 C.L.R. 129, 152.

[3] *McKelvey* v. *Meagher* (1906), 4 C.L.R. 265.

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justices must hold office subject to removal only on address from both houses of Parliament on the ground of proved misbehaviour or incapacity. It follows, therefore, that, if any body is given judicial power, and has not such tenure of office, the grant is invalid. Thus the Inter-State Commission Act, 1912, which gave that body power to issue injunctions was ruled invalid,[1] because the members had only a seven years' tenure of office, so that the Commission was allowed to expire by lapse of time and has not been reappointed. Similarly, when the President of the Commonwealth Court of Conciliation and Arbitration had a like tenure, it was ruled that the Court could not enforce its own awards by judicial remedies.[2] The issue was much discussed in regard to the tribunal set up to aid the Federal Commissioner of Taxation in determining income tax. Was this a tribunal, so that its assessments were invalid, because its members were not holding office by judicial tenure? In one form it was held to be such a tribunal and so unable validly to make assessments, but by altering its functions to those of Board of Review it was found possible in *Shell Co. of Australia* v. *Federal Commissioner*[3] to hold that it was not a court, and so could make valid determinations. The Privy Council held that a tribunal was not necessarily a court in the strict sense because its decisions were final; nor because it heard witnesses on oath; nor because two contending parties appeared before it whose rights it had to decide; nor because it gave decisions affecting the rights of

[1] *New South Wales* v. *Commonwealth* (1915), 20 C.L.R. 54.

[2] *Waterside Workers' Federation* v. *J. Alexander, Ltd.* (1918), 25 C.L.R. 434.

[3] [1931] A.C. 275. Contrast *British Imperial Oil Co.* v. *Federal Commr. of Taxation* (1925), 35 C.L.R. 422.

subjects; nor because its findings were subject to appeal; nor because a matter had been referred to it by another body. The Council ruled also that it was impossible to establish a real court unless the members held by the true judicial tenure. The restriction can be got rid of only by a constitutional amendment, a fact which illustrates effectively the difficulty of too great rigidity in constitutions.

The constitution again has been invoked successfully to negative the power of the High Court to give advisory judgements, on the score that this is not an exercise of judicial authority.[1] There must be contrasted the greater freedom under the Canadian constitution where the Privy Council[2] has held that advisory judgements are possible, a view which is natural seeing that the Council itself may be called upon by the Crown to give such a judgement. The value of the procedure is very great, for it enables a broad issue to be determined without the chance of the judgement resting on a technical or minor point. The question of radiotelegraphy jurisdiction, for instance, was thus decided on a reference by the Governor-General of Canada of the issue to the court. No doubt sometimes it is impossible to answer effectively too vague or complex issues, but the total absence of the power in Australia is inconvenient.

The British North America Act, 1867, gave to Canada by Section 101 the power to establish a general court of appeal for Canada and other courts for the administration of the laws of Canada. It left otherwise federal matters as well as provincial in the hands of the

[1] *Judiciary Act, In re* (1921), 29 C.L.R. 257.
[2] *A.-G. for Ontario* v. *A.-G. for Canada*, [1912] A.C. 571.

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courts in the provinces, to which were assigned by Section 92 (14) the control of civil and criminal courts and civil procedure, while criminal law and procedure are assigned to the federation. Canada has established a court of appeal in the Supreme Court, and an Exchequer Court which has jurisdiction in claims against the Crown which might be brought by petition of right in England,[1] in matters of patents and copyright, and in admiralty. The jurisdiction of the Supreme Court is subject to appeal by special leave to the Privy Council both in civil and in criminal cases, for the effort of the Canadian Parliament to bar the appeal in the latter case, in view of the objections to such delays as occurred in *Riel's Case*,[2] has been pronounced invalid in *Nadan* v. *R.*[3] The Council, however, does not in such cases grant leave to appeal. But in civil cases, especially those affecting the constitution, the Council is the final arbitrator. Cases can also be taken direct from the provincial courts to the Privy Council either by special leave or as of right, but the Council prefers[4] that, when possible, the views of the Supreme Court should be ascertained before it rules finally on constitutional questions. But this tendency must be read subject to the fact that where an appeal is taken by the unsuccessful party in the provincial court to the Supreme Court, and he is there defeated, it will be difficult to persuade the Council to grant leave to appeal. It is otherwise if the application for leave to appeal is made by the party

[1] No appeal lies from a refusal of the Governor-General to fiat a petition of right: *Lovibond* v. *Governor-General*, [1930] A.C. 717. Such an action is not a judgement.

[2] (1885), 10 App. Cas. 675.

[3] [1926] A.C. 482.

[4] *Initiative and Referendum Act, In re*, [1919] A.C. 935, 939.

successful in the provincial court but unsuccessful before the Supreme Court.[1]

In the Commonwealth before the passing of the Judiciary Act, 1903, jurisdiction in federal as well as State business was necessarily exercised by the State courts. Since the passing of that Act the State courts act as grantees of federal jurisdiction by the Parliament under the constitution. The grant of federal jurisdiction is wide and the chief exceptions from State authority to act is in regard to matters arising directly under any treaty; suits between two States; suits between the Commonwealth and a State or a State and the Commonwealth; and cases in which a writ of mandamus or prohibition is asked for against a federal official. Suits by a private person against a State may be brought in a State court or the High Court, and the States may deal with suits by claimants against the Commonwealth both in contract and tort. The position of the Commonwealth is safeguarded by the right of appeal from State decisions, and by the restriction of the exercise of federal jurisdiction in its lower grades to specially qualified magistrates.

There is, however, a further limitation to State power in the fact that State Supreme Courts cannot exercise jurisdiction in matters, other than trials of indictable offences, involving any question arising as to the limits *inter se* of the constitutional powers of the Commonwealth and those of any State or States, or as to the constitutional powers *inter se* of any two or more States. In any such question the issue stands automatically transferred to the High Court for decision. This pro-

[1] *Clergue* v. *Murray*, [1903] A.C. 521. A similar rule applies to Australia: *Victorian Railways Commrs.* v. *Brown*, 3 C.L.R. 1132.

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vision marks in 1907 the termination of the conflict of authority between the Privy Council and the High Court, arising from the fact that appeals lay from State courts to the Privy Council direct as well as to the High Court. The High Court ruled that the States could not tax official salaries of the Commonwealth as this might interfere with a federal instrumentality;[1] the Privy Council on appeal from the Supreme Court of Victoria held that this view was unsound;[2] the High Court[3] refused to follow the ruling of the Privy Council, in reliance on the fact that in the type of constitutional cases set out above, the constitution, Section 74, excludes appeal to the Council unless on a certificate of the High Court. If this certificate were refused, the High Court held that its decision should be final, and it refused to certify the case.[4] The way out lay in the right given by the constitution to the Parliament to define to what extent the federal jurisdiction of the High Court should be independent of that of any State court, and the legislature provided for the automatic removal to the High Court of all cases of the type described. There can be little doubt that the enactment was valid, and in any case the issue became of no practical consequence, as the Parliament proceeded to permit the States to levy income tax at the normal rates on federal salaries.

The result of this legislation has been that the High Court decides all such constitutional issues without possibility of reference to the Privy Council. It remains,

[1] *Deakin* v. *Webb* (1904), 1 C.L.R. 585.

[2] *Webb* v. *Outrim*, [1907] A.C. 81.

[3] *Baxter* v. *Commissioners of Taxation* (1907), 4 C.L.R. 1087.

[4] The Privy Council refused to allow appeal. See *Flint* v. *Webb*, 4 C.L.R. 1178; [1908] A.C. 214.

however, for that body to decide in each case whether or not there is a conflict of rights between Commonwealth and States or State and State. Thus it has ruled[1] that no such issue is involved in the question of the interpretation of Section 92 of the constitution providing for absolute freedom of trade between the States, for, if the section applies to the States only, no conflict arises, nor, even if it applies to the Commonwealth also, can there be any conflict as to rights *inter se*.

The matters in which original jurisdiction is federal are provided for by the constitution. They include those mentioned above; any questions affecting consuls or other foreign representatives; claims between residents of different States, or a State and a resident of another State. Moreover, Parliament may confer jurisdiction in any matter arising under the constitution, or as to its interpretation, or under laws of the Parliament, or as to admiralty jurisdiction, or as regards subject-matters claimed under the laws of more than one State, and wide use has been made of this power. It has also exercised the power to give rights of proceeding against the Commonwealth or the States in contract and tort[2] on issues within the judicial power. This limitation excludes, it may be noted, political issues proper, but a State may secure a judgement as to its boundary line as against another State.[3] Moreover, the Parliament has power, which it has exercised, to facilitate the serving and execution of process by one court in one State throughout other parts of the Commonwealth.

(7) The financial clauses were among those which

[1] *James* v. *Cowan* (1932), 48 T.L.R. 564. Cf. *Nelson, Ex parte* (No. 2) (1929), 42 C.L.R. 258, 262.

[2] *Commonwealth* v. *New South Wales* (1923), 32 C.L.R. 200.

[3] *South Australia* v. *Victoria* (1911), 12 C.L.R. 667.

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most vexed the framers of the constitutions, and nearly prevented agreement. The difficulty was that, with the grant of sole power of raising customs to the federation, the local governments would be without the necessary means of carrying out their functions, since direct taxation is always most difficult to raise in young communities. Hence it was necessary to provide for subsidies, in addition to taking over most of the debts of the provinces which entered the federation in 1867. They were at the same time granted by Section 107 of the constitution their lands, mines, minerals, royalties, etc.; other governmental property was duly divided between the federal and provincial governments. Terms were arranged on the creation of the other units. British Columbia surrendered certain lands intended to be used to purchase the construction of the intercolonial line to connect east and west, the surrender including, according to the courts, water rights but not minerals;[1] and Manitoba, Saskatchewan, and Alberta were not granted their lands, which were instead reserved for Dominion control in the interests of immigration and of the whole of Canada. In 1906 provincial needs compelled a reconsideration of subsidies, which was effected by Imperial Act in 1907, the Dominion hoping vainly thus to have the issue settled for ever, despite the protests of British Columbia that the situation was still unfair. The provinces continued to protest against their absence of lands, and in 1930, after prolonged delays, the issue was finally disposed of when the Dominion surrendered control of the lands to Manitoba, Saskatchewan, and Alberta, and of the railway belt to British Columbia. The subsidies payable were at the

[1] *A.-G. of British Columbia* v. *A.-G. of Canada* (1889), 14 App. Cas. 295.

same time revised, the agreements being confirmed by Imperial Act. Saskatchewan, however, demanded as part of the settlement a judicial decision as to her claim to be entitled to compensation for the use made of the lands by the Dominion during the time when they were withheld, but this remarkable claim was naturally found to be without legal foundation both in Canada and by the Privy Council.[1]

The constitution provided for internal freedom of trade, and forbade the Dominion or the provinces to tax the property of the other. This does not, however, mean that Canada cannot raise custom duties on a province's wine imports,[2] and the lands of the Dominion in any hands but the government itself are certainly not free from local rates or other imposts ordained by the provincial legislatures.[3]

(8) A feeble compromise determined that for the first ten years of the Commonwealth the federation should give back to the States three-quarters of the customs and excise revenue collected. At the close of that period a system of payments of 25s. *per capita* to the States was adopted. The war, however, completely upset the balance of financial arrangements, and the Parliament discontinued the system in 1927. In lieu, under agreements with the States, the State debts were from July 1, 1929, taken over by the Commonwealth, elaborate arrangements being made as to the payment of agreed sums by States and Commonwealth[4] as

[1] *A.-G. for Saskatchewan and A.-G. for Alberta* v. *A.-G. for Canada*, [1932] A.C. 28.

[2] *A.-G. of British Columbia* v. *A.-G. of Canada*, [1924] A.C. 222.

[3] *Halifax Corpn.* v. *Fairbanks' Estate*, [1928] A.C. 117.

[4] £7,584,912 a year for fifty-eight years as interest and 2s. 6d. per cent as sinking fund.

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interest and sinking fund. In future loans were to be controlled by a Loans Council representing the Commonwealth and the States, which should have power to limit borrowing to such sums as should be practicable to raise at reasonable rates. The agreements with the States were accompanied by the alteration of the constitution, so as to provide that the Parliament of the Commonwealth might make laws as to the carrying out by the parties thereto of any agreement made between the Commonwealth and the States. The importance of this alteration, duly approved by referendum on November 17, 1928, was made obvious in 1932 when New South Wales persisted in default in respect of her interest payments on her debt. In 1931, at her first default, Mr. Scullin arranged for payment by the Commonwealth and proceeded to sue the State, but the matter was compromised, the State agreeing to pay. A second default, however, followed, and the Commonwealth hesitated to pay, having been advised that the legal liability was not clear. Moreover, it was held best to expose Mr. Lang's default to the world, even at the cost of weakening Australian credit. The Commonwealth then passed two Acts in 1932, the one to accept full liability and to give bondholders a right to sue the Commonwealth, the other to provide for the enforcement of the agreement. The procedure under the new Act permits on a certificate of default by the Auditor-General resolutions by Parliament authorising payment to the Commonwealth in lieu of the State of specified revenues, whereupon the States taxpayer would be discharged only by payment to the Commonwealth. At the same time reference would be made to the High Court to declare that the State was in default, though

action might be taken before the Court decided the issue. The Act was held valid by the High Court on an injunction against action being taken under it being claimed by the State. The State, however, persisted in default, including default on the internal as well as the external debt, and it was calculated that by June 30 its defaults would total £7,200,000. Accordingly a further Act was passed to make it clear that, once the Auditor-General had certified, fresh sources of revenue might be seized under resolutions of the houses. Moreover, the Financial Emergency (State Legislation) Act was passed to counter the attempt of New South Wales to levy 10 per cent of the value of every mortgage in the State. The Commonwealth Act was based on the taxation power, and power as to insurance, banking, foreign corporations, and trading and financial corporations formed within the Commonwealth. Luckily the dismissal of Mr. Lang enabled the ministry to pass legislation suspending the Acts, and the election in the State gave a majority in June to a government bent on maintaining the obligations of the State.

The drastic character of the Commonwealth action is obvious, and Mr. Scullin, who did not defend repudiation, was perturbed by it, suggesting that it meant unification which he would vote for if brought forward directly. In the Senate the cry of State rights was also raised for Western Australia. But the emergency was complete and the case convincing. If the State was coerced, it was because it was deliberately endeavouring to destroy its obligations and to break the federal bond. It could not be ignored that, if the State left its debts unpaid, the other States must make good the deficit, and thus would be reduced to impossible straits,

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which must end in wholesale repudiation and disorganisation.

The constitution provides for freedom of trade between the States, an issue which has caused grave difficulties of interpretation. Might a State forbid the export of meat in order to conserve meat resources for use of the Imperial Government?[1] Could the issue be evaded by the purchase compulsorily by the State of the whole wheat output and its disposition of it at its pleasure? The latter doctrine was asserted by the High Court in *New South Wales* v. *Commonwealth*,[2] but anything short of that has been ruled by that court to be inadequate. But the Privy Council in *James* v. *Cowan*[3] has destroyed this doctrine in the wide form which was given to it by the High Court. Reversing a judgement of that court, it has held that an effort by this method in the form of acquisition by the State of certain quantities of dried fruits to carry out a scheme for regulating the sale in Australia is invalid. The seriousness of the judgement is unquestionable, for it is plain that the method of controlling the industry so as to secure a fair return to growers throughout the State, in lieu of allowing unregulated private profits, is in the public interest. The Council would only admit that acquisition might be valid as a means of countering famine or disease or for purposes of defence. When it was merely as a device for forcing fruit off the Australian market, *i.e.* preventing inter-State trade, it was invalid. In other cases the operation of Section 92 is clearly less open to objection. It has invalidated an effort of South

[1] *Foggitt Jones & Co., Ltd.* v. *New South Wales* (1916), 21 C.L.R. 357; *W. & A. McArthur, Ltd.* v. *Queensland* (1920), 28 C.L.R. 530.

[2] (1915), 20 C.L.R. 54.

[3] (1932), 48 T.L.R. 564.

Australia to tax consumers of oil imported from outside the State.[1]

The Commonwealth is forbidden to discriminate in any of its actions, and it has been ruled, therefore, that any legislation which does not accord equality of treatment is void, though it is otherwise if the law produces unequal results as the outcome of divergences in local conditions.[2] The criterion of formal equality is clearly the only one possible, for Parliament has no means of knowing precisely local conditions as they will be affected by its enactments.

(9) The formation of new provinces in Canada was provided for by the process of allowing the admission of British Columbia and Prince Edward Island on addresses from the legislatures approved by the Queen in Council; Newfoundland was placed in the same position but has never agreed to federate, despite many intrigues for that purpose. The award by the Privy Council of Labrador[3] to Newfoundland with a much larger area than had once been believed in 1927 has strengthened the position of the island and rendered inclusion in the Dominion less probable at any early date. It is naturally feared that government from Ottawa would neglect the interests of the territory, and local autonomy is prized.

The British North America Act contemplated the inclusion of the Hudson's Bay territory, and the North-West Territories, not included in the charter of the Hudson's Bay Company, in the Dominion; the surrender of the charter was authorised by an Act of 1868,

[1] *Commonwealth* v. *South Australia* (1926), 38 C.L.R. 408.
[2] *Cameron* v. *Deputy Federal Commr. of Taxation* (1923), 32 C.L.R. 68.
[3] 43 T.L.R. 289.

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the lands granted by the Crown to the Dominion, and Canada gave Manitoba a constitution of provincial type in 1870. This was validated in 1871 by the Imperial Parliament, which also provided that a constitution thus given could not be altered by the Dominion, save, with the assent of the province, as regards boundaries. The Act also authorised legislation by Canada for the territories not converted into provinces, and for the representation of new provinces in Parliament, a power extended in 1886 to the territories. Moreover, by Order in Council of 1880 all British territory in North America was assigned to Canada. In 1905 Saskatchewan and Alberta were given provincial rank. In 1912 much of the North-West Territories was assigned to Manitoba, Ontario, and Quebec. What remains outside the provincial system is the Yukon, governed by the Gold Commissioner, aided by an elective Council of three, and the Territories, governed by a Commissioner and six Councillors appointed by the Dominion Government. Subordinate legislative powers are exercised in both areas, but supreme legislative power rests with the Dominion.

In Australia the earlier federation movement contemplated the inclusion of New Zealand in the federation, but that Dominion definitely rejected the suggestion on grounds of distance. The decision is clearly wise. The question, therefore, which remains is the possibility of constituting new States. For that there is abundant legal power, but the consent of the State Parliament is always needed. Proposals for the cutting up of Queensland into two or three States or the increase generally of the number of States have been numerous but unfruitful. But a State may surrender territory,

whereupon the Commonwealth has full legislative power, and this has happened in the case of the Northern Territory. It was transferred under a South Australian Act of 1908 in 1911 to the Commonwealth for development. In 1927 it was divided into North and Central Australia, but reunited in 1931. Legislation takes place by the Ordinances of the Governor-General in Council. The Commonwealth has also power to legislate for the capital territory,[1] Canberra. Under an Act of 1930, the area is administered by the Minister for Home Affairs with the aid of other departments. Under him is the Civil Administrator, and there is an Advisory Council of four officials and three inhabitants elected for two years.

The Commonwealth has also by Section 122 of the constitution legislative power over any territory placed by the Crown under its control. This enables it to provide for the government of Papua, which is a British colony, and under Letters Patent of 1902 has been subject to the Commonwealth since 1906. It is governed under the Papua Act, 1905, as a Crown Colony by a Lieutenant-Governor, with a nominated Executive Council, and a Legislative Council composed of the Executive Council and five members, nominated by the Governor-General in Council. Norfolk Island, also British territory, has been under the Commonwealth since 1914 and is under an Administrator; it can be legislated for by the Governor-General in Council.[2]

[1] *Federal Capital Commission* v. *Laristan Building, etc. Co.* (1929), 42 C.L.R. 582.

[2] It is provided by Letters Patent of 1931 to place under the Commonwealth Ashmore Island when legislation is passed by the Commonwealth. The power to transfer Norfolk Island was based on the Australian Waste Lands Act, 1855.

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New Guinea, on the other hand, for which the Commonwealth holds a mandate from the League of Nations, is apparently to be held subject to the legislation of the Commonwealth by reason of the Imperial legislation to carry out the treaty of peace with Germany. It is not British territory and its court is not a federal court.[1] Legislation is carried out by the Governor-General in Council.

Nauru is governed under provisions enacted by the Imperial, Commonwealth, and New Zealand Parliaments in 1919–20 to give validity to an agreement between the governments in 1919 for the exploitation of the phosphate deposits, and the Commonwealth has at present control of its affairs. The Administrator has executive, legislative, and judicial authority, and an Advisory Council of two Europeans selected by him and two chiefs elected by the natives has been created. An independent Commission exploits the deposits on an agreed basis. Reports on New Guinea and Nauru are necessarily provided for the League of Nations.

[1] *Porter* v. *R.*; *Chin Man Yee, Ex parte* (1926), 37 C.L.R. 432; *Edie Creek Proprietary, Ltd.* v. *Symes* (1929), 43 C.L.R. 53.

CHAPTER XIII

THE FEDERATIONS—THE DIVISION OF POWERS

In the federations the formal allocation of powers by the constitutions may fairly be said to be of comparatively little importance as compared with the interpretation of these powers by the courts, on the one hand for Canada the Privy Council, on the other for Australia the High Court. In both cases the constitutions have been made to yield results hardly at first sight to be expected.

(1) The scheme of the British North America Act, 1867, has been pronounced to depart widely from the true federal model by Lord Haldane,[1] on the score that it does not, as in the United States constitution, leave the existing units with their powers, save in so far as they are expressly withdrawn or are given to the federation exclusively. Whether this criticism is quite just depends on the assumption that "federal" has this connotation, and the issue is not of importance. The essential fact is that the Act does undertake to divide the powers of legislation and government necessary for Canada between the federation and the provinces, and, as it must be assumed that all the powers requisite are implicitly or explicitly contained therein, the distribu-

[1] *A.-G. for Commonwealth* v. *Colonial Sugar Refining Co.*, [1914] A.C. 237, 252.

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tion is careful to provide for such residuary authority as is demanded. It therefore gives the provinces exclusive powers in respect to the topics enumerated in Section 92, and all other power is assigned to the Dominion. But, as the heads of Section 92 cover, or might be held to cover, many powers which are necessary for the peace, order, and good government of the Dominion as a whole, these matters are set out in Section 91, but not so as to restrict the general authority accorded to legislate on all matters not exclusively assigned to the provinces.

The national powers include (i.) those necessary for the maintenance of the federal government; control of the civil and other services; taxation; borrowing; the public debt and property, of which much in the possession of the existing governments was assigned to the federation. (ii.) It controls militia, naval and military services, and defence. (iii.) It regulates naturalisation and aliens and Indians and lands reserved for them. (iv.) It has important economic powers, the regulation of trade and commerce; navigation and shipping, beacons, buoys, lighthouses, quarantine and marine hospitals; postal service; ferries between two provinces or between Canada and any other place; currency and coinage and paper money, banking, legal tender, interest, bills of exchange and promissory notes; patents, copyrights; bankruptcy and insolvency; and weights and measures. Moreover, it controls sea-coast and inland fisheries, and steamships, canals, telegraphs, or other works connecting any province with another province or extending beyond its limits, steamship services from Canada overseas, and—a very important power—works which, though actually situated in any

province, are declared by the Parliament either before or after their construction to be for the general advantage of Canada or of two or more provinces. (v.) As was natural in 1867, social interests were hardly provided for, but the federation was given control over marriage and divorce in general, and over criminal law and procedure and penitentiaries, but not over the constitution of criminal courts.

To the provinces are assigned (i.) the necessary means of maintenance of their organisation, control of provincial officers, taxation (but only direct), borrowing, and management of lands; shop, saloon, tavern, auctioneer, and other licences may be used to raise revenue for provincial, local, or municipal purposes; (ii.) municipal institutions, and hospitals, asylums, and like bodies; (iii.) local works and undertakings save as specially given to the Dominion; (iv.) property and civil rights, and in special the solemnisation of marriage and the incorporation of companies for provincial objects; (v.) generally all matters of a local or private nature in the province; and (vi.) the administration of justice, including the constitution of courts, civil and criminal, and civil procedure; the imposition of fine, penalty or imprisonment for violations of provincial enactments; and the maintenance of public and reformatory prisons. Further, the provinces have power to legislate as to agriculture and immigration, but subject to the paramount power of the federation in these circumstances. Uniformity of civil law in Ontario, Nova Scotia, and New Brunswick might be established by the federation with the assent of the legislatures, but this power will never be used, though on many matters concurrent legislation is not rare in all the

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provinces. How far the provinces can be assigned delegated powers by the federation is still quite uncertain.[1]

As regards education, the provinces were given power to legislate, but the legislation must not prejudicially affect any right or privilege with respect to denominational schools which any class of persons had by law at the union, a rule extended in the case of Manitoba to law or practice. The privileges enjoyed by Roman Catholics in Upper Canada were extended to dissentient schools of Lower Canada. Moreover, where any system of separate schools existed at union or was thereafter created, an appeal was to lie to the Governor-General in Council from any act or decision of any provincial authority affecting any right or privilege of the Protestant or Roman Catholic minority concerned. If any legislation thought necessary on this appeal by the Governor-General in Council were not executed, power was given to the federal Parliament to remedy the defect.

To the federation was given the power to implement treaties entered into by the Empire and binding on Canada, and to establish a federal court of appeal and other federal courts. But no power of constitutional change was accorded to the federation, while a province is permitted to alter its constitution save as regards the office of Lieutenant-Governor.

(2) It was the pleasing impression of the framers of federation that they had devised a constitution which would raise few questions in the courts, a fact which explains the indifference shown to the creation of a

[1] *Lord's Day Alliance of Canada* v. *A.-G. for Manitoba*, [1925] A.C. 384; Keith, *Journ. Comp. Leg.* xiii. 124.

federal judicature. In fact the division of powers was soon found inadequate, and repeated efforts were made by the federation to check claims of the provinces to legislate on subjects believed to be denied to them. But in due course the Privy Council worked out a scheme which has certainly greatly enhanced the powers of the provinces, and which has in the opinion of some critics given them too great authority and weakened the cohesion of the state.

A vital issue has been the question of the federal power as to the regulation of trade and commerce. In the normal sense of these terms it might have been expected that the Dominion would be able to control industry throughout the territory, but judicial interpretation has completely defeated this view. In *Russell* v. *The Queen*[1] it was ruled that the federal Parliament could enact the Canada Temperance Act, 1878, which prohibits, save under restrictive limitations, the liquor traffic in Canada. This was supported as part of the general legislative power, but also as falling under the trade and commerce power and criminal law, as opposed to the provincial control of property and civil rights. But in *Hodge* v. *The Queen*[2] the decision was given that Ontario could establish a local licensing system in the province, and later it was ruled that the Canada Act known as the McCarthy Act, which purported to set up a federal licensing system, was *ultra vires*.[3] Still more important was the decision against the validity of the attempt of the Dominion to control insurance[4] business by the plan of requiring the taking out of a licence from

[1] (1882), 7 App. Cas. 829. [2] (1883), 9 App. Cas. 117.

[3] Keith, *Journ. Comp. Leg.* vii. 61-8.

[4] *A.-G. for Canada* v. *A.-G. for Alberta*, [1916] 1 A.C. 588; *A.-G. for Ontario* v. *Reciprocal Insurers*, [1924] A.C. 328.

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the federation. It was definitely ruled that this would not be permissible under the general power, nor the commerce power, nor would the fact that penalties were imposed bring it within the ambit of criminal law. The Dominion indeed persisted in its efforts to evade this decision, but it has again been laid down[1] definitely that the Insurance Act is invalid in its attempt to require Canadian companies, and aliens, and British companies, and individuals immigrating into Canada to take out licences, and that the Special War Revenue Act which imposed taxation on persons insuring with insurers who had no licences was also invalid, as it depended on an invalid requirement of a licence. It stands, therefore, as certain that the commerce power has no reference to the right to regulate any business not assigned to the Dominion by licensing, nor can the rule be evaded by claiming that the power is really an exercise of the right to enact criminal law, to regulate aliens, or to control immigration. "What it is not legal to do directly cannot be effected indirectly." The same principle has been applied in the case of the effort of the Dominion to require licences to be taken out for operating salmon canneries in British Columbia.[2] The power to deal with sea-coast and inland fisheries is federal, but it does not mean an unlimited authority to do anything connected with fish, such as the regulation of canneries as a matter of business.

Far more serious was the decision in 1925[3] that the Dominion Industrial Disputes Investigation Act was invalid. The measure had proved of great value and its

[1] *A.-G. for Quebec* v. *A.-G. for Canada*, [1932] A.C. 41; Keith, *op. cit.* xiv. 115, 116.

[2] *A.-G. for Canada* v. *A.-G. for British Columbia*, [1930] A.C. 111.

[3] *Toronto Electric Commrs.* v. *Snider*, [1925] A.C. 396.

principles were sound. It forbade a strike or a lock-out pending the investigation of any dispute by a Board, in the sound belief that in many cases by such action accord might be reached. In fact it worked well, and it was unfortunate when it was challenged by the Toronto Electric Light Commissioners that the Privy Council refused to uphold it either under the general legislative power as a measure serving the peace and good government of Canada, or as an enactment under the commerce power, or as a measure of criminal law. Some effort was made to repair the injury legislatively by amending the Act to apply to all cases within federal power.

So far the Privy Council's decisions tell in favour of the provinces, but there are cases in which the general power and possibly even the commerce power may be adduced. This was shown in the *Fort Frances Power & Pulp Co.* v. *Manitoba Free Press*,[1] where it was held that conditions arising out of the war were sufficient to authorise Dominion interference with proprietary rights and civil law regarding the cost of news-print. But the limited effect of this case must not be ignored. A determined effort of the Dominion to set up a system of control of prices in general and of stocks of foodstuffs to protect the public from imposition was defeated as incompetent.[2] It did not fall within the commerce power, nor within criminal law, and there was no longer such an emergency as would have induced the Council to accept the view that they could be justified by the general power to legislate for Canada

[1] [1923] A.C. 695.

[2] *Board of Commerce Act*, 1919, *and Combines and Fair Prices Act*, 1919, *In re*, [1922] 1 A.C. 191.

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or the defence power. But against this unequivocal declaration falls to be set the recent upholding of the Combines Investigation Act of the Dominion.[1] It aims at securing the punishment of persons who take part in the operation of combines to the injury or restraint of trade and commerce, and it was naturally feared that it must share the fate meted out to the earlier effort. But the Privy Council upheld the Act and the auxiliary section of the Criminal Code as legitimate measures of criminal law, and such penalties as were not covered by this head were justified by the power of taxation or the control of patents.

This sign of readiness to recognise that the federation has powers of a wide character when necessary to secure the public interest is also exhibited in the decision as to the Regulation and Control of Aeronautics in Canada.[2] It was held without hesitation against the provinces that the exclusive power to legislate on the whole topic belongs to the Dominion. In part, of course, this rests on the fact that under Section 132 of the constitution Canada has power to implement obligations under imperial treaties, and this term covers the Convention of October 13, 1919, regarding aerial navigation. But reference was also made to the trade and commerce power, to the control of postal service, and to defence. More important still is the insistence in the judgement that the process of interpretation of the constitution must not be allowed to dim or whittle down the terms of the original contract on which the constitution was

[1] *Proprietary Articles Trade Assocn.* v. *A.-G. for Canada*, [1931] A.C. 310. For a strong assertion of a generous view of the Canadian constitution see *Edwards* v. *A.-G. for Canada*, [1930] A.C. 124.

[2] [1932] A.C. 54. On the Air Convention see Keith, *War Government of the British Dominions*, pp. 177, 178.

based. So in the case of Radio Communications in Canada[1] the Privy Council rejected entirely any power of regulation by the provinces, relying on the general power to legislate for the peace, order, and good government of the Dominion, and stressing the fact that communications between the provinces and other parts of the world were expressly made matters of federal concern. Moreover, it was insisted that it was impossible to hold, as the provinces contended, that, even if transmission was federal, reception was provincial. The case is specially noteworthy because it was not held to be within the terms of Section 132, the International Radiotelegraph Convention, 1927, being asserted not to be an Empire treaty in the sense of the Air Convention of 1919, as it was signed separately for Canada as a distinct unit, and not as associated with the United Kingdom.

An issue of importance is raised by the question of company law, for the power of Canada to incorporate companies is obvious. If the company deals with matters included in the list of special powers, then obviously it will be possible for Canada to give it authority which will override[2] so far as is necessary provincial law. But how far is a Dominion company subject to provincial control apart from this special case? It is clear that the province cannot so legislate as to destroy or deny the status of a company granted by the Dominion; it cannot enact that it may not trade unless it is registered in the province,[3] still less that it

[1] [1932] A.C. 304. For a strong criticism see Ewart, *Can. Bar Review*, x. 298-303.

[2] *Toronto Corpn.* v. *Bell Telephone Co.*, [1905] A.C. 52.

[3] *John Deere Plow Co., Ltd.*, v. *Wharton*, [1915] A.C. 330; *Great West Saddlery Co.* v. *R.*, [1921] 2 A.C. 91.

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may not issue its capital unless registered, for this would be to sterilise its activities and to deny its essential status and capacity.[1] But this must not be misunderstood. The fact that a company is incorporated by the Dominion does not necessarily mean that it can operate at all in a province; it may be paralysed by the legislation against the liquor traffic or by the rules as to the holding of land by companies. Moreover, if a province makes provision for the investigation of the affairs of any company operating in the province in order to discover if any fraud is being committed or if the regulations are being disobeyed, such legislation may well be valid, nor does it trench on the field of criminal law.[2]

On the other hand, the power of the provinces to establish provincial companies has been much extended in utility by the decision of the Privy Council in *Bonanza Creek Gold Mining Co.* v. *The King*[3] that such a company, though it can only be incorporated for provincial purposes, can be given the capacity of a natural person to accept, when outside the province, such privileges of action as the law allows. This decision has put an end to the efforts of the federal government to use the power of disallowance to prevent the counter-efforts of the provinces to charter companies with authority to act outside the province.

The taxation power of the provinces raises issues of complexity. The limitation to direct taxation is interpreted on the definition of Mill, in the simple sense that that taxation is indirect which is levied on a person

[1] *A.-G. for Manitoba* v. *A.-G. for Canada*, [1929] A.C. 260.
[2] *Lymburn* v. *Mayland*, [1932] A.C. 318.
[3] [1916] 1 A.C. 566.

who normally passes it on to third parties.[1] The Privy Council will not attempt an exact analysis, nor will it take note of any special circumstances under which in fact a tax normally indirect may operate as a direct tax. Recent cases have decided that a tax levied on dealings in sales of grain for future delivery in Manitoba,[2] of sales of fuel oil in British Columbia,[3] and on the gross revenues of mines in Alberta,[4] are all really indirect taxes and as such invalid. So also a tax levied on timber cut in British Columbia [5] is so framed as to operate as a tax on export, as opposed to consumption locally, and as such is beyond the power of the province. But a province may authorise a municipality to levy a tax on lessees of Dominion property,[6] for that is a direct tax.

Another difficulty arises in the case of death duties, as the provinces are restricted to legislation in the province. But the result of the cases [7] is in effect that the province can tax either because the property in question is physically within the territory, or because the recipient of a part thereof is within its control. In the latter case it may make the tax payable by him proportionate to the total value of the whole of the property of the decedent. The situation of property of course offers difficulty where the property is a claim, for instance, on a bank, but the true criterion is that

[1] Keith, *Journ. Comp. Leg.* x. 104, 105; *Halifax Corpn.* v. *Fairbanks' Estate*, [1928] A.C. 117.

[2] *A.-G. for Manitoba* v. *A.-G. for Canada*, [1925] A.C. 561.

[3] *A.-G. for British Columbia* v. *C.P.R. Co.*, [1927] A.C. 934.

[4] *R.* v. *Caledonian Collieries*, [1928] A.C. 358.

[5] *A.-G. for British Columbia* v. *McDonald Murphy Lumber Co.*, [1930] A.C. 357.

[6] *Halifax Corpn.* v. *Fairbanks' Estate*, [1928] A.C. 117.

[7] Keith, *Journ. Comp. Leg.* xiii. 280, 281.

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such a claim is located where it can most naturally be enforced by legal action, and a share in a company has its *situs* where it can be transferred.[1] The local limitation may be of importance, for it disables a province to deal with a claim which in this sense is situate outside the province, so as to cancel a debt which in law is regarded as not within its limits.

In many matters the province and the federation have powers which can be exercised without actual conflict, in which case action is possible by either in its own sphere. Situations present different aspects as federal or provincial. The control over naturalisation and aliens is given to the federation, but none the less it is open to British Columbia to deny the franchise to a naturalised Japanese subject.[2] Cases as to Chinese are conflicting. On the one hand, the Privy Council has held that they cannot be barred from working underground in mines, as that is a mere effort to prevent them living in the country to which they have been admitted by federal authority; yet it has held valid the insertion of clauses forbidding their employment by lessees of timber.[3] As regards Japanese aliens the position is governed by the treaty power, for that enables Canada to override any provincial legislation denying them the rights promised by treaty.[4] It is not, it is clear, illegal to forbid the employment of white women

[1] *Cotton* v. *The King*, [1914] A.C. 176; *Alleyn* v. *Barthe*, [1922] 1 A.C. 215; *Brassard* v. *Smith*, [1925] A.C. 371; *Royal Trust Co.* v. *A.-G. for Alberta*, [1930] A.C. 144; *Erie Beach Co.* v. *A.-G. for Ontario*, [1930] A.C. 161.

[2] *Cunningham* v. *Tomey Homma*, [1903] A.C. 151.

[3] *Union Colliery Co.* v. *Bryden*, [1899] A.C. 580; *Brooks-Bidlake* v. *A.-G. for British Columbia*, [1923] A.C. 450.

[4] *A.-G. of British Columbia* v. *A.-G. of Canada*, [1924] A.C. 203.

in Chinese restaurants, as is the law in Saskatchewan, which is a simple safeguard for morality.[1]

Marriage is a federal subject, but not solemnisation, and it has been ruled[2] that it is not open to the federation to enact a law which would render valid any marriage though the provincial rules of celebration had not been respected, but much doubt attends the efforts of the provinces to include as part of solemnisation such matters as parental consents and to declare invalid marriages which do not comply with this condition.[3] Divorce is in a curious position. It has been ruled that all the provinces save Ontario and Quebec (and in practice Prince Edward Island) have courts which before union had the necessary jurisdiction to give divorces in accordance with the English law of 1857. Only the federation can extend causes, as has been done by putting men and women on the same footing, and only the federation could give Ontario such a court, an action delayed until 1930, when also divorce jurisdiction was extended, so that any province where a husband was domiciled before he deserted his wife may give a divorce, though the wife's domicile has been changed by her husband's action in securing a domicile elsewhere.[4]

In the matter of the administration of justice the provincial power of legislation as to courts must be taken into conjunction with the federal power to appoint the judges of the superior courts in the province, and colourable efforts to evade the power of the

[1] *Quong Wing* v. *R.*, 49 S.C.R. 440; *Yee Clun* v. *City of Regina*, [1925] 4 D.L.R. 1015.

[2] *Marriage Legislation in Canada, In re*, [1912] A.C. 880.

[3] Dicey and Keith, *Conflict of Laws* (5th ed.), pp. 736, 737.

[4] *Ibid.* pp. 424, 431.

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federation in Ontario have failed.[1] What is more important is the question of the extent to which the provinces can pass legislation which resembles criminal law. It is clear that the issue is delicate, and an inconvenient position arises because the Privy Council is unwilling to admit the possibility of appeals in criminal matters and extends that term to cover penalties imposed for violation of provincial statutes. It may therefore be difficult to challenge the validity of a provincial Act before the Privy Council on a conviction for a violation of a statute whose validity may be suspect, as in the case of the Produce Marketing Act of British Columbia.[2]

Most important of all have been the disputes over the control of education, for that has raised two most serious causes of dispute, religion and language. The issue was raised definitely in Manitoba in 1890 when the legislature established unsectarian schools. Prior to this there had been denominational schools paid for by the parents. The new régime imposed taxation for the unsectarian schools on all, and in *City of Winnipeg* v. *Barrett*[3] it was ruled that the Act of 1890 was perfectly valid, for the only right existing before it was for parents to pay for denominational schools, if they desired and this privilege remained, even though they now had to provide for unsectarian schools. But it was also held in *Brophy* v. *Attorney-General of Manitoba*[4] that the Governor-General in Council could be appealed to in equity as opposed to law, as the position

[1] *A.-G. for Ontario* v. *A.-G. for Canada*, [1925] A.C. 750.

[2] *Chung Chuck* v. *R.*, [1930] A.C. 244; Keith, *Journ. Comp. Leg.* xii. 286, 287; xiii. 125, 126, 252. Against the validity see *Lawson* v. *Interior Tree, Fruit, and Vegetable Committee*, [1931] S.C.R. 357.

[3] [1892] A.C. 445.

[4] [1895] A.C. 202.

had been changed to the detriment of the minority. On appeal, the Dominion Government, under clerical influence, ordered Manitoba to amend its legislation; on its refusal to comply with the demand as unjustified, a remedial bill was brought into the federal Parliament, but the opposition of many of the Protestant supporters of the government and the efflux of the existence of the Parliament rendered its enactment impossible. It formed the chief subject of contention at the general election, in which, despite clerical efforts, the Conservatives were routed. Sir W. Laurier succeeded by persuasion in an effort to secure a settlement which permits denominational teaching out of the ordinary class hours in the public schools. It is significant that in 1905 when he gave constitutions to Saskatchewan and Alberta he imposed on them a modified denominationalism which cost him the allegiance of his able lieutenant, Sir C. Sifton, and has left a legacy of trouble. The issue was revived in 1926 when the question of the transfer to the two provinces of the school lands retained under federal control was discussed, and the restrictions remain under the surrender of 1930. Bitterness has also arisen from the decision of Saskatchewan in 1930–31 to abolish the use of religious emblems in the common schools and to require that English alone be the medium of teaching, an action denounced as an attack on the position of French Canadians, but clearly within the legal power of the province.

Very serious during the war period was the conflict which arose in Ontario in this case on the language issue. The Roman Catholic School Trustees insisted on defying efforts made to secure the effective teaching of

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English, and in consequence the legislature authorised the establishment of a Commission to supersede the trustees. Great bitterness developed; Quebec voted funds to aid the dissentients; Sir W. Laurier mustered the Liberal forces to denounce the action taken. But the Privy Council decided[1] that the Commission was illegal, as the Roman Catholics were entitled to control, but that they must comply with the law, for French had no legal claim to be made a subject of instruction or use as a medium unless in so far as legislation provided. In a later case[2] it ruled that the sums expended by the Commission when in office could legally be made a charge on the funds provided for education of Roman Catholics. Since then the strife has moderated through the relaxation by Ontario of her efforts to compel the effective knowledge of English, on the one hand, and the recognition by many Roman Catholics that, in the interests of the French children themselves, knowledge of English is worth acquiring. But an effort has been made to demand for Roman Catholics control of secondary education and funds for that purpose. The Privy Council has ruled[3] that no such legal right exists as it did not exist in 1867, but it has suggested that an appeal to the Governor-General in Council would lie. Fortunately no action by that authority is likely in view of the sad precedent of Manitoba. On the other hand, it has transpired[4] that in Quebec the legislature in 1903 classified Jews as Protestants, so that in 1924 the Jewish community was naturally demanding repre-

[1] *Ottawa Separate Schools Trustees* v. *Ottawa Corpn.*, [1917] A.C. 76.

[2] *Ottawa Roman Catholic Separate Schools Trustees* v. *Quebec Bank*, [1920] A.C. 230. See also *Trustees* v. *Mackell*, [1917] A.C. 62.

[3] *Roman Catholic Separate Schools Trustees* v. *R.*, [1928] A.C. 363.

[4] *Hirsch* v. *Montreal Protestant School Commrs.*, [1928] A.C. 200.

sentation on the Protestant Board for Montreal and the appointment of Jewish teachers for pupils in the schools. It was decided by the Privy Council that the Jewish claim was illegal, that Jews could not be classed as Protestants, and that the proper and legal course was to make separate provision for the Jewish minority, a step since taken.

The Dominion legislative power over topics specially assigned to it does not carry with it rights of property when the subject-matter of the exercise of that power is vested otherwise in the provinces. Thus the Dominion control of fisheries is a power of legislative regulation, and does not carry with it the implication of ownership. Likewise the Dominion power over navigation does not enable it to claim property in the bed of the St. Lawrence or in the waters of the river.[1] It has proved impossible for the Supreme Court of Canada to give effective answers to the questions propounded to it regarding the extent of Dominion authority in this regard, and this fact explains the difficulties which attended the reaching of agreement with the United States for the St. Lawrence treaty of 1932. Under the decisions of the Privy Council in the issues of aeronautics[2] and radio control[3] it is doubtless believed that it will be possible by the treaty power, aided by the general power of legislation, to secure the full control necessary to prevent provincial obstruction by Quebec, while Ontario's co-operation has been won by the agreement for Ontario to develop power from the dam to be erected on the Canadian side of the river as part of the scheme for the provision of an effective

[1] *Montreal Corpn.* v. *Montreal Harbour Commrs.*, [1926] A.C. 299.
[2] [1932] A.C. 54. [3] [1932] A.C. 304.

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waterway for traffic from the Atlantic to the Great Lakes.

Throughout its interpretation of the Dominion constitution the Privy Council has rigorously adhered to the rule that the Act must be interpreted from its own terms, and has rejected any implications drawn from American constitutional law. Thus it has insisted[1] that it will not forbid provincial taxation of banks, because a province might conceivably use the taxing power to destroy the capacity of banks and thus hamper the federal authority as to banking and the incorporation of banks, although the Supreme Court of the United States had protected banks under federal charter from State legislation as being federal instrumentalities and so to be safeguarded from State intrusion. Again it has ruled[2] that federal officers are subject to provincial taxation, despite the plausible contention that the provinces might use their power to cripple federal activities. In this regard Australian decisions long preferred the American view.

(3) The plan of the Australian constitution differs essentially from the Canadian, for on the true federal model it leaves to the States, by Section 107, every existing power unless it is exclusively vested in the Commonwealth or withdrawn from the State, subject only to the rule that, if the Commonwealth has concurrent power and exercises it, the Commonwealth law prevails (Section 109). It is necessary, therefore, to enumerate the powers of the Commonwealth, and under Section 51 thirty-nine heads of varying importance are

[1] *Bank of Toronto* v. *Lambe* (1887), 12 App. Cas. 575.

[2] *Caron* v. *R.*, [1924] A.C. 999; so *Abbott* v. *City of St. John* (1908), 40 S.C.R. 597, overruling *Leprohon* v. *City of Ottawa*, 2 Ont. A.R. 522.

enumerated, while further powers by Section 52 are exclusively vested in it. Its powers may be classed conveniently as follows. (i.) It has the necessary powers for the maintenance of government: matters relating to the public service; taxation, but without discrimination between States or parts of States; the borrowing of money; the acquisition of lands, and matters incidental are ascribed to it. (ii.) It controls defence and the use of railways for that end; external affairs;[1] and relations with the islands of the Pacific. (iii.) Citizenship is within its power; it regulates naturalisation and aliens; immigration and emigration; the influx of criminals; and people of any race for whom special laws are necessary. (iv.) It has extensive powers as to trade, commerce, and industry, though there are important reservations. It regulates trade and commerce with other countries and among the States, but not intra-State trade and commerce; navigation is included, and the regulation of lighthouses, lightships, beacons, and buoys; and astronomical and meteorological observations, as well as postal, telegraphic, and telephonic communications. It controls all foreign corporations and financial and trading corporations formed within Australia; currency, coinage, legal tender, and the issue of paper money; insurance other than State insurance; banking other than State banking, bills of exchange and promissory notes; copyright, patents, and trade marks; bankruptcy and insolvency; census and statistics; bounties which must be uniform; the acquisition of railways from the States with their consent and rail-

[1] Latham, *Australia and the British Commonwealth*, p. 55, holds that this power covers the right to conclude treaties and override State laws, as in Canada, but this seems quite unsupported by authority.

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way construction in any State with its consent. Moreover, by a most important clause it may regulate conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State. It can deal also with fisheries in Australian waters beyond territorial limits. (v.) For social and health purposes it has power over marriage and divorce with the custody and guardianship of infants; old age pensions; and quarantine. (vi.) It can secure the service of judicial process and execution thereof as between the States and the Commonwealth, and the recognition of the public acts and records and judicial proceedings of the States. Finally, (vii.) it can legislate on any issue referred to it by the States, and with their consent on any matter which was formerly reserved to the Imperial Parliament or the Federal Council of Australasia.

The exclusive powers of the Commonwealth are those dealing with the seat of government; with the Commonwealth departments (customs, excise, posts, etc., lighthouses, etc., quarantine, and defence), with customs and excise, and coinage. The States may not maintain naval or military forces save with Commonwealth consent, nor tax Commonwealth property; they may not make anything save gold and siiver legal tender. The Commonwealth itself may not establish or prohibit any religion nor impose religious tests; it may not by any regulation of trade, commerce, or revenue give a preference to any State or part thereof, and the States may not discriminate between British subjects on the score of residence within or without the State. The Commonwealth may not deprive the residents of any State or the State of the reasonable

use of river waters for conservation or irrigation. Free trade among the States is enjoined, and inspection laws, if any, may not be used as sources of State revenue and may be annulled by the Commonwealth Parliament. But States have the same control over liquor brought into them as they have over liquor produced therein. It was contemplated in the constitution that an Inter-State Commission should be set up to deal with such issues as the determination of rates on State railways, but the Commission was held by the High Court not to be capable of exercising judicial power,[1] and it has since 1919 been allowed to remain in abeyance.

(4) In the case of the Commonwealth the High Court as first constituted was dominated by men who had studied deeply the interpretation of the United States constitution, and whose minds therefore led them to interpret the wording of the Constitution in the light of the principles of construction laid down for that instrument by the jurisprudence of the Supreme Court of the United States. The assumption that this line of reasoning should be followed was perfectly natural to those who knew under what auspices the constitution had evolved, and the tendency in the United Kingdom to regard the High Court's procedure as unnatural is clearly far from just. There is, in fact, much truth in the view held by the High Court that the Privy Council was imperfectly familiar with American constitutional law, and that in interpreting the constitution it brought to it a system of its own based on the construction of unified constitutions which was not really applicable to the framework of a

[1] *New South Wales* v. *Commonwealth* (1915), 20 C.L.R. 54.

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federal constitution. The British North America Act, in fact, in the High Court's view, had not been construed quite as a federal constitution should be, or at least it must be taken that the Canadian constitution was not truly federal, a view for which, as has been seen, Lord Haldane's authority can be cited.

It was inevitable that, holding these views, the High Court should constantly oscillate between obedience to the literal meaning of the constitution and implications derived from American practice. This factor of literal or broader construction appears very clearly in the two lines of judgements given as to the extent of its appellate jurisdiction, under Section 73 of the constitution, from all judgements of the Supreme Courts of the States. On the one hand it was ruled in *R.* v. *Snow*[1] that the general terms were not intended to cover the case of an appeal from an acquittal, in view of the regular English doctrine that no appeal lies from the verdict of a jury in such cases. On the other, the literal meaning triumphed in so far as, contrary to English practice, an appeal was held to lie from the findings of the courts below in the case of *habeas corpus* proceedings discharging the accused.[2] This divergence, perplexing as it is in so simple an issue, was far more serious when the question arose of the application of American doctrines. Of these two were of fundamental importance. The American Courts had laid down[3] that in order to prevent the States destroying the operation of federal laws it was necessary to rule that any State law

[1] (1915), 20 C.L.R. 315.

[2] *A.-G. for the Commonwealth* v. *Ah Sheung* (1907), 4 C.L.R. 949. Contrast *R.* v. *Secretary of State for Home Affairs; O'Brien, Ex parte,* [1923] A.C. 603.

[3] *McCulloch* v. *Maryland* (1819), 4 Wheaton 316.

which might hamper the operations of federal instrumentalities was void, and logically they extended[1] the same protection to State instrumentalities against federal intrusion. Moreover, they protected the States by a generous interpretation of their reserved powers, that is the doctrine of Amendment 10 of the Constitution that all matters not withdrawn from the States by the constitution remain within their sole authority.[2]

Applied to Australian conditions, this resulted in the decision that the salaries of federal officers were exempt from State taxation, whether as in *D'Emden* v. *Pedder*[3] in the form of the necessity of giving a receipt stamp, or as in *Deakin* v. *Webb*[4] in the shape of income tax. Reference has already been made to the dissent from that doctrine of the Privy Council in *Webb* v. *Outrim*,[5] in which case the Privy Council simply applied the rules of English construction and very naturally found nothing in the constitution to take away the normal application of the taxing power of the State. It held equally, contrary to the view of the High Court, that, under the Order in Council dealing with appeals from the Supreme Court of Victoria to the Council, an appeal lay whether the issue were federal or not, and that, as the Order in Council was made under the authority of an Imperial Act of 1844, no Commonwealth legislation could override it. The conflict of authority was terminated by the cutting off by a Commonwealth Act of 1907 of any power of the Supreme Courts of the States to deal with constitutional issues of the powers of the Commonwealth and

[1] *Collector* v. *Day* (1870), 11 Wall. 113.
[2] Section 107 of the Australian constitution is the parallel.
[3] (1904), 1 C.L.R. 91. [4] (1904), 1 C.L.R. 585. [5] [1907] A.C. 81.

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States *inter se*. The doctrine of the High Court could thus be employed without control. It was applied to deny the validity of municipal rating of Commonwealth property,[1] or the levy of State stamp duty on a transfer of property to the Commonwealth.[2] But, if the Commonwealth thus profited, so did the States, for in the *Railway Servants' Case*[3] it was ruled that awards of the Federal Arbitration Court could not be made to bind a State instrumentality, and it was also ruled that the Board of Water Supply of Sydney was such an instrumentality,[4] though it was denied that municipalities were. On the other hand the High Court set bounds on the doctrines. It refused to hold that the Commonwealth could not levy land tax on leasehold estates in land of the States, despite the argument that in this way the Commonwealth could regulate State land policy, though it had no legislative power over State lands.[5] It denied also that the States were precluded from taxing cheques drawn by private customers on the Commonwealth Bank[6] or transfers of land by the Commonwealth to private individuals.[7] On the same lines it is easy to understand how in *The King* v. *Sutton*[8] it was easy for the Court to hold that the Commonwealth could tax wire netting imported by New South Wales to sell to farmers. The American doctrine protecting instrumentalities has no application

[1] *Municipal Council of Sydney* v. *Commonwealth* (1904), 1 C.L.R. 208.
[2] *Commonwealth* v. *New South Wales* (1906), 3 C.L.R. 807.
[3] (1906), 4 C.L.R. 488.
[4] *Federated Engine Drivers* v. *Broken Hill Proprietary* (1911), 12 C.L.R. 398.
[5] *A.-G. for Queensland* v. *A.-G. for Commonwealth* (1915), 20 C.L.R. 148.
[6] *Heiner* v. *Scott* (1914), 19 C.L.R. 381.
[7] *Commonwealth* v. *State of New South Wales* (1918), 25 C.L.R. 325.
[8] (1908), 5 C.L.R. 789.

to commercial activities as opposed to governmental occupations, and the argument that the Customs Act did not specifically mention the Crown could be disposed of by the view that in a Commonwealth Act the assumption is that it binds all save the Crown in the Commonwealth.

The matter was more difficult in the case of the importation of steel rails by New South Wales,[1] for railways management is a recognised governmental function in the States. Moreover, the State pleaded the force of Section 114 which denies the power of the Commonwealth or the States to tax the property of the other. But the justices solved the difficulty in diverse ways, either holding that a customs duty was not a tax on property but on importation, or that "tax" in Section 114 did not mean "impose customs duties", since it applied also to the States which had no power so to do. The Privy Council solved much more simply the similar issue in Canada by holding that the unequivocal power to tax by customs duties given to the federation must not be whittled away by the protection of provincial property. On the other hand, the High Court[2] rejected efforts of the Commonwealth to regulate industry in the States by means of the device called the "New Protection", under which industries which respected certain conditions as to treatment of employees, in matters of hours of labour, wages, etc., were to be granted protective tariffs on their output denied to other employers. The power of regulating industry had always been a State matter, and it was not possible that it should be taken away in this indirect

[1] *A.-G. for New South Wales* v. *Collector of Customs* (1908), 5 C.L.R. 818.

[2] *R.* v. *Barger* (1908), 6 C.L.R. 41.

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manner. Similarly in the *Union Label Case*[1] it was ruled that the Trade Marks Act of the Commonwealth could not be used to authorise an association of workers to register a worker's trade mark and to penalise the fixing of it to goods not produced by that association —another ingenious device to intervene in the State sphere. Still more important was *Whybrow's Case*[2] in which it was ruled that the awards of the Commonwealth Court of Conciliation and Arbitration could not override the positive laws of the States, as opposed to mere awards of State Wages Boards or arbitral authorities.

Against this mass of consistent jurisprudence only one authority could up to 1920 be cited. Once the High Court in view of a difference of opinion between its members certified a case as suitable for decision by the Judicial Committee. The Commonwealth had enacted a measure giving royal commissions full power to investigate any issue referring to the peace, order, and good government of Australia. A commission had demanded information from the Colonial Sugar Refining Co. as to its internal constitution and operations. It denied the right, for such issues were State matters. Of the High Court[3] two judges held that the federal law could be interpreted to apply to enquiries within the powers only of the Parliament, but that, this being so, the questions put were too wide; two that the enquiry could extend to any subject, since the constitution might be amended and thus the questions put were valid. The Privy Council[4] resting on a literal interpreta-

[1] (1908), 6 C.L.R. 469.
[2] (1910), 10 C.L.R. 266.
[3] *Colonial Sugar Refining Co.* v. *A.-G. for Commonwealth* (1912), 15 C.L.R. 182.
[4] [1914] A.C. 237.

tion of the Act pronounced the Act invalid. It homologated the doctrine that, where powers were reserved to the States by the fact that they continued to be in State power under the constitution, it was necessary to adduce some proof that they had been handed over to the Commonwealth, and such proof was wanting. The Commonwealth might no doubt frame an Act so as to authorise enquiries on any of the matters actually placed under its control, but it had not done so, and the court would not reconstruct the Act as suggested by the High Court to restrict its operation to matters within its power. This doctrine, it is clear, reasserts the Council's view of literal interpretation as opposed to interpretation by implication.

In 1920 in *Amalgamated Society of Engineers* v. *Adelaide Steamship Co., Ltd.*,[1] the High Court reversed earlier decisions, using a power practised by the Privy Council but not by the House of Lords. It ruled that the doctrine of the immunity of instrumentalities had no application to the Commonwealth constitution. Instead it was to be governed by the plain fact that Section 5 of the Constitution Act made the laws of the Commonwealth binding on the courts and people of the States. The powers granted, therefore, were not subject to any implied limitation, but merely to any express limitation, and the continuance in force, by Section 107 of the constitution, of the powers of the States was subject to the constitution. It followed, therefore, that the Commonwealth arbitration system being authorised by a Commonwealth Act could be applied to the engineering works and sawmill of the Government of Western Australia, Gavan Duffy, J., alone contending

[1] (1920), 28 C.L.R. 129.

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that the States could not be subjected to Commonwealth control. It would, of course, have been possible to dispose of the case by distinguishing, as in America,[1] between trading and governmental activities of the States, and to lay down that in the former the Commonwealth could control them, while being unable to affect political sovereignty; but this was not the view adopted by the majority of the court which constitutes a definite assertion of the unlimited power of the Commonwealth within the sphere granted to it.

It is significant that the issue arose out of the Commonwealth power to provide for conciliation and arbitration in regard to disputes extending beyond the limits of a State. On no subject has the High Court been more generous in extending the ambit of Commonwealth powers. The provision was carried with difficulty at the Convention session at Melbourne in 1898, and it was then pleaded that it would apply to cases like those of shipping or shearers, where men were mobile and where they were united in organisations extending beyond State limits, so that no State could effectively deal with their conditions. But the High Court in the *Jumbunna Case*[2] decided that the Court of Conciliation and Arbitration could register a local branch of a miners' union in Victoria as entitled to the procedure of the court because miners in another State made common cause with those in Victoria in desiring fresh terms. Hence the State unions soon affiliated themselves into federal groups, and thus every industry of any consequence falls as a rule under federal and State control as regards awards of conditions of labour.

[1] *South Carolina* v. *United States*, 199 U.S. 437.
[2] (1908), 6 C.L.R. 309.

Moreover, the system has been ruled as applicable to all sorts of employees, such as clerks or bank officials, and the existence of what is merely a formal dispute has been held sufficient to justify the action of the Commonwealth Court. Even when a dispute has been settled in every State but one, the court has been held to have jurisdiction to make an award covering the whole field. It is easy to see how under this system there has arisen a constant possibility of divergence between State and Commonwealth awards, from which until the decision in 1920 the State Governments had felt themselves safeguarded by the doctrines of the High Court as to immunity of instrumentalities and reserved powers. The most vital of the problems suggested is yet unsolved.[1] If under the authority conceded to it the Court should regulate the wages of State employees, how could its awards be enforced if the State Parliament would not vote the sums? The result appears to be that, while an award might impose an obligation on the State, it is one of imperfect obligation which the inaction of the State Parliament might defeat. But the theoretic inroad on sovereignty is extremely grave, and accounts for serious difficulties felt by the States.

The importance of the case is enhanced by the subsequent decision of the *Clyde Engineering Co.'s Case*[2] which asserted in the sharpest terms the subordination of the States. In *Whybrow's Case*[3] it had been ruled that, while the Commonwealth Court could make awards freely, it could not violate State law. Now in

[1] *Australian Railways Union* v. *Victorian Railways Commrs.* (1930), 44 C.L.R. 319.

[2] (1926), 37 C.L.R. 466.

[3] (1910), 10 C.L.R. 266.

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New South Wales legislation had been passed for a 44-hours week and for payment for that week at the rate which would be payable under current awards for any longer week thereby provided. It was claimed by the State that workers under federal awards enjoying a 48-hours week must be paid the full sum for 44 hours' work, but the Court now refused to accept this reasoning. It insisted that, as the power to make an award was given by Commonwealth law, that award outweighed any State law, however clear. Thus the whole of State industrial policy is dependent on the view taken by the Commonwealth Court—not Parliament—as to the terms of awards, and the deliberate will of the electorate on this issue was made liable to nullification by a Court wholly irresponsible to it, and not necessarily in any touch with public feeling either in the State or the Commonwealth as a whole. The judgement, however, in its exaltation of the Commonwealth authority, was entirely in accord with the earlier rulings in *Commonwealth* v. *Queensland*[1] that the federal Parliament could exempt federal loans from State income tax, and in *Davoren* v. *Commissioner of Taxation*[2] that State officers must pay federal income tax. Far more important than these cases was the decision in *R.* v. *Brisbane Licensing Court*[3] that the federal Act forbidding the taking of State votes on the day of the elections was valid, so that a liquor referendum taken in Brisbane on the day of the polls was invalid. This was clearly an extreme application of the supremacy of Commonwealth law.

The doctrine of State sovereignty was also to be

[1] (1920), 29 C.L.R. 1. [2] 29 A.L.R. 129.
[3] (1920), 28 C.L.R. 23.

distinctly repudiated by the High Court in *Commonwealth* v. *New South Wales*.[1] It was there laid down that the State could be sued in tort, arising out of a collision between steamers belonging to the two governments, despite the contention of the State that it was sovereign and that to derogate from its immunity there must at least be a State Act. The Court relied on the terms of Section 75 (3) giving jurisdiction to the Court where the Commonwealth is a party. Indeed the State as sovereign was discounted as an unfounded and mischievous idea. In the same way it has been held that the power to acquire property from States or persons carries with it the Crown rights to minerals, so that they pass to the Crown in the Commonwealth.[2] Moreover, it has been ruled that the Commonwealth may grant aid to such State undertakings as roads,[3] despite the suggestion that this is a distinct contravention of the true federal principle. In Canada similarly the Dominion has been permitted to finance an Old Age Pensions scheme concurrently with the provinces, though such a social activity is not *prima facie* in the federal sphere. The decision in *Pirrie* v. *McFarlane*,[4] which holds that the State law as to motor-cars applies to a federal military officer, no doubt admits the right of the State to bind the Crown in the Commonwealth, but its value is greatly reduced by the fact that it equally recognises the right of the Commonwealth by mere regulation under the defence legislation to override a State Act.

On the other hand, some limitation has been placed on the ubiquity of the operations of the Commonwealth

[1] (1923), 32 C.L.R. 200.
[2] *Commonwealth* v. *New South Wales* (1923), 33 C.L.R. 1.
[3] *Victoria* v. *Commonwealth* (1926), 38 C.L.R. 399.
[4] (1925), 36 C.L.R. 170.

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Court of Conciliation and Arbitration. It has been ruled that its awards cannot be applied to persons who are not members of a union and were not cited in the case in which the award was made, a welcome recognition of the rule that persons should not be bound by proceedings between other parties.[1] Much more important is the decision[2] invalidating the attempt of the Labour Government in 1930 to hand over the work of deciding disputes to Conciliation Committees, which were to be able to act without even troubling to cite or hear the parties concerned, on the strength of the fact that there would be employers and employed of some sort on the Committee. Nor can the Court have jurisdiction where there is no real dispute, even if the pretext of making demands on employers is adopted.[3] The Court must consider substance, not form.

On other heads the States have seen their powers questioned and disallowed: it is clear that they cannot levy excise duties whether, as in South Australia,[4] the aim is the legitimate one of raising money by an oil tax to pay for roads, or, as in New South Wales,[5] the desire to hamper political opponents by imposing a ridiculous impost on their newspapers. What is more important to the States is the question of their ability to use their general powers to protect themselves against the intrusion over the frontier of criminals or disease. In both

[1] *Amalgamated Clothing and Allied Trades Union* v. *D. E. Arnall & Sons* (1929), 43 C.L.R. 29.

[2] *Australian Railways Union* v. *Victoria Railway Commrs.* (1930), 44 C.L.R. 319.

[3] *Caledonian Collieries, Ltd.*, v. *Australasian Coal and Shale Employees' Federation*, No. 1 (1930), 42 C.L.R. 527.

[4] *Commonwealth* v. *South Australia* (1926), 38 C.L.R. 408.

[5] *John Fairfax & Sons, Ltd.*, v. *New South Wales* (1927), 39 C.L.R. 139.

respects there is much doubt. The decision in *Benson's Case* [1] suggests that undesirables cannot be excluded if Australians, and it is by no means clear how far the power to exclude tick-infested cattle extends. The High Court [2] has permitted New South Wales to protect herself in this regard from Queensland, but it is not wholly certain if this decision can be relied upon, for on this matter the High Court is not the final authority, and, as we have seen, the Privy Council [3] has given a wider extension to Section 92 of the constitution enjoining freedom of trade between the States than the High Court has been inclined to do. A similar doubt exists as to the decision [4] of the High Court recognising a measure of authority in the State to regulate the operations of agents engaged in inter-state trade. Moreover, a serious infringement of State authority is involved in the decision [5] that the Transport Workers' Act, 1928–29, is authority for the Governor-General in Council to authorise the giving of preference in the grant of employment to members of the Waterside Workers' Federation. The Court was much divided on the issue, for obviously it is a strong step to provide that under a general power as to commerce and navigation a domestic detail of this sort can properly be regulated so as to give preference to one particular set of men to the detriment of other workers.

In the war the defence power was, as in Canada, regarded by the courts as sufficient to justify much rather remarkable action. Naturally nothing was made by

[1] 16 C.L.R. 99.
[2] *Nelson, Ex parte* (1928), 42 C.L.R. 209.
[3] *James* v. *Cowan* (1932), 48 T.L.R. 564, reversing 43 C.L.R. 386.
[4] *Roughley* v. *New South Wales; Beavis, Ex parte* (1928), 42 C.L.R. 162.
[5] *Huddart Parker, Ltd.* v. *Commonwealth* (1931), 44 C.L.R. 492.

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denying the power to enlist for service outside Australia,[1] and it was held that the power sufficed to justify detention on suspicion of disaffection,[2] and regulation of trading with the enemy,[3] as well as the fixing of maximum prices of bread,[4] and of the date of the termination of the war,[5] or the Treaty of Peace Act,[6] 1919, approving the treaty with Germany, or soldier resettlement.[7] In peace it has equally been held that religious objections cannot be pleaded against the power to enlist,[8] and that employers may be punished if they penalise persons called on to serve.

Immigration[9] has been interpreted generously to secure wide powers for the Commonwealth. But a person genuinely connected by birth and domicile with Australia is not subject to control.[10] Deportation is also within the powers of dealing with aliens,[11] and so the Pacific Islanders, however long settled, could be deported,[12] even though this involved extra-territorial constraint, and the High Court has normally insisted on construing narrowly the power to legislate with extra-territorial effect.

(5) It is not surprising that so complex a constitution

[1] *Sickerdick* v. *Ashton* (1918), 25 C.L.R. 506.
[2] *Lloyd* v. *Wallach* (1916), 20 C.L.R. 299.
[3] *Welsbach Light Co.* v. *Commonwealth* (1916), 22 C.L.R. 268.
[4] *Farey* v. *Burvett* (1916), 21 C.L.R. 433.
[5] *Jerger* v. *Pearce* (1920), 28 C.L.R. 588.
[6] *Roche* v. *Kronheimer* (1921), 29 C.L.R. 329.
[7] *A.-G. for the Commonwealth* v. *Balding* (1920), 27 C.L.R. 395.
[8] *Krygger* v. *Williams* (1912), 15 C.L.R. 366.
[9] *Donohoe* v. *Wong Sau*, 36 C.L.R. 404.
[10] *Potter* v. *Minahan* (1908), 7 C.L.R. 277.
[11] Also with British subjects in certain cases: see *Walsh and Johnson's Case*, 37 C.L.R. 36. In 1932 the Immigration Act was amended to include power to remove undesirable persons within five years after entrance, as in the case of Canada.
[12] *Robtelmes* v. *Brenan* (1906), 4 C.L.R. 395.

should have elicited repeated efforts at amendment. The early efforts were dominated by the feeling that the Commonwealth needed power to deal with inter-state trade and commerce, with all kinds of corporations, with conditions of labour of every sort, and with monopolies, both by way of control and of operating services as monopolies in the interests of the Commonwealth. Projects, however, were rejected in 1911, and in 1913 the effort to secure their passage, even in altered form and with the division of the projects under six measures, failed of acceptance. The war brought a temporary quiescence, especially in view of the wide interpretation of federal power by the courts, but in 1919 a fresh effort was made to extend federal powers on the familiar lines, with a definitely negative result. The decision of the High Court [1] that a federal award could override State law elicited a new crisis, and in 1926 Mr. Bruce had two referenda submitted, the one to increase the powers of the federation so that it might establish authorities to regulate terms of employment of labour in general, and that it might control trusts and monopolies, and the other to enable legislation to be passed in the event of the actual or probable interruption of any essential service. The latter proposal evoked bitter opposition from Labour, which preferred the power to force concessions by industrial unrest and strikes in the port and shipping industries. Moreover, compulsory voting now imposed irritated the electorate, which rejected both proposals. The result was that Mr. Bruce developed a very different policy, that of evacuating the field of conciliation and arbitration save as regards essentially Aus-

[1] *Clyde Engineering Co., Ltd.* v. *Cowburn* (1926), 37 C.L.R. 466.

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tralian services such as shipping, but that was rejected in Parliament through the opposition of Mr. Hughes and the defection of a group of followers, and in the ensuing general election in 1929 Labour obtained power only to bring the Commonwealth into the financial impasse of 1931, and its ejection from office. In the meantime a Royal Commission had reported on the constitutional issue, but no party sponsored its findings, and Labour proposals for referenda in 1930 were not carried through.

The position is unsatisfactory. Unification desired by Labour is opposed partly by historical considerations, partly by feelings of loyalty to the States, partly by grave doubts of its practicability. The size of Australia renders it necessary to allow of diversity, which is difficult to achieve with mere local machinery, and, if the central Parliament were not to be rendered unable to work, it would have to devolve so much power as virtually to recreate the States though presumably in greater numbers. Financial issues would be extremely difficult to adjust, and members of Parliament would have the greatest difficulty in keeping in touch with the large electorates inevitable. Nor is there much chance of real saving. The remedy seems rather to lie in the readjustment of function, above all in the allocation between States and Commonwealth of power to regulate labour conditions on a clear and intelligible basis. It is possible that the Commonwealth should have the power to regulate company law on a uniform system, while leaving the States to regulate, as in Canada, the incidents of their operations. The States again, to perform their functions of self-preservation, might be given power to exclude undesirables and to

regulate prices, which is now impossible under the rule of freedom of inter-state trade. Nor is it unreasonable that the States should desire that in the process of constitutional change their Parliaments should be consulted at some stage, in lieu of leaving matters to the federal Parliament and the electorate. It is clear from the negative results of the referenda that the electors cannot be educated sufficiently to pronounce effective judgements in favour of change by this method of action. The position might easily be improved by securing that projects should form the subject of State government and Parliamentary consideration, so that as far as possible the electors should be asked to pronounce on proposals approved by the Commonwealth and at least a majority of States.[1]

In one sphere reform is urgently necessary. The States control intra-state shipping, the federation other shipping, and collision and other navigation regulations may be issued under State[2] and federal[3] power. Nothing whatever is gained by conflicts on this score, and a surrender of State authority seems clearly requisite.[4]

[1] See Holman, *The Australian Constitution* (1928). For other suggestions see Keith, *Journ. Comp. Leg.* xiv. 114.

[2] *R.* v. *Turner*; *Marine Board of Health, Ex parte*, 39 C.L.R. 411.

[3] *Hume* v. *Palmer*, 38 C.L.R. 441.

[4] Latham, *Australia and the British Commonwealth*, pp. 101-5. For the limitation of Commonwealth power see *Owners of S.S. Kalibia* v. *Wilson* (1910), 11 C.L.R. 689; *Newcastle and Hunter River S.S. Co.* v. *A.-G. for the Commonwealth* (1921), 29 C.L.R. 357.

CHAPTER XIV

THE UNION OF SOUTH AFRICA

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FROM the federations the Union differs in essentials, for it is a unitary state with a very flexible constitution. But its provinces were created as a compromise to the federal ideal, and in South-West Africa, its mandated territory, it possesses what is expected to be the precursor of a fifth province.

(1) Disintegration in South Africa had reached its height in 1858 when Sir G. Grey adumbrated his famous scheme for the restoration of unity by federation, for five republics and three British colonies divided the territory with native races. The Imperial Government regarded his suggestions as premature, and it was not until after the annexation of the diamond fields in 1871 that Lord Carnarvon produced his scheme of federation, which placed on the statute book the abortive Act of 1877. In the same year the premature annexation of the Transvaal completed the ruin of a policy which the grant of responsible government to the Cape in 1872 had rendered impracticable in any event. The conquest of the Transvaal and the Orange Free State opened up the way to renew the idea of federation which Rhodes consistently favoured. For a time it seemed that it might be imposed as a preliminary to responsible government, but the failure to secure the suspen-

sion of the Cape constitution defeated any chance of success on these lines. The creation of responsible government in the two former republics seemed for a moment to have hampered federation, but in fact by giving the Transvaal control of its actions it enabled its statesmen to force not merely federation but union on the Cape and Natal. Moreover, it ensured that the union should be created from below, not imposed from above as under Carnarvon's scheme, and that the Dutch should have an equal share in its devising. It is significant that Lord Selborne's memorandum attaches weight to the argument that a united South Africa would be free of British intervention, which it insisted was inevitable as long as there were four units, whose co-operation must largely be arranged, and whose differences must be settled by an external authority. Not fear of foreign hostility but desire for national autonomy was a governing factor in the movement.

From the economic point of view it was controlled by the issue of customs and railways, for the coastal colonies desired to secure protection for their own nascent industries and agriculture, while the Transvaal with its mining industry desired cheap imports, and for the traffic to the Rand there was keen competition between the rival Cape ports, Natal and Delagoa Bay. It was the power of the Transvaal to transfer her traffic to Delagoa Bay, and her need for friendly relations with Mozambique in order to secure Portuguese labour for the mines, that dictated largely the nature of events. But the influence of the Cape was hampered by her financial straits. It was from a railway and customs conference called to meet on May 1908 that the decision proceeded to abandon any

attempt to deal with business on ordinary lines and to advise the summoning of a National Convention of colonial representatives. This body met in 1908–9 at Durban and Cape Town; its report, after criticism in the four Parliaments, was adjusted, and was finally enacted by the Imperial Parliament as the South Africa Act, 1909, the Union taking effect on May 31, 1910. In the case of Natal alone was a referendum of the people deemed necessary for acceptance. There was in fact no real doubt elsewhere that the measure was accepted by the majority of the representatives of public opinion.

Other considerations doubtless were adduced to strengthen the desire for union; such as the necessity of a more systematic native policy suggested by the grave unrest in Natal and Zululand in 1906–8 which had elicited aid from the other colonies, the desirability of unified defence arrangements, of improvements in judicial administration such as the creation of one court of appeal, of assimilation of law on commercial issues, of co-operation in higher education and other matters, but these were incidental rather than fundamental causes of union.

(2) The decision for union, not federation, was largely imposed by the Transvaal. Natal was frankly federal in feeling, there was a good deal of sympathy for federation in the Cape, and the Orange River Colony was rather afraid of centralisation. But considerations of the similarity of conditions, the absence of essential boundaries, the cost and legalism of federation illustrated by the vast amount of controversy over provincial rights in Canada, and the need of union of Dutch and British in one state prevailed over other considera-

tions of local autonomy. To the federal spirit some concession was made in the mode of choice of the Senate, while in practice, as in the federations, the Cabinet is constructed with regard to the need of representing as far as practicable the whole of the provinces. Most important, however, was the decision to continue the provincial areas under a form of government which, while not to resemble too closely the former responsible government, should be something decidedly more important than mere local authorities. One factor in determining the retention of the provinces was the absence in the northern provinces of those local institutions on which powers might have been devolved if the provinces as such had been abolished, and this difficulty still remains to stabilise the claims of the provinces for maintenance in some form.

The issue of the native vote afforded a motive for the Cape to press for federation as opposed to union. A compromise, however, was reached. The proposal to adopt a uniform franchise with no colour bar, but a high qualification of civilisation, was rejected, but the Cape franchise was entrenched by the rule that it could be abolished only by a two-thirds majority, at a joint session of the two houses,[1] of the total number of their membership. On that basis the other provincial franchises were allowed to stand, the Transvaal and the Orange Free State, with adult male franchise, excluding all natives, Natal virtually excluding all, but having a property qualification as in the Cape. The provincial factor again was given effect to as regards representation by numbers, a necessary concomitant of the retention of the different franchises. The basis was long

[1] *R.* v. *Ndobe*, [1930] A.D. 484.

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debated, as number of voters would have been unjust to the Cape. As it was, the criterion of adult male population, Europeans only being accounted, was adopted, but Natal and the Free State were given 17 members each at the cost of the Cape with provision for revision by the census results. The present Parliament has 148 members, when by the growth of population, as is now the case, 150 members are requisite, the basis of partition becomes the number of European adults, the restriction to males having been abolished in 1931 together with the extension to all such adults of the vote without property qualifications.

The provinces again received recognition in the allocation of federal business. Pretoria was made the administrative capital, Cape Town the seat of Parliament, and Bloemfontein the headquarters of the Supreme Court, Appellate Division, a system which is held to cost at least £60,000 a year and to be a cause of much inefficiency and inconvenience.

One suggestion of the Transvaal which would greatly have affected the future of the Union was laid aside. It desired the adoption of proportional representation for elections to the Parliament, so that its principle of "one vote, one value" might be given effect. This was unacceptable to the Convention, and in lieu single-member constituencies were adopted, delimited with a margin of 15 per cent on either side of the quota by Commissions. Proportional voting was retained only for the election of the Senate, which now rests in the hands of the members of the Assembly for the province and the Provincial Council in joint session, and the selection of the Provincial Executive Committees. The result has been that large minorities are constantly

under-represented, and that the present position of the Government in Parliament by no means reflects its actual votes; thus in 1929 the Nationalists with 144,907 votes captured 78 seats, the South African Party with 156,398 obtained only 52 seats in addition to nine members elected unopposed.

(3) The system of provincial government is deliberately devised to mark its distinctive character. At the head of each province is an Administrator, the title denoting his inferiority to a Lieutenant-Governor, though the terms of his appointment for five years follow the Canadian model. He is selected by the Governor-General in Council and can be removed only before expiry of office on cause assigned which must be communicated to Parliament. He administers with an Executive Committee of four selected by proportional representation by the single transferable vote by the Provincial Council after its election. Members hold office until the next election of the Council and the choice of their successors. They need not be members of the Council, in which they may sit and speak, but, like the Administrator, may not vote, save as members. They are paid.[1] The authority of the Committee is exercised by a majority vote if necessary, the Administrator having an ordinary and a casting vote. It extends to all matters on which the provinces have legislative power. But in addition the Union government may impose other duties as its representative on the Administrator, and on these he governs alone. Control over finance is secured to the Union by the fact that the Administrator must grant warrants for all expenditure authorised by Ordinance, and that

[1] This does not disqualify for a seat in Parliament.

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accounts are supervised by an Auditor chosen by the Union. In emergency the Administrator may authorise expenditure without approval by the Council, but subject to reference to it thereafter.

The Councils were given the same number of members as the provinces have in the Assembly, but with an increase to twenty-five for the Orange Free State and Natal. The Council must meet once in every year; it is summoned and prorogued by the Administrator, but it chooses its own chairman and lays down its own rules of procedure, subject to approval by the Governor-General in Council, who also determines its remuneration. It is elected for three years and is not subject to dissolution.

The powers of legislation of the Councils are limited and are in every case purely subordinate, for the Union can legislate on any of the topics conceded to the provinces, overriding the provincial ordinances. Nor have the provinces any safeguard from destruction by the Union, for the only condition hampering such action is the formal requirement of reservation which the Union Parliament may repeal at pleasure, thus being able by simple Act to abolish the whole system. The subjects assigned have been considerably varied in detail. Initially the power to raise money by direct taxation[1] was given without reserve, but the use of this authority was found to be inconvenient and the financial powers of the Councils were largely remodelled in 1925. In the same way borrowing has been restricted

[1] *De Waal* v. *North Bay Canning Co.*, [1921] A.D. 521 (tax on sale of canned crayfish indirect and invalid); *Clarke* v. *De Waal*, [1922] A.D. 264; *Johannesburg Consol. Investment Co.* v. *Transvaal Prov. Adm.*, [1925] A.D. 477 (tax on financial companies); *Inland Rev. Commr.* v. *Royal Exchange Ass. Co.*, [1925] A.D. 223 (tax on insurance premiums).

to borrowing from the Union on its own terms. The essential powers are education, but higher education is under Union control; agriculture subject to conditions laid down by the Union Parliament; hospitals and charitable institutions; municipal and local government;[1] local works and roads and bridges of purely local character; markets and pounds; fish and game preservation; matters deemed by the Governor-General in Council of a local and private nature; and subjects on which Parliament by law confers power of legislation on the province. Of the latter many are enumerated as possible subjects of transfer by agreement in the Financial Relations Act, 1913. They include such matters as township administration; licensing of vehicles on provincial roads; control of horse-racing, betting, and totalisators; regulation of hours of opening and closing of shops and of shop assistants; administration of poor relief; control of cemeteries; control of libraries, museums, public resorts; destruction of weeds and vermin; the experimental cultivation of sugar, tea, and vines; the registration of dogs outside municipal areas; and the making of grants to agricultural societies. The subjects of most importance in practice are education, which is the chief object of expenditure, hospital and poor relief, roads and bridges, townships, game and fish preservation, and betting.

The finances of the provinces as revised by the settlement of 1925–26 were fixed as follows: The Union pays a subsidy based on the number of European pupils in

[1] A health committee cannot be created under this power: *Isipingo Health Committee* v. *Jadwat*, [1926] A.D. 113. But fresh authority was given by the Union, and used by Ordinance No. 4 of 1925. For power to deal with the franchise see *Abraham* v. *Durban Corpn.*, [1927] A.D. 444.

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primary and secondary schools, with grants for training of teachers and native education, and special subsidies of £75,000 to Natal and the Free State. It also controls licence fees for trades, professions, and occupations, the power to license having been taken from Natal municipalities, but gives the proceeds to the provinces to which it pays also the sums levied as transfer duties on land, liquor licences, and, in the Transvaal, native pass fees. The provinces, in lieu of their former taxing power, may raise by legislation hospital and education fees; dog licence fees; fees in respect of licences as to game, fish, or flowers; wheel tax on vehicles and motor licence tax; auction duties; entertainment and amusements tax; betting taxes; person and income taxes; taxes on companies other than mutual life insurance companies; land taxes; taxes on licences to import goods from outside the province for sale therein, and minor receipts arising out of provincial activities.

The system has not worked well despite Union control. Not only may the Union legislate to annul provincial legislation as when the Transvaal Gold Profits Tax of 1918[1] was cancelled in 1921, but each Ordinance must be assented to by the Governor-General, who may reserve it for consideration, in which case it is void if not assented to within a year, or may refuse assent. It had been hoped that the administration would be conducted on business lines, but this idea has been disappointed. The Councils have been divided on purely Union party lines, and both in the Cape and the Transvaal the result of proportional representation has been

[1] Held valid in *New Modderfontein Gold Mining Co.* v. *Transvaal Prov. Adm.*, [1919] A.D. 367.

to produce an even balance at times in the Council, so that the Administrator had had the determining voice, and one Cape Administrator, Sir N. F. De Waal, was for years virtually sole representative of the administrative power. Moreover, the provinces have failed to develop their taxation resources, preferring to rely on the obligation, moral if not legal, of the Union to enable them to meet crises. A constant series of deficits has been recorded, and the decision of General Hertzog in favour of unification is not surprising. But it is opposed by members of his own party who dislike unification, and by the South African Party, which in this matter is largely motived by the claims of Natal. Natal indeed has pressed for federal reconstruction of the constitution, while, if this is not conceded, one section of the population would prefer to leave the Union. General Smuts has negatived either true federation or secession, while insisting that due regard for provincial interests may be expected from a government controlled by his party, if and when that comes to pass. Administrative difficulties arise also from the unsatisfactory character of the delimitation of functions between the Union and the provinces, nor is the distinction between the different forms of education at all satisfactory. Unification even if politically practicable—and the appeal of the Orange Free State for Union intervention in 1932 to meet the financial situation strengthens the case for it—has dangers and difficulties of a serious kind to face. The northern provinces still lack the local institutions to which the functions of the province could be handed over, and above all there is the strongest objection to levying rates on landed property, which should be the chief course of revenue of such institutions.

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In addition to their own functions the Councils are given the power to make recommendations of legislation on topics not within their control to Parliament, and they may be used by the Union to take evidence on private bills.

The whole control of judicial matters is denied to the provinces, but they may impose penalties, including fine or imprisonment for violation of ordinances on the matters within their control. The validity[1] of provincial ordinances has, of course, repeatedly come before the courts of the Union, the superior courts being expressly given jurisdiction in any case where the validity of ordinances comes into question. The most important of the decisions have turned on points of power to tax and have become of no present interest by reason of the changes in power made by the Act of 1925. But it has been laid down[2] that power to tax a trade by licence includes power of regulation of the trade, and that a Council may assign to a municipal body functions which are appropriate to such a body but which it itself does not possess,[3] but that it cannot delegate to a municipality functions properly legislative in character.[4] If it authorises a municipality to collect rates, it is entitled to provide that the owner shall not by contract place his obligation in this regard on the

[1] Their distinction from municipal by-laws is pointed out in *Middelburg Municipality* v. *Gertzen*, [1914] A.D. 544, discriminating *Kruse* v. *Johnson*, [1898] 2 Q.B. 91; *A.-G.* v. *London County Council*, [1901] 1 Ch. 781.

[2] *R.* v. *Adam*, [1914] C.P.D. 802; *R.* v. *Maroon*, [1914] E.D.L. 483. For present limitations see *Reloomal* v. *Receiver of Revenue*, [1927] A.D. 401.

[3] *Williams* v. *Johannesburg Municipality*, [1915] T.P.D. 362; *Middelburg Municipality* v. *Gertzen*, [1914] A.D. 544.

[4] *Maserowitz* v. *Johannesburg Town Council*, [1914] W.L.D. 139.

lessee.[1] A poll tax on natives imposed by the Transvaal has been ruled invalid,[2] but municipalities may be empowered to discriminate as regards use of trams by white or coloured persons or Asiatics, though by Section 147 of the South Africa Act, 1909, the control and administration of matters specially or differentially affecting Asiatics rests with the Governor-General in Council.[3] Nor is it illegal for Natal to deprive Asiatics of the municipal franchise, permission to take this action being accorded by the Governor-General in Council after the assumption of office by General Hertzog's administration.[4] A province cannot interfere with judicial process, as, for instance, by empowering a magistrate to state a case on a municipal prosecution.[5] It has been ruled also that it is not required by the South Africa Act that members of the councils should, despite the standing orders, take the oath of allegiance which is required of Senators and members of the Assembly, and a like claim to be exempt from such an oath has been made by an Administrator of the Transvaal, affording interesting precedents for the attitude adopted by Mr. De Valera in the Free State which was applauded by republican members of Parliament despite their oaths, though no approval of the attitude of the Irish administration was given by the cautious and diplomatic Prime Minister.

The officers of the provincial services were originally supplied from the existing colonial services on the

[1] *Marshall's Township Syndicate* v. *Johannesburg Consolidated Investments Co.*, [1920] A.C. 420.

[2] *Transvaal Province* v. *Letanka*, [1922] A.D. 102.

[3] *George* v. *Pretoria Municipality*, [1916] T.P.D. 501.

[4] Ordinance No. 3 of 1925.

[5] *Germiston Municipality* v. *Angehrn*, [1913] T.P.D. 135.

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institution of the Union, but the Executive Committee have now a certain power to appoint new officers. The service is subject to the rule of Section 137, which gives absolute equality to English and Dutch as the languages of the Union, and this rule is in a measure one of the grounds for dissatisfaction in Natal, for the great majority of the population there is British and Dutch, or Afrikaans, which has by a Union Act of 1925 been given rank as Dutch, is in little practical use outside the two districts transferred after the war from the Transvaal.

The utterly dependent position of the provinces is emphasised by the fact that the Union took over all lands with mineral rights from the former colonies and all harbours and railways, as well as liability for the colonial public debts. A certain guarantee to the provinces was contained in the enactment that the control of harbours and railways should be administered on business principles with due regard to agricultural and industrial development within the Union and promotion by means of cheap transport of settlement of an industrial and agricultural population in the inland portions of all provinces of the Union, a clause designated by General Smuts as the Magna Charta of the interior. The Union assumed, of course, the obligations of all sorts resting by treaty or agreement on any of the colonies and the obligation of securing the observance of the agreement of 1909 between the Cape, Natal, and the Transvaal, which gave 30 per cent of the Transvaal traffic to Durban, 20 per cent to the Cape ports, and the balance to Delagoa Bay.

(4) The possibility or, in General Hertzog's view, the certainty of the addition of a fresh province to the

Union in the shape of South-West Africa is a factor which it is necessary to consider in connection with the proposal to abolish the provincial system. It would seem impossible to expect that South-West Africa would be willing to enter a unified South Africa, for it has developed with great rapidity a régime of marked autonomy, especially having regard to the fact that it is a mandated territory, over which the Union does not in strictness possess sovereignty. General Smuts, of course, was anxious to secure by the peace treaty incorporation of the territory in the Union, but his own suggestion of the mandatory system for Central Europe recoiled upon him, and all that he could secure was the determination that the mandate, as confirmed by the Council of the League of Nations, should be of the most generous class in its grant of authority and should permit administration and legislation over the territory as an integral part of the Union. The mandate contains the usual requirements that the mandatory shall further the material and moral well-being of the inhabitants, prohibit the slave trade and the supply of intoxicants to the natives and their military training, save for local defence and internal police, and may not erect naval or military bases. It must regulate the arms and ammunition traffic, and secure free exercise of all forms of worship and freedom of conscience, and must permit the entry and residence of missionaries, nationals of members of the League. An annual report must be rendered to the League, and no change in the terms of the mandate can be made, save with the consent of the Council. Any dispute between the Union and any member of the League as to the interpretation or application of the terms of the mandate must be settled in the

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last resort by the Permanent Court of International Justice.

The position of the Union under the mandate has been discussed by the Permanent Mandates Commission of the League and the Council. The issue has arisen from the reference in the Union Act of 1919 establishing a provisional administration to "state" lands, and to the transfer by an Act of 1922 of the harbours and railways in full dominion to the Union, to be controlled and managed by the railway administration as part of the system of the Union. More concrete still was the fact that in the treaty between the Union and Portugal in 1925 regarding the Angola boundary the term "sovereignty" was actually used of the position of the Union as regards the territory. What was perhaps more striking, and what formed the ground, in part, for this use of the term, was the discussion by the Appellate Division of the Supreme Court on appeal of the issue[1] whether the Union had such a measure of authority, or in the technical language of Dutch law majestas, over the territory as to justify a charge of treason against one of the natives implicated in the Bondelzwart rising. The judges all agreed that it had the right to punish treason in such circumstances. Innes, C.J., held that the Union was not a sovereign and independent state in the full sense, but that majestas operating internally might suffice to found the charge. His view clearly was that, while full external sovereignty did not exist, internal sovereignty was present, and De Villiers and Wessels, J.J., went further and held that sovereignty resided independently in the Union, for it could not reside either in the League of Nations, or the Principal

[1] *R.* v. *Christian*, [1924] A.D. 101. Cf. *Journ. Parl. Emp.* xii. 442, 443.

Allied and Associated Powers, or the British Empire. Fortunately, after a rather meaningless exchange of comments, the issue was simplified by the action of the Union in modifying in 1930 by Act No. 9 the terms of the Act of 1922 affecting the railways, without in the least altering its effect. What is clear to all but theorists is that the Union is determined to retain the territory and that the mandate in no wise restricts its action, though it has been rather severely criticised indirectly in regard to the faulty administration which brought about, and the unsatisfactory measures by which the administration repressed, the Bondelzwart rebellion. The natural claim of Germany to the territory reasserted by the Chancellor on August 17, 1932, cannot, of course, be denied, but the Union stresses the fact that in 1923 the German Government was induced to recognise that the future of South-West Africa was now bound up with the Union of South Africa, and consented that all German subjects in the territory, unless they expressly refused to do so, might be transformed by the Union into British subjects, as was duly done in 1924 for the Union, though British legislation has not yet accorded this status in the United Kingdom. Unquestionably this weakens the claim of Germany for the restoration of control, and the desire of a section of the German population for autonomy.

On the strength of this agreement the Union gave the territory by Act of 1925, amended in 1927 and 1931, a constitution of great generosity. The model is obviously the provincial system, but free from certain vital limitations of that scheme. The administration is entrusted to an Executive Committee, consisting of the Administrator, appointed by the Governor-General in

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Council, and four members elected by each Assembly for its duration and until successors are appointed. It administers all matters on which the Assembly may legislate, the Administrator having the casting vote. Proportional voting is prescribed, and members need not be members of the Council, in which they may speak but not vote unless members.

The Executive Committee is augmented by three members selected by the Administrator, with the approval of the Governor-General in Council, to form an Advisory Council; one of the three must be an official chosen because of his knowledge of the reasonable wants and wishes of the non-European peoples in the territory. Its functions are to advise the Administrator on issues of principle arising in regard to matters in which he is required to act for the Union, and which are not subject to the Assembly; of the question of assent to or reservation of Ordinances; and any other matters referred to it by the Administrator.

The Legislative Assembly is composed of six members appointed by the Administrator with the Governor-General's assent and twelve elective members. The franchise is male adult suffrage, with twelve months residence. The duration of the Assembly is now five years, and, while English and Dutch, including Afrikaans, are the official languages, German may be used by members. The powers granted are general, not as in the case of the Provincial Councils narrowly restricted, but they are subject to exceptions. It is necessary to have the consent of the Governor-General before legislation is passed on certain vital issues, including native affairs and taxation; mines and precious stones; railways and harbours; postal and telegraph

services; tariffs, customs and excise duties; currency and banking; military organisation, and movements or operations of the South African defence forces; entry of immigrants; and control of the public services as well as the constitution and jurisdiction of courts of justice. The removal of this restriction was duly applied for in 1932 by the local legislature, but requires legislation by the Union to concede it. On the other hand, the Government of the Union had power to comply with the other request then made for the concession of authority over the establishment of a police force; civil aviation; primary or secondary education; establishment of a land bank; and the disposal of government lands. There is the usual rule that any appropriation or taxation measure must be recommended by the Administrator, and he may assent to a bill or reserve it or refer it back to the Assembly for consideration. The Governor-General may allow or disallow or continue consideration of an Ordinance, but a reserved measure is void unless assent is given within a year.

The finance of the territory is controlled in large measure by the Administrator, whose warrant is necessary for issues from the revenue fund, and who, with the aid of the Advisory Council, submits the estimates of expenditure to the Assembly. No issue may be made, save of sums appropriated by Ordinance, except that for two months after the end of a financial year the Administrator may authorise payments on the basis of the past year. If the Assembly fails to approve necessary expenditure or impose taxation requisite, the Governor-General may legislate to impose taxation or authorise expenditure by proclamation, thus preventing the Assembly misusing the power of the purse.

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Moreover, there is a fundamental principle laid down in the Act (Section 44). Nothing in the powers of the Assembly derogates from the full powers of administration and legislation conferred by the mandate and confirmed by the Treaty of Peace and South-West Africa Mandate Act, 1919, and the Governor-General can legislate by proclamation and of course the Union Parliament by Act. The power to issue proclamations may be delegated to the Administrator, but any such proclamation and any Ordinance shall have effect only so far as it is not in conflict with any proclamation of the Governor-General or Union Act. There is therefore no possible diminution of Union control in law, so that the Union still has the full power to make effective her obligations under the mandate which she is not empowered by the mandate to delate.

The Assembly may suggest legislation on topics on which it may not legislate to the Union. Moreover, the Assembly may make representations to the Governor-General in Council who has the power to modify any part of the Act except Sections 26 and 44, which remain within the control of the Parliament. The Government agreed in 1932 to place German on an official footing of equality with English and Dutch or Afrikaans, but General Smuts deprecated the policy of insisting that officers should be trilingual as resulting in the transfer of all authority into the hands of Germany, though the population is not essentially German. The claim was also made for the early grant of British nationality in the territory and the Union to such settlers as had not already attained it.

(5) It is obvious that in view of the comparatively wide range of powers thus enjoyed by the territory

some difficulty may be found in fitting it into a reformed scheme of Union Government, especially if the idea of unification is pressed. Moreover, even assuming the assent of Germany and the League of Nations Council to annexation, the Union has further projects of expansion, which may affect the proposal to unify. It failed to secure the addition of Southern Rhodesia despite the generous offers made by General Smuts who desired in the difficult times of 1922 to strengthen his supporters in the Union, for on a referendum that territory determined to remain autonomous under responsible government. General Hertzog has no doubts that in the future Southern Rhodesia, with Northern Rhodesia in all probability, must form part of the Union, and one of his ministers has already suggested that British policy in central Africa should be made to harmonise with South African ideals regarding the true relations of the native and European races. This Monroe doctrine for South Africa was naturally repudiated by the British Government, and Southern Rhodesia seems by no means disposed to welcome merger in the predominantly Dutch population of the Union with its compulsory bilingualism in official life and its republican sentiments. The two areas, however, are connected by many vital interests, and in 1930 a new customs agreement replaced the customs union which formerly made them economically one area. At Ottawa the agreements made by South Africa expressly excluded from the treatment accorded by the agreement of 1930 the parts of the Empire with which they were concluded.

The Union moreover hopes to secure the control of Basutoland and the protectorates of Swaziland and

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Bechuanaland. It was indeed proposed, when the South Africa Act, 1909, was passed, that these territories should be handed over at no distant date, and terms for their administration, to secure native interests, were duly imposed in a schedule to the Act, and provision made that these conditions could not be varied save by a reserved bill of the Union. With the new doctrine of the powers of the Union reservation would be meaningless, and the treatment of natives in the Union has rendered the inhabitants of the territories more and more disinclined to fall under Union rule, nor does it seem that the British Government has any moral right to abandon control of these areas without the assent of the chiefs and people so far as they are capable of expressing their views. The separation of the offices of Governor-General and High Commissioner in 1930 was obviously necessary when the Governor-General became merely the head of the Union Government, since it would have been unwise to place him in a position where the wishes of the Union Government might have conflicted with his duty to the territories, and the British Government now has clear and independent authority.[1]

[1] *R.* v. *Crewe*; *Sekgome, Ex parte*, [1910] 2 K.B. 576; *Sobhuza II.* v. *Miller and the Swaziland Corporation*, [1926] A.C. 518; *Tshekedi Khama* v. *Ratshosa*, [1931] A.C. 784.

CHAPTER XV

THE RULE OF LAW AND THE RIGHTS OF THE SUBJECT

TRUE to the British tradition the Dominion constitutions, even those of the federations and the Union, ignore entirely the question of defining the rights to be enjoyed by subjects. The Commonwealth constitution limits both the Commonwealth and the States in various spheres, but it essentially acts as a rule in the sense of allocating the sphere of government to one or the other, not in that of exempting the subject from control by either. The nearest approach to recognition of the principle of a definition of rights is the declaration that the Commonwealth may not establish a religion nor interfere with the exercise of religion nor impose a religious test for employment under the Commonwealth. No attempt, however, was made to extend this principle to the States, although in fact they did not contravene any of these principles. The federations and the Union again provide for internal freedom of trade, and the Commonwealth forbids the differential treatment of subjects on the score of residence or non-residence by the States.

(1) The Irish Free State, however, insists on a full exposition of civil rights. It grants (i.) liberty of the person; trial by jury; and inviolability of the domicile;

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(ii.) freedom of conscience and the free profession and practice of religion; (iii.) freedom of expression of opinion; (iv.) freedom to assemble peaceably and without arms; (v.) freedom to form associations for purposes not opposed to public morality, and (vi.) the right to free elementary education; while (vii.) it renders all the lands, mines, minerals, natural resources, including air and water power, franchises and royalties belonging to the State its inalienable property, subject only to non-renewable leases for not more than ninety-nine years. But these rights are inevitably subject to the legislation of the State, and the constitution may be altered by simple Act, so that in fact the liberty of the person, the inviolability of domicile, the freedom to assemble and express opinions and form associations, have been most drastically limited, notably by the Public Safety Act, 1927[1] (which ceased to operate in 1928), and by an Act to amend the Constitution which, passed in 1931 to counter the danger arising from the Irish Republican Army, was suspended in operation by Mr. De Valera's government. Apart, however, from legislation the terms used in the constitution are significant. The right of personal liberty is inviolable and no person shall be deprived of it except in accordance with law. The High Court or any judge must examine on *habeas corpus* any violation of liberty. But "nothing in this Article contained shall be invoked to prohibit, control, or interfere with any act of the military forces of the Irish Free State during the existence of a state of war or armed rebellion". Again "the jurisdiction of military tribunals shall not be

[1] *A.-G.* v. *McBride*, [1928] I.R. 451. For the very wide discretion allowed, see *R.* v. *Hare Park Camp* (*Mil. Gov.*), [1924] 2 I.R. 104.

extended or exercised over the civil population save in time of war or armed rebellion, and for acts committed in time of war or armed rebellion, and in accordance with the regulations to be prescribed by law. Such jurisdiction shall not be exercised in any area in which all civil courts are open or capable of being held, and no person shall be removed[1] from one area to another for the purpose of creating such jurisdiction."

(2) The Irish doctrine implicit in these clauses corresponds well with the traditional rules of martial law in its application to the Dominions. There was controversy over the question whether it should be required, in order to oust martial law jurisdiction, that "all" courts should be open, but the narrower view prevailed, which is in accord with the spirit of the decision in *Marais' Case*.[2] But the Irish Courts[3] have held firmly to the view that it is for them to decide at what point they will cease to exercise jurisdiction and allow martial law courts to act; in 1923 hasty legislation was necessary in the Free State because the courts declined to hold that the country was any longer so disturbed as to oust their jurisdiction and permit detention without due process of law. Where the courts hold that a state of war exists they will not intervene, nor is a martial law tribunal a court from which appeal lies.[4] It is merely a piece of executive machinery for the combating of action

[1] An injunction against removal lies: *O'Boyle* v. *A.-G.*, [1929] I.R. 558.

[2] [1902] A.C. 109.

[3] *R.* v. *Strickland*, [1921] 2 I.R. 317, 333; *R.* v. *Allen*, [1921] 2 I.R. 241; *R.* (*O'Brien*) v. *Minister of Defence*, [1924] 1 I.R. 32; *R.* (*Childers*) v. *Adjutant-General of the Provisional Forces*, [1923] 1 I.R. 14, which explains *Egan* v. *Macready*, [1921] 1 I.R. 265.

[4] *Clifford and O'Sullivan, In re*, [1921] 2 A.C. 570; *Tilonko's Case*, [1907] A.C. 93, 461.

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against the State, with which when it is exerted to the full the courts cannot attempt to interfere.

On the other hand, acts done by such tribunals have no judicial effect. They therefore expose the persons who took part in them to liability both civil[1] and criminal if their deeds have exceeded the measures necessary for the suppression of disorder. English opinion wavers between the views that officers and private persons will be held justified in respect of any acts they reasonably do to combat insurrection or wide disorder and that they can only be excused in respect of necessary acts. The issue is never likely to be decided fully, for the usual plan and the only safe procedure is to obtain an act of indemnity. Not since 1867 when a New Zealand Act of indemnity in respect of the suppression of the Maori rebellion was disallowed as too wide in terms has any measure been refused assent by the Crown. The Natal Act of 1906, which authorised the courts to regard every act done by military or civil officials in suppressing the native revolt as done in good faith and legal, though private persons might be required to prove good faith, was permitted to stand. In the Union martial law has been exerted with much effect to deal with disorders on the Rand, in 1912 when British forces were employed, in 1914 and 1922 when the defence forces of the Union were compelled to act with great vigour. In all these cases full legislative provision was made to cover the action taken. In 1919, however, when Manitoba was the scene of a serious outburst of unrest, the Dominion and the provincial governments refrained from drastic action and the

[1] *Phillips* v. *Eyre* (1870), L.R. 6 Q.B. 1; *Hébert* v. *Martin*, [1931] S.C.R. 145; *Higgins* v. *Willis*, [1921] 2 I.R. 386.

citizens of Winnipeg succeeded by self help in crushing the strike, without bloodshed. As a result some rather drastic accessions were made to the criminal code, and the Senate has persistently refused to allow the clauses to be deleted from the statute book as it believes that the country should have effective safeguards especially against alien agitators or even British immigrants who seek to excite disaffection to the established state of government in the Dominion.

(3) Thus in the Dominions in general it has been necessary by law to make inroads on the rights which can be enjoyed by subjects, and to strengthen the common law provision as against treason, sedition, and like offences. The same causes which evoked the British legislation of 1920 to confer emergency powers on the executive have resulted in the enactment being copied overseas, and in some cases even stronger terms have been included. Much indignation was expressed in New Zealand in 1932 because the ministry not merely adopted the British Act but omitted the safeguarding clauses against the right to impose compulsory work on members of the public or to introduce any form of military conscription. How far matters have gone in the Free State has already been noted. The legislation of 1931 set up military tribunals with power even to increase penalties provided by law, and exempt from appeal. It authorised the government to place a ban on associations deemed to be hostile to it, and to make membership a criminal offence; it placed in certain cases the onus of establishing innocence on the accused, and it gave power to secure the suppression of the opposition press. No doubt these powers were not likely to be seriously abused, but they resulted in refusals of

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the accused to recognise the courts and their rather drastic punishment. Other legislation protected juries by preventing the making known of their names. As has been said, the measures were denounced by Mr. De Valera's Government and suspended in operation.

In South Africa the most recent limitations of freedom have been connected with the determination to repress the growth of native unrest. The action taken is the necessary concomitant of the legislation intended to widen the European franchise and, in the words of a Dutch pastor, to secure thus aid in keeping the natives in their place of inferiority in state and church. An Act of 1914 gave wide powers to magistrates to forbid public meetings, but in 1930 this was felt insufficient on the ground that it did not authorise them to forbid a meeting which, though likely to excite racial feeling, was not expected to lead to deeds of violence, and that it did not prevent an agitator from attending a meeting and inflaming passions by his address. The Parliament therefore gave power to the Minister of Justice to forbid the holding of any meeting in any defined area for a defined period and to forbid any person from attending that meeting, if he believes that hostility might be engendered between the European and non-European inhabitants. Moreover, the Governor-General in Council may prohibit the dissemination of publications likely to engender such feeling, though an appeal to the courts is given as to whether any publication would naturally have such a result. The Minister may also prohibit the presence of a person in any defined area if he thinks his presence there may engender such hostility. Contravention of the Act is a crime involving the possibility of deportation in the case of persons

born outside the Union. Necessary as the measure may be from the point of view of maintaining racial supremacy, it is impossible not to recognise the force of the arguments brought against it by the opposition as a deliberate effort to prevent the expression of native or coloured opinion on issues vitally affecting them. Whether such suppression is the wisest line of policy is a matter on which only experience can render an opinion of value. But the whole measure is one more sign that growing social unrest throughout the Dominions is increasing the difficulty of recognising as widely as formerly the liberty of the subject. Freedom of speech is always regulated by the law of libel, and in the case of attacks on the government the crime of seditious libel[1] in one form or another is recognised in all the jurisdictions. The Commonwealth of Australia was compelled by the violence of the strikes in the ports to resort to drastic legislation, part of which involving the deportation of persons on the determination of a minister was ruled by the High Court to be impossible of support in law.[2]

It is of course a maxim of English law that all subjects are bound to assist the authorities in suppressing disorder, and the same doctrine is found in Quebec and the Union of South Africa. In the Irish Free State a Volunteer Division of the State army has constituted itself as a safeguard for the opposition. All the more is

[1] The Montreal trials (*R.* v. *Engdahl et al.*; *R.* v. *Chalmers et al.*) in 1931 (*Can. Bar Review*, ix. 756-61) show the risk from this source to individual liberty.

[2] *Walsh and Johnson, Ex parte*; *Yates, In re* (1925), 37 C.L.R. 26. The Crimes Act, 1932, allows deportation of members of unlawful associations, declared so by the High Court or a State Supreme Court, their arrest without warrant, and disqualification from voting.

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it incumbent on officers of the Crown to render mutual aid, and, while imperial military forces are normally not now present in the Dominions, naval forces if available are at the disposal of Dominion governments to repress disorder beyond the power of local means to subdue. In the 1932 riots in New Zealand local volunteers, naval ratings, and police co-operated to repress senseless and destructive manifestations by strikers, and at the Governor's request the *Dragon* was sent to Newfoundland to counter the rioting against Sir R. Squires.

In the case of the Commonwealth it is definitely enacted that it shall protect the States against invasion, and on the application of the domestic government of the State, against domestic violence. The obligation is clear in law, but it is one of imperfect obligation manifestly not being suited for legal enforcement, and in point of fact the Commonwealth has asserted its right to consider whether or not in fact the circumstances demand intervention by armed force. In the case of Canada the use of the military forces can be secured from the Dominion through the application of the province backed by its Attorney-General, but that the provinces shall not rely unduly on this source of strength and therefore neglect their duty of securing adequate police forces the rule is enacted that the province must undertake to pay the cost of the force employed.

(4) The subject is protected as in the United Kingdom against illegal taxation by the action of the courts. They have decided sometimes as in England that the mere passing of resolutions by one house of Parliament is no ground for raising money from the taxpayer,[1] so

[1] *Stevenson* v. *R.* (1865), 2 W.W. & A'B.L. 143; contrast for the Commonwealth *Colonial Sugar Refining Co.* v. *Irving*, [1906] A.C. 360.

that it has been necessary to provide by legislation for the raising of customs duties before the legislation imposing the whole tariff is finally adjusted. It is no doubt the case that, if the illegal legislation of Tasmania had been placed before the courts, it would have been held invalid so far as it imposed taxation. As regards the right of the executive to raise money by attaching conditions of payment for licences to do acts which may be performed only under licence, the Dominion courts[1] have ruled as in England that this is taxation without Parliamentary authority, unless the power to license definitely includes that to levy a sum for licensing. The right of the subject to prevent expenditure without due Parliamentary sanction is less easy to enforce, for no individual[2] has a *locus standi* in the matter, but it is clear that, while an injunction against expenditure may not be obtainable, yet the moneys illegally paid may prove to be recoverable from the payee in a suitable form of action.[3] The taxpayer is also protected by the rule that no ministry can conclude a contract which will bind Parliament to provide money; the implication in any contract is that it is subject to Parliamentary approval if it involves payments,[4] and in the Commonwealth it has even been held very drastically by the High Court that it is not enough to validate a contract that later on an appropriation is passed by the legislature.[5]

[1] *Commonwealth* v. *Colonial Combing, etc. Co.* (1922), 31 C.L.R. 421; *A.-G.* v. *Wilts United Dairies, Ltd.* (1922), 91 L.T. K.B. 897; *Brocklebank, Ltd.* v. *R.*, [1925] 1 K.B. 52.

[2] *Dalrymple* v. *Colonial Treasurer*, [1910] T.P. 272.

[3] *Auckland Harbour Board* v. *R.*, [1924] A.C. 318; *Mackay* v *.A.-G. for British Columbia*, [1922] 1 A.C. 457.

[4] *Commercial Cable Co.* v. *Newfoundland Government*, [1916] 2 A.C. 601; *Troops in Cape Breton Reference*, [1930] S.C.R. 554.

[5] *Commonwealth* v. *Colonial Ammunition Co.* (1923), 34 C.L.R. 198; cf. *Kidman* v. *Commonwealth* (1925), 37 C.L.R. 233.

CHAPTER XVI

THE FOREIGN RELATIONS OF THE DOMINIONS

WE have already seen that the Dominions—excluding Newfoundland—are for many purposes sovereign international states, though of a special kind in view of the integral relations which they still retain with the United Kingdom. But for most purposes they are glad to avail themselves of the British services as the most effective and cheapest method of dealing with international affairs, and their own activity is minor in character.

(1) Foreign relations in each Dominion are dealt with by a special Department, the tendency being for the Prime Minister to keep the issues in his own hands. The reason for this is that the Prime Minister is specially charged with imperial relations as a member of the Imperial Conference, and that it is on foreign affairs that such relations are constant and pressing. The control exercised over the ministry by Parliament is perhaps less close than in domestic issues. The latter are vital to members and with them they are familiar. But foreign affairs are studied by only a handful of politicians, and the Commonwealth Parliament has shown a most remarkable indifference to all such questions. More interest exists in Canada, as a result of proximity to the United States and greater touch with European

currents of opinion; but in the other Dominions, save the Irish Free State, external affairs bulk little in the popular estimation. But, as in the United Kingdom, since the treaties of peace were submitted for the approval of Parliament before ratification, the tendency has been for every important treaty to be submitted to the Dominion Parliaments for approval. There is no absolute rule. In minor matters the executive government can act, if it does not impose any positive obligation affecting existing law. If any change of law is necessary, the Dominion Parliament must be asked to make that change before assent to ratification is expressed.[1] In Canada the demand that Parliament should be consulted on all treaties has been raised but not seriously pressed. On the other hand, it has been insisted repeatedly that anything which might involve the Dominion in risk of war must go before Parliament. In the same way the doctrine is accepted by both sides in Canada that a declaration of war ought, if not preceded by Parliamentary approval, to mean that Parliament shall be summoned and its assent secured before any active assistance is given to the Empire. The much more drastic question whether there should be a referendum in the form of a general election on the subject as proposed by Mr. Meighen has never been answered. Clearly it would mean in practice that Canada could not be expected to render any effective aid in war. The Irish Free State constitution, which negates implication in active hostilities without the assent of Parliament except in case of invasion, is content to leave the issue to Parliament without suggesting a referendum.

[1] If legislation is not essential, only the lower house need assent: Keith, *Journ. Comp. Leg.* xi. 252, 253; xii. 295, 296.

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In this condition of public indifference to any foreign issues which do not immediately touch the interests of the Dominion, it is inevitable that Dominion foreign policy should be mainly negative, or should consist in accepting the views of the British Government where these do not mean involving the Dominions in any responsibilities. The attitude of the Dominions at the Imperial Conference of 1926 to the Locarno Pacts illustrates admirably the real attitude; the governments applauded the step taken which engaged the British Government in the obligation to defend the frontier between France, Belgium, and Germany, but exempted the Dominions from obligation unless they deliberately accepted it, but not one Dominion actually did accept the obligation. Similarly the Dominions adopted a purely negative attitude to the ingenious plan of 1924 for strengthening the Covenant of the League so as to avoid the possibility of war. One and all feared that some obligation might be involved, and the idea that the immigration issue might be brought into international discussion completed their determination to oppose. Even in the minor case of the grant of financial assistance to any power unjustly attacked, Canada would not dream of accepting, though Australia and the Irish Free State were more generous. In the great disarmament conferences at Washington in 1921 and at London in 1930, as well as in the efforts made at Geneva on the same account, the Dominions have been content to act formally in accordance with the British lead; the attraction to save their resources by allowing armaments to be reduced to a nominal basis has irresistibly led to acceptance of the view that the British Government and public should bear the burden of

safeguarding the commerce of the Empire and the integrity of all British territory, though New Zealand has generously contributed to the share of the Dominions in the Singapore base project, which of course is virtually devised for the Dominions. In reparations at The Hague in 1930 and at Lausanne in 1932 the leadership has been British, and the Union alone was able to refuse the offer of British concessions as to repayment of war debt in 1931–32.

(2) Direct diplomatic representation achieved by the Irish Free State in Washington in 1924 has been extended by the Free State to Paris, to Berlin, and to the Vatican City, while in 1931–32 arrangements were made for appointing a Minister to Belgium, the office to be combined with that of Minister to France. The Dominion of Canada decided on a similar course in 1926, and proceeded to appoint Ministers to Paris and Washington; this was followed by a like appointment to Tokyo; the Union of South Africa has made appointments to The Hague, Rome, and Washington. In all cases the points selected are deemed of special importance on political and economic grounds, and the extension of representation in all cases is dependent on the decision whether the cost involved is likely to be repaid by the results achieved. The foreign governments concerned have reciprocated: the United States in 1927 sent Ministers to Ottawa and Dublin; France in 1928 despatched an envoy to Ottawa; Tokyo followed suit in 1929, and in that and the following year the Netherlands, the United States, and Italy sent Ministers to the Union; a Papal Nuncio reached Dublin in 1930, to be followed later in the year by Ministers from France and Germany.

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Consular representation has been slower of development, the British consular service being sufficient for most needs. Friction over the recognition of Irish Free State passports, which did not state that the bearer was anything save a citizen of the Free State—not therefore necessarily a British subject—helped to bring about in 1930 the creation by the Irish Free State of a Consul-General to the United States, and in 1931 Consuls were placed under his control at New York and Boston as ports of entry of immigrants. In 1932 an appointment was made at Paris. The Union in 1930 marked its sense of the closeness of its relations with Portuguese East Africa by the appointment of a Consul-General there. In view of the Convention of 1928 regarding railway rates and the supply of native labour, the interests of the territories are inextricably interwoven.

In arranging diplomatic representation the normal procedure is for the British Government to ascertain that the foreign power concerned is willing to accept, and is prepared in return to accredit an envoy, for naturally it is a rather undignified position for a Dominion to be represented at a Court which regards it of too small account to reciprocate representation. The Minister is then accredited by the King by a letter of credence, which is normally issued through the Foreign Secretary, but in the Irish Free State is issued by the Ministry of External Affairs. The Minister is then received in the foreign state in the same manner as Ministers from other countries. Conversely the letter of credence from a foreign state is addressed to the King, but is presented to the Governor-General as representing the King personally. Foreign Ministers receive in

the Dominions the same immunities as are accorded in the United Kingdom under English views of diplomatic privileges under international law. These, of course, are denied to persons not recognised as diplomatic envoys, such as trade representatives of Russia; so in the United Kingdom it required a special agreement to accord diplomatic status to such representatives.

The relation between the British representative at a foreign Court and Dominion representatives is parallel to that of the British and Dominion Governments. The latter are bound to consult one another in treaty matters, and accordingly the representatives must keep in touch, though on a basis of complete equality. It is significant that when the incident of the sinking of the vessel *I'm Alone* took place in 1929 both the British Ambassador and the Canadian Minister took up the matter with the United States, until it became clear that Canada was essentially interested owing to the vessel being Canadian, and then the Minister assumed the burden of negotiation, the British Government being duly informed, as the incident involves issues of importance to all British subjects and shipping. It may be noted, with regard to the many attacks made in Canada in pre-war days on the slow progress of British diplomacy, that the incident was still unsettled in 1932.[1] Canada is not the only Dominion to learn by experience that diplomacy is not a matter in which any power can expect to have its own way. There seems no doubt that the system of free intercourse and consulta-

[1] A fresh incident took place in 1931, the master of the *Josephine K.* being killed by a shot from a United States cutter, allegedly in the twelve-mile limit from the American coast, while engaged in liquor traffic. Canada protested: *Canadian Annual Review*, 1930–31, pp. 362, 363.

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tion is far more calculated to enhance the value of Dominion representation than would be an effort to remain aloof. No Dominion can seriously compare as yet with the United Kingdom as a great force in international politics.

Where the Dominions do not care to be represented, they may use British diplomatic machinery. This can be done through the Foreign Office or direct by requests to the legations and embassies. In the latter case the British representative is now permitted, in accordance with the request of the Dominions at the Imperial Conference of 1930, to act without prior authorisation from the Foreign Secretary in matters of routine character and minor importance. In other issues, and of course where the proposed action seems to affect British interests, he must take the instructions of the Foreign Office, to which he is responsible for due safeguarding of the primary duty of securing British interests. But the legations and the consular service are under clear instructions to assist as far as possible Dominions in their political and economic interests.

(3) The most formal, if not necessarily the most important, part of the duties of Dominion representatives abroad is to negotiate and conclude treaties. The mode of procedure in these cases has already been indicated. The normal course is to use Foreign Office machinery, and to secure a full power to sign from the King under the Great Seal of the Realm, but in the case of the Free State the Irish seal is used. Ratification is expressed in like manner, either by the King with the use of the Great Seal or by His Majesty with the use of the Irish seal. But in either case the responsibility for advising ratification is the same, and rests on the

Dominion Government. That Government again is formally responsible for the decision of the question whether or not the matter is one which can be disposed of without requiring the formal assent of Parliament, or whether it must be so approved. It is, of course, the Dominion Government which must know whether there is any legal obstacle to giving effect to the treaty by executive action which necessitates legislation, or whether the matter is so important that it must ask Parliament for formal approval. It is interesting to note that in the controversy over the financial issues between Mr. De Valera and the British Government stress was laid by the former on the view that Parliament had never been asked to approve the payments made or the agreements entered into in 1923 and 1926, and by the latter on the undoubted fact of the discussion of the agreements in Parliament and the upholding of the action of the Government by the Dáil Eireann.

Apart from the activity of the Dominion representatives at foreign courts, treaties have constantly to be negotiated, signed, and ratified for the Dominions by envoys specially appointed, the procedure in the issue of the necessary instruments being as described above. Thus the treaty between the Union and Germany was signed at Pretoria on September 1, 1928, by a Union minister under special authority, and on September 11 was signed there the Convention between the Union and Portugal regarding relations with Mozambique. Or the matter, if not too formal, may be arranged by an exchange of notes between the Prime Minister and the Consul-General, as in the case of the *modus vivendi* between New Zealand and Japan of July 24, 1928, or between the External Department of the Union and

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the German Consul-General in 1930 as to registration of patents, etc. Frequently the business is managed through the British Minister to the foreign power specially instructed for the purpose, as in the case of the extradition convention of January 20, 1932, with Portugal.

There are, of course, much more important matters in which the Dominions are concerned. They now are parties to the great international treaties, and for that purpose the procedure now adopted is the signature of these treaties by delegates with special powers to act for each Dominion.[1] The Imperial Conference of 1926 left open the question of the mode of procedure, suggesting that a single delegation representing the whole of the Commonwealth might be preferred, but the present system is clearly established and is not likely to be departed from. It applies even to cases where the Empire must act as a whole, as in the Treaty of London, 1930. There is nothing in such cases to show the fact that unity of action is imperative. The whole matter depends on considerations of necessity from the point of view of foreign powers which clearly cannot in some matters accept the dissociation of the Dominions from the United Kingdom. In such cases ratification as well as signature for the whole of the Empire is essential, a fact which may delay ratification as in that case until the last of the Dominions has found time to act and to obtain Parliamentary approval for ratification. It is not necessary even that ratification should be expressed in one instrument; in that case separate instru-

[1] The legal character of such treaties as distinct from the old type of British Empire treaties is noted in the decision on *Radio Communication in Canada*, [1932] A.C. 304.

ments were preferred, and the Irish Free State will in future use its own seal on such documents. Similarly the settlement reached in 1932 as to the treatment of the war reparations due from Germany was signed by the Dominion delegates, and their ratification was to be accorded in the same manner as the British, if the necessary conditions for bringing the Lausanne treaty into operation could be fulfilled.

In all matters of negotiation it is an obligation imposed by the Imperial Conference on the United Kingdom and the Dominions alike to engage in consultation in advance of action, so that no part of the Empire may negotiate without letting the other parts know, so that they may propose combined action or at least may be able to make representations and to endeavour to safeguard their interests. Thus, when in 1928 the Union gave Germany a promise not to accord any preferences to the United Kingdom or the Dominions without extending them to Germany, the British Government was informed in advance of the intention and was able to point out the difficulties that might arise, but the Union, as it was clearly entitled to do, persisted in the course set. There is, of course, nothing to enforce the obligation save the agreement at the Conferences, first reached in 1923, re-asserted and strengthened in 1926, and homologated in 1930, but these concurrences are essentially of the type which places a moral obligation of the highest quality on each of the Governments of the Commonwealth. That the British Government has ever failed in this respect since 1926 has not so far been suggested by any Dominion.

In addition to formal treaties negotiated under full powers, it has long been recognised that the Dominions

can, if they please, conclude more informal agreements direct with foreign governments. In theory, as laid down by the Imperial Conference of 1923, these should deal with questions of technical or at least minor importance, but the most famous of all was the reciprocity agreement of 1911 between the United States and Canada, which embodied a principle so important as to bring about a Parliamentary impasse through the obstruction of the opposition, and to lead to the downfall of the administration at the general election ensuing. Sir W. Laurier had been led on to this measure by the success of his earlier informal negotiations with Germany and Italy. Need for informal action was abrogated by the doctrine effectively asserted in 1923 that a treaty affecting Canada could be signed for Canada by a Canadian delegate without a British colleague, and there are obvious advantages in securing that measures are embodied in treaties which involve definite and well-understood obligations in lieu of mere governmental accords, which suffice for a *modus vivendi*.

Indirectly, obligations can still be placed on Dominion nationals by British action without Dominion concurrence. The right to exercise extra-territorial jurisdiction belongs to the King on the advice of the British Government, and thus his renunciation on that advice alone of such jurisdiction as regards Albania in 1926 and his similar action in 1923 and 1928 as regards the Tangier Zone of Morocco deprived British subjects resident in the Dominions or nationals thereof of the rights formerly enjoyed in this regard, and placed them under control of the Albanian courts and the Mixed Court set up in Tangier. This position is on a par with the fact that by declaring war with Afghanistan at any

time the British Government could without Dominion action place British subjects in the position of alien enemies as regards that territory.

Benefits are still regularly provided for in British treaties, despite the Irish Free State doctrine that this is unconstitutional without Dominion signature of the treaty concerned. Thus in the treaty with Hayti of April 7, 1932, the right is taken in Article 10 to accede to the treaty for any Dominion or India and to withdraw separately if accession has been notified. Article 11 stipulates further for most favoured nation treatment in Hayti for goods the produce or manufacture of any Dominion, so long as that Dominion accords such treatment to Haytian goods. Apparently also it is still the intention that under the treaty British subjects,[1] despite the fact that they are nationals of or resident in a Dominion which has not accepted the treaty, shall be entitled to the privileges provided in it, as regards commerce and navigation, the carrying on of business or profession or occupation, residence, and the acquisition and disposal of property. It must be doubted[2] whether this claim will remain possible to maintain with the development of Dominion nationalities, and it has been negated in the Russian agreement of 1930.

In the treaties of the Dominions and the United Kingdom alike there is involved in the view of the British Government that domestic arrangements between parts of the Empire are not matters which fall within the scope of the most favoured nation clause in

[1] Canada in the Halibut Treaty of 1923 and Germany in its Patents Agreement of 1930 with the Union dealt with nationals and residents.

[2] Keith, *Journ. Comp. Leg.* xii. 293, 294.

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commercial treaties. The doctrine that such arrangements must not be regarded by foreign States as matters of which they can take cognisance was fought out by Canada and Germany on the occasion of the first preferential tariff of the Dominion. Germany retaliated on Canada for not treating Germany on the same footing as the United Kingdom by placing Canadian products under disability, and Canada forced the retraction of this policy by her action in imposing from 1903 surtaxes on German imports, which convinced Germany that a tariff war was unprofitable. It cannot, however, be denied that the strength of this doctrine has been impaired by the action of the Union of South Africa in 1928 in promising Germany the benefit of any future British preferences, though the treaty was made terminable at short notice, and the Union explained that she would denounce it if it were shown at any time that the British Government were willing to offer better terms. But the opposition suggested that the German negotiators had been too astute for the Union ministry, and it was also deemed possible that the Union desired to conciliate Germany in order to secure her acceptance of the loss of South-West Africa for good.

It is also now possible to argue that, as members of the League and signatories of the Kellogg Pact, the Dominions, being, as the British Government asserted when signing the Optional Clause, "international units individually in the fullest sense of the term", are so clearly distinct States that the denial of the application to their concessions to one another in economic matters of the most favoured nation clause in treaties is impossible of acceptance. It is clear that this matter is

vital, and that the Ottawa Conference, in determining that it is impossible to make any concession on that head, is acting in accordance with the necessities of the case. It was there agreed that no treaty obligations into which they might enter in the future should be allowed to interfere with any mutual preferences which the Governments of the Commonwealth might decide to accord, and that they would free themselves from existing treaties, if any, which might so interfere. They would also take all steps necessary to implement the preferences which may be granted. This arrangement will involve not merely the disappearance of the principle of the treaty of 1928 between the Union and Germany, but it will involve reconsideration of the terms of other existing British treaties, and the further obligation of securing commodity prices (*e.g.* of lumber) against the rendering useless of the preference by foreign dumping, as in the case of Russia, necessitated the termination of the Russian agreement of 1930, and the German treaty of 1924 may be affected.

For purposes of business the Dominions have long been in the habit of using Trade Commissioners; thus the Union established one at Milan in 1921 and another in the United States in 1925, precursors in a sense of the later decision to have diplomatic representation in these countries. The Commonwealth and New Zealand prefer to rely on such representatives in lieu of appointing diplomatists.

In the Dominions foreign countries are regularly represented for economic purposes by Consuls of various ranks, from Consuls-General downwards. As has been noted, the approval of such appointments rests now with the Dominion Governments, and in the case of

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the Commonwealth also with the governments of the States to which they are assigned. Consuls are not entitled to diplomatic immunities, but may receive minor courtesies from local authorities. If desired to act in a diplomatic function for any special occasion, they are given by their governments the necessary full powers to exchange with the Dominion representatives.

The Dominion Governments regularly issue passports to British subjects, whether natural born or naturalised, resident in the Dominions. The protection of British representatives abroad is regularly extended to the bearers of such passports, even if the naturalisation is local only in legal effect as regards the Empire. For foreign purposes this limitation is disregarded, and British protection is extended. There is, of course, an inevitable exception in the case of those persons who, though naturalised in a Dominion by the local law, remain subjects of the foreign power in whose territory they are travelling. In such cases the British Government cannot demand, in the absence of special treaty, that the national connection accorded by naturalisation shall be accepted by the foreign power as prevailing over the original nationality. But difficulties on this score have diminished of late, partly through the disappearance of compulsory service in Germany, which formerly used to refuse to recognise local naturalisation of German subjects who had failed to undergo their military service.

(4) In the League of Nations the Dominions occupy a place of absolute independence of the British Government, though as representing the Empire that Government has a permanent seat on the Council as well as representation in the Assembly. The delegates of the

Dominions to the League Assembly[1] are accredited by the Governor-General in Council, and they are under Dominion control absolutely, and the position of the delegate of the Irish Free State to the Council is the same.

Conventions signed under League auspices were for a time considered as proper for ratification by the Dominion Governments, but the resolution of the Imperial Conference of 1926 urged that as a rule treaties of this sort should be made in the form of conventions between heads of States, and this form exacts the formality of full powers issued by the King and ratifications signed by the King, as in the case of treaties negotiated apart from the procedure of the League. But this rule does not apply to conventions arrived at under the procedure of the Labour Organisation of the League provided for by the treaties of peace. Draft Conventions there accepted by any Dominion must be submitted to the authority competent to approve. This means, of course, the obligation to ask Parliament to consent to ratification, but in the case of the federations it is clear that the duty is fulfilled if the matter is brought before the provincial legislatures or the State Parliaments if the matter falls within their legislative sphere. Nor in any case is there any binding obligation to press for approval. The Government does not bind itself to make the matter one of party loyalty, and an indifferent Government may rest assured that no pressure will be put upon it by its Parliament. In the Union it has been observed by supporters of the Labour Organisation that the ratifications effected by

[1] Canada has stationed an advisory officer at Geneva, and similar action has been taken by the Irish Free State and the Union.

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the Union are far too few, but the Union Government maintained that it had done all that was wise, and refused even to submit the Coal Hours Convention on the score that it had been approved irregularly by the Labour Organisation.

In the Labour Organisation the Dominions from the first were accorded full rights as independent members, an achievement of Sir R. Borden, who insisted that there must be no derogation from the status of the Dominions by reason of their connection with the United Kingdom. Canada now ranks as one of the eight leading industrial nations in the Organisation, but unfortunately her activity is hardly on a par with the place assigned to her, as she has been able to do very little to ratify conventions. The reason, of course, is that the issues discussed by the Organisation are matters essentially appertaining to the provinces, with whose rights the Dominion is most reluctant to interfere.

(5) The actual contribution of the Dominions to the formulation of foreign policy in the League has been probably in the main negative in character. They have been, in the words of M. Rappard, rather observers than actors in the discussions. But their activity must not be underestimated. Canada, until 1923, led an energetic campaign to have it made clear that the obligations of the Dominion under Article 10, which she would have desired to suppress, must ultimately be determined by her Government, and that it could not be bound by the request of the Council as to action to vindicate the territorial integrity or sovereign independence of any member of the League. The interpretative declaration reached in 1923 was approved by 29 members, but 22 abstained in the desire not to

press their views unduly, and Persia rendered it purely a gesture by definitely declining to agree. Canada naturally would have none of the Draft Treaty of Mutual Assistance which rendered in her opinion the position even worse than did Article 10, for it definitely conferred on the Council and not on the members of the League the duty of determining the aggressor. Australia was equally hostile, insisting *inter alia* that she had not yet brought her own armaments to the stage of securing her protection from attack. The Geneva Protocol of 1924 was the object of a chorus of disapproval, Australia being specially anxious lest Japan should under it be placed in a more advantageous position to press the issue of exclusion. On the question of submitting to the compulsory jurisdiction of the Permanent Court there was less objection. Canada, while rejecting the Protocol, intimated that on principle she favoured acceptance of the Optional Clause of the Statute of the Court, and in 1925 the Irish Free State expressed dissent from the negative attitude of the United Kingdom. At the Imperial Conference of 1926, however, it was only possible to agree that no part of the Empire should sign without prior consultation, and it was under the Labour Government of 1929 that the Clause was signed by the United Kingdom and the Dominions, with reservations on the part of all but the Irish Free State, which signed unconditionally.[1] The exception from acceptance of inter-imperial disputes on the ground of the special relationship of the parts of the Empire was only adopted by the Union on grounds of expediency, not of right, and Canada, while making it, doubted if such a reservation was legitimate,

[1] Keith, *Journ. Comp. Leg.* xii. 95, 96.

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and the Irish Free State negatived energetically the right to make any limitation and asserted that the Court was the suitable tribunal for such disputes. The acceptance of the General Act of 1928 for the Pacific Settlement of International Disputes was pressed on the Dominions by the British Government,[1] and assent to it was obtained in 1930–31 except in the case of the Union, which has refused to sign, but the Irish Free State, as in the case of the Optional Clause, refused to agree to the British reservations; the other Dominions found them necessary and agreed that inter-imperial issues must be excluded. The Dominions also have very reluctantly accepted the policy of promising to support the amendments in the Covenant to make it more harmonious with the Kellogg Pact, on the condition that these amendments come into force only after disarmament has been arranged. It is significant that Mr. te Water for the Union expressed its disfavour of the principle of the extension of sanctions in the Covenant of the League, and its disapproval of the conversion of the functions of the Council from those of a mediatory and conciliatory to those of an arbitral and judicial authority. In the same way the Dominions took no trouble in the case of the Kellogg Pact[2] to conceal their refusal to be necessarily bound by the reservation as to the right of self-defence in the case of the attack on certain eastern territories which was made by the British Government. The Irish Free State, of course, explicitly refused to accept such reservations as in any sense binding on the signatories.

[1] Keith, *Journ. Comp. Leg.* xiii. 254.

[2] *Ibid.* xi. 251, 252. The Pact clearly does not apply between the parts of the Empire, though it may safely be assumed with Mr. McGilligan that its principles would be applied.

The attitude of the Dominions to security is coloured essentially by the fact that Canada relies on the Monroe doctrine, and the Union on self-help for local purposes and the British fleet for security of trade, while Australia and New Zealand regard themselves as in essential alliance with the United Kingdom. As regards the acceptance of further obligations to aid other members of the League, Canada has strong objections; it has always been held that the obligations of Article 16 are onerous enough, and hence it is surprising that the Dominion should have accepted the principle of agreeing to the amendments of the Covenant even conditionally. Canada too is far from being an admirer of any compulsion to arbitration. As in her domestic policy she has believed in investigation and report, so that public opinion should operate to clarify the dispute, so in her negotiations with the United States and in the treaty of 1909, under which the International Joint Commission is constituted, the aim is rather to secure a report in which both governments can concur than any arbitral pronouncement. South Africa, again, desires in any disarmament compact to prevent the training of African natives for war. But, though this would admirably meet Union needs, where an armed native population would be a menace, France may be excused if she feels that the power to use natives from her African territories may be essential to counter the plurality of German manhood.

In other issues the Dominions have taken a decided stand. On Albania, South Africa and Canada succeeded in 1920 in securing the assent of the League to admission against French and British doubts. The Union consistently pressed for German membership of the

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League. All again were active in securing the reduction of their contributions to its expense, originally on the analogy of the Postal Convention fixed on the basis of equality of status with the United Kingdom. The issue of minorities was one of the grounds stressed by Mr. Dandurand as interesting Canada, and in 1928–29 he showed Canadian appreciation of the help given to Canada's election to the Council in 1927 by pressing for the fairer treatment of petitions from minorities, greater publicity of procedure, and generally a more sympathetic outlook.

In economic issues the Dominions have been narrowly national, as was inevitable from their history. At the Assembly of 1920, as against the British Government Mr. Rowell bitterly protested against the idea that the League could concern itself with the question of the distribution of raw materials, though obviously in a comprehensive survey of national relations such questions are of grave moment. The idea of any dealing by the League with immigration has always excited fears in Australia, which Mr. Latham voiced in 1926 when the question of the Economic Conference was mooted. The Conference wisely left migration alone, but its attitude towards customs tariffs drew in 1928 from Mr. McLachlan the strong opinion that the issue was outside the sphere in which the League could wisely venture, a view which for the Irish Free State Mr. Blythe naturally countered. But he condemned the idea that tariffs all round should be reduced as unfair to the Free State with her too low tariff, which she must certainly increase, since industrialisation of the State to a certain degree was essential for a more just balance of productive activity. Australia and the Free

State in 1929 and 1930 were again vocal in denouncing the idea of a tariff truce or the lowering of barriers, and in 1930 repudiated the suggestion that the central and south-eastern European states should be given a preference in the markets of western Europe as a means of extricating themselves from the extreme economic depression in which they were placed. The failure of the Dominions to realise as late as 1930 the ruinous tendency of the erection of tariff barriers is natural enough, but it is significant of their almost complete detachment from the realities of the situation in Europe, and Australia was soon to realise that her own position was incapable of remedy by the mere process of rendering it impracticable for foreign countries to send her exports, while expecting them to take her natural products in ever increasing amounts.

(6) The Dominions, it has been suggested above, cannot claim the right to make war independently of the United Kingdom. The best case that can be made out for any such claim rests on their separate signature of the Kellogg Pact renouncing war as an instrument of international policy. But the value of the argument is minimised by the fact that it was an occasion on which the British Government successfully insisted that the conclusion of the Pact must depend on its acceptance by the whole of the Dominions. The argument that the Dominions have not accepted the British interpretation or reservation regarding the extent of the right of defence is interesting. It suggests that the Dominions might be internationally bound not to take as justified a war commenced on that plea by the United Kingdom, so that they would have the duty to be neutral in the conflict. This, however, does not show that the

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Dominions have any power to make war by themselves; at most it gives some ground for the argument of the possibility of neutrality. Against that argument must be set the fact mentioned above that the Dominions claim that their commercial relations *inter se* are not subject to the rights of foreign countries under the most favoured nation clause, and that they have asserted at the Imperial Conference of 1926 that it is recognised by the League that agreements *inter se* are not governed by the League Covenant and that the Covenant does not apply to their mutual relations. The dissent of the Irish Free State has been expressed in 1924, and in respect of the acceptance of the Optional Clause in 1929 and of the General Act of 1928 in 1931, but the Free State has no conclusive right to speak for the other Dominions. In fact she has expressly excluded from her treaties giving most favoured nation treatment any inter-imperial concessions. This, of course, may be treated as an admission that but for the omission by specific mention the concessions to other Dominions would fall within the clause, but it is also open to argue that the exclusion is a matter of precaution, and in any case it is certainly a definite expression of the view that inter-imperial commercial relations should stand in a quite different category from international commercial relations.

As already pointed out, if a Dominion cannot be neutral in international law, the declaration of war by the United Kingdom without Dominion assent would clearly be most unfortunate. The necessity of carrying the Dominions with her in any policy is an obvious duty of the United Kingdom, and aggressive war is so little probable that the issue can hardly arise. If it did

under circumstances implying the defective working of the Covenant and the Pact, it is clear that it would rest with each of the Dominions, if not attacked, to regulate its conduct according to its own interest and any agreement for imperial co-operation it might have made. The automatic effects of belligerency, such as severance of relations with the enemy country, internment of enemy vessels and of enemy subjects, would depend on Dominion decisions. No doubt by legislation intercourse with the enemy could be facilitated as much as the Dominion deemed desirable, even at the expense of friction with the United Kingdom and other Dominions. In such a manner a Dominion might produce in effect the condition of peace between itself and an enemy state, but it must be doubted whether it could make a valid peace without severance of the imperial bond. It is in fact in the last resort clear that the King could not at one and the same time be head of a country waging war and of one which made peace with and thus rendered material assistance to the enemy of the United Kingdom.

(7) The position of Newfoundland differs essentially as regards foreign affairs from that of the ordinary Dominion, which is a member of the League of Nations and therefore in a very definite sense an individual unit of international law. In the case of the great international Conferences it is not the practice for Newfoundland to be given special representation; the British representatives act for it as they do for Southern Rhodesia, Malta, and the Crown Colonies and Protectorates. On the other hand, it must be remembered that, while for other parts of the Empire the United Kingdom makes the final decision in these issues of

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acceptance or not of treaty obligations, it only adheres for Newfoundland with the assent of that Dominion. Nor in theory would that Dominion be refused the right to conclude a treaty through her own representative, who would sign the convention if the matter raised were one of special concern to the Dominion, as, for instance, would be a compact as to trade with the United States. It must, however, be remembered that the obligation to consult the Dominions on treaty matters involves the right of any of them to object to separate action by Newfoundland and diminishes the possibility of Canadian interests being prejudiced by separate action by that Dominion.

The Dominion is entitled to the régime of discussion of British policy at the Imperial Conferences and to consultation on all issues of general concern, as in the case of the Geneva Protocol of 1924, and the disarmament projects of the British Government. But in issues of fundamental importance it is contented to adopt British guidance—and indeed New Zealand has often accepted a like doctrine without public dissatisfaction. It is not doubtful that a British declaration of war would at once apply to Newfoundland, and for the purposes of the jurisdiction of the Permanent Court of International Justice, as for representation in the League of Nations Council and Assembly, Newfoundland is dependent on the action of the British Government. It is not a unit which can be deemed responsible internationally to a foreign power for any action taken by it contrary to treaty; for that the United Kingdom still remains bound to answer, and, if necessary, to accept the findings of the Court or the intervention of the League of Nations. Its position thus in these

matters resembles that of Southern Rhodesia, but in virtue of membership of the Imperial Conference and the right to enjoy the benefit of its resolutions as to consultation on international issues, it differs in essence from that colony.[1]

[1] Southern Rhodesia was duly represented at the Ottawa Conference and entered into trade agreements.

CHAPTER XVII

THE DEFENCE OF THE DOMINIONS

SINCE 1862 at least it has been recognised that the true policy of the Empire is that each Dominion should be prepared to undertake all matters of local defence, while external defence should largely be a matter for the British fleet. But it has also been recognised that even as regards naval defence the Dominions should endeavour to relieve the British taxpayer of some portion of the cost. This feeling has resulted in the development, on the one hand, of the military and air defences of the Dominions in practically complete autonomy, and, on the other hand, of the gradual evolution of naval defence based on the closest co-operation with the British fleet.

(1) Constitutionally, of course, the Crown is the head of the various forces throughout the Empire, but the practice or law is to grant to the Governor-General the title of Commander-in-Chief. In the Irish Free State alone is the position of the King ignored, as it is as far as possible in every form of governmental and judicial activity. That does not, however, alter the fact that the troops owe allegiance to the sovereign and that the whole of the executive government is vested in the Crown, though in effect the power is exercised quite independently of the King or his representative in the

Free State by the Executive Council or the Minister for Defence.

Whatever the extent of the prerogative of the Crown in matters of defence in the Dominions, the matter now rests on statute, which may be taken to have rendered obsolete any prerogative powers. The keeping of a standing army of any kind in the Dominions is no doubt illegal unless approved by statute, and the present forces are all so regulated. Such power of compulsion to serve as now exists in law depends entirely on statute, and the courts are open to test the validity of any effort to compel service. During the war of 1914–18 the extent of the power to provide for defence was tested in the Dominions by persons who alleged on one ground or another that the Dominions had no power to compel men to serve overseas, but in Canada,[1] in Australia,[2] and in New Zealand[3] alike the arguments adduced were rejected.

(2) The military forces of Canada, together with the air service and the naval force, were in 1922 placed under a Minister of National Defence, whose chief task since that date has been to reduce the forces of the Dominion in accordance with the decision of the Government that public policy was opposed to the carrying out of the project of Sir R. Borden after the war to increase largely the Dominion troops.

In law all male British subjects in Canada are liable to service in the Militia from age eighteen to sixty, and in the case of a *levée en masse* all the male inhabitants capable of bearing arms are liable to service. Moreover,

[1] Keith, *War Government of the British Dominions*, p. 84 (*Grey's Case* (1918), 57 S.C.R. 150).

[2] *Sickerdick* v. *Ashton* (1916), 25 C.L.R. 506.

[3] *Semple* v. *O'Donovan*, [1917] N.Z.L.R. 273.

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there is given the power to complete a corps either for training or emergency by ballot, but these powers of compulsion are not made use of, special legislation being passed in 1917 to provide for compulsory service overseas, though in law the Militia is liable for service in Canada and beyond Canada for the defence of the Dominion, and it was open to argue that this fully covered the case of the war of 1914–18. In time of war, and when under exercise, the troops are made subject to the Imperial Army Act.

In practice the Militia is divided into an Active Militia and a Reserve Militia. In both cases recruiting is voluntary. The Active Militia is divided into a small Permanent Militia (3400 strong), whose business includes the care of forts and the provision of schools of instruction and instructors for the Non-Permanent Militia. The term of enlistment is normally three years. Non-Permanent Militia may be called out for training for a period not exceeding thirty days in any year, but at present four and a half days' training at headquarters of 32,000 city corps suffices. The Reserve Militia is also recruited voluntarily. There is an elaborate organisation and the Royal Military College at Kingston trains cadets for commissions, and the trainees are also eligible for commissions granted by the British Government in the imperial forces. The Air Force is also organised as permanent and non-permanent and recruited voluntarily from men between eighteen and forty-five years of age. In addition, semi-military training on a voluntary basis of cadets is carried out on a growing scale.

The Minister is aided in his work by a Defence Council over which he presides, while the Vice-Presi-

dent is the deputy of the Minister, and the members the Chief of the General Staff and the Chief of the Naval Staff, with the Adjutant-General, the Quartermaster-General, and the Director, Canadian Air Force, as assistant members, and a Secretary.

(3) The Commonwealth of Australia has passed through several stages of development of military policy. The first period was spent in reorganising the colonial forces on a national basis, then from 1909 began the period of compulsory training, supplementing the enactments of 1903 and 1904, which provided for the liability to serve in Australia in war time of all male inhabitants between eighteen and sixty. The new system, which was due in large measure to the advice of Lord Kitchener, extended the possible liability of compulsory training in peace up to age twenty-six. This was in process of development when war supervened, and brought about the creation for service overseas on a voluntary basis of the Australian Imperial Force. Referenda for conscription were attempted in 1916 and 1917, but failed to secure approval. After the end of the war, in 1921, a divisional organisation was worked out with a minimum of permanent staff on the basis of the units of the Australian Imperial Force. But in 1922 financial and other considerations brought about the reduction of the scheme to a nucleus force. From November 1, 1929, the régime of modified compulsion ceased, and a voluntary basis was adopted, the nucleus force of 48,000 Citizen Force and 16,000 Senior Cadets being reduced to 35,000 Militia Forces and 7000 Senior Cadets. The organisation provides for 55 battalions in 14 brigades. Enlistment in the Militia is open from age eighteen to forty, the period being

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three years, which may be renewed up to age forty-eight; the training is annually sixteen days, of which eight are continuous camp training. Senior Cadets from sixteen to seventeen are attached to Militia units; from fourteen they serve in school detachments. The Royal Military College at Sydney provides for the training of cadets as officers. Air administration is entrusted to a Board, and provision is made for a training school and two service landplane squadrons and one service land amphibian flight.

The control of the defence forces as a whole is given, as in Canada, to a Minister for Defence, who has a Defence Committee to advise him, composed of the Chiefs of the Naval, General, and Air Staffs, with a Financial Secretary and a Secretary, while Military and Air Boards, each of three service members and a finance member, carry out administration.

(4) New Zealand, like Australia, adopted under the influence of Lord Kitchener the policy of compulsory training for defence. The plan was supplemented in the war period by compulsory service overseas, and on the termination of the war the system of compulsion remained in law, though it was modified by many concessions in practice, partly dictated by considerations of economy. The influence of the abandonment by Australia of compulsion was indicated by the proposal in 1930 to abandon compulsion and reconstruct on a voluntary basis, but this project failed to pass the Council. In 1931, however, the definite intention to drop compulsion was announced. The new system necessitated the decision to increase the maximum ages of service from twenty-five in the case of the Territorial Forces to thirty-five, and from thirty in the case

of the Reserve to forty. Moreover, it will be possible for officers to remain to age sixty and warrant officers to age fifty. The territorial organisation is adhered to on a voluntary basis, and the expenditure (£200,000 with £40,000 additional for aviation) will, it is hoped, be more than halved. A total force of under 10,000 as a maximum is aimed at, but grave uncertainty exists as to how far the voluntary system will provide the numbers desired. There is a small Air Force, and rifle clubs.

The control of the forces is vested in the Minister of Defence, and he has as his chief adviser the officer commanding the New Zealand Military Forces, who is Chief of the Staff. New Zealand thus prefers the simpler organisation, which dispenses with a Board.

(5) The Union of South Africa was partly formed in order to consolidate defence, and the task was in progress when the war broke out and exposed it to the strain of a rebellion and an attack on South-West Africa. Its success was such that on December 1, 1921, the Imperial Military Command in South Africa was abolished, and responsibility for the coast defence of the Cape was taken over by a Union Commander. The necessary property for the purpose was handed over gratis by the Imperial Government, and legislative provision was made by the Union for its maintenance for that purpose.

The Union still retains the doctrine of compulsory training and service laid down by the Act of 1912, and now amended in certain respects by the Act of 1922. Under it every citizen of European descent is liable to render service in any part of South Africa within or without the Union in time of war for the defence of the Union. Every citizen of sound physique is liable

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to four years' training between age seventeen and twenty-five. A minimum of 50 per cent of those liable is called upon to serve; those who are not selected must at age twenty-one enter a rifle club for four years. As an alternative every such person may enter the South African Division of the Royal Naval Volunteer Reserve, and any citizen may enter a rifle club if he pleases. There is a small permanent force, and a Coast Garrison Force, composed of Garrison Artillery, in which citizens may serve, and a Coast Defence Force of men trained in engineering, harbour works, etc. The Active Citizen Force is composed of those in training between age seventeen and twenty-five; the Rifle Associations include all those not so trained from age twenty-one to twenty-five, and others who volunteer, as well as boys from thirteen to seventeen in areas where no cadet training exists. The Citizen Force Reserve is made up of ex-members of the Active Force up to age forty-five and ex-members of Rifle Associations up to the same age. The National Reserve embraces all between seventeen and sixty not serving in the Active Force or the Citizen Force Reserve; after these have been called out in time of war, the National Reserve may be called up in three classes by age. Cadet training is available from age thirteen to seventeen for those boys whose parents do not object; it lasts three years and shortens the period of compulsory service. The Air Force is intended to secure the training of airmen and the maintenance of a small permanent force, concentrated at Pretoria, with power to reach in a day any point in the Union. The force has been employed in reducing revolt in South-West Africa, but with inevitable complaints of undue destruction of innocent tribesmen and women.

The Minister of Defence is aided by a Council of Defence and a headquarters staff on the usual basis. The Director of Air Services is also commandant of the Air Force, and the Chief of the General Staff is Secretary for Defence and also Executive Chief of the Union Defence Force. The Union Military Discipline Code is based on the Army Act; it applies always to the permanent force, and also, when on service, to the other forces, with certain restrictions on punishment when not on war service. Civil courts have jurisdiction in respect of offences under it as well as of those matters which are punishable also by civil law.

The purpose of the scheme is essentially to secure the Union against the possibility of native unrest on a serious scale. Therefore, under General Hertzog's régime, special stress has been laid on the giving of facilities for training to the rural districts of the Cape and to the farming population in the Transvaal and Orange Free State.

(6) The Irish Free State has not yet determined on the form of army best adapted to its needs. During the régime of Mr. Cosgrave the essential requisite was to provide a force sufficient to keep the subversive elements under republican leadership in a state of quiescence. That the army should be effective to combat foreign attack was soon realised to be an impossibility. Under the treaty of 1921 its numbers are in theory limited to the proportion borne by the population of Ireland to that of the United Kingdom of the British forces. The rule is ambiguous, as the term Ireland may be interpreted as including Northern Ireland in the Free State population for the purpose of computing the number, but the issue is of no importance. The

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force was progressively reduced to some 5000 men with a reserve of picked men, which can be called up in national emergency or in aid of the civil power, efficiency being maintained by twenty-one days' annual training.

The Minister for Defence is aided by an advisory body, the Council for Defence, composed of four members, the Parliamentary Secretary to the Ministry, who is chosen from the Dáil, the Chief of Staff, the Adjutant-General, and the Quartermaster-General. The military members hold office at the pleasure of the Executive Council, and the maximum tenure of office is three years continuously.

Considerable difficulty has been experienced in keeping the Army free from faction, and the advent of Mr. De Valera to office has increased the delicacy of its position and the danger to public safety through the resumption of activities by the Irish Republican Army, a force unrecognised by law, and under Mr. Cosgrave's régime the object of severe repressive legislation, now suspended in operation.

Newfoundland has frankly abandoned any effort to provide for military defence, as a result *inter alia* of the lack of funds and the recognition of the dependence of the Dominion on British naval protection.

The cessation of the practice of stationing imperial troops in the Dominions renders for the time being the power of the Dominions to repeal the Army Act in its application to their territories of no importance. But it is clear that under the new conditions it is necessary to secure that, if any troops from the United Kingdom or a Dominion should be stationed by agreement in a Dominion or the United Kingdom, there should be

accorded to them such immunities from local jurisdiction as might be suitable. The issue is raised in a slight form as a practical matter by the powers given to the British Government as regards the coastal defence of the Irish Free State, in which the power has now been given to repeal the Army Act in its application to its territory. Agreement on the principle of according a measure of exemption on the lines customary as between forces of different powers when present by agreement on the territory of the other, as in the case of Egypt, was arrived at during the Imperial Conference of 1930, and the detailed terms proposed will doubtless in due course be generally accepted.

(7) While the control over land forces was from the first clearly vested in the Dominion Parliaments, for the Imperial Army Act was carefully framed to leave room for local legislation for local forces, the development of naval forces in the Dominions was long retarded by the difficulties of legal authority. It was commonly held that the lack of extra-territorial power on the part of the colonies prevented their laying down discipline for ships outside territorial waters,[1] and obviously a navy restricted to operations in such waters would serve no useful purpose. An imperfect effort was made by legislation in 1865 to facilitate independent control of local flotillas, with full power to secure that in time of stress or war they would be available for imperial control. Some use was made of this power especially in Australia, but it was not until the Colonial Conference of 1907 and the later Conference of 1909 on defence that the decision was arrived at to permit the development of naval forces under Dominion

[1] *Brisbane Oyster Fishery Co.* v. *Emerson*, Knox (N.S.W.), 80.

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control, which would probably be transferred to British control in war. This project was developed at the Conference of 1911 to provide for the creation, if desired by Canada and the Commonwealth, of two squadrons with defined areas of operation. To render control possible an Imperial Act was necessary, the Naval Discipline (Dominion Naval Forces) Act, 1911, which ingeniously ensured that the Dominions should be able to legislate for their forces without danger of the measures being held *ultra vires*, while the British Government was enabled by Orders in Council to carry out the purpose of securing that there should be a regular relation of seniority between officers of the British and Dominion navies, and that officers of the different navies should be available for service on Courts Martial affecting officers of other branches. The Statute of Westminster, 1931 (s. 2), by its insistence on the right to repeal Imperial Acts as far as they extend to the Dominions, and by the grant of extra-territorial power, completes the work of rendering beyond doubt the right of the Dominions if they please to control their forces.

The other aspect of control affects the position of Dominion war vessels in foreign waters and harbours. On that subject also agreement was achieved in 1911 on the basis of system of notification to the British Admiralty and the British representatives at foreign courts of the intention to visit foreign waters and harbours. Now that Dominion representation has been established, these officers might be used as channels of communication in such an event. But in general[1] the rule remains that the commanders of war vessels in

[1] Australia alone has a real navy and she has no diplomatic representatives.

such circumstances shall accept the advice given by the British Government on any issues of ceremonial, or questions of foreign policy.

(8) The actual forces of the Dominions have been steadily diminished in course of time. The Washington Conference of 1921–22 with its insistence on disarmament strengthened the desire in the Commonwealth, born of financial difficulties, to diminish the cost of the Australian navy, and the necessity of sinking the *Australia* as part of the reduction of the British naval forces in 1924 doubtless damped enthusiasm for naval development. In 1925, however, it was decided to build two cruisers of 10,000 tons, the maximum under the Washington treaty, and the *Australia* and *Canberra* were duly commissioned in 1928. Moreover, in order to provide Australian seamen with opportunity to share in fleet exercises on a substantial scale, arrangements have been made with the Admiralty for the exchange of a cruiser from time to time. The decision to provide also two new submarines arrived at in 1925 was finally modified in 1930–31 in view of the difficulty of maintaining in efficiency in Australia so highly specialised a service, and the British Government in 1931 took over the submarines as a free gift, agreeing to bear the cost of maintenance. The only other vessel of value, the seaplane-carrier *Albatross*, was built at Sydney and commissioned in 1929; other units—two small cruisers, four sloops, five destroyers—have been put in reserve. But a floating dock has been successfully provided for the docking of the cruisers. A Naval College on British lines has been established to train officers. Service is voluntary, the numbers being now 97 per cent derived from Australia, and there is a Reserve composed of

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men who have served in the Royal Australian Navy. The form of training and all matters of equipment are as far as possible the same as in the British Navy, as the necessity of the closest co-operation is recognised, though the fleet[1] is completely under Australian control even in war unless it is decided to transfer the supreme command to the British Navy and the Admiralty. Together with the military and air forces the naval force is controlled by the Minister for Defence.

The New Zealand naval force is also in time of peace distinct from the British Navy, but it passes under British control in time of war, and its close relation to the British force is marked by its designation given in 1921 as the New Zealand Branch of the Royal Navy. It is controlled by the Naval Board presided over by the Minister for Defence and including the Commodore Commanding. Enlistment is by voluntary recruitment for twelve years, which may be extended by agreement to twenty-two. As in Australia, it has been necessary drastically to reduce expenditure on the force, which is maintained mainly as a sign of the Dominion's desire to share in naval defence. A more striking symptom of this feeling is the decision in 1927 to contribute £1,000,000 towards the project of the Singapore base as a means of recognising that that enterprise was essentially dictated by considerations not of British but of Dominion interests.

In Canada the decision to have a distinct naval service has never flourished. It had not been developed in the period before the war, and it has hardly seriously

[1] Vessels exchanged, of course, fall under the control of the Government in whose fleet they serve, but Mr. Bruce has claimed a voice in any warlike use of an Australian vessel: Keith, *Responsible Government in the Dominions* (ed. 1928), ii. 1016, 1017.

been revived. There is the Royal Canadian Navy and its Reserve, and its Volunteer Reserve, both, of course, voluntarily recruited, costing 3,375,000 dollars in 1932; there are maintained in commission two destroyers and four mine-sweepers, half based on Halifax, half on Vancouver. The Minister for Defence is responsible for control of the force. Newfoundland naturally has made no effort to develop a force of her own.

In the Union of South Africa, on the score of national status, General Smuts at one time favoured the idea of an independent naval unit, but soon dropped the project because of cost. As matters now stand, citizens may volunteer to serve in the South African Division of the Royal Naval Volunteer Reserve, which has companies at Cape Town, Durban, Port Elizabeth, and East London, where there are two mine-sweeping trawlers and one surveying sloop. These units are administered under the orders of the Commander-in-Chief, Africa Station, by the Commander, South African Station, whose headquarters are at Simon's Town.

The charge of coastal defence by the treaty of 1921 was given in the case of the Irish Free State to the United Kingdom. The matter can now be reopened by agreement, but nothing is likely to be done on this head.

(9) The Dominions possess full control over their forces, and even in war time, as is recognised by the constitution of the Irish Free State, Article 49, it rests with their Parliaments to authorise their employment for purposes beyond self-defence.[1] A Government

[1] The doctrine was adopted in Canada in the Chanak incident on September 18, 1922, and reiterated on March 1, 1923.

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might, of course, in emergency, send troops or prepare to do so pending the meeting of Parliament, but the mere need of funds, apart from constitutional considerations, would render it impossible for it to ignore the legislature. It is a very different thing to suggest, as was done by Mr. Meighen in Canada in 1925–26, that before Canada sent any force overseas a general election should be held to decide the issue. Whether such action were possible would depend on many circumstances, and the general view taken of the proposition in Canada was that of Mr. Ferguson, that by such a procedure the non-participation of the Dominion in active hostilities would be assured. In case of actual attack, of course, no Government would wait for Parliament, for the right and duty of self-defence is obvious.

In the event of any Dominion desiring to use its forces overseas in an Empire war, the legislation of the Dominion can make the amplest provision for their control, and even in the war period of 1914–18, before the Statute of Westminster, the powers of the Dominion Parliaments added to the Army Act availed to remove any possibility of lack of legal authority. The Dominion may either in such a case retain control of its own forces or co-operate more completely by placing them, as during the war, under the British Commander-in-Chief, while sharing through some form of War Cabinet for the Empire with the British Government the supreme control of their employment. In view of the possibility of co-operation efforts have been made to assure similarity of organisation and training and of types of armament, while the Dominions have based their codes of regulations for use in war time on the Army Act, with such modifications as Dominion senti-

ment renders necessary. It may be remembered that Australian law during the war of 1914–18 was less rigorous in punishments than British, and that, on the other hand, the Imperial Parliament in 1930 made, against the advice of the Army Council, several mitigations in the terms of the Army Act in order to reduce the number of offences for which the death penalty was exigible, thus in part assimilating British law to the Australian model. The same aim to secure effective co-operation when desired is seen in the interchange of officers in the endeavour to secure the fullest friendly co-operation between General Staffs in the United Kingdom and in the Dominions, and in the invitation to the Dominions to take advantage of the facilities for the study of strategy and kindred problems afforded by the establishment of the Imperial Defence College.

The most important symbol of imperial co-operation is the Imperial Defence Committee, the creation of Mr. Balfour when Prime Minister, whose activities were as far as practicable developed by Mr. Haldane. The essence of that body is the principle as regards the Dominions of inviting their Governments to have issues affecting defence discussed there by Dominion ministers and experts, so that the Dominions may have the advantage of the best possible advice in any matters in which they care to receive it. The Committee has no powers of decision; it is purely an advisory body, though in the case of the United Kingdom its advice is normally adopted by the Cabinet and the Prime Minister who presides over its most important sessions. In its power of securing expert investigation on any issue it possesses resources which no Dominion Government can ever expect to enjoy. It cannot, however, be

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said that the suggestion that each Dominion should create a like Defence Committee has been developed to any extent, for the Dominions are as a whole uninterested in issues of defence.

This decline in concern with defence has been seen especially in the abandonment of the compulsory system in Australia and New Zealand, the striking reduction of Australian efforts at setting up a navy of her own, and the general determination to rely for security on external forces of one sort or another. In the case of Canada the Monroe doctrine has always provided a sure shield against foreign intervention or serious attack. In the case of the rest of the Dominions the League Covenant and the Kellogg Pact serve much the same purpose, together with the projects of disarmament, which are believed to indicate far more probably the future trend of events than the disbelief of Signor Mussolini in the desirability of the abolition of war or the ideal of perpetual peace, or the determination of Germany to undo the whole system of the peace treaties. Yet it must be borne in mind that Germany has strong claims for the restoration to her of the Pacific and African territories allotted to Australia and to New Zealand and to South-West Africa, and that none of these Dominions could view with anything save grave inquietude the presence on their borders of what is potentially one of the greatest of powers. Moreover, the attitude of Japan towards the League of Nations is a constant reminder that Australia bars entry to Japanese and other orientals, and yet seems unable to increase her population to such a number as would give moral support to her claim to be entitled to maintain a White Australia. In comparison with the burden

borne by the British taxpayer (in 1932–33, £50,476,300, navy; £36,488,000, army; £17,400,000, air), the contributions made by Dominion taxpayers are scarcely more than nominal, even in the case of Australia, which reduced defence expenditure from £7,890,938 (£2,765,033 for the navy) in 1926–27 to £3,913,031 (£1,762,983) in 1930–31, and since has effected further reductions.

As a result of the renunciation of legislation for the Dominions by the Statute of Westminster (s. 4), the Army and Air Force (Annual) Act, 1932, provides modifications in the Army and Air Force Acts as regards any Dominion in which the Statute is brought into operation. These Acts still govern British forces in such Dominions, but leave intact any jurisdiction of civil courts to try persons subject to military law for any offence; imprisonment of offenders in Dominion prisons depends on Dominion law, as does punishment of civilians for violation of the Acts.

CHAPTER XVIII

THE CHURCH IN THE DOMINIONS

FOR a variety of reasons the Imperial Government never succeeded in securing the adoption of the doctrine that the Church of England held in the colonies the same position as it did in England. In fact the appointment of a bishop to the American colonies, a step which must have raised in acute form the whole legal position, was deliberately avoided, to the great detriment of the adherents of that body; but, in the case of Quebec, the King, who would not concede any freedom of religion to his subjects in Ireland, was induced to consent virtually to establish and endow the Roman Catholic Church in Quebec, and to release it in fact from the measure of civil control which the French kings had always, in consonance with the fixed principles of the French monarchy, continued to exercise over the appointment and activities of the episcopate.[1] The result of this policy has been that in the Dominions there is no established church save that of Quebec, which may in effect be held to enjoy that position.

(1) It was at first held that there existed prerogative power in colonies to create bishoprics by letters patent and to confer on these bishops power to deal with the

[1] Keith, *Const. Hist. of the First British Empire*, pp. 222 ff., 386 ff.

conduct of clerical persons and to inflict ecclesiastical punishments upon them. For this purpose it was deemed necessary to give authority to summon and swear witnesses, but otherwise jurisdiction over the laity was not asserted. Bishoprics of this type were created in Canada from 1787, in Newfoundland in 1839, and in Australia from 1836, but such action in 1842 in Tasmania elicited protests against the right to summon and swear witnesses. It was then realised that the prerogative power did not extend to authorise such action, and henceforth, save by inadvertence, letters patent gave merely the power to visit and enquire into clerical action. The lack of coercive power was speedily remedied by local Acts in the Australian colonies and in Canada. But in 1853 letters patent were issued under which the Bishop of Cape Town, whose office had been created, with power to visit, only in 1847, was given the position of metropolitan in respect of the newly created bishops of Natal and Graham's Town. This led to the decision of the bishop to summon a synod, and to a conflict with Mr. Long in his diocese, who held that the bishop's action was illegal. The status of the Church was therefore investigated in *Long* v. *Bishop of Cape Town* [1] by the Privy Council, which held that after the grant of representative institutions to the Cape the Crown could neither regulate religion nor civil rights by prerogative, and that Mr. Long's position must rest merely on contract, not on any jurisdiction inherent in a bishop. As, however, Mr. Long was in the right in objecting to a synod held without the authority of the Crown or the legislature, he had done nothing to merit

[1] 1 Moo. P.C. (N.C.) 411; Keith, *Responsible Government in the Dominions* (ed. 1912), iii. 1426–35.

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removal. This was followed by the famous conflict between the bishop and Dr. Colenso, bishop of Natal, when the bishop as metropolitan sought to remove Dr. Colenso from his post because of his alleged heretical doctrines. In this case the Privy Council, on a misunderstanding of the facts,[1] held that the Crown had no legislative power as regards Natal and that the metropolitan relation was invalid in respect of civil law, for the law of the Church of England was no part of colonial law without legislative sanction. In fact the Crown had still power, as Natal was a conquered or ceded colony and had not then received representative government, so that the principle of *Campbell* v. *Hall*[2] did not apply, and in *Bishop of Natal* v. *Green*[3] the local court asserted, quite correctly, the authority of the bishop over his clergy under the letters patent.

The Imperial Government, however, decided now to abandon creation of colonial bishoprics by letters patent even where the legal power existed, and henceforth the colonial churches were allowed to regulate their own mode of selecting bishops, though, if a Dominion bishop desires consecration by the Archbishop of Canterbury, the royal licence must be obtained, while the position of colonial clergy was legislated for as regards England by an Act of the British Parliament in 1874 at the instance of Lord Blachford. South Africa developed a Church of its own, in communion with the Church of England but no part of it. This issue was settled by the Privy Council in *Merriman*

[1] *Lord Bishop of Natal, In re* (1865), 3 Moo. P.C. (N.S.) 115; cf. *Bishop of Cape Town* v. *Bishop of Natal*, L.R. 3 P.C. 1.

[2] (1774), 20 St. Tr. 239.

[3] [1868] N.L.R. 138; 18 L.T. 112. Cf. *Bishop of Natal* v. *Gladstone* (1866), L.R. 3 Eq. 1; *R.* v. *Eton College* (1857), 8 E. & B. 610.

v. *Williams*,[1] when it was pointed out that the constitution of the Church of the Province of South Africa expressly disclaimed the binding effect of judgements on doctrine of the Privy Council, and thus created an irreconcilable gulf between the two churches. It follows, therefore, that any church in the Cape which, like Trinity Church, is vested in trustees for the maintenance of worship according to the Church of England cannot be handed over to the control of the South African Church, unless, of course, by legislation, a doctrine reaffirmed in 1932 by the South African courts[2] following the decision of the Privy Council. In the same way the intervention of the legislature in 1910 was necessary to secure for the South African Church control of the property which had been in the charge of Bishop Colenso as a representative of the Church of England proper.

(2) The Protestant Churches other than the Church of England never had any claim to be established churches, though the Church of Scotland had a right to be treated under the Canada Constitution Act of 1791 as one of the Protestant Churches for whose maintenance governmental endowments of land were provided, a régime which, after causing the long-drawn-out controversy over the clergy reserves, was ended in 1854 by the diversion of all the property to purely secular ends, with a saving for life interests. The position of these churches and of all other religious institutions rests therefore on contract, and on that basis the courts may have, when any civil as opposed to merely

[1] (1882), 7 App. Cas. 484.

[2] The dispute arose regarding the same Trinity Church as in *Merriman* v. *Williams*, the Appellate Division on June 30 negating any control over it of a bishop of the South African Church.

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religious issue arises, to investigate the practice and doctrine of the church so far as to decide the justice or injustice of a claim to property or of immunity from removal from office. The position is thus precisely as in *Merriman* v. *Williams*, where it was necessary to decide whether or not the South African Church could assert a claim to property which was held on trust for the Church of England. The court perforce had to investigate the doctrines and discipline of the South African body to determine its relation to the Church of England, and the case is important because of the recognition that no mere change of form of government—which might be inevitable—would necessarily terminate vital connection so as to prevent continuity. The chief difficulty which now arises is to decide how far a minister may deprive himself of the right to appeal to the civil courts by binding himself to accept the jurisdiction of the religious courts. The question was debated in *Macqueen* v. *Frackleton*[1] by the High Court of the Commonwealth but without absolutely decisive results, and it is probable that no exact rule can be laid down *a priori*.[2]

Legislation to enable the churches to manage their affairs and to set out their constitutions in accordance with their wishes is far from rare. The Dutch Reformed Church was enabled to unite its distinct units in the four provinces by a Union Act of 1911. In 1927, by a

[1] (1909), 8 C.L.R. 673. Compare *McMillan* v. *Free Church of Scotland*, 22 D. 290.

[2] Disputes often turn on the power to adopt new doctrines where property is held on trust: *Wodell* v. *Potter*, [1929] 3 D.L.R. 525 (Baptist Church). The courts will not interfere in relations of members of a voluntary society if what is done is within the rules, if these are not contrary to natural justice and are applied in good faith: *Wetmon* v. *Bayne*, [1928] 1 D.L.R. 848.

private Act of the Union, the Wesleyan Methodist Church of South Africa, hitherto in organic union with the parent conference in Great Britain, was recognised as an entirely autonomous community, though remaining in communion with the parent body. Of fundamental importance to Canada has been the union of the Presbyterian, Congregational, and Methodist Churches into the United Church of Canada. It necessitated Dominion and provincial legislation, for a church extending throughout the Dominion could not be dealt with by provincial legislation on civil rights alone. Hence a certain amount of difficulty arose as to the question of entry into the United Church, for a strong body of Presbyterian opinion, especially in the eastern provinces where religion takes on a more particularistic type, felt unwilling to enter the new body. Authority was given by Dominion Act in 1924 for creation of the United Church, and six months before June 10, 1925, were allowed for any congregation to decline inclusion, in which case the church property was not to pass to the new body. In Nova Scotia an Act of 1924 gave authority to any congregation to join the United Church at any time after June 10, 1925, and St. Luke's congregation, which had originally in 1924 decided not to join, declared in July 1925 its desire to join. It was ruled by the Privy Council[1] that the choice under the Dominion Act ruled the position, for the right to enter the United Church or to remain out of it must be declared prior to June 10, 1925, and the provincial Act could not alter that fact as it had proposed to do.

[1] *St. Luke's, Saltsprings, Trustees* v. *Cameron*, [1930] A.C. 673. For other cases see *Aird* v. *Johnson*, [1929] 4 D.L.R. 664; *Ferguson* v. *Maclean*, [1931] 1 D.L.R. 61.

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Subsidies to churches have now generally been abandoned by Parliaments, though for a time the Australian colonies for the most part made grants in proportion to numbers of members of the several congregations. The Commonwealth of Australia is specifically forbidden to establish any religion or require a religious profession from a servant of the Commonwealth, nor may it interfere with the exercise of religion, but these rules are rather *pro forma* than of importance. In the case of the Irish Free State, however, the treaty of 1921 enjoins abstention from religious discrimination,[1] and the Constitution by Article 8 provides that "freedom of conscience and the free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen, and no law may be made either directly or indirectly to endow any religion, or prohibit or restrict the free exercise thereof, or give any preference, or impose any disability, on account of religious belief or religious status, or affect prejudicially the right of any child to attend a school receiving public money without attending the religious instruction at the school, or make any discrimination as respects state aid between schools under the management of different religious denominations, or divert from any religious denomination or any educational institution any of its property except for the purpose of roads, railways, lighting, water, or drainage works, or other works of public utility, and on payment of compensation."[2] It must be presumed that, despite the disappearance of

[1] The Roman Catholic Church law is in the Free State a foreign law, to be proved as in England, not part of local law as in Quebec: *O'Callaghan* v. *O'Sullivan*, [1925] 1 I.R. 90 (power of bishop to remove parish priest).

[2] For the power of control of schools in the parallel case of Northern Ireland, see *Londonderry County Council* v. *McGlade*, [1929] N.I. 47.

any Imperial Act to render this provision binding if the Irish Free State repeals the Imperial Act of 1922, the treaty and the constitution will still govern the clause and prevent action contrary to it being valid, but the same issue rises as in the case of the proposed abolition of the oath of allegiance.

(3) A different fate has attended the Church of Rome in Quebec. British policy in 1774 confirmed it in its privileges and gave it legal powers to exact its dues from all Catholics, though not from Protestants. The effect of this concession, which has been continued in all subsequent legislation and is now regulated by provincial statutes, is to give the church virtually the position of the established church of Quebec. Moreover, the law of Quebec continues much of the old ecclesiastical law. This favoured position has not gone without comment in the Dominion, and prolonged litigation and much bitterness were excited in 1869–75 by the controversy over the right of a Catholic who had been condemned for his opinions by the hierarchy to secure burial in a Roman Catholic cemetery. The Privy Council[1] decided the issue in favour of the right, based on a careful study of Quebec law, which later was altered. Even more acute for a time was the unrest caused by the assumption of some Canadian judges that the decree of the Pope known as Ne temere regarding forms of marriage altered automatically the law of Quebec. This contention was also disallowed by the Privy Council,[2] which took the opportunity to point out that the concession made to the church in

[1] (1874), L.R. 6 P.C. 157 as *Brown* v. *Curé de Montréal*; Willison, *Sir Wilfrid Laurier*, i. 53-76.

[2] *Despatie* v. *Tremblay*, [1921] 1 A.C. 702.

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1774 did not continue the church in the plenitude of its former powers under a régime which did not even tolerate Protestantism, but gave it a defined position which, but for statute, would have been illegal. This judgement established that Quebec may legislate, if it pleases, to conform to papal injunctions, but that such injunctions are not part otherwise of the law of the province. The position is in a sense vital, because the province is inhibited from any rash legislation which might injuriously affect Protestants by the Dominion power to disallow, but, if the law were capable of automatic change by the Pope, the safeguard for moderation would be gone. The church dominates Quebec life, and its attitude towards Protestants is not badly revealed in the provincial Act of 1903, which classed Jews with them in school matters, or the argument of one judge in the case [1] arising out of that action, that Jews were in the same religious category as Protestants, a rather interesting revelation of Christian charity. Striking also is the Act of 1888, which, to please the Pope, restored to the Jesuits the property confiscated on the conquest of Canada, although any claim to it had long been extinguished either by the suppression of the order by the Pope in 1773 or the death of the last member of the Order in Canada in 1800. Strong as was feeling against the measure, the Dominion Government was upheld by the Commons in its refusal to interfere in a decision which was one for Quebec to make as it pleased.

(4) Sectarian feeling has intervened in politics mainly through the claims of the church in Quebec to govern the politics of its adherents. The issue was bitterly

[1] *Hirsch* v. *Montreal Protestant School Commrs.*, [1928] A.C. 200.

disputed during the period from 1873 in Canadian politics when the hierarchy was opposed to the Liberal party. At the Charlevoix bye-election the curés used undue influence and spiritual and temporal intimidation freely. Yet when the election of Mr. Langevin was attacked on this score, Routhier, J., held that he had no jurisdiction to censure a priest on account of the exercise of his duty to advise parishioners in accordance with the views of his superiors. He accepted the view that an ecclesiastical person was not subject to the jurisdiction of a civil court without the sanction of his spiritual superior. This view was rejected by the Supreme Court, Taschereau, J., and Ritchie, J., both negating the doctrine of ecclesiastical immunity and the superiority of the church to the laws of the land.[1] The same view was taken by Casault, McCord, and McGuire, JJ., in holding void in 1876 the Bonaventure election in Quebec on the ground of spiritual penalties being threatened against those who voted for the Liberal, with the approval of the Conservative candidate. Efforts were made by the Pope to inculcate moderation on the ecclesiastical authorities, and after a visit of Mgr. Conroy as apostolic delegate in 1877 the bishops issued instructions which should have prevented a repetition of the earlier tactics. None the less, in 1878 the election at Berthier was reversed on the ground of the use of spiritual threats to intimidate the voters, a policy used successfully in 1932 in Malta. Much vehemence was shown in 1896 in the controversy over the Manitoba education question,[2] but Sir W.

[1] Willison, *Sir Wilfrid Laurier*, i. 253-96; *Brassard* v. *Langevin*, 1 S.C.R. 145.

[2] Skelton, *Sir Wilfrid Laurier*, i. 440-85, ii. 16; Willison, *op. cit.* ii. 202 ff., 259 ff.

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Laurier succeeded in winning a victory despite the efforts of the hierarchy to secure a majority for the Conservative Government in gratitude for its efforts to coerce Manitoba. Sir W. Laurier succeeded, however, at no distant date in winning popularity by his adjustment with Manitoba of the education question, and he placed Catholics under considerable obligations by his insistence against the wishes of many in his own party in forcing denominationalism on Saskatchewan and Alberta in 1905 when they were given provincial status.[1] The church has in later years moderated the vehemence of its claims, but the substance of its control over the faithful has in no wise been reduced, nor is there any doubt that it is to the church that Quebec owes the preservation and extension of the French-Canadian race.

In New South Wales and Queensland Roman Catholic influence is strong and has on the whole favoured the Labour party, for many of the Catholics are Irish who are disloyal to the imperial connection and see in the Labour party the most promising material for carrying out the aim of detaching the Commonwealth from the Empire.

It is in the sphere of the teaching of religion in schools that political struggles have chiefly centred. Reference has already been made to the issue in Canada; how much alive it is may be seen from the bitterness of the denunciation of Saskatchewan for forbidding in its ordinary schools the display of religious emblems in 1930. In Australia the principle that

[1] Skelton, *op. cit.* ii. 224-47; Willison, *op. cit.* ii. 369-80; *R.* (*Brooks*) v. *Ulmer*, [1923] 1 D.L.R. 304; *Alberta Act, Section* 17, *In re*, [1927] S.C.R. 364, assert the validity of the limitations put on provincial power.

children shall have some form of religious instruction, unless their parents object, is accepted in New South Wales, in Queensland, where it was insisted on by the voters at a referendum of 1908 in the teeth of the Government of the day, in Tasmania and in Western Australia, but not in South Australia or Victoria, while New Zealand has been acutely divided on the issue but without effect so far. In the Union of South Africa schools are opened with prayer and Bible reading. The teaching of Bible history is permitted subject to a conscience clause, but no doctrinal or sectarian instruction is allowed, save in the Cape province under conditions laid down in an Ordinance of 1921. In the Irish Free State, of course, denominational education is largely prevalent.

CHAPTER XIX

HONOURS AND PRECEDENCE

(1) It has already been pointed out that so long as Dominion officials and residents are anxious to receive honours with imperial status, the Governments of the Dominions, despite their new status, cannot expect that their advice shall prevail with the King without the assent of the Imperial Government, within whose functions the control of this prerogative still lies. The rule prior to the evolution of Dominion status was simple. The Government of a Dominion or State could recommend for honours, but the Governor-General was expected to comment on such recommendation, and he was not debarred from himself suggesting names when the honours were not intended to be awarded for political services. It was in fact obvious that for the British Government to reward in this way a political enemy of the Dominion Government would be highly unwise. In the case of the States the Governor-General personally was also requested to give his opinion, chiefly from the point of view of the comparative claims of persons recommended by the different States.

In the case of Canada the award of honours fell into disrepute during the war, partly owing to the unwise generosity of grants, partly owing to the innovation of including hereditary honours such as peerages and the

unpopularity of two of the recipients of these honours. The Government of Sir R. Borden did not wholly share the view of the people, and drastic action was forced by the voice of the back-bench members of the House of Commons, whom the ministry dare not defy. An address was voted to the Crown in 1919 "to refrain hereafter from conferring any title of honour or titular distinction on any of your subjects domiciled or ordinarily residing in Canada, save such appellations as are of a professional or vocational character or which appertain to an office". It was further requested that every hereditary honour held by a person domiciled or ordinarily residing in Canada should be made to terminate on his death. The latter request was not formally acted upon, as the proposal would have required an Imperial Act, but the former has been religiously observed. The rule has been resented by those circles in which honours were held in value, but an effort by the leader of the opposition to secure a reversal of the decision failed decisively and the probability of the Government risking popularity in the democratic West by insistence on change is small. The presence of the United States in close proximity has an inevitable effect in rendering honours unpopular.

The decision of the Dominion has been deliberately homologated by the Union of South Africa, and it is the rule adopted by Labour Governments in the Commonwealth and the States. Other Governments do not adopt this system, with the result that, as honours can hardly be refused on personal grounds to ministers of a certain status, the list of persons decorated for Dominion services is not altogether satisfactory. There is no general agreement in those Dominions

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where honours are still awarded as to the wisdom of the procedure.

There is no restriction to any one form of honour. Peerages and baronetcies are unquestionably undesirable in view of the clear sentiment of the Dominions that, even assuming that merit should be rewarded in life in this manner, perpetuation is undesirable. Mr. Bruce as Prime Minister of the Commonwealth received the C.H., but this is nearly isolated. Formally the various ranks of the Order of St. Michael and St. George (Knight Grand Cross, Knight Commander, and Companion) are awarded, but the different ranks of the Bath may be given, not to mention the less distinguished Order of the British Empire and the Imperial Service Order. Knighthood is considered appropriate to judges. The Victorian Order, unlike these other orders, is a matter in which the King acts on his personal discretion, and he may award it for some service in regard to the Dominions which he considers sufficiently personal to deserve recognition. In other cases the award is made on the submission of the appropriate minister, the Prime Minister, or, in the case of the St. Michael and St. George, the Dominions Secretary. Honours for persons of Dominion origin but serving in the British defence forces may be accorded on the recommendation of the appropriate department, and are not excluded even as regards Canadians or South Africans, nor are honours barred in the case of persons connected with the Dominions but ordinarily resident in the United Kingdom, but in such cases services should be rendered in matters not concerning the Dominions. The rule is neatly expressed in Article 5 of the Irish Constitution: "No title of honour in respect of any

services rendered in, or in relation to, the Irish Free State may be conferred on any citizen of the Irish Free State, except with the approval of, or upon the advice of, the Executive Council of the State." It will be noted that here as usual the Governor-General is ignored, though normally at the time when the constitution was enacted his advice would have been an important factor to be considered by the Imperial Government before acting on the advice tendered to it.

The Canadian resolution excludes the use of appellations which mark the tenure of office. Thus there is no objection to the holding of British Privy Councillorships by members of the Dominion Cabinets, though General Hertzog has declined the honour. The style Honourable is therefore used in Canada as in the rest of the Dominions. It is borne by all members of Executive Councils (including the Privy Council of Canada, for which Sir J. Macdonald vainly sought the style of Right Honourable), all members of Legislative Councils (save that of Quebec), Canadian and Union (but not Australian) Senators, and Speakers of the lower house of the legislatures, and the same style is given to judges of the Supreme Courts in the Dominions. On retirement from office the style may be granted by the Crown to ex-ministers who have served for three years on an Executive Council or one year in the office of Prime Minister, to Presidents of the upper houses, and Speakers of the lower houses after three years' service, and to members of the upper houses after ten years' service, and to judges of the Supreme Courts. This style is recognised by direction of the Crown throughout the Empire.

The style of a Governor-General is His Excellency;

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his wife is Her Excellency; a Governor His Excellency, and an officer administering the government is in like case. The Lieutenant-Governors of the Canadian provinces are styled His Honour, and the same style is sometimes used elsewhere, but the Administrators of the provinces of the Union are Honourable. In 1927 it was provided and intimated by Canadian Order in Council that Lieutenant-Governors in the provinces should be entitled to the style Honourable during office and for life after retirement.

(2) Precedence like honours is a matter of the royal prerogative, but there is an important distinction between the two cases. Honours are imperial, and involve the advice of the British Government. Any Dominion may, of course, create an honour and authorise the Governor-General to bestow it, and Quebec has the Order of Agricultural Merit, but such honours at present would not be as highly valued as British honours, though in the Irish Free State the possibility of legislation has been discussed. In regard to precedence the matter is local, and there is now no ground why the matter should not be determined solely by the advice of the ministry. It depends in fact on various grounds; there is no reason why it should not form the subject of enactment, and judicial precedence has been so regulated with inconvenient results; as a rule it is determined under the prerogative by the approval of lists by the King, as in the case of the Commonwealth in 1903, the Union in 1910, and Canada in 1923. Where there is no definite list the Governor-General can regulate the matter, unless authoritative usage has restricted his discretion. Legally persons who by birth or title have precedence in the United Kingdom cannot

claim any precedence in the Dominions; if accorded, it is by courtesy, and in any case it is the rule that all officers, naval, military, or civil, must rank by office, and that their wives follow their status, not any they possess in the United Kingdom by birth, a rule reminiscent of a time when quarrels on precedence between the wives of high officials were not unknown. Curiously enough, there has been in Canada of late a revival of ceremonial, some of the usages of the British Court having been introduced by the Governor-General, in striking contrast to the régime of the Duke of Connaught as Governor-General or that of the Marquis of Lorne.

Ecclesiastical precedence has ceased to cause serious trouble since the rule of preferring bishops of the Church of England was abandoned, and all bishops rank by date of consecration and archbishops take precedence of them on the same basis of consecration as archbishop. In all cases ecclesiastical precedence is by courtesy. The long-fought-out battle over precedence of naval and military and air officers is disposed of by adopting the date of commission to the rank in question as decisive.

In the Commonwealth as usual there are difficulties, because the States and the Commonwealth have each their own lists, and these conflict in detail. The Commonwealth places State Premiers below its own ministers, while the States claim precedence over such ministers after the Prime Minister of the Commonwealth, and similarly as regards State and Commonwealth justices. The issue should be of negligible concern, but some difficulty is caused to those arranging functions who desire to prevent friction. This, how-

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ever, has been rendered of minor consequence, since the removal of the federal capital to Canberra has taken away the concurrent presence of the Governor-General and Governor in Melbourne or Sydney.

Members of the royal family while in a Dominion are given precedence after the Governor-General unless by special order of the King. The matter seems sufficiently disposed of by considerations of the courtesy extended to a royal guest.

(3) The grant of medals to the forces of the Crown is properly regarded as a matter in which the Crown is personally concerned, and accordingly the royal authority is sought for the issue of medals, and has been granted under royal warrant. The conditions of issue can, of course, be regulated by local legislation and regulations under such legislation, but the royal authority gives the medals validity beyond the boundaries of the Dominion concerned. Similarly, in order to have a clear right to wear a foreign decoration or medal, the royal pleasure must be obtained through the Secretary of State for Foreign Affairs.

The royal authority is also decisive regarding the right to wear civil uniforms of the five classes, which are allocated according to status between ministers and departmental officers, the rules as to visits between naval officers and Governors, and salutes on the occasion of visits or of the opening and closing the legislatures. In point of fact, no doubt, these matters will be ordered as desired by ministers, but the Crown is formally the decisive authority, and, where the matter concerns the British Navy, possesses the sole right to issue direction to officers of the fleet.

As a marked sign of the new relationship of the

Governors-General to the Crown, the right has been accorded to them to have special flags of their own as distinct from the use of the Union Jack, with or without the distinctive sign of the Dominion or the Dominion flag. This decision involves the cessation of any use in the Dominions of the royal standard, the personal flag of the King, and effect was given to it in 1931 in the case of the Union Parliament by substituting the use of the Governor-General's flag during his presence there for that of the royal standard.

CHAPTER XX

THE DOMINION MANDATES AND DEPENDENCIES

MENTION has been made above of the constitutional arrangements affecting the case of New Guinea under mandate to the Commonwealth of Australia, of Nauru mandated to the British Empire, and of South-West Africa under the control of the Union. There remain to be considered the mandate of New Zealand and the attitude of the Dominions towards the control of the League of Nations through the Permanent Mandates Commission.

(1) New Zealand in accepting the mandate for Western Samoa differed from the Union and the Commonwealth in her estimation of the mode of constitutional action necessary to give her legal rights over the territory.[1] In the Union it was held that the grant of the mandate to the King to be exercised on his behalf by the Government of the Union invested the Union with the necessary authority independently of any further grant, and the Parliament of the Union was declared by the Speaker to be inherently capable of legislation, despite the fact that the territory was beyond colonial limits, nor has that ruling been questioned in the courts. In the case of Australia it was

[1] Keith, *War Government of the British Dominions*, pp. 182 ff.

believed that the Crown might, under Section 122 of the constitution, by according to the Commonwealth the mandate, enable it to exercise full authority, though the High Court seems rather to rely on the Imperial Act of 1919 approving the treaty of Versailles. In New Zealand Orders in Council under the Foreign Jurisdiction Act were obtained in 1920, under which the power of government in the fullest sense in the terms of the mandate was conferred on New Zealand. The constitution of the territory rests, therefore, on New Zealand legislation, which is very elaborate. But the essential feature is administration by an Administrator appointed by the Governor-General and responsible to the Minister of External Affairs. There is a Legislative Council composed of the Administrator, four or six nominated official members appointed by the Governor-General, two Europeans elected by the European population, and two natives of Samoa chosen by the Governor-General. With this body, which can always be controlled by the Administrator, he can legislate for the territory, subject to disallowance by the Governor-General. There is also created a High Court, over which the Supreme Court of New Zealand has control, and that Court has also authority over Samoa.

As a sign of the evolution of Dominion views of the rights of the Government of New Zealand it may be noted that in two judgements[1] of the Supreme Court the view has received support that without the Order in Council New Zealand has authority, but, as the Order in Council stands, it may be held that these views are not of fundamental importance. What is clear is that the

[1] *Tagaloa* v. *Inspector of Police*, [1927] N.Z.L.R. 883; *Tamasase, In re*, 1929 Gazette L.R. 149; Keith, *Journ. Comp. Leg.* xi. 260-62.

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courts are satisfied of the full rights of New Zealand to manage the affairs of the territory, and there is no reason to suppose that the Privy Council would differ in opinion if it were held that it was proper to entertain an appeal from the Supreme Court in a matter appertaining to Samoa.

Despite very great care in the interests of the natives to observe the terms of the mandate, which resemble those of the mandate for South-West Africa, the administration has been exposed to grave difficulties, largely due to the hostile attitude of a section of the European population which has worked on the love of independence of the natives to create unrest. With this it has proved most difficult for New Zealand to deal, without adopting methods too severe to be approved by Dominion opinion, and, despite wide powers of deportation of agitators taken and exercised, it has proved difficult to bring about effective co-operation with the native race in furthering its economic and health interests.[1]

The Commonwealth of Australia has also had a very difficult task in spreading order and civilisation among the natives of New Guinea, whose conversion to more civilised habits German administration had hardly begun to secure. In the case of Nauru, administered for the Empire by the Commonwealth, the problem presented is more complex than usual, because it concerns the reconciliation of the commercial work of exploiting the phosphate deposits of the island, which by purchase from the holders are the property of the Empire in proportions agreed upon by Australia, New Zealand,

[1] J. B. Condliffe, *New Zealand in the Making* (1930), chap. xiii.; *New Zealand Affairs* (1929), pp. 179-206.

and the United Kingdom, with the interests of the native population.

(2) The Union has had still more trouble in reducing to obedience the tribes of South-West Africa. They had in many cases been reluctant to accept German rule, and they resented their transfer without their consent to South Africa, claiming autonomy; and the use of the air arm to compel the cessation of unrest among the Bondelzwart tribes caused much anxiety in the Mandates Commission, and it is perhaps from that dramatic episode that has developed the careful scrutiny of the mandatory system in the hands of the Dominions by the Commission, which by its constitution necessarily has a majority of powers which are without mandates and therefore can be critical without fear of counter-criticism.

The unique problem in the Union's mandate was the presence in South-West Africa beside the natives, for whose advantage the mandatory system was *prima facie* invented and applied, of a large German population (7000) and a British population (10,000) too numerous to be overlooked. The Union from the first went further than that. To the Government, the European population seemed entitled to the same place as it enjoyed in the Union, that of superiority to the natives, who should be made to serve as the basis of European prosperity, deriving thence ultimately profit for themselves also. This conception runs entirely contrary to the ideal of mandatory guardianship and explains the whole of the difficulties which have manifested themselves. The issue was really definitely raised in 1923, when the League was induced to consent to the automatic naturalisation as British subjects of the whole of the

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German population unless any person specifically desired to remain a German, the assent of Germany being obtained by the promise *inter alia* to permit for certain purposes the use of the German language. Yet the action of the Union was only really consistent with the idea of exercising sovereignty over the territory, and this was revealed in the controversy over the use of the term which has already been mentioned. What is surprising is the fact that the Mandates Commission at one time realised that its action in accepting naturalisation would be a distinct impetus to assumption of sovereignty and yet was so displeased at the use of the term.

The Bondelzwarts episode produced a certain strain between the Mandates Commission and the League Union Government; only special pleading can justify the attitude of the Union in the matter, though the difficulties of its position were great, seeing that it held a view of native rights very different from that of the Mandates Commission. To this friction may be ascribed the acerbity with which the Dominions opposed the terms of the questionnaire which in 1926 the Commission desired to have used in eliciting information from them as to their policy towards the mandated territory. Sir A. Chamberlain was induced to support their objections and the proposal was dropped, though other mandatory powers saw no objection to giving the information desired, and in fact the Dominions have regularly sent most of what was asked for, revealing the artificial character of their protests in 1926. Much more reasonable was their objection to the Commission attempting to hear petitioners against the mandatory power in person, a procedure which would have un-

questionably given a false impression of the status of the mandatory.

New Zealand more recently has had to explain in detail the unfortunate event in Samoa, and has found sympathetic understanding of her difficulties, and even the suggestion that her policy may have been too lacking in firmness. But it must be remembered that in the case of New Zealand it is clear that her interest in Samoa is largely disinterested, and that her conception of her duty differs entirely from the determination of the Union to amend the treaty of Versailles by annexing the Union as a fifth province. The League, however, must consent to any such change, and Germany has a clear right to claim the position of a mandatory in view of the fact that her native policy has been followed in principle by the Union administration, though happily with considerably more moderation and humanity.

In the case of Nauru the anomaly of the ownership of the Empire added to trusteeship for the natives caused at first considerable difficulty. The Mandates Commission, however, soon learned to understand the position, and the value of its comments has not been negligible. It has been made clear that the legislative authority of the Administrator is subject to the control of the Commonwealth Government, and that due care is being taken to provide for the future of the natives of the island in view of the damage done to it by the operation of phosphate removal. The fact of ownership secured by purchase has been recognised as definitely authorising the monopoly of exploitation which accrues to the Empire. Nor has the Commission been unsympathetic towards the problems confronting the Commonwealth in the slow task of civilising the people of

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New Guinea. The mandates have unquestionably served to accentuate the position of the Dominions as autonomous members of the League, for it has been made absolutely clear that the British Government had no responsibility for, or control over, their conduct of the matters entrusted to their care.

One issue of importance, however, has arisen regarding the doctrine of the exclusion from the case of the Dominion mandates of the principle of equality of treatment of all members of the League. The result is that the Japanese are less favourably situated as regards immigration into these territories than they were under the former régime applicable to them. Of minor importance is the complaint made that the Union has insisted on missionaries undertaking, as a condition of being permitted to work among the natives of South-West Africa, that they will inculcate the duty of natives undertaking work for Europeans. This doctrine is of value for the Europeans, but there is no reason to suppose that it is in most cases beneficial to native society or to the individuals concerned.

(3) Mention has already been made of the dependencies which are administered by the Commonwealth of Australia. New Zealand has since June 11, 1901, included in its boundaries the Cook and Niue Islands, which are provided with a somewhat elaborate system of local government. Island Councils are provided, consisting of *ex officio*, nominated, or elective members, officials and native chiefs sitting *ex officio*, nominated members being selected by the Governor-General, and elected members including women, who share the vote with men. The Europeans of Rarotonga elect one representative to the Council of that island. The

Councils have a power of legislation for each island, but are bound by Dominion laws and regulations thereunder. They may not impose customs duties, borrow money, appropriate expenditure otherwise than out of revenue raised under their laws, establish Courts of Justice, or impose penalties exceeding three months' imprisonment or £50 fine. Any Ordinance must receive the assent of the Resident Commissioner, or the Governor-General, and, if assented to by the former, may be disallowed within a year. A High Court is established whose judges and commissioners are appointed by the Governor-General. It has full jurisdiction, subject to appeal to the Supreme Court of New Zealand, and the latter executes its judgements in civil cases in the Dominion, as in the case of Samoa. As in Samoa also, there is absolute prohibition of the manufacture or importation of intoxicating liquor save for medicinal, sacramental, or industrial purposes.

By an Order in Council of July 30, 1923, under the British Settlements Act, 1887, the Ross Dependency, lying south of the 60th degree of south latitude and between 160° E. longitude and 150° W. longitude, was declared to be a British settlement and the Governor-General of New Zealand was made Governor, with full power of administration and legislation. In the exercise of this power the laws of New Zealand have been declared to apply to the territory. It seems, however, clear that the delegation of power to legislate is *ultra vires*,[1] on the score that the Act of 1887 authorises delegation only to three or more persons within the settlement. The absence of any permanent population

[1] Keith, *Responsible Government in the Dominions* (ed. 1928), ii. 1039, 1040; Charteris, *Journ. Comp. Leg.* xi. 229-32.

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renders such delegation difficult, but the irregularity of the procedure has been canvassed in New South Wales.

Since 1925 New Zealand has accepted the control of the Tokelau or Union group of islands on the score of convenience of administration from Apia. The islands were formerly connected with the Gilbert and Ellice Islands, now a British Colony by cession, and their administration is mainly in the hands of chiefs aided by native village councils.

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IMPERIAL CO-OPERATION

THOUGH autonomy is essential to the Dominions, their attitude to the other parts of the Empire is no less essentially positive, and in many ways they engage in important co-operation.

(1) The chief form of that co-operation is seen in the institution of the Imperial Conference. Its constitution as laid down in 1907 comprises the Prime Minister of the United Kingdom as President, the Secretary of State for Dominion Affairs, and the Prime Ministers of the Dominions, to whom was added in 1923 the representative of the Irish Free State. India was admitted as a full member by agreement of 1917. Its normal time of meeting is every four years, but with provision for subsidiary Conferences as may be requisite. Each unit has only one vote in discussions, and, though the number of ministers of each Government is not limited, it is expected that not more than two will speak.

In point of fact the resolutions of the Conferences are of absolutely no binding force, in the strict sense of the term. It is a Conference of Governments responsible to Parliaments, and the obligation which agreement to a resolution implies is not absolute. A Dominion Government must no doubt desire to carry into effect

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any resolution to which it has agreed, for obviously the value of Conferences becomes minimal if the resolutions are treated lightly. But it must be the judge of the wisdom of submitting to its Parliament any resolution and of the extent to which it should press the issue if it appears to be unpopular. It is true that General Smuts resented strongly the failure of the British Government in 1924 to carry out the preference proposals of the Conference of 1923, but his position was manifestly untenable. In that case the Government of Mr. Baldwin which promised the preferences might no doubt have carried them if submitted *simpliciter* to Parliament. But the Prime Minister decided in lieu to appeal to the electorate on a much wider scheme of protection with Dominion preferences, and suffered defeat. That the new Government should submit the question at all was as much as could be expected; that it should try to carry proposals which it disapproved as involving food taxation was absurd to expect. Nor could it be said that Mr. Baldwin was bound not to risk the preferences for the sake of protection when that appeared to him as essential in the interest of his country.

The resolution of 1907 provided for a Secretariat to maintain communication between Conferences, and it was duly created, but it has been merged in the Dominions Office staff, the Secretary of State for the Colonies having been made also Secretary of State for Dominions Affairs in 1925, and in 1930 separate appointments were made to the two offices, which have Parliamentary Under-Secretaries of State. The Dominions Office serves as a channel of correspondence with Dominion Governments, but the right of Prime

Ministers in the Dominions to communicate direct with the Prime Minister remains unaltered. Communication may take place either direct with Dominion Ministers of External Affairs, or through the High Commissioners of the Dominions in London. In the Dominions the Governor-General of New Zealand and the Governor of Newfoundland still serve as channels of communication, but High Commissioners for the United Kingdom have been appointed in Canada, in the Union, and in Australia.

The Conference has always combined political and economic issues in its investigations, and it was from its deliberations that there have proceeded the resolutions on status which brought about the passing of the Statute of Westminster, 1931, and the present understandings regarding foreign relations which are the foundation of the position of the Empire in international affairs. The report of the Conference of 1926 was, curiously enough, never formally approved by the Imperial Parliament, but it may be taken by subsequent action by that Parliament to have received full endorsement. The Dominions all consented to and applied for the enactment of the Statute of Westminster, and they may fairly be said to have approved as formally as is practicable the resolutions of the Conferences of 1926–30. The constitution of the Empire thus rests on these agreements and on their approval by the Parliaments as the working basis of its practical operation. No doubt it would be possible to throw the agreements into the form of treaty obligations, but any such action is contrary to the view of the British Government, which, as has been seen, insists that the relations between the parts of the Empire are not

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governed by the ordinary rules of international law, and therefore does not approve their being stated in such a form. Moreover, it is clear that to stereotype these relations in their present inchoate and undeveloped state would be both difficult and unwise. The flexibility of the British constitution suggests that the same quality should be safeguarded for the constitution of the Commonwealth or Empire.

(2) For legislation on subjects of common interest to the Empire the Dominions in the past have been indebted to the Imperial Parliament. It still remains open after the Statute of Westminster for the same mode of action to be adopted; but, as there is divergence of view among the Dominions as to the desirability of thus emphasising the imperial functions of the Parliament, the continuation of this form of action is unlikely. On the other hand, the alteration of the uniform law now existing on many topics would manifestly be inconvenient, and it is accordingly agreed that there shall be consultation before changes are made in such legislation. On some topics, of course, divergence may be natural, but clearly it is necessary that on an issue such as is prize law there must be a measure of agreement.

The power of the Imperial Parliament was formerly exercised for a variety of reasons, some of which are now invalid. Thus (i.) constitutional Acts were usually first enacted by Parliament with power to the colonies to alter; legislation is still necessary for Canada and may be used for the States of Australia. The succession and the royal style were formerly under imperial control; the Statute of Westminster has provided that the constitutional practice requires concurrent action in

the Dominions, but the paramount power clearly remains, and is exhibited in the Statute of Westminster, 1931, as formerly in the Colonial Laws Validity Act, 1865. The Colonial Boundaries Act, 1895, gives power to alter, with the assent of the Dominions, their boundaries, a power still obviously necessary and valuable.

(ii.) Other Acts were justified by considerations of extra-territorial legislation or by international considerations. Such are the Fugitive Offenders Act, 1881, the Colonial Prisoners Removal Acts, 1869 and 1884, the Extradition Acts, 1870 and 1873, and the Colonial Courts of Admiralty Act, 1890. Even as matters stand, it will be most inconvenient if these matters are not regulated by accordant legislation. Legislation for shipping and air navigation are now within Dominion authority.

(iii.) The Army and Air Force Acts and the Naval Discipline Act extend to the Empire and provide a code for British forces even when within Dominion jurisdiction. This position could clearly be altered by Dominion legislation, and it was therefore stressed at the Imperial Conferences of 1929 and 1930 that in any fresh legislation by the Dominions it must be secured that, when the armed forces of one part of the Empire were in the territory of another part with its assent, they should be exempted from local jurisdiction on the same principle as is applied in foreign countries in like cases, *e.g.* an allied force on French territory. The details of this principle have not yet been fully worked out, but in principle the issue is disposed of. The change in the position effected by the Statute of Westminster is marked by the fact that in 1922 it was found necessary to legislate so as to permit the application to members

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of the royal navy serving with Dominion forces of the Dominion legislation which otherwise would have been overridden by British law.

(iv.) In many international matters Imperial Acts were formerly passed where local legislation would have been even then adequate and now is normal. Such cases are the Foreign Enlistment Act, 1870, in part, the International Copyright Act, 1886, or the Geneva Convention Act, 1911, which interfered without consultation with trade marks in the Dominions. The Indemnity Act, 1920, on the other hand, was limited in its application to meet Dominion rights. But it dealt with the acts of Dominion forces in mandated areas before the mandates were granted, and it barred actions in British counts for matters done in the Dominions even if they had not been made the object of indemnity there, thus preventing the enforcement in British courts of judgements obtained in the Dominions.

(v.) In certain domestic affairs of the Dominions imperial legislation intervened as a survival of the infancy of the colonies. Thus the Bankruptcy Act, 1914, and the Trustee Act, 1925, both contain rules binding property in the Dominions,[1] because the constitutional issue was not raised when they were passed, while the Finance Act, 1894, was carefully worded to avoid laying direct burdens on colonial land in view of objections urged by the Agents-General and the High Commissioner for Canada. These provisions can now be dealt with by the Dominions as they please.

(vi.) The plan of legislation subject to adoption by the Dominions is exemplified in the Copyright Act, 1911, and the British Nationality and Status of Aliens

[1] Dicey and Keith, *Conflict of Laws* (5th ed.), pp. 367, 370 ff.

Act, 1914. In both cases legislation concurrently[1] is expected to be adopted in future.

(vii.) Other Acts are simply concerned with matters affecting the United Kingdom, or part thereof, in relation to matters taking place in the Dominions. Thus Acts deal with reciprocity in recognition of medical or dental qualifications, the resealing of colonial probates, colonial solicitors, the avoidance of double income tax, recognition of patents and trade marks, and the very important question of the terms on which trustee rank can be accorded to Dominion and State loans. There are Acts also carrying out the British share of a bargain, as the Acts for the control of Nauru or the constitution and function of the Pacific Cable Board. Such Acts, of course, cannot be affected in any way by Dominion legislation, for the power of the Dominions does not extend to make laws for the United Kingdom.

(viii.) By other Acts matters taking place in the Dominions can be made criminal in the United Kingdom, and this state of affairs will not be affected by the Statute of Westminster. Under it (Section 2) the Dominions can prevent the Acts operating so as to make the actions dealt with criminal in the Dominion or subject to punishment by the courts of the Dominion. But they cannot prevent the United Kingdom providing that certain persons shall, if found within British jurisdiction, be punished if they have committed certain offences abroad. Such crimes include those punished under admiralty jurisdiction, including crimes committed by any persons on board British ships and

[1] Thus in 1931 Canada amended her Copyright Act in order to enable her to adhere to the Rome Copyright Convention of 1928, and her Naturalisation Act to carry out the concession to married women agreed upon by the Imperial Conference of 1930.

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crimes by British subjects on foreign ships to which they do not belong; treason committed abroad, as in Casement's case; murder and manslaughter, now regulated by the Act of 1861; offences against the Slave Trade Acts, if committed by any person in the British dominions or by any British subject anywhere; offences against the Explosive Substances Act, 1883, that is offences by dynamiters, under the same conditions; perjury and forgery,[1] which are triable where the accused is in custody; bigamy contracted outside England or Ireland by a British subject;[2] and offences against the Official Secrets Act, 1911, committed by any person in the British dominions or by a British subject anywhere, or the Foreign Enlistment Act, 1870, committed by a British subject whether within or without the British dominions.[3] Moreover, where felonies have been committed in England or Ireland, accessories and abettors may be punished under an Act of 1861 in respect of acts done outside as well as within the British dominions.

It is clear that a delicate situation arises from the position of the Dominions as autonomous units with their own nationals. Should the Imperial Acts continue to be valid in regard to such nationals, or should they be treated as being in the same position as foreigners and exempt from British jurisdiction? It would, of course, need British legislation to effect a change. British courts must obey British Acts, and, if they define British subjects, must apply such provisions as those above-mentioned to them whether or not they

[1] Perjury Act, 1911, s. 8; Forgery Act, 1913, s. 14.
[2] Offences Against the Person Act, 1861 (24 & 25 Vict. c. 100), s. 57.
[3] *R.* v. *Jameson*, [1896] 2 Q.B. 425.

are nationals, and no Dominion Act under the powers of the Statute of Westminster can alter the position. The question, as has been mentioned, is of practical importance as regards the Foreign Jurisdiction Act, 1890, and the Orders in Council under it which have statutory validity. They will continue to be applicable in foreign territory where jurisdiction exists, as in Egypt, to all British subjects, be they Dominion nationals or not. Nor in all probability is there any reason for the Dominions to object. If they do in any case, the remedy is obviously the readiness of the British Parliament to limit the scope of its legislation to accord with Dominion views.

The ambit of Dominion legislation under the extra-territorial power conceded by Section 3 of the Statute of Westminster has been discussed above. It is clear that the Dominions can hardly claim power over all British subjects on the score of the common status demanded by the Imperial Conference of 1930.

(3) By an important innovation dating from 1920 effect has been given in matters judicial to the essential connection between the Dominions and the United Kingdom. For purposes of the conflict of laws or private international law the different parts of the Empire, so far as they have distinct legal systems, are treated as foreign countries as a matter of principle, Scotland thus being foreign to England. But it has long been possible to obtain in England the execution of Scottish judgements by a simple process in lieu of the necessity of bringing a formal action in the English courts on the Scottish judgement, and *vice versa*. Not until the Administration of Justice Act, 1920, was this procedure made applicable to the Dominions, including the

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Australian States and the Canadian provinces on condition of reciprocity. The system provides for the registration in a Superior Court of the United Kingdom of a judgement ordering payment of a sum of money obtained in a similar court of any Dominion, whereupon execution can be carried out as if the judgement were one of the court by which it is registered. Moreover, the conditions of registration are eminently reasonable. It is necessary that the person against whom judgement is given shall either have consented to accept the jurisdiction of the Dominion court, or have ordinarily resided or carried on business within its area; he must have been duly served with process, and the judgement must not have been obtained by fraud, nor must it be the subject or intended subject of appeal to a higher court in the Dominion. The Act can be applied only by Order in Council where reciprocity is offered, and it has been widely applied except in Canada, where the majority of the provinces exercise jurisdiction rather too widely for it to be easy to apply the principle to their judgements.[1]

There is also provision for the recognition in the United Kingdom of probates of wills and letters of administration of the estates of intestates granted in the Dominions, States, and provinces, again on the basis of reciprocity, thus saving much expense and facilitating dealings with property of persons dying outside the United Kingdom.[2] Moreover, bankruptcy courts throughout the Empire act as ancillary to one another,[3] even as regards the Irish Free State.

[1] Dicey and Keith, *Conflict of Laws* (5th ed.), pp. 480-83. The Irish Free State so far stands outside the system.

[2] Dicey and Keith, *op. cit.* pp. 389, 390, 527, 528.

[3] *Ibid.* pp. 370, 497 ff., 508 f.

On the other hand, the equality of the Dominions was long since recognised by the withdrawal in 1862 of the power of the English Courts to issue writs of habeas corpus effective throughout the colonies,[1] though the writ runs still to the Channel Islands, which for most purposes are without the sphere of the operation of British legislation and jurisdiction.

(4) Of greater importance materially, economic co-operation is constitutionally a matter of little complication. The essential character of the co-operation has in the past consisted of the establishment of instrumentalities for the purpose of promoting Empire trade, and of the conclusion of agreements between parts of the Empire for preference in trade. There was at first some hesitation on the part of Canada as to accepting any form of organised co-operation even in the sphere of economics lest it should have political implications, and therefore it was not until 1925 that the Imperial Economic Committee, which was recommended by the Imperial Economic Conference of 1923, came into being. Its competence was enlarged by the Conferences of 1926 and 1930, and now it extends to the investigation of all kinds of matters bearing on Empire marketing, the facilitating of conferences among those engaged in particular industries in various parts of the Empire, and the carrying out of any investigation which the Governments may decide to entrust to it. The composition of the Committee is representative, on a footing of equality, of the United Kingdom, the Dominions, including Newfoundland, India, with representatives for

[1] The Act was passed because in *Anderson, Ex parte* (1861), 3 E. & E. 487, a writ had to be issued to Canada. It no longer lies to the Free State: *O'Brien, Ex parte*, [1923] A.C. 603.

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the Crown Colonies and Protectorates and for Southern Rhodesia. Its many reports have been of considerable advantage in disseminating information. More immediately practical has been the work of the Empire Marketing Board, which was set up in 1926 by the British Government under the Secretary of State for the Dominions to promote the marketing of Empire produce, and the development of inter-imperial trade by use of the sums—initially £1,000,000 a year was projected—to be granted by Parliament for this end. This procedure was due to the decision of the Government that, as the policy of imposing a tariff with Dominion preferences had been rejected by the electorate, it would be possible in this manner indirectly to accomplish much of what it had been its desire to do more directly. At the Imperial Conference of 1930 it was realised that the Board should be allowed to extend its work to endeavouring to promote the sale of British produce in the Dominions. In view of the great services rendered by the Board in promoting the sale of Union products in the United Kingdom, it is not surprising that considerable surprise was expressed by the opposition in the Union Parliament on March 11, 1932, when it transpired that the responsible minister declined official patronage to a Buy Empire Goods campaign in the Union. Similarly it proved impossible at the Ottawa Conference in August to secure any contributions from the Dominions towards the cost of the Board, the British Government consenting to continue its expenditure for a further year, although it was admitted by the Dominions that with the adoption of preferential trade in favour of them the motive for the maintenance of the Board on the original basis had disappeared.

Of earlier date is the Imperial Shipping Committee, which was established in 1920 under a resolution of the Imperial War Conference of 1918. Under the resolution of the Conference of 1930 its functions are, (1) to enquire into complaints as to ocean freights, facilities, and conditions in the inter-imperial trade or questions of a similar nature referred to them by any of the nominating authorities, and to report their conclusions to the Governments concerned, and (2) to survey the facilities for maritime transport on routes necessary for inter-imperial trade, and to make recommendations to the appropriate authorities as regards facilities, type of ships, depth of water in docks and channels, and harbour construction, with due regard to the possibility of air routes. The constitution of the Committee is of fifteen members, nine nominated by the Governments concerned, five representing shipping and commerce, and one civil aviation, with an independent chairman. It has reported on many important issues.

As regards telegraphic communications, the Imperial Wireless and Cable Conference of 1928 recommended the setting up of a Committee, which was duly constituted in 1929 as the Imperial Communications Advisory Committee. It consists of eight members, representing the United Kingdom, the five great Dominions, India, and the colonies and protectorates. It is charged with certain responsibilities affecting the work of the Imperial and International Communications, Ltd., the public utilities company set up by advice of the Conference to co-ordinate inter-imperial telegraphic services. The Committee deals in special with questions of principle, such as the institution of new services, the discontinuance of old services, alterations of rates,

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and the distribution of business among the different routes.

A much more ambitious project was the cause of the establishment of the Oversea Settlement Department, and of the Committee of the Dominions Office in 1922, as a result of the recommendations of the Dominions Royal Commission and the Empire Settlement Committee followed by the passage of the Empire Settlement Act, 1922. It was then proposed to further the settlement of emigrants from the United Kingdom overseas on a large scale on the basis of the division of cost between the British and the Dominion Governments. The justification for British expenditure up to £3,000,000 a year was the view that it was advantageous to be able to provide a satisfactory outlet for surplus population, and that imperial interests demanded the increase of the population in the Dominions, which should involve in due course an increase of inter-imperial trade. The most important outcome of the proposal was the conclusion of an agreement in 1925 with the Commonwealth, and through the Commonwealth the States, for the settlement of emigrants in Australia, the consideration being loans up to £34,000,000 at a low rate of interest as well as a share in the cost of transport.[1] Unfortunately it has proved impossible for the settlers to be given the treatment which was expected, as was shown by the complaints of settlers in Victoria investigated by a local Royal Commission, and in addition the Commonwealth felt obliged in 1930 to ask the British Government to forgo its rights under the agreement as to the settlement of the due number of persons in proportion to the ad-

[1] *Official Year-Book of the Commonwealth*, xxii. 929; xxiv. 677.

vances made. The episode illustrates the grave difficulty of such agreements. If the Dominions feel unable to keep them, there is virtually no possible means by which they can be made binding save by the adoption of some form of retaliatory action ruinous to Empire solidarity. Fortunately, though the latest investigation of the issue[1] resulted in a recommendation for a further measure of activity in settling population overseas, it seems clear that the result of the decline in the birth-rate in the United Kingdom will shortly render emigration quite unnecessary, unless indeed the country loses its capacity of industrial production on the existing scale. It may therefore be hoped that in future emigration, by being voluntary, will obviate inter-imperial friction. As it is, public opinion in the United Kingdom has naturally resented strongly the spectacle of the repeated deportations from the Dominions of persons settled there, largely at the expense of the British Government, because they have been unable to remain in effective employment on the score of ill-health or the economic crises. The principle that the Dominions will retain only emigrants who are completely successful is one which is contrary to the supposition underlying the grant of British assistance, and it is surprising that the British Government should not have made it a binding condition that repatriation of emigrants shall not be practised when the emigration has involved cost to the British Government. In 1931–1932, however, the Dominions Secretary insisted that the British Government could not agree to bear the cost of repatriating from Australia those emigrants who had found the promises made to them on behalf of

[1] Parl. Paper, Cmd. 4075, a very inconclusive report.

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Australia dishonoured in practice. The decision was no doubt unavoidable, but unquestionably those emigrants who were assisted to the Commonwealth under the agreement have a moral right to expect the British Government to secure that the Commonwealth honours, as regards emigrants already in the territory, the assurances given to them, even if performance of the obligation to take further emigrants is waived on the plea of the poverty of the Dominion.

(5) A start with the doctrine of preference in inter-imperial trade was made by Canada in 1897 when Sir W. Laurier conceded preference without exacting any return from the United Kingdom.[1] His motive was partly sentimental, to mark Canada's appreciation of the imperial connection on Queen Victoria's Diamond Jubilee, partly economic. To gain low freights for Canada's exports it was expedient that the ships conveying them should have full cargoes to bring to the Dominion. Moreover, Canada resented the raising of the United States tariffs against her in the Dingley tariff in that year. In return the British Government denounced the treaties with the Belgian Government and the German Zollverein of 1862 and 1865, under which the Canadian preference had had to be extended to every country between which and the United Kingdom there existed a treaty containing a most favoured nation treatment clause. In 1902, in 1907, in 1911 the Dominions announced their desire for imperial preference, but it was not until the war that the British Government accepted the principle, approved it in 1917, and carried it into effect in 1919. The preferential

[1] Willison, *Sir Wilfrid Laurier*, ii. 286-312; Skelton, *Sir Wilfrid Laurier*, ii. 54 ff.

duties were, however, then limited in extent owing to the objection to taxing either food or raw materials, and the Conference of 1923 recommended further measures which were defeated, for the electorate rejected the appeal of Mr. Baldwin to give his Government authority to protect British industry and to give preference. Not until the National Government was formed in 1931 was this policy reversed.

The other Dominions have gradually followed the lead of Canada. The South African Customs Union of 1903 adopted the plan of imperial preference; New Zealand also gave a British preference, and in 1907 made an agreement with the South African Customs Union. In 1908 Australia gave preference. But it was not until 1922 that Australia and New Zealand could agree on a preferential treatment of their mutual trade, and, when in 1925 Canada and Australia came to terms, much irritation was caused in the Dominion. New Zealand was granted by Order in Council the advantages given to the Commonwealth and reciprocated by according the British preferential tariff. In 1930, however, the necessity of meeting the demands of Canadian butter producers who objected to the entry of New Zealand butter resulted in the imposition of prohibitive rates in the Dominion.[1] New Zealand in 1930–31 withdrew the British rates, with the result that Canadian motor-cars and other exports were virtually excluded. The result was a new agreement in 1932 which agrees

[1] *Canadian Annual Review*, 1930–31, pp. 516 f. Canadian industrial development proceeded very rapidly during and after the war, American manufacturers transferring their businesses in part to Canada to avoid Canadian duties and secure imperial preferences. In 1932 American capital was estimated at £1,700,000,000 as against £424,000,000 British, a fact explaining opposition to British trade.

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in considerable measure with an agreement of 1931 between Canada and Australia, replacing the arrangement of 1925. In both these agreements Canada grants and receives as a rule the British preferential rates, but on a few articles there are concessions bringing the duties below these rates. The Australian agreement, however, provides for the right of either party to call the attention of the other to any case in which exports from the other are causing prejudice to the sale of domestic products or manufactures of the same kind. If the other party does not remedy the matter within three months, then the provisions of the general tariff apply to the articles indicated. This prevents it being necessary to terminate the agreement as a whole. In the case of New Zealand the provision is similar, but the mode of action is by applying the anti-dumping legislation of either country and the period is only thirty days, and the Dominion Government may insist that imports other than perishable goods may be placed in bond during that period. The New Zealand agreement also allows of either party increasing rates on the articles included in the agreement on three months' notice, but not so that they exceed whatever is the British preferential rate. The agreements are of short duration, illustrating the great difficulty felt, even with so much elasticity, in adjusting terms which are not regarded as too risky to be made abiding.

In these cases, it will be seen, the ruling principle is that the British preference may be lowered as between the Dominions. But in the case of the Union in 1925 the principle was adopted that tariffs ought to be reciprocal simply, and the grant to foreign states of better terms than to the United Kingdom was even

contemplated, but had to be abandoned in view of the protests made by the opposition. In 1928, however, Germany was promised the advantage of any further preferences given to the United Kingdom or a Dominion, and the preferential system was drastically revised to reduce what South Africa thought she gave to what she thought she might receive. The result was the termination of the agreement which had so long existed, from 1906, with Australia. It must, however, be added that the treaty included provision for easy determination, and the Government maintained its readiness to terminate the arrangement if it could receive better terms from the United Kingdom, as it did in 1932.

Between Australia and New Zealand it was found extremely difficult to secure satisfactory terms. The agreement of 1922 was replaced by a new one in 1926, and in 1928 New Zealand had to agree to the drastic increase in the imposts on her exports of butter and cheese. Australia also in the financial and economic crisis in 1930–32 found it necessary by a series of measures to exclude as far as practicable all British or foreign exports with which Australian consumers and manufacturers could dispense. But, as was pointed out, even in the earlier period Australia in common with the other Dominions had built up tariff barriers on such a scale that there was no real possibility of competition with industries protected in the Dominions for British exports. The fact was brought out with great clearness by Mr. Baldwin at the Ottawa Conference of 1932 when he stressed the size of the balance of trade in favour of the Dominions, and pointed out that for all practical purposes British exports found no free entry into the Dominions, while Dominion exports in

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overwhelming quantities were free of entry into the United Kingdom. He also stressed the error of thinking that large preferences over foreign competition had any real value for the United Kingdom if the rates still levied on British imports were on a scale which rendered competition with local manufacturers impracticable. Moreover, it was pointed out that the Canadian practice, followed also in the other Dominions, of abruptly imposing anti-dumping duties was destructive of all security in trade and prevented British exporters making effective contracts in advance. On the other hand, stress was laid on the determination of the Dominions to erect a better balanced structure of economy than could exist on the basis of devotion to agriculture alone. This doctrine is one which has been incessantly enunciated by the Irish Free State, which has aimed at fostering new industries, at first welcoming the investment of non-Irish capital, but in 1932 altering its policy so as to penalise such capital and to restrict its support to purely Irish undertakings. As it was at the same time admitted by Mr. De Valera that it was probably impossible to find foreign markets for the products of Irish farming, the prospect of that industry appears to be somewhat depressing; a small country with industries and agriculture confined to the local market is hardly destined to enjoy even a modest prosperity.

In the circumstances it was not to be expected that agreement at Ottawa would be easy, for the Dominions failed to realise that their offers to the United Kingdom were largely illusory, and were strengthened in their resistance to pressure by the belief, fostered by the continuance of the grant to their exports of freedom

from duties despite the imposition of tariffs generally, that the British market would for domestic reasons remain open to them without serious counter-concessions. Moreover, Russian dumping was bitterly resented by Canada, which desired the British Government to assimilate its attitude to that of Canada and to refuse entry to goods produced under unfair conditions of competition. In the end pressure of the desire to be able to assert success in the negotiations led, on August 20, 1932, save in the case of the Irish Free State, to agreements, largely in favour of the Dominions, at the expense of the United Kingdom, and to a certain amount of inter-Dominion concessions. It must, however, be admitted that in the framing of the compact with Canada so much friction was engendered that it illustrates the grave dangers of seeking to base inter-imperial co-operation on trade considerations. The Dominions have found among themselves that trade is apt to lead to tension of relations when in lieu of voluntary preferences a balance of advantage falls to be struck between the parties.

The Ottawa agreements, as far as concerns the Dominions, rest on the basis that they will maintain existing British preferences, and will also consider seriously the reduction of their tariffs so as to secure British manufactures the possibility of competition on reasonable terms. Access to the Tariff Boards of Canada and Australia will be accorded to British manufacturers, though the value of this concession is problematic, especially in Canada, where the object of creating the Board was to secure fuller protection for home industry. In any case, the Dominions will protect such local undertakings as they think capable of successful

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development as opposed to exotic industries. Concessions are promised in the removal of extra duties at present imposed on revenue grounds, when financial conditions permit. The British concessions, in addition to the maintenance of preference under the Import Duties Act, 1932, by the maintenance, unless with Dominion consent, of the 10 per cent *ad valorem* duty on foreign imports, include free entry for three years of eggs, poultry, butter, cheese, and milk products, a duty of 2s. a quarter on wheat, and a system for increasing the price and securing orderly marketing of chilled and frozen meat and mutton, as well as minor increases of preference. The interests of consumers in the United Kingdom are to some extent safeguarded by the right to withdraw imposts on foreign meat if supplies at reasonable cost are not available from Dominion sources, and there is a general agreement to discuss issues arising from the unsatisfactory operation of any part of the agreements.

Constitutionally the agreements are open to no serious objection on the score of duration, for that is limited to five years with possibility of denunciation by six months' notice before that date, and on like notice thereafter. The only exception is the British undertaking to ask Parliament for a ten years' preference on tobacco, which is a luxury and may be treated differentially. This obviates any serious criticism of the compacts as unduly tying the hands of Parliament, a possibility protested against in advance by Mr. Mackenzie King, but three years would have been wiser.

It is important to note that Newfoundland was brought definitely into the ambit of the British preferential scheme as well as Southern Rhodesia, which

has always had close relations with the United Kingdom, first as part of the Customs Union, and then as a self-governing colony. The agreements were also made in some measure applicable to the colonies and protectorates, thus bringing them into close contact with the Dominions as parts of the Empire, if not of the British Commonwealth of Nations.

Inter-Dominion preferences proved more difficult of attainment. But the Union made compacts with Canada, New Zealand, and the Irish Free State, Canada with the latter and Southern Rhodesia. Despite the difficulty caused by the British decision that negotiation with the Free State was impossible pending the settlement of the outstanding difficulties between the countries over the breach of the Irish treaty, the Free State delegates were able to accomplish something and to establish friendly relations with the personnel of the other delegations. Clearly, however, the nature of the exports of the State forbids much hope of a substantial development of inter-imperial trade save with the United Kingdom.

Valuable as were the results in the economic sphere, the political implications were of far greater importance. As already mentioned, the Conference had to face the issue of the relations of inter-imperial preferences to the most favoured nation clauses of treaties with foreign powers. It was resolved that these preferences must be maintained apart from treaty relations, which means essentially that the Conference has homologated and reaffirmed the doctrine of the Conference of 1926 that relations between the Dominions are not regulated by international law. If, of course, they were so regulated, it would clearly be impracticable

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for the system to work, as the advantages conceded between the parts of the Empire would enure to foreign powers, unless and until all treaties with most favoured nation clauses were abrogated, a step of dubious value to British foreign trade and relations. This is a most important result, for it means that the need of economic unity has interposed a most substantial barrier in the way of the development of the tendency to stress the sovereignty and independence of each unit of the Empire. Incidentally it afforded a strong support to the British contention that its differences with the Irish Free State ought to be decided by a domestic tribunal and not by one on which sat a foreign arbitrator.

A further most important agreement pledged the United Kingdom and Canada to the effect that, if either Government is satisfied that the system of preference in respect of any class of commodities is being frustrated through the State action of any foreign country, it will use its powers of prohibition of import to secure the effective operation of the preferences which it has granted. This clause, of course, is directed essentially against Russian dumping of wheat, and especially timber under the five years' plan, but specific mention was deliberately avoided. The principle is of importance, for it meets the contention of the Dominion that no preference would avail to aid timber against dumping; and the same plea has been adduced by the Scandinavian countries, the other great historic source of British timber imports. In this point as in general the agreements are not intended to prevent other forms of Empire trade being developed, though the immediate object is to encourage fuller use of the opportunities of exchange of Empire commodities on reasonable terms.

(6) The relations between the Dominions and India stand on a distinct footing from their relations *inter se*. This depends essentially on the fact that, while there is normally freedom of intercourse between the Dominions, though each exercises the widest power of exclusion of other British subjects at its discretion, the Dominions definitely have closed their doors to the immigration of Indians. The principle of such exclusion has been recognised by India on the score of the right of each part of the Empire to regulate the composition of its own population, and to follow such a policy as may best accord with its own views of the wisest method in which to build up its social and economic structure. The principle of inter-imperial equality, however, has one satisfactory effect. It has induced the Dominions to recognise that they may be subjected at pleasure by the Indian Government to similar conditions of exclusion to those which they impose. This principle, enunciated at the Imperial Conference of 1917, was reinforced by the Conference of 1918 with the recognition that it was proper that Indians lawfully domiciled in the Dominions should be permitted to bring into them their wives and minor children, assuming that such marriages were *de facto* monogamous. This was followed in 1921 by the further recognition that in principle Indians lawfully resident should not be denied the ordinary right of citizenship. From this view South Africa expressed strong dissent, and the contest was renewed in 1923 when General Smuts recorded his disapproval of the formation of any resolutions by the Conference when unanimity could not be achieved, and when, on the contrary, the Indian delegates pressed for reconsideration of the whole issue by the Union and

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for direct negotiations with the stationing of an agent of the Indian Government in the Union to represent Indians there resident, and to act as an intermediary between them and the Union Government.

The proposal, in its recognition of the right of the Government of India to interest itself in Indians domiciled abroad, was repulsed by General Smuts, who insisted that there could be no question of extending political rights to Indians, and that for economic reasons the Union must safeguard herself against their competition. General Smuts' position was difficult. The laws of the Transvaal forbidding acquisition of landed property by Indians had been circumvented in various ways, and the activity of the Indians in petty trade was an object of envy to their competitors, often themselves immigrants or descendants of immigrants into the Union. The Asiatic Inquiry Commission of 1920–21 presented recommendations which were carried out in part by the Government, resulting in the further lowering of Indian status in the Union, and the feeling there against Indians was so marked that the ministry, after the Conference of 1923, proceeded to introduce a Class Areas Bill to segregate Indians in urban areas. The measure aroused deep resentment in the community and was not passed before the fall of the Smuts administration. In 1926, when Indians were included in the Colour Bar legislation, permitting exclusion of non-Europeans from skilled mining and other work, it reappeared as the Areas Reservation, and Immigration and Registration (Further Provision) Bill, which was followed by the visit of a delegation from India to study the issue on the spot. This led to a formal conference at Cape Town in December 1926

and January 1927, which achieved a most important agreement.

Under this agreement both Governments reaffirmed their recognition of the right of the Union to use all just and legitimate means for the maintenance of Western standards of life. The Union Government recognised that Indians domiciled in the Union who were prepared to conform to Western standards of life should be enabled so to do. For those Indians in the Union who might desire to avail themselves of it, the Union Government would organise a scheme of assisted emigration to India or other countries where Western standards were not required. Union domicile would be lost after three years' continuous absence from the Union, in agreement with the revision it was proposed to make of the general law relating to domicile; emigrants under the assisted emigration scheme who desired to return to the Union within the period of three years would be allowed to do so only on refunding the cost of the assistance given. The Government of India recognised its obligation to look after such emigrants on arrival in India. The admission into the Union of the wives and minor children of Indians permanently domiciled in the Union would be regulated by the terms of the Imperial Conference Resolution of 1918. In the expectation that the difficulties with which the Union had been confronted would be materially lessened by the agreement, and to secure that the agreement should come into operation under the most favourable auspices, the Union Government agreed not to proceed further with the Areas Bill. Provision was made for the stationing in the Union of an agent of the Indian Government in order to secure continuous and

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effective co-operation between the two Governments, and Mr. Srinivasa Sastri, who had long been a protagonist in expressing Indian views, was selected as the first incumbent of the office.

Successful in its own way as this agreement was, it did not prevent difficulties arising. It was the hope of a considerable section of the Dutch population that the agreement meant the deportation of a large number of Indians, but this expectation was not fulfilled, and, on the other hand, the land difficulty in the Transvaal revived. In 1919 an Act[1] had been passed to prevent companies controlled by Indians from holding land, and thus evading the Gold Law of 1908 which forbade Asiatics doing so, but in a number of cases this prohibition had been evaded, without breach of the letter of the law but in defiance of its spirit. It was proposed, therefore, by the Government of the Union to legislate by the Transvaal Asiatic Tenure (Amendment) Bill to meet these evasions, and to diminish substantially the future possibility of Asiatics holding land or trading in the province. As a result of this and other difficulties a further Conference met in January and February 1932 and achieved agreement. It was recognised that, as eighty per cent of the Indians in the Union were Union born,[2] it was hopeless to contemplate their settlement in India, and the two Governments therefore agreed to co-operate in seeking to secure settlement elsewhere, a representative of the Indians in the Union assisting them if so desired by the community. Otherwise the agreement of 1927 was confirmed, and the Indian

[1] Keith, *War Government of the British Dominions*, pp. 319-21.

[2] The Indians are found chiefly in Natal (160,000), Transvaal (20,000), Cape (6000); the Orange Free State has successfully excluded them. Cf. Hofmeyr, *South Africa* (1931), pp. 300-305.

Government agreed to continue to maintain an agent in the Union. Considerable concessions were made as to land-holding as regards lands acquired up to March 1, 1930, by companies, and it was agreed that an impartial commission should investigate individual cases, and that on their report the Minister of the Interior should be empowered to withdraw specified areas of land from the operation of the Gold Law forbidding the occupation of land by coloured persons. This power would apply also in the future.

While matters in the Union are thus regulated on a rather narrow basis, and while Indians enjoy less privilege in the matter of immigration than do the Japanese under an agreement made informally in 1930,[1] their position in the other Dominions is on the whole more favourable. Immigration is shut off, and Canada unquestionably thus affords better treatment under treaty and informal agreement to Japanese than is granted to Indians. Japanese up to 150[2] a year newcomers are permitted entry, while Indians are entirely refused entry save for mere visits. Nor has Canada been able to induce British Columbia to accord Indians the franchise from which they are excluded by the province, with the result that they are also excluded from the federal franchise. Otherwise the issue is not there of much concern owing to the small number of Indians resident. The same remark applies to the Commonwealth, and the result of the doctrine of inter-imperial equality has been that both the Commonwealth and Queensland have legislated to accord the vote to Indians, and the former has allowed them to receive

[1] *Journ. Parl. Emp.* xii. 1058-70.

[2] *Ibid.* x. 614, 616. Cf. Brady, *Canada* (1932), pp. 170-74.

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old age pensions. New Zealand rigidly excludes under Acts of 1920 and 1931, but does not otherwise penalise; Newfoundland has no attractions to offer, and the Irish Free State maintains the British doctrine of freedom of entry, and no discrimination save that the franchise is restricted to Irish citizens.

No doubt the matter is not wholly satisfactory. The suggestion has even been made that the day may come when India may appeal to the League of Nations to take up the issue of the right of migration, and it is possible that at some future time the activities of the League may extend beyond the present doctrine that immigration is essentially a matter of domestic jurisdiction, so that it cannot be dealt with either by the League Council or the Permanent Court of International Justice.[1] The most important factor in the situation is the attitude of Japan, which endeavoured to secure the right of migration as a fundamental principle recognised by the League, and which has never acquiesced in the justice of the policy of the reservation of areas by nations as their inviolable preserves, especially when, as in the case of Australia, the local population and such immigration as it permits fail to fill up the territory at any adequate rate. It is significant that one of the reasons which induced Dominion refusal to accept the Geneva Protocol of 1924 was the belief that it might in some measure handicap them in their maintenance of the doctrine that immigration issues were of purely domestic concern.

It is significant of the difficulty of relations between India and the Dominions that it proved impossible

[1] Wheaton, *International Law* (ed. Keith), i. 574, 600.

at Ottawa to reach any agreements as to trade relations between these countries, though India definitely adopted the principle of a preferential agreement with the United Kingdom. Further development of relations may doubtless be expected in the course of time.

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