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RESPONSIBLE GOVERNMENT IN THE DOMINIONS

BY

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Second Edition

REWRITTEN AND REVISED

TO 1927

IN TWO VOLUMES

VOLUME I

MATRIS
IN MEMORIAM

PREFACE

IN my *Imperial Unity and the Dominions*, completed in November 1915, I sketched the steps which in my opinion should be taken to complete the autonomy of the Dominions, the ideal which appeared to me clearly indicated by the whole course of the history of Imperial relations. My suggestions appeared at a time when a small but active coterie was engaged in a press campaign intended to secure the early consideration of a scheme for Imperial Federation, and naturally they proved extremely unpalatable to this group. Their view, which I had briefly disposed of in *Imperial Unity*, excited some interest in Canadian legal circles, and at the request of the late Mr. A. H. F. Lefroy, K.C., I dealt with the issue more completely in an article in the *Canadian Law Times*, November 1916, in which I further developed the counter suggestions which I had made in favour of autonomy. The fate of the Imperial Federation propaganda is well known; the proposal never had the support of a single responsible minister of the Crown in any Dominion, and it would have been innocuous save for the distrust which it excited in the minds of two such representative men as Sir Wilfrid Laurier and General Botha, and the more untoward results which it produced in Dominion opinion at large. The candid historian will have to admit that this propaganda played its part in the reluctance of Quebec to accept compulsion for military service in the Great War; in the growth of the Labour movement in the Commonwealth with its defeat of compulsion and its manifesto in favour of peace without annexations or indemnities; and in the ultra Nationalism of the Union of South Africa with its repugnance for the Union Jack. So true is it that well-meaning enthusiasts often work incalculable injury to the very causes which they favour.

It is of interest to note how far the recommendations which I made in 1915 have been carried into effect. The first three urged (1) the freeing from legal liability for their official actions of the Governors-General and Governors; (2) the requirement that in their conduct of the Executive Government they should

conform in all questions, including that of a grant of a dissolution, to the practice of the King in respect of the Government of the United Kingdom; and (3) that they should cease to exercise any personal responsibility in the matter of the exercise of the prerogative of pardon. The Imperial Conference of 1926 has definitely accepted as regards the Governors-General and Governor of Newfoundland the second doctrine, and with it necessarily the first and third. The latter can be disposed of by a mere change in the royal instructions, eliminating any question of personal action in the matter of pardons; the first might be effected by rulings of the Courts which might accept the view that the change in the position of the Governors carried with it legal immunity from responsibility; otherwise it can be carried out by short declaratory Acts. The main reform, whose accomplishment is due directly to Lord Byng's action in Canada in 1926, was decidedly overdue. It was retarded by the fact that the fundamental distinction between Dominion and British practice was long misunderstood, and had to be clearly established in the earlier edition of this work.

My fourth recommendation was that, while the supremacy of Imperial over Dominion legislation should be recognized, the control of Dominion legislation by disallowance and reservation should be formally abandoned. The principle of the surrender of the power of disallowance and reservation appears to be conceded by the Imperial Conference of 1926, which has referred the points involved to the consideration of an Expert Committee.

Fifthly, I suggested that all legal restrictions on Dominion control of merchant shipping should be abandoned; that the exercise of control by the Imperial and Dominions Parliaments should be regulated by agreement; and that steps should be taken to render it possible to enforce in all parts and Courts of the Empire Dominion legislation affecting locally registered shipping in the same manner as effect is now given throughout the Empire and in Naval and Consular Courts to Imperial Acts regulating British registered shipping. The Imperial Conference appears also to have homologated this doctrine, for it has referred the matter to a special conference with a view to securing equality of rights for the Dominions.

Sixthly, I suggested that the Dominions should be enabled to amend their constitutions freely without reference to the

Imperial Parliament. This, of course, was specially meant for the benefit of Canada, and I am glad to note that in the Canadian debate on the Imperial Conference the Minister of Justice, a distinguished French Canadian, advanced to the position that Canada should be able to change her constitution for herself, free from the necessity of approaching the Imperial Crown with addresses asking for legislation which is sometimes not at once accorded on one pretext or another. It does not appear to me consistent with the status of the Dominion that an address from both Houses asking for the modest boon of powers of extra-territorial legislation, passed in June 1920, should have remained without result down to the present time. The grant of power of extra-territorial legislation was also suggested by me in 1915, and it is satisfactory to know that at last the Imperial Government has agreed to it in principle, though it is dubious whether the form in which the change has tentatively been expressed is wholly satisfactory.

Seventhly, I suggested that, if the appeal to the Privy Council was to be maintained, it would be essential to secure on that body the continuous and effective representation of Dominion judges and the transfer to it of judicial appeals in United Kingdom causes. I see no alternative between this and the abandonment of appeals. The theory which is held by many Canadian —but by few Australian—lawyers that their own resources in judicial talent are insufficient to secure the due decision of cases is a confession of inferiority which is inconsistent with the legislative freedom which all claim for the Dominion, and with due self-respect. Moreover, a Court which is not good enough for the United Kingdom ought not to be good enough for the Dominions, and the Dominions cannot be regarded as in any real sense autonomous as long as (1) it lies with a small body of judges to decide whether or not to hear appeals from their Courts, and (2) the appointment of these judges rests entirely with the Imperial Government and the majority is always English.

My eighth recommendation demanded the acceptance by the Empire of the doctrine of the right of the Dominions to preserve homogeneity of race, but also their recognition of the right to entry of the educated class of British Indians and the removal of all racial restrictions placed on British Indians lawfully resi-

dent in the Dominions. Much to effect this result has been accomplished by the efforts of the Imperial War Conferences of 1917 and 1918 and the subsequent Imperial Conferences of 1921 and 1923. The Commonwealth in special has arranged for the admission, without degrading conditions, of educated Indian visitors, and has removed the franchise disability as well as admitting Indian residents to the status of old-age pensioners. It may be hoped that even in Canada the franchise may ultimately be conceded, and, now that the Union and India have agreed on the doctrine that Indians of western habits and ideals can be allowed to live in the Union, the grant ultimately to them also of the franchise seems logical and even possible.

Ninethly, I recommended that the right should be given to the Dominions to be represented at International Conferences, political no less than commercial or social, by their own plenipotentiaries, nominated by the Governments concerned and appointed by the King on the advice of the Imperial Government, constitutional agreements being made as to the mode in which the votes of such representatives should be cast in case in which it was imperative that the action of the Empire should be uniform, and that ratification of conventions thus arrived at should rest with the King on the advice of the Imperial Government after consultation with the Dominions. I discussed in 1915 the question of the possibility of applying this mode of procedure to the Peace Conference to be held at the close of the war, and in 1916 the case for such representation appeared to me definitively established by the extent and importance of the contribution of the Dominions to the allied cause. The decision in 1918, which was essentially secured by the efforts of Sir R. Borden, to give the Dominions a distinctive position at the Peace Conference led immediately to their separate recognition as members of the League of Nations, and in that capacity they enjoy full power of self-determination as regards the international questions which come before the League. But, as the Conference of 1926 shows, there are treaties which must either be accepted for the whole Empire or the Empire must resign itself to dissolution through the adoption by its members of irreconcilable obligations, and in respect of such treaties consultation remains the only means of action.

The tenth of my suggestions, that in favour of the Dominions

ıccepting the offer of full information regarding and a share in general foreign policy, has been carried out as regards informa-ion which is lavished on the Dominions. But they still main-ain, it must be admitted, a somewhat passive attitude towards the mass of papers and telegrams sent to them, and up to 1927 nothing was done to carry out effectively, save for a period during the war, the representation of the Dominions in London by ministers charged with discussing issues of foreign policy with the Imperial Government and serving the function of intermediaries between the Governments. The Imperial Conference has in effect approved more serious efforts to co-ordinate British and Dominion views, and specially noteworthy is the idea of having the Imperial Government represented by High Commissioners at Dominion capitals, which has been welcomed by Canada and the Union in particular, as a corollary to their desire to eliminate the Governor-General as a link between governments. It is difficult to ignore the obvious deduction that in uch cases the Governor-General should be a local nominee in he full sense of the term, even if lack of local talent should be elieved to prohibit the appointment of local men. The example f the Irish Free State suggests that it is not necessary to import lovernors from the United Kingdom, if they are not to serve ı any way as links between the United Kingdom and the Dominions, unless indeed royal princes are available and desired ınd can be regarded as bringing the King into more personal ouch with his subjects overseas. The great importance of close consultation between the United Kingdom and the Dominions is accentuated by the decision to arrange for the separate representation of Dominion Governments at foreign capitals and their reception of foreign diplomats in certain cases —Washington now exchanges diplomats with Ottawa and Dublin—subject to the maintenance of the diplomatic unity of the Empire. The effort is not impossible of accomplishment, but it implies mutual confidence and readiness to accept the obligation of the fullest consultation laid down by the Imperial Conference.

One minor suggestion has already been made fully effective; the old rule of ignoring the Dominions as regards extradition treaties has been abandoned and the ordinary rule of separate adherence and withdrawals has been accepted.

Finally, as regards defence, the ideal of an Imperial as

opposed to a local outlook has unquestionably made dist progress. The Prime Ministers of the Dominions, while re ing the Admiralty plea in 1918 for a single navy, put on record their acceptance of the view that ultimately it would be requisite to have a true Imperial authority to co-ordinate the efforts of the naval forces of the Empire in time of war, it being conceded that such unity was essential for success. In the meantime, New Zealand and Australia, the only Dominions which have undertaken seriously naval defence, have shown the utmost eagerness to co-operate with the Imperial Government both as regards the Singapore base and naval defence in general, and the essential unity of the Empire in this regard has inevitably been accentuated by the participation of the Dominions in the Washington Conference of 1921–2 and the Geneva Conference of 1927 regarding limitation of armaments. It is indeed plain that foreign countries will, and in their own interests must, insist that, if limitation is to be adopted, the Dominions must share with the United Kingdom the obligation of reductions. No development of autonomy, it may safely be assumed, would be admitted by any foreign state as justifying the ignoring of Dominion forces in any scheme of general disarmament.

Despite the wide phraseology of the report of the Imperial Conference of 1926, there remains a good deal to be done, both by legislation and by alteration of formal instruments, to bring about as a matter of law the ideals which are asserted in the Report. But, apart from that, the Report clearly does not set up the ideal of a number of autonomous nations linked only through the possession of the same sovereign. On the contrary, it asserts their unity in the British Empire and imposes on them very precise duties of consultation with one another it nowhere hints at any right of secession, and Lord Balfour, more wise in his day than Mr. Bonar Law, has successfully evaded every effort to induce him to admit that it permits secession save by consent. Moreover, the Imperial Govern ment has not even surrendered its control over all formal treaties through the necessity of its intervention in the grant of full powers and in the ratification of treaties ; the Dominions cannot be on a footing of equality until their Governors receive unfettered powers to authorize the making and ratification of treaties, to be exercised free from Imperial control, for the

estion that the King can act directly on the advice of Dominion ministers is a constitutional monstrosity, which would be fatal to the security of the position of the Crown. That His Majesty should on his personal discretion and responsibility accept or reject Dominion advice is absurd ; but not less so the idea that he should serve the purpose of automatically registering the decrees of six or more independent governments, even if they conflicted with the interests of the people of the United Kingdom, apart altogether from the delay and inconvenience involved in sending documents to London for formal signature.

As, however, to my surprise, the idea of the King forming the sole connexion between several independent governments has recently been regarded apparently with approval by some publicists, if not by statesmen—Lord Balfour in the House of Lords on 8 December 1926 and during the discussion of his address to us at Edinburgh on 26 January was careful not to commit himself—it may be well to point out the insuperable objections to the proposal. If it is desired that the King should act automatically on Dominion advice, then it is far better that action should be taken in his name by the local representative of the Crown, who should then be definitely appointed on local authority alone, by such method as seemed fit to the Dominion, thus obviating the absurdity, for instance, of the same signature being appended to treaties involving inconsistent policies. If, as is apparently the real aim of those who advocate the proposal, the King would be expected to take an active part in harmonizing Imperial projects of different parts of the Empire, it is clear that he would be placed in a most dangerous position. If he objected to any action desired, e.g. by the Union of South Africa or Canada, nothing would induce the people of these Dominions to believe that he was not actuated in his views by the British Government, and no person should expose to any such risk the popularity of the Crown. Nor would his position be substantially easier if on grounds of Dominion interests he demurred to suggestions of his British ministers ; the extraordinary growth in popularity of the Crown, patent to all observers, is unquestionably in very great measure due to the feeling that the King does not bear the responsibility for the conduct of public business, though in emergency in the event of

any effort to defy the constitution his residual authority would doubtless be exerted to secure the rights of the people against any usurpation by ministers.

The mistaken belief that the Report of the Conference of 1926 contemplates a mere alliance of independent states is doubtless due to the unfortunate employment of italics to emphasize the declaration of autonomy of the parts of the Empire and the omission of this mechanical and unscientific aid in stating the equally fundamental principle of differentiation of function; Lord Balfour at Edinburgh did not attempt, in reply to my criticism on this head, to justify the differentiation of treatment of the two great doctrines of the Report. The real aim of the Report is to secure that in all matters where unity of action is essential there shall be agreement between the parts of the Empire on the course to be adopted; the measure of control secured by the rule of action through the King to the Imperial Government is not intended to be used at the sole discretion of that Government, but as a mode of securing that all vital questions shall be fully considered by the whole of the Empire before final action is taken. Moreover, in view of the impossibility of securing the full acceptance of liability by the Dominions for certain aspects of Imperial policy, the plan, first clearly enunciated in my letter to *The Times* (26 April 1924), in the controversy over the Treaty of Lausanne, has been devised under which recognition is accorded to the distinction between passive and active liability. A Dominion may thus acquiesce in a course of Imperial policy, while it would not be prepared to promise any active assistance in making effective the obligations undertaken by the Empire. This is a perfectly intelligible position, and foreign powers will doubtless reckon on it as inevitable, while, on the other hand, it introduces no new conception of International Law and does not require their assent for its application. The express provision in the Locarno pact that its terms shall not bind the Dominions, unless expressly accepted, does no more than consecrate the constitutional usage of the Empire, under which the Dominions were never under any obligation to afford active assistance in British wars, save those undertaken in defence of Dominion territory.

It is natural that so complex a system as that now evolved should have evoked proposals for something more clear cut, and

Sir Clifford Sifton among others has definitely appeared as a supporter of the view that the relations between the Dominions and the United Kingdom as regards foreign affairs and defence should now be regulated on a treaty basis. This now popular proposal has doubtless a precedent in Sir John Macdonald's dictum of 12 March 1885 that 'the reciprocal aid to be given by the Colonies and England should be a matter of treaty, deliberately entered into and settled on a permanent basis'. But this remark was merely made in support of his decision not to offer aid to Britain in the Sudan expedition, and it is clear that no Canadian Parliament would ever authorize the Government of the Dominion to conclude any precise agreement, involving Canada in the necessity of giving help in British wars; secure from other foreign countries under the aegis of the Monroe doctrine which Canning inspired, protected from the United States by fundamental considerations of American politics, Canada has remained justly indifferent to the exhortations of Messrs. Hughes and Bruce alike to share in the cost of Empire defence, and can never be expected to interest herself automatically in European problems. The case of the Union of South Africa is dominated by the Republican sentiments of a large minority, if not a majority, of the European population and by a preference for detachment from European affairs which General Smuts has vainly attempted to counter. Nor would it profit Australia or New Zealand to seek precisely to define the support to be given or received from the United Kingdom. It is a true instinct which has made both Dominions deprecate the idea of pressing the conception of autonomy to extreme lengths; the eastern situation presents elements of danger whence the Dominions must look for protection to the closest relations with the United Kingdom rather than delude themselves with visions of the protection of the United States. The sacrifices which the United Kingdom would make for an integral part of the Empire would be very different in magnitude from those which would be deemed adequate for a merely allied state. It is significant that the treaty with the Irish Free State makes no effort to deal with this aspect of the relation of the two countries, contenting itself with an endeavour to prevent the maintenance in the Free State of forces sufficiently strong to be a menace to the security of the Empire. Nor in the present transitional state of affairs

in India could any treaty relations be contrived which would have any value or promise of permanence. The possibilities of inter-Imperial alliances were soberly considered by Mr. Bruce in his address to the Commonwealth House of Representatives on 3 August 1926 in anticipation of the Imperial Conference, when he made clear the fundamental difficulty of any Dominion entering into definite commitments as to assistance in war. Small wonder, therefore, that this mode of action should have failed to win the support of the Imperial Conference, which once more expressed its unwillingness to seek to fetter by formal arrangements the natural growth of inter-Imperial relations.

Of the many misunderstandings to which the vague terms of the Report have given rise one may at once be dealt with. It seems to be held by many authorities that assimilation of the position of the Governor-General to that of the King means depriving him of any authority. Thus, in the Canadian Parliament Mr. Cahan, K.C., countered my support of the position of Mr. Mackenzie King by claiming that it meant that a Prime Minister would be entitled, after receiving a dissolution of Parliament, to demand another forthwith if the polls failed to give him the majority he desired. This argument, of course, as I pointed out in my reply in *The Scotsman* of 11 May, rests on a complete misunderstanding of the position of the King. The essential part played by the sovereign in the system of the British Constitution is that of preserving the system from violation by ministers or Parliament. The one service which he can render the people is not seeking to secure the adoption by ministers of his political conceptions, but assuring that ministers and Parliament alike do not forget that final authority lies with the people. Hence it follows that the King cannot properly refuse the first request of a ministry for a dissolution, for that means a reference to the real sovereign power in the State; on the other hand his obligation to the people would necessitate the refusal of an immediately ensuing second request, for that would be to defy the will of the people as expressed at the polls. In a country where constitutional propriety is fully recognized there may be little or no occasion for the use of the reserve power of the Crown, but it is wholly impossible to deny its existence either for the King himself or for the Governors-General.

In the light of these facts, it need hardly be added that I cannot admit for a moment the effort made by the Attorney-General of New South Wales to claim my support for the attempt to coerce the Governor of that State into swamping the Legislative Council. As repeatedly stated (e.g. in *The Scotsman* of 17 November 1926 and 4 March 1927), I consider that in similar circumstances it would have been unconstitutional for the King to swamp the House of Lords, and that Admiral Sir Dudley de Chair's attitude was in perfect harmony with his constitutional duty. The discourtesy with which he was treated by his Premier in this connexion must be regarded as wholly inexcusable. But it only throws into brighter relief the perfect fairness which the Governor continued to show to his advisers, and which culminated in May 1927 when, after refusing to Mr. Lang the dissolution for which, with the support of only one member of his Cabinet, he asked, he accepted his resignation, thus dissolving his ministry, and then recommissioned him to form a new ministry in the hope that the much-needed dissolution would shortly be advised by the reconstituted ministry. It is obvious that the temptation to dismiss ministers must have been strong, but the Governor wisely held that so drastic a step was unnecessary and would merely prejudice the position as giving colour to accusations of partisan conduct. Fortunately, the federal constitution has checked the worst extravagance of the Premier and his majority, the High Court having unhesitatingly declared invalid the tax of ½*d.* on each copy by which the ministry sought to penalize the opposition of practically the whole of the newspapers of the State.

The view here advocated of the duties of the Crown does not, I admit, accord either with the action of the Secretary of State in authorizing in 1924 the Acting-Governor of Tasmania to assent to a Bill passed by the Lower House, but refused concurrence by the Upper and therefore utterly invalid, or with the view expressed in June 1927 by Lord Birkenhead that the Crown could properly assent to a Bill passed by the two Houses altering the composition of the House of Lords and preventing future change in constitution or powers without its own assent. But in both cases the doctrine enunciated appears to me to reduce the Crown to a mere instrument of ministers, and to

ignore entirely its function as a safeguard to the electorate against usurpation of undue power by a temporary Parliamentary majority.

The decision in the Tasmanian case appears to me to be symptomatic of a dangerous tendency, perhaps engendered by war-time conditions, to depart from the maxim that it is the duty of the Executive Government to respect meticulously the law and to violate only in case of grave emergency. No adequate excuse can be adduced for the breaches of law which compelled the passing of the *Restoration of Order in Ireland (Indemnity) Act*, 1923, or the *Poor Law Emergency Provisions (Scotland) Act*, 1927. Still more inexplicable is the decision carried out in the Order in Council of 30 July 1923 to confer on the Governor-General of New Zealand legislative authority in respect of the Ross Dependency, which is a British settlement, and in which, therefore, under the express terms of the *British Settlements Act*, 1887, legislative authority ought to have been entrusted to three or more persons within the settlement and not to a single individual or even to the Governor-General in Council of a place other than the settlement. Still more unfortunate is the decision to endeavour in the Cyprus Letters Patent of 10 March 1925 (Clause ix) to enact that 'it shall not be lawful for the Governor and Legislative Council to make any law altering the constitution of the Legislative Council'. It is an elementary principle that a representative legislature, such as that of Cyprus, has 'full powers to make laws respecting the constitution, powers, and procedure of such legislature', as is expressly enacted in the *Colonial Laws Validity Act*, 1865 (s. 5), and the provision of the Letters Patent is absolutely invalid, whereas the desired effect could have been simply secured by requiring as usual the reservation of any law to amend the constitution of the Council.

The view taken in this work (completed in November 1926) of the significance of the Report of the Conference of 1926 as sentimental rather than substantial was expressed in the contribution which appeared in the *Glasgow Herald* simultaneously with the text of the Report on 22 November 1926 and in my articles in *The Outlook* of 8 January and 5 February. The passage of time has only served to confirm me in this opinion. It is in effect the view of General Smuts, as opposed to the

exaggeration of the importance of the Conference by General Hertzog, as expressed in the debate in the Union House of Assembly on 16 March 1927, when he effectively cited the rather similar doctrine of Lord Balfour in his Edinburgh address. Moreover, it is extremely significant that the Government of Canada decided that it was not necessary to ask Parliament to approve the Report, and so little have its recommendations been regarded as fundamental in the United Kingdom that His Majesty's Government did not even arrange a discussion of the Report, which was merely raised incidentally by an opposition member on 29 June. Though Sir John Marriott doubted the wisdom of letting loose a metaphysician on the Constitution of the British Empire, lest he prove as dangerous as Athanasius in theology, it was clear that the House of Commons was satisfied that nothing essentially new had transpired ; the Secretary of State for the Dominions held that the two principles adopted at the Conference were the absolute equality of the Dominions within the Empire and their unity under the common Crown. But these two principles will be found expressed with remarkable accuracy of thought and language in Mr. Bruce's speech of 3 August 1926, which in a very real sense may be said to foreshadow the essential content of the Report, though Mr. Bruce, like Mr. Hughes and as opposed to General Hertzog, attached no importance to the removal of the formal marks of dependence of the Dominions, concentrating instead on the absolute necessity for the Commonwealth that the unity of the Empire for purposes of foreign affairs and defence should be preserved. While the unhappy controversy over the South African flag has cast a shadow on the repudiation by General Hertzog of the idea of secession, it is at least satisfactory to record that there was no opposition by the Nationalist party to the Labour amendment of Mr. Strachan on 21 June, which, while supporting the new Union national flag with its reduction to insignificance of the Union Jack, asserted that the Union Jack was to continue to symbolize the connexion of the Union with the other members of the British Commonwealth of Nations, thus opening the way to the daily use in the Union of the two flags to denote, one the national status of the Union, the other the unity of the Empire.

One real gain in nomenclature may be ascribed to the Con-

ference. The royal title by the Proclamation of 13 May 1927 now runs : ' George V by the grace of God of Great Britain, Ireland and of the British Dominions beyond the Seas, King, Defender of the Faith, Emperor of India ', thus substituting purely geographical terms in place of the older style ' United Kingdom of Great Britain and Ireland '. At the same time the *Royal and Parliamentary Titles Act*, 1927, expressly provides that in all Acts passed in future and in public documents United Kingdom shall denote Great Britain and Northern Ireland. It may therefore be hoped that in place of the ugly phrase ' His Majesty's Government in Great Britain ', which has recently been used, we shall have the correct term ' United Kingdom ' regularly employed. Nothing whatever is gained by ignoring the position of Northern Ireland, which is the outcome not of chance or prejudice but of centuries of history and of deep-rooted racial tendencies.

The term ' Dominions ' in the royal title is, of course, used in the widest sense of territories belonging to the Crown, Great Britain and Ireland being equally part of His Majesty's Dominions in this sense. In a new and narrower sense the word Dominions applies to the self-governing Dominions in accordance with the decision of the Colonial Conference of 1907, so that Newfoundland is in this sense a Dominion, as I pointed out in a note in *Canada* of 25 October 1924, while Malta and Southern Rhodesia are not entitled to the style. The Irish Free State is now a Dominion, while all the Dominions are in legal terminology colonies and the *Colonial Laws Validity Act*, 1865, applies to their legislation. As it is often convenient to use the term ' dominions ' in the wider sense, it is desirable then to distinguish its meaning by the use of an ordinary in place of a capital initial letter ; the term ' possessions ', which otherwise is suitable to denote all the territories of the Crown, has unfortunately been given by the *Interpretation Act*, 1889, a technical sense in which it signifies all His Majesty's dominions save the United Kingdom.

Of the political changes ensuing on general elections in the Dominions which have taken place since this work was completed, it is of interest to note South Australia has reverted to Liberal-Country rule, that Western Australia has sustained Labour, and that Victoria has seen the establishment of a

Labour Government by reason of the feud between the two sections of the anti-Labour forces, the ex-Premier as leader of the Country party having advanced claims for a proportion of seats in the Cabinet of a coalition Government which proved unacceptable to the other wing, thus permitting the instalment of a Labour administration compelled to rely on the insecure support of a number of Liberals. The Irish Free State, on the other hand, suffered no immediate change of Government from the election of June, but the Government ceased to command a majority, even though the new Republican party, Fianna Fail, no less than the Republican Sinn Fein irreconcilables, who united outnumber the governmental party, at first refused to take the oath and thus were excluded from the Dáil. In August, however, a new chapter in the history of Irish relations with the United Kingdom was inaugurated by the entry of Fianna Fail into the Dáil.

Doubtless it is to the question of the oath that we must attribute the decision of the Dáil to provide for the automatic re-election of the Chairman to the Dáil for his constituency in the last Dáil, thus saving from opposition the member of the Dáil on whom is incumbent the unpopular duty of securing that the oath shall duly be taken.

A strange misconception of the constitutional position of the Governor-General of Canada was revealed in the debates on the reassembling of Parliament after the return of Mr. Mackenzie King from the Imperial Conference. It had transpired that during the constitutional crisis of the preceding June Mr. King had suggested to the Governor-General that he might do well, before deciding on the issue of dissolution, to ascertain the views of the Secretary of State for the Dominions as to his constitutional position. This action was keenly and, quite sincerely, denounced as attempting to introduce Imperial interference in the affairs of Canada. As a matter of fact, as shown in my letter in *The Scotsman* of 16 March, Mr. King's action was entirely constitutional. Lord Byng, a gallant soldier without political experience, was confronted with a difficult position, and, as wholly unversed in constitutional usage, nothing was more natural than to advise him to inquire from the head of the department officially charged with recording constitutional precedents what was in such a case the constitutional duty of

a Governor-General, i.e. whether he was to be guided by the practice of the Crown in the United Kingdom or should exercise a personal discretion. That the Secretary of State should never intervene in such issues is obvious; that he should refuse to advise if asked would be absurd, and surely there could be nothing undignified in a Governor-General consulting an expert instead of relying on the advice of a private secretary or on his own interpretation of the dicta of writers of text-books.

On one problem presented by the Conference no light has been forthcoming from any official quarter. If the Dominions are really autonomous, then clearly it is open to claim that the King should accept the recommendations of their Prime Ministers as regards honours on the same principle as he accepts those of the Imperial Prime Minister. Doubtless this is not intended, and the present practice of Imperial ultimate responsibility will continue. It is in fact clearly justified by the consideration that honours are given recognition throughout the Empire, and that, accordingly, while honours of purely local validity could be granted on local office, ordinary honours must still rest on Imperial advice. It is of interest to note that the Royal Society of Canada appears to have suggested a local system of honorary awards, while Quebec by Act (1925, c. 33) rejoices in the possession of Commanders, Officers and Knights of Agricultural Merit, who are hardly likely to purchase these distinctions by contributions to party funds.

So much confusion seems to exist as to the question of the appeal from the Irish Free State to the Privy Council that it is desirable to point out that the present position is the result of illogical compromises. The acceptance by the Free State in the Treaty of 1921 of the model of Canada as the foundation of the interpretation of her constitutional position meant that no statutory limitation should exist regarding the bringing of appeals by special leave from any Irish Court of Law to the Privy Council. But the framers of the constitution in 1922, under pressure from the Imperial Government, devised a compromise which is expressed in the constitution. Under it (Articles 65 and 66) the only appeal from the Free State lies from decisions of the highest Court, the Supreme Court, and the Parliament has the power to prevent any class of cases ever reaching that Court save only cases which involve the validity

of any law. This means, in effect, that the Free State was allowed by the Imperial Government to take powers which would enable it to shut off from the Privy Council all save constitutional cases. It is clear, therefore, that Lord Cave completely misunderstood the matter when he contended in the House of Lords on 3 March 1926 that the aim of the constitution was to preserve the appeal in ordinary legal issues, and that the action of the Parliament in legislating to prevent the Privy Council usefully entertaining an appeal as to the meaning of a point of Irish land legislation, by giving statutory validity to the view taken by the Supreme Court, was entirely in the spirit of the constitution. Moreover, common sense supports the conclusion that only in regard to constitutional issues, involving the supremacy of Imperial legislation over Irish legislation, is there any real Imperial interest in the existence of the appeal. There remains, of course, the possibility that the general provision, which governs the whole constitution, of conformity to the Canadian model may be ruled by the Privy Council to render the attempted restriction in the constitution null and void, but this contingency perhaps may be neglected. It may be added that the same point may be raised as regards certain other provisions of the constitution, such as the prohibition (Articles 28 and 53) of the grant of a dissolution to a defeated ministry.

I have expressed the opinion that Quebec still values the appeal to the Privy Council as one of the chief securities for the position of that province in Canada, and I note that my view was cited with concurrence by Mr. Guthrie, leader of the Opposition in the Canadian House of Commons, during the debate of 29 March on the implications of the Report of the Imperial Conference. It appears from the observations of Mr. Lapointe, the Minister of Justice, that some at least of the people of Quebec, irritated in part at the decision of the Labrador boundary dispute with Newfoundland unfavourably to Canadian claims, are prepared to see Canada given autonomy both as regards constitutional change and the appeal. But I remain sceptical how far this movement will extend at any early date, and I confess that from their own point of view the people of Quebec may well be content with the *status quo*, however humiliating it may be in the opinion of my much-esteemed friend, Mr. J. S. Ewart, K.C.

The increase in the cost of production has rendered it necessary in preparing a new edition of this work to compress the material into two volumes in lieu of three, though the additional matter includes the record of the all-important years from 1912–26. It has been necessary, therefore, to re-write the whole, and to substitute summaries for the citation verbatim of the leading dispatches and cases, and it is some consolation that the result of the change of scale and method is to avoid the supersession of the edition of 1912. Some space has fortunately been saved by the decision of the High Court of the Commonwealth to reverse the judgements based on the doctrine of the reserved powers of the States and the immunity of State instrumentalities, which I analysed at length in the former edition with a view to show their defects. In summarizing recent developments of the interpretation of the Commonwealth constitution I have profited by the able and thoughtful work of Mr. Donald Kerr, LL.D., of the South Australian Bar. On many points it has been necessary to state results rather than arguments ; these will be found in my *Imperial Unity* or *War Government of the Dominions* or chap. IV of vol. VI of *The History of the Peace Conference* or in the series of articles on Imperial Constitutional Law which I have contributed at the request of the editors to the *Journal of Comparative Legislation*, vols. i–ix (1919–27). The most important of the original authorities for Dominion status up to 1917 have been printed in two volumes of The World's Classics, *Selected Speeches and Documents on British Colonial Policy, 1763–1917.*

Considerations of space have precluded any effort to deal with the over-modest instalment of Responsible Government conceded to India by the Act of 1919. The excessive caution of the Imperial Government, on the one hand, and the exaggerated and often impossible demands of extreme politicians, on the other, have undoubtedly rendered the progress of India since 1920 needlessly slow and chequered, but it is clear that there has been definite progress and that there is a probability of further advance in lessening the control of the Imperial Government on the lines indicated in the report which I submitted when a member of Lord Crewe's Committee on the Home Government of India (Cmd. 207).

Of those whose help in one form or another I acknowledged

in the previous edition, the Hon. John G. Jenkins, Lord Carmichael, Mr. James Drysdale, and Mr. R. C. Steuart Keith, I.C.S., have to my deep regret passed away, and Sir William Keith's absence in Burma has precluded the renewal of his help. The form taken by the book has been largely influenced by Mr. R. W. Chapman's suggestions, and I am deeply indebted to my wife for her assistance in the task, always arduous, of compression of a material only too abundant. Acknowledgements are gratefully expressed to the High Commissioners of the Commonwealth of Australia, New Zealand, the Union of South Africa, Newfoundland, and Southern Rhodesia for the supply of information, and to Mr. J. S. Keating, who furnished the papers of which the substance is embodied in Appendix A. The many efforts which have been made by foreign writers to define the position of the Empire seems to me normally to be vitiated by serious misunderstandings, but value attaches to the views of Professor C. D. Allin, of the University of Minnesota, whose familiarity with colonial history has been established by a long list of important contributions. I am glad that on a number of important points as to Dominion autonomy and foreign relations my views accord with those expressed by Sir R. Borden in his *Canadian Constitutional Studies* (1921) and in his important address to the Institute of Politics, Williamstown, Mass., of 17 August 1925. In special was it gratifying to find his complete acceptance of my argument for the assimilation of the position of the Governor-General to that of the King, a doctrine which unhappily was violated in 1926 by Lord Byng with somewhat unfortunate results for the Dominion.

If I do not express nominatim my sense of obligation to those oversea statesmen, lawyers, and students with whom I have had oral or written communication on problems of Imperial relations, it is due merely to the desire not to seem to ascribe to them responsibility for views with which they may only in part concur. Nothing is more illuminating than to learn details of the complex personal issues which in fact so largely determine the actions of governments, but it may be at times easier for those who are detached from local interests to see more precisely than the protagonists the constitutional implications of their actions and speeches. But, as experience proves, to attempt impartiality is certainly to displease the combatants on either side.

I have sacrified to the needs of compression, with great reluctance, the Appendix of Prerogative Instruments, which would have suffered seriously by any attempt to abbreviate. It requires, so conservative are lawyers, no change of the slightest importance. New Letters Patent indeed have been issued, in 1925, for Queensland, but the reviser has been so unwilling to break even in the slightest with the past that he not only permits the reference to the royal Order in Council of 6 June 1859 to stand, though it is still more antiquated than it was when I suggested its removal in 1912, but he authorizes the Governor to appoint members to the Legislative Council, which met its fate and passed away in 1922. In due course, let us hope, a revision of these venerable documents will bring them closer to reality.

Considerations of space[1] have compelled me reluctantly to refrain from adding the interest of citation of striking episodes in colonial history, such as are fully depicted in the many volumes of biography or letters of statesmen in the Dominions or in such histories as C. A. Bernays's *Queensland Politics during Sixty Years*. The value of such instances in making real constitutional struggles is undeniable, apart from the relief to the reader afforded from the continuous exposition of constitutional law. But so much else had to be passed over already that it would have been inexcusable thus to occupy the limits assigned. As it is, it was with equal surprise and pleasure that I learned from the Delegates of the Oxford University Press that the demand for the work justified their suggestion of a new edition, and I gratefully acknowledge the care and skill bestowed by the University Press on the production of these volumes. It gives me pleasure to recall that the acceptance of the first edition had the support of Sir Charles Lucas, then Head of the Dominions Department of the Colonial Office.

A. BERRIEDALE KEITH.

THE UNIVERSITY OF EDINBURGH,
1 *July* 1927.

[1] Points mainly of the Conflict of Laws have been lightly passed over, as I have developed them in the 4th edition (1927) of Dicey's *Conflict of Laws*. The account of British Nationality here given is based on the elaborate discussion in that work.

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[*Paragraphs 5–7 should stand as paragraphs 3–5 of Chapter IV, having been accidentally misplaced.*]

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ABBREVIATIONS

The following abbreviations have been used in addition to the ordinary contractions for the titles of the law reports current in England :

A.L.R.	Argus Law Reports.
B.C.	British Columbia Reports (from 1867).
B.Y.B.I.L.	British Year Book of International Law.
Cart.	Cartwright, Cases on the British North America Act.
C.L.J.	Canadian Law Journal.
C.L.R.	Commonwealth Law Reports (from 1903).
C.L.T.	Canadian Law Times.
C.T.R.	Cape Times Law Reports (also cited as Sheil).
D.L.R.	Dominion Law Reports (Canada).
E.D.C.	Court of Eastern Districts of Cape Reports.
Ex.C.R.	Reports of the Exchequer Court of Canada.
F.L.R.	Fiji Law Reports.
Gr.	Chancery Reports, Upper Canada and Ontario.
H.C.G.	High Court of Griqualand Reports.
J.C.L.	Journal of Comparative Legislation and International Law (Third Series from 1919).
J.S.C.L.	Journal of the Society of Comparative Legislation (New Series up to 1918).
Knox	New South Wales Reports.
L.C.J.	Lower Canada Jurist.
L.C.R.	Lower Canada Reports.
L.N.	Legal News.
L.Q.R.	Law Quarterly Review.
Legge	New South Wales Reports (1826–62).
M.L.R.	Montreal Law Reports.
M.R.	Manitoba Reports.
N.B.	New Brunswick Reports.
N.L.R.	Natal Law Reports.
N.S.	Nova Scotia Reports.
N.S.W.L.R.	New South Wales Law Reports (1880–1900).
N.Z.A.C.R.	New Zealand Appeal Court Reports.
N.Z.J.R.	New Zealand Jurist Reports.
N.Z.L.R.	New Zealand Law Reports.
O.A.R.	Ontario Appeal Reports.
O.B. & F.S.C.	Oliver Bell and Fitzgerald, New Zealand Supreme Court Reports.
O.L.R.	Ontario Law Reports.
O.R.	Ontario Reports.
O.R.C.	Orange River Colony Reports.
P. & B.	W. Pugsley and G. W. Burbidge's New Brunswick Reports.
P.E.I.	Prince Edward Island Reports.

Pugs.	W. Pugsley's New Brunswick Reports.
Q.L.J.	Queensland Law Journal.
Q.L.R.	Quebec Law Reports.
R. & C.	Russell and Chesley, Nova Scotia Reports.
R. & G.	Russell and Geldert, Nova Scotia Reports.
R.J.Q.	Les Rapports Judiciaires Officiels de Québec.
R.L.	La Revue Légale.
S.A.L.R.	South Australia Law Reports.
S.A.L.R.	South African Law Reports (cited by year and Provincia Local or Appeal Division, from 1911 upwards).
S.C.	Supreme Court of Cape Reports.
S.C.R.	Supreme Court of Canada Reports (from 1878).
S.R. (N.S.W.)	State Reports, New South Wales (from 1901).
S.R. (Qd.)	State Reports, Queensland (from 1901).
Steph.Dig.	Stephen's Quebec Law Digest.
Stuart	Lower Canada Reports.
T.P. or T.P.D.	Transvaal Provincial Division Reports (from 1910).
T.S.	Transvaal Supreme Court Reports (up to 1909).
Tas.L.R.	Tasmanian Law Reports.
U.C.C.P.	Upper Canada Common Pleas Reports.
U.C.Q.B.	Upper Canada Queen's Bench Reports.
V.L.R.	Victoria Law Reports (from 1875).
W.A.L.R.	Western Australia Law Reports (from 1900).
W.N. (N.S.W., &c.)	Weekly Notes (New South Wales, &c.).
W.W. & A'B.	Wyatt, Webb, and a'Beckett, Victoria Reports (1864–9).

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Wright v. *Wright*, 13 C.T.R. 881 : 964 n. 2.
Wright v. *Wright*, 26 N.L.R. 651 : 963 n. 1.

Yelverton's Case, [1893] A.C. 138 : 1106 n. 3, 1121 n. 1.
Young v. *Adams*, [1898] A.C. 469 : 288 n. 1.
Young v. *S.S. Scotia*, [1903] A.C. 501 : 103 n. 4.
Young v. *Waller*, [1898] A.C. 661 : 288 n. 1.

Zacklynski v. *Poluskie*, [1908] A.C. 65 : 1135 n. 1.
Zaghlul Pasha, In re, 67 S.J. 382 : 341 n. 2, 348.
Zamora, The, [1916] 2 A.C. at p. 92 : 93 n. 3.

PART I

INTRODUCTORY

I

THE ORIGIN AND DEVELOPMENT OF RESPONSIBLE GOVERNMENT

§ 1. *The Origin of Representative Government*

IN the early days of British expansion overseas two legal doctrines were applied in determining the status of territories acquired for the Crown. If territories were occupied without conquest from, or cession by, a civilized power, as took place in the case of lands uninhabited or occupied only by small numbers, then British subjects were deemed to carry with them as far as was compatible with the change of conditions the legal system of England. Logically it might have been expected that where Scots predominated they should have been held to carry with them the law of Scotland, but, though in the case of Nova Scotia we find traces of the attempt to claim the application to its people of the wise divorce system of Scotland, the predominance in numbers of the English in oversea settlements rendered it natural that English law should prevail. It was, however, obvious that so complex and artificial a system was ill adapted for application without serious modification in the case of newly settled lands, and that local legislation was essential, while the necessary funds for administration had to be raised by taxation. The way to a solution of the question was suggested by the analogy of the chartered company which became a marked feature in British expansion after the success of the East India Company. In such a company against the executive authority of the Court of Directors was set the sole power of the whole body of the proprietors to make by-laws binding on all members of the company, subject always to such regulations being compatible with English law. The analogy of the British constitution resulted in the development in the eighteenth century of the doctrine [1] that in a colony by settlement laws could

[1] *Blankard* v. *Galdy*, 2 Salk. 411; *Forbes* v. *Cochrane*, 2 B. & C. 448, 463; *Kielley* v. *Carson*, 4 Moo. P. C. 63, 84; *The Falkland Islands Co.* v. *The Queen*, 2 Moo. P. C. (N. S.), 266, 273; *The Mayor of Lyons* v. *E. I. Co.*, 1 Moo. P. C. 175, 272; *The Lauderdale Peerage*, L. R. 10 App. Cas. 692; *Catterall* v. *Catterall*, 1 Rob. Ecc. 580; *Freeman* v. *Fairlie*, 1 Moo. Ind. App. 324.

only be made with the assent of an Assembly in which the people were present in person, or, as considerations of distance normally rendered inevitable, by representatives. Moreover, taxation fell under the same rules as the enactment of laws, and from the constitutional struggles of the seventeenth century the idea had become firmly implanted in the minds of settlers overseas that taxation without representation was illegal and destructive of liberty. There was considerable vagueness in the theory, especially as regards the right to the franchise which was normally granted to freeholders when a royal grant of a constitution was made, but the principle was clear enough, and it found striking recognition in the history of the Australian settlements after 1815, when it was admitted that, while convicts might be dealt with under the Imperial Acts establishing the system of transportation, and soldiers and sailors restrained under the legislation regulating these services, the Governor could not legislate for free persons who had come to settle in the country, and it was therefore necessary to pass express legislation empowering him to do so.[1]

The position was different as regards colonies acquired by conquest, or by cession, which normally supervened on conquest. It was held[2] that in these cases the Crown had an unfettered right of legislation, at any rate if no specific stipulations were included in the instrument of cession. Despite, however, some vagueness, it is clear that stipulations in treaties were binding indeed on the conscience of the Crown, but they did not become law unless and until they were duly enacted. But it was obvious that settlement by white immigrants could not be expected to prosper in territories where English rights were not assured to the new-comers, and it was therefore customary to concede to such colonies representative institutions ; thus after the cession of Canada by France in 1763 it was proposed by the Royal Instructions to the Captain-General and Governor-in-Chief of Quebec to arrange for the calling of an Assembly in order to encourage the influx of English settlers to the newly acquired territories. It might seem as if the power to grant

[1] 4 Geo. IV, c. 96 ; Charter of Justice, 13 Oct. 1823.

[2] *Smith* v. *Brown*, 2 Salk. 666 ; *Beaumont* v. *Barrett*, 1 Moo. P. C. 59, 75 ; *Cameron* v. *Kyte*, 3 Knapp, 332, 346 ; *Attorney-General* v. *Stewart*, 2 Mer. 143, 157.

representative institutions must include the power to cancel them if need arose, but in the famous case of *Campbell* v. *Hall* [1] it was finally decided that, if representative institutions were granted by the Crown to a conquered or ceded colony, the grant was irrevocable, unless indeed the right of revocation were expressly reserved in the instrument by which the grant was made.

Representative institutions, therefore, belonged of right to settled colonies, and once conceded, as was normal, to other colonies, became irrevocable. It was natural, therefore, that this form of government should early prevail in the American and West Indian possessions of the Crown. The Crown, moreover, had scant control over the Legislatures; in some cases the analogy of the chartered companies resulted in the Crown having no control over the Executive, and even in the more normal case, where the Governor was a royal nominee, the Assemblies were apt to use the control of finance to usurp the power to direct the actions of the executive and to govern by committees. The revolt of the American Colonies was preluded by clear signs of the weakness of the royal authority, and a definite change of policy was seen in the passing of the Act of 1774 [2] which denied to Quebec the representative system announced in 1763, and in lieu entrusted the legislative power to the Governor and a nominee Council. The plan of 1763 was indeed, as it stood, unworkable, as no provision was made to enable Roman Catholics to become members of the Assembly, whence they would have been excluded by their inability to take the oath of supremacy and to make the declaration against transubstantiation, but Sir Guy Carleton was clearly motived by the desire to create a stronghold in Quebec to serve in the task which he foresaw of reducing to obedience the American Colonies.[3] His belief that formidable forces for this purpose could be raised in Canada proved ludicrously inaccurate, the habitant relieved from seignorial and governmental compulsion revealing his innate hatred of militarism, and the English settlers, reinforced by refugees from the United States, accustomed to free institutions, pressed for the grant of the Assembly which had been promised to them. The result was seen in the

[1] 20 St. Tr. 239.

[2] 14 Geo. III, c. 83.

[3] See Coupland. *The Quebec Act.*

further intervention of Parliament which by an Act of 1791 [1] divided Canada into two provinces and equipped each with the full apparatus of a Governor, Council, and Assembly. The Acts of 1774 and 1791 were decisive in their effect in securing the preservation of the French nationality in Canada; by the first, the interests of the English settlers were definitely postponed to those of the French, who were in effect encouraged to maintain their distinctive legal system and religion; by the latter, tardy justice was done to the English, but simultaneously a French province was created. When Lord Durham in 1838 recommended that the partition should be undone, he believed, perhaps on the strength of the history of Louisiana, that the French could still be amalgamated with the British into one people; but, though the provinces were reunited by the act of 1840,[2] it was already far too late to seek to undo the results of Carleton's effort to use a docile French population to repress the American struggle for liberty.

The intervention of Parliament had been necessary in 1774 partly in order to undo the effect of the Royal Commission of 1763 providing for the summoning of an Assembly, partly because it was necessary to relax in their application to French Canadians the penal laws applicable to Roman Catholics throughout the royal dominions under Imperial Acts. No such action was required in the other provinces of Eastern Canada. In 1758 Nova Scotia was accorded a bicameral Legislature of the usual type to replace the nominee Council, which since 1713 had served as an advisory and a legislative body in conjunction with the Lieutenant-Governor. The change was motived by realization that such a body could not properly make laws for a settled colony. Similarly, Prince Edward Island, when separated from Nova Scotia in 1769, was first given a Lieutenant-Governor and a Council with executive and legislative functions, but an Assembly was summoned to meet in 1773. In 1784 New Brunswick was brought into being as a distinct province with both Council and Assembly. In all three cases action was taken under the royal prerogative alone.[3]

Western Canada in the meantime remained under the vague

[1] 31 Geo. III, c. 31. [2] 3 & 4 Vict. c. 35.

[3] Houston, *Constitutional Documents of Canada*, pp. 11, 21 f.; Canada *Sess. Pap.*, 1883, No. 70.

control of the Hudson Bay Company, but the opening up of the west of America resulted in realization of the necessity of resisting the claims of the United States, and the Treaty of 1846 secured for the Crown Vancouver Island and what, since the choice of name made in 1854 by Queen Victoria, is known as British Columbia. It was proposed to expedite settlement by granting the territory to the Company for a period of ten years from 1849[1] on terms of colonization. A Governor was appointed with a nominee Council but with power to summon an Assembly; but the first incumbent of the office found himself powerless before the Company, and retired to England. James Douglas, the Company's chief factor, was then given the office, but he served rather the interests of the Company which were opposed to settlement than those of the Government, and, though a petition from the few settlers for the revocation of the grant to the Company in 1853 was defeated by the Company's influence, Douglas was instructed to call an Assembly, which, composed of seven members, met in August 1856. In the same year the discovery of gold on the Fraser river led to settlement on the mainland, and rendered it essential to give the territory some form of organization to replace the authority *de facto* asserted by Douglas and the miners' readiness to turn themselves into a self-regulating community. By an Act of 1858[2] British Columbia was created a Crown Colony, the Governor being given legislative authority, but the summoning of an Assembly being contemplated. Douglas was given the new post, severing his connexion with the Company, but he failed to conciliate public opinion, and by 1861 the demand for an Assembly became strong. It was felt difficult to concede the request, as the settled population was small and the Indians formed a large majority of the inhabitants, but in 1863 it was decided to introduce an indirect form of representation. By 1865, however, the Legislature of Vancouver Island presented a request for union with the mainland, and an Act of 1866[3] amalgamated the two colonies, creating a Council with a nominee majority but including elective members. The result, it will be seen, was to destroy for the time being the status of Vancouver Island as a colony possessing a representative legislature. In 1870, however, in order to facilitate the federation

[1] 12 & 13 Vict. c. 48. [2] 21 & 22 Vict. c. 99. [3] 29 & 30 Vict. c. 67.

of Canada an Imperial Order in Council of August 9 altered the constitution of the Colony by giving the elective members a majority of 9 to 6 on the Council, and this representative Legislature promptly created by Act 147 of 1871 a wholly elective Assembly, representative government at the same time passing over to responsible government. The other western provinces had no experience of representative government. The surrender of the control of the Hudson's Bay Company under an Act of 1868 [1] to the Crown was followed by a grant [2] of the territory to Canada, and in 1870 [3] Manitoba was created by a Dominion Act and given a Council and Assembly with responsible government. Similarly in 1905 from the remaining territories under the direct control of the Dominion were carved out two new provinces of Saskatchewan and Alberta with Assemblies and responsible government.[4]

In Newfoundland the aim of successive British Governments was to discourage settlement, and the administration of justice was provided for by Imperial legislation. In 1832, however, the effort thus to hamper progress was abandoned, and by repeal of the existing legislation the way was left clear for the Crown to grant under the prerogative a representative constitution to the island, with Council and Assembly. Modifications were introduced in 1842, but in 1847 these were in the main removed.[5]

In Australia the impossibility of granting an Assembly led in 1823 to the passing of an Imperial Act and the grant of a Charter of Justice ; the nominee Council constituted in virtue of this authority was confirmed in 1828, and in 1842 a somewhat tardy recognition of the just demands of the colonists, now largely increased in numbers and free from suspicion of criminal tendencies, was conceded by the passing of an Act providing for the creation of a Council, one-third nominee and two-thirds elective. A further advance was made by an Act of 1850 which authorized the passing of local legislation to substitute a bicameral Legislature for the single chamber. The local Act of 1853 for this purpose was amended by the Imperial

[1] 31 & 32 Vict. c. 105.
[2] Order in Council, 30 June 1870.
[3] 33 Vict. c. 3.
[4] 4 & 5 Edw. VII, cc. 42–3.
[5] 5 Geo. IV, c. 67 ; 2 & 3 Will. IV, c. 78 ; 5 & 6 Vict. c. 120 ; 10 & 11 Vict. c. 44.

Parliament and enacted in 1855, responsible government being at the same time conceded.[1] Tasmania, at first merely a dependency of New South Wales, received under the Act of 1823 a nominee Council in 1825; this remained nominee, though enlarged in 1842, until 1851, when in virtue of the Act of 1850 a Council two-thirds elective took its place, and this new body in 1854 passed the Act, which received the royal assent in 1855, establishing a bicameral Parliament as a preliminary to responsible government.[2] Victoria, also part of New South Wales, was created as a distinct colony by the Act of 1850, with a Council two-thirds elective; this body passed in 1853 an Act which, amended by the Imperial Parliament in 1855, created a bicameral Parliament and heralded the grant of responsible government.[3] A final diminution of New South Wales was effected in 1859 when an Imperial Order in Council under the Act of 1855 created the Colony of Queensland with a bicameral Parliament and responsible government.[4]

In South Australia there was not the complication arising from the primary use of the territory as a penal settlement. E. G. Wakefield and others pressed upon the Colonial department the advantages of creating near Spencer Gulf a province based on a scientific system of immigration, the settlers to be largely autonomous. The project was not accepted as it stood, but in 1834 an Act was passed which created a province under a Governor with a Council, endowed with executive and legislative powers, while a Resident Commissioner with ill-defined powers was to represent in the province a Board of Commissioners whose business it was to sell land and to arrange for emigration from the United Kingdom. Confusion of authority resulted in an Act of 1838 defining the spheres of action of the Governor and the Resident Commissioner, and both posts were conferred on the new Governor. In 1842 the further step was taken of abolishing the Commissioners and creating a nominee Council of seven members. In 1851, under the powers given in the Act of 1850 a Council two-thirds elective was created, which, after certain difficulties arising from a controversy over the

[1] 9 Geo. IV, c. 83; 5 & 6 Vict. c. 76; 13 & 14 Vict. c. 59; 17 Vict. No. 41; 18 & 19 Vict. c. 54.

[2] 4 Geo. IV, c. 96; 18 Vict. No. 17. [3] 18 & 19 Vict. c. 55.

[4] Order in Council, 6 June 1859, confirmed 24 & 25 Vict. c. 44, s. 3.

need of two Houses and the mode of constituting the Upper ended in the passing of an Act on 2 January 1856, which created a bicameral Legislature, with an elective upper chamber as in Tasmania and Victoria, in preparation for responsible government.[1]

In the case of Western Australia under an Act of 1829 there was created in 1831 an administration under a Lieutenant-Governor, aided by a Council of four official nominees with executive and legislative functions. The demand of the settlers for representation was very barely recognized in 1838 by the addition of four unofficial nominees to the Council, and in 1849 the decision to send convicts to the territory was but feebly set off by the inclusion in the Imperial Act of 1850 of a clause permitting the Council to alter its constitution by constituting itself two-thirds elective. The Council showed itself by no means anxious to lessen its powers ; a petition from the people in 1865 was rejected, but it was agreed to allow an addition of two unofficial nominees, and the Governor wisely consented that the unofficials should be selected by the people. This concession put into operation as regards five members in 1867, the sixth district declining anything short of out and out election, was followed in 1870 by the transformation of the Council into a body of 18, of whom 12 were elected ; but twenty years were to elapse before responsible government was to be achieved.[2]

New Zealand[3] started existence as a dependency of New South Wales, but in virtue of an Imperial Act of 1840 was constituted an independent colony with a nominated Council for legislative purposes. By an Act of 1847 a complex form of constitution was proposed for the territory, the settlement of which was being undertaken by the New Zealand Company, acting under a Charter which was surrendered in 1850. This Act contemplated a representative central Legislature, the members of which would be made up from the membership of representative provincial Councils, indirectly elected ; but its complexity was

[1] 4 & 5 Will. IV, c. 95 ; 5 & 6 Vict. c. 61 ; 13 & 14 Vict. c. 59 ; Act No. 2 of 1855–6.

[2] 10 Geo. IV, c. 22 ; 13 & 14 Vict. c. 59, s. 9 ; Ordinance No. 13 of 1870 ; 53 & 54 Vict. c. 26.

[3] 3 & 4 Vict. c. 62 ; 10 & 11 Vict. c. 112 ; 11 & 12 Vict. c. 5 ; 15 & 16 Vict. c. 72.

obviously objectionable and the constitution finally decided upon in 1852 conceded representative government with a nominee Council and an elective House of Representatives.

In the case of South Africa the Cape of Good Hope, which was effectively occupied by British forces in 1806, was formally ceded by the Netherlands in 1814. A prolonged period of Crown Colony administration followed, but in 1849 the decision to confer representative government in the form of a bicameral Legislature was arrived at, and in 1853 the necessary formal steps were completed by the issue of an Order in Council under the prerogative. Natal, which in 1844 had been annexed to the Cape, was made a distinct but subordinate government in 1845, and in 1856 by a Charter of Justice was created a distinct Colony with a partially representative Legislature. In 1904 a representative constitution for the Transvaal, annexed in 1901 and finally reduced in 1902, was drawn up, but owing to the fall of the Government of the day it never became operative, both the Transvaal and the Orange River Colony passing in 1906–7 directly from Crown Colony government to full responsible government.

Malta, originally under a Crown Colony form of government with an elective minority in the Legislative Council, passed directly to responsible government under the Letters Patent of 1921 granted under the prerogative. Southern Rhodesia, originally a protectorate administered under a royal charter by the British South Africa Company, received in 1898 a complex constitution under which the Legislature contained an elective majority, but administration was still left in the hands of the Company subject to a measure of Imperial control. In 1923 full responsible government subject only to limitations in favour of the property rights of the Company was conferred on the territory under the prerogative, the protectorate having as a preliminary step been transformed into a colony.

§ 2. *The Instability of Representative Government*

Representative government, involving the relative independence of the Executive and the Legislature, is familiar as a form of government from its employment with general acceptance in the United States, and the Transvaal and Orange Free State before annexation showed that the scheme has distinct merits at

certain stages of political development. In practice, however, in British territory it has normally proved unsatisfactory, though for varying reasons. In the West Indian Colonies [1] which remained British after the loss of the American Colonies, the electorate was too narrow in outlook and too limited to be capable of dealing effectively with the problems created by the abolition of slavery, which indeed had to be forced upon them by the authority of the Imperial Parliament. So impracticable was the Legislature of Jamaica that in 1839 an unsuccessful attempt was made to induce Parliament to suspend the constitution; and, after a modified form of responsible government introduced in 1854, the mismanagement which brought about the negro rising of 1865 was followed by the decision of the Legislature to surrender an authority it could not successfully wield.[2] In 1876 Grenada, Tobago, and St. Vincent voluntarily surrendered to Parliament their independence,[3] and in 1898 Antigua and Dominica, last of the Leeward group, reduced their Legislatures to nominee bodies in return for the promise of financial aid from the Imperial Government. Only since 1923 has an effort been made to restore some measure of election to the Windward and Leeward Islands, and, though the Jamaican Legislature has been given a quasi-representative constitution, following the precedents set in the case of India and Ceylon, and earlier applied to Jamaica itself, special power is reserved to the Executive to secure legislation despite the opposition of the elected members. Instructive is the history of British Honduras; it began in the oldest form with an Assembly of the woodcutters who founded the colony, then passed to a representative Assembly which in 1853 transformed itself into a body of 18 elected and 3 nominee members, and in 1870 converted itself into a nominee body.

On the other hand, where the settlers were predominantly European it was inevitable that they should resent the position in which they were placed by a form of representative government in which they had no control over the Executive, which was appointed and controlled from England. The demerits of the system were seen at the worst in Canada, where the history of representative government after the Act of 1791 in

[1] H. Wrong, *Government of the West Indies*, pp. 53 ff.

[2] 29 & 30 Vict. c. 12. [3] 39 & 40 Vict. c. 47.

both Lower and Upper Canada was one of increasing tension between the Assembly and the Executive, resulting in the abortive rebellions of 1837. The Assemblies, having no responsibility, were reckless and imprudent, and were denied the advantage of learning by experience; they were incapable of carrying any measures in the face of the Councils and the Governor, but by the possession of the power of the purse they could prevent the carrying out of any constructive policy which the Governor might favour. He in his turn represented an Imperial Government, which as a result of the revolt of the American Colonies regarded with anxiety the progress of democracy in Canada, and his advisers were either appointed from England and held like sentiments to those of the Government, or represented the narrow views of a local oligarchy. In Upper Canada the struggle was embittered by the championship of the Church of England by the Government against the wishes of a majority of the electorate, while racial feeling tinged the struggle in Lower Canada.

§ 3. *Responsible Government in Canada*

Efforts to adjust matters in the Canadas were early forthcoming, but much effort was misdirected. In both agitation for the election of the Legislative Councils was inspired by recognition that the Councillors from whom the advisers of the Executive came formed an invaluable source of support to the Governor who was thus relieved of the odium of constantly refusing assent to measures passed by the Houses of the Legislature. Much more promising was the demand voiced since 1828 for the responsibility of the Executive to the Assembly of Upper Canada. But nothing short of the rebellions would probably have produced the desired result. The constitution of Lower Canada was suspended by the Imperial Parliament and Lord Durham was given power as Governor-General to legislate for the territory with the advice of a nominee Council. Durham's stay in Canada extended from 27 May to 1 November 1838; his resignation was induced by the feeble defence made in the House of Lords of his ordinance banishing to the Bahamas eight of the rebels, to most of whom a generous amnesty was extended, but he had already determined on the lines of his

famous Report[1] of 31 January 1839. It is wholly unnecessary to discuss the contribution to the report of Charles Buller, his chief secretary, or Wakefield, who had already claimed for South Australia the right of the settlers to govern themselves. The credit for adopting the doctrine of responsible government and for impressing it upon the British public lies with Durham. On many subjects indeed he had but an imperfect vision ; he had been entirely disillusionized by finding the French reactionary and stagnant ; he felt the danger that the British settlers might in disgust at the oppressive treatment which they received, and the indifference of Lower Canada to the needs of the Upper province, seek union with the United States, and, realizing that a federation was rendered impracticable for the moment by difficulty of communication, he was led to his famous policy of reuniting the Canadas, in the belief that thus French nationality would speedily be merged. This complete miscalculation was compatible with the insight which saw that it was quite unnecessary to imitate American methods and secure the election of the Executive Council of the Governor, but that

> every purpose of popular control might be combined with every advantage of vesting the immediate choice of advisers in the Crown, were the colonial Governor to be instructed to secure the co-operation of the Assembly in his policy by entrusting its administration to such men as could command a majority, and if he were given to understand that he need count on no aid from home in any difference with the Assembly that should not directly involve the relations between the mother country and the colony.

Matters which fell under the category of the interests of the mother country were given by Lord Durham as 'the constitution of the form of government, the regulation of foreign relations, and of trade with the mother country, the other British colonies, and foreign nations, and the disposal of the public lands'. In other matters, including the important head of patronage, the local ministry should have its way ; the people would feel its errors and remedy them of their own action. An obvious omission from the list of matters of Imperial concern is the control of military and naval forces, but, writing at a time when two rebellions had been repressed by British forces, Imperial

[1] Fully discussed in Sir C. Lucas's edition.

control doubtless seemed axiomatic to Durham. Relations with the Indian tribes were also then a direct obligation of the Crown, and one which had not been regarded as a matter of provincial competence, whence their omission from the list can easily be explained.

The list shows clearly enough how far Durham's conception of responsible government differed from the doctrine of equality of status within the Empire now asserted, and Durham's formula undoubtedly raised, if pressed, fundamental problems which still await solution. But what was essential was the fact that his scheme was well adapted for the immediate solution of the actual difficulties of the time, and that action under its terms without any fundamental change sufficed to maintain the Empire practically down to the great war of 1914. But it was not to be expected that the theoretical difficulties which he minimized or ignored would fail to strike the minds of the Ministry at home. In a dispatch [1] of 14 October 1839 Lord John Russell with some vehemence denied that responsible government could exist in Canada; it was true that in the United Kingdom the prerogative was only exercised on advice, but Canadian ministers could not advise the Crown, which had other ministers for that purpose, possessing superior authority. This was obvious as regards all foreign relations whether of diplomacy or trade, but it applied equally in matters of more domestic concern; no British ministry could acquiesce in the state of affairs which prevailed under the influence of Mr. Papineau, when British officers were punished for doing their duty, British emigrants were defrauded of their property, and British merchants discouraged in their lawful pursuits. Fortunately, while pointing out these perfectly valid contentions, Lord John Russell conceded by a dispatch [2] of 16 October 1839 all that was really essential by laying down that the principal offices of the colony should no longer be held, as formerly, on what was equivalent to a tenure on good behaviour, but that their holders should be liable to be called upon to retire whenever from motives of public policy or other reasons this was held expedient. This, of course, meant their transformation from civil servants to ministers and it was left to C. Poulett Thomson, the first Governor-General of the reunited provinces

[1] *Parl. Pap.*, H. C. 621, 1848, p. 3. [2] *Parl. Pap.*, H. C. 621, 1848, p. 5.

under the Imperial Act of 1840, to carry into practice the new policy. His conception of responsible government doubtless was not that of the present day; he doubtless conceived of himself as the prime factor in the Government of the day, acting with ministers who secured for the doctrines which they shared or accepted on his arguments the support of the majority of the Assembly.[1] His last important action before his premature death from an accident was the carrying of a Municipal Districts Bill in the teeth of much opposition. Nevertheless a series of resolutions proposed by Mr. Harrison in the Assembly on 3 September 1841 laid down quite clearly the fundamental principles of the responsibility of the Governor to the Crown alone, but the necessity that he should act on the advice of representatives of the people enjoying their confidence.

No difficulty of importance arose during the tenure of office of Sir Charles Bagot, who had diplomatic experience and was conciliatory in temper. The next Governor-General, Sir Charles Metcalfe, had Indian administrative experience which unfitted him, though an advanced Liberal in politics, for the task which he had to face. He resented the anti-British attitude of the French Canadians, the advanced British party he regarded as republican, and his Ministry treated him with lack of courtesy, showing reluctance to consult him in regard to affairs of policy. A crisis arose on the question of an appointment which he made contrary to the wishes of the Ministry, which under Sir C. Bagot, though not without heartsearchings on the part of the Colonial Secretary, Lord Stanley, had been much changed in complexion by the introduction of a strong French Canadian element. Metcalfe felt that he had a personal responsibility regarding patronage, and that the demand of his ministers was equivalent to a claim to use their patronage to purchase Parliamentary support. His attitude violated Durham's doctrine, and ministers resigned. An impasse followed, for the Governor-General could not find any Ministry to replace that which had departed until September 1844 after a nine months' interregnum. Parliament was then dissolved, a small majority was obtained, but Metcalfe, who received a peerage as a mark of the approval of the Crown, was compelled to resign owing to fatal disease. His

[1] See A. Shortt, *Lord Sydenham* (1908); J. L. Morison, *British Supremacy and Canadian Self-Government, 1839–54*, pp. 70 ff.

period of office,[1] though in a sense marking a halt in the progress of evolution, was really of great constitutional value, showing the limitations inherent under the new arrangements in the sphere of action of the Governor-General. After the brief period of rule of Lord Cathcart, commanding the forces in Canada, who was appointed Governor-General during the danger of war with the United States over the Oregon boundary, the appointment of Lord Elgin paved the way for the definite establishment of responsible government.[2] He had had experience of the difficulty of representative government in Jamaica, and he held strongly that the essence of responsible government lay in the coming and going of ministries, the most conservative feature in the British political system, which taught politicians moderation by imposing on them responsibility for their action when in opposition. He was therefore prepared heartily to co-operate with the Conservative Ministry which Metcalfe had placed in office, so long as it did not involve him in any action which would render him unable in turn to co-operate with a Ministry of a different political type, and in return he expected his Ministry as far as possible to carry out his views for the maintenance of the connexion with Britain and the advancement of the province. Doubtless this attitude implies a more active participation in the conduct of policy than is now deemed compatible with responsible government, but at the same time it marks an advance, not merely on Metcalfe, but also on Sydenham ; the initiative is to rest in the main with ministers. The Conservative Government after an uneasy existence met with defeat in the Assembly in March 1848, and the Governor-General made no attempt to refuse their resignations[3] and appointed in lieu a Liberal administration, though he disliked the racial character of the opposition in the Assembly, and was anxious that it should lose that character and divide on other grounds into Conservatives and Liberals on the lines of the divisions in the ranks of the members of Parliament from Upper

[1] See J. W. Kaye, *Life and Correspondence of Charles, Lord Metcalfe* (1854) ; *Selections from the Papers of Lord Metcalfe* (1855).

[2] See T. Walrond, *Letters and Journals of James, Eighth Earl of Elgin* (1872) ; F. Hincks, *The Political History of Canada between 1840 and 1855* (1877) ; G. M. Wrong, *The Earl of Elgin* (1905) ; Lord Grey, *The Colonial Policy of Lord John Russell's Administration* (1852).

[3] *Parl. Pap.*, H. C. 621, 1848, p. 6.

Canada. The new Ministry in 1849 proceeded to secure legislation to provide £90,000 to be granted to sufferers during the rebellion of 1837, excluding from the benefits of the grant only persons actually convicted of treason, and thus permitting rebels to receive compensation, an idea familiar since the Irish settlement of 1921–2, but then deemed startling and objectionable by the British element of the population. Strong efforts were made to induce the Governor-General either to dissolve Parliament and compel an appeal to the electorate on the Bill, or at least to reserve it for the consideration of the Imperial Government, but Lord Elgin firmly declined to take either course, assuming the responsibility of deciding to assent to the Bill.[1] A dissolution, as he argued, might have produced a rebellion, but certainly would not have led to a reversal of the decision of the electorate, while reservation would simply have thrown an unfair burden on the Imperial Government. An attack on his person in Montreal and efforts to secure disallowance of the Act by the Imperial Government were his reward, but, although the rioting at Montreal led to the abandonment of that city as the capital of Canada, Ottawa being substituted by the suggestion of Queen Victoria in 1857, the Imperial Government declined to intervene, thus establishing the constitutional correctness of the Governor-General's act. While he thus recognized the sphere of action of ministers, he was prompt to seek to allay the bitterness of party strife by unobtrusive personal intervention in favour of moderate counsels, and he devoted himself assiduously to measures to promote British action for the benefit of Canada. Thus he intervened to deprecate any hasty insistence on Canada assuming the sole burden of her defence, and, when the negotiations for closer commercial relations with the United States, rendered advisable by the cessation in 1846 of the old policy of colonial preference with the introduction of free trade, were dragging on idly, he undertook a personal mission to Washington and succeeded in bringing about, largely by his influence and persuasion, the reciprocity treaty of 1854, which benefited Canada greatly until it ceased to operate in 1866 as the result of the denunciation of it by the United States. Moreover, he recognized that it fell to the representative of the Crown as detached from party politics

[1] *Parl. Pap.*, 25 May 1849, p. 6; 12 Vict. c. 58.

to stand out as the supporter of all movements for the moral and social improvement of the people and the promotion of education.

In one matter of vital importance Elgin differed from his father-in-law, Durham. He held that any idea of denationalizing the French Canadians was impracticable and unwise,[1] and he endeavoured to induce the Imperial Government to consent to the recognition of French as an official language. He was brought face to face with the question of the permanence of the British connexion by the Montreal annexation petition of 1849,[2] which was signed by many leading citizens and advocated a peaceable and friendly separation from the United Kingdom as a prelude to union with the United States. While he took active steps to secure the dismissal of all holders of office who did not disavow their signatures, he recognized that the petition was largely the outcome of economic difficulties resulting from British policy, and he declined to be pessimistic for the future. He insisted instead that the connexion with Britain might be maintained unbroken if it was realized that within the Empire the people of Canada might attain the fullest measure of freedom which they could desire, anticipating in this vision the events of more than sixty years.

Almost simultaneously events led to the introduction of full responsible government in Nova Scotia.[3] The ground had been prepared by the creation of an Executive Council distinct from the Legislative Council by instructions to Durham in 1838,[4] but Lord Falkland as Lieutenant-Governor shared the views of Sydenham without his ability, and insisted on seeking to rule through a coalition Ministry of which Mr. Joseph Howe, who had won a distinguished place in the fight for responsible government by his exposure in four letters to Lord John Russell of the demerits of the old system, was induced to become a member. Naturally he proposed that the general election of 1842 should be used to decide the issue of the creation of a

[1] See especially his dispatch, 4 May 1848 (Walrond, p. 54).

[2] See C. D. Allin and G. M. Jones, *Annexation, Preferential Trade, and Reciprocity* (1911).

[3] *Parl. Pap.*, H. C. 621, 1848, pp. 7, 8; J. H. Chisholm, *The Speeches and Public Letters of Joseph Howe* (1909); biographies by J. W. Longley (1904), G. M. Grant (1904), and W. L. Grant (1915).

[4] Canada *Sess. Pap.*, 1883, No. 70, pp. 8, 39.

homogeneous Ministry, but the result was indecisive, and Howe eventually resigned and began a strong attack on Lord Falkland, leading to his retirement in 1846. His successor, Sir John Harvey, elicited from Earl Grey in a dispatch of 3 November 1846 the advice that a Governor ought not to dismiss ministers but leave it to the Legislature to force them into resignation, if it lost confidence in them; ministerial advice should be accepted if it did not aim merely at party advantage, and even in that case, if the public supported ministers, their wishes must be given effect to, as it was neither possible nor desirable to govern any province against the desires of the people. In vain did the Ministry urge[1] that the full system of responsible government would be inconvenient in causing changes of office; Earl Grey[2] on 31 March 1847 reiterated the necessity for the Ministry to possess a clear majority, and pointed out that a distinction should be drawn between permanent offices and a few ministerial posts, while officers displaced under the new régime should receive pensions. Howe might now have re-entered the Ministry but preferred to await the result of the election of 1847, which went in favour of the Liberals, who accordingly defeated the Government in the Assembly in January 1848. This was followed by the appointment of a homogeneous Ministry, the Provincial Secretary, who refused to resign, being removed by the royal prerogative, and the Treasurer, whose post it was desired to divide into two offices, being dismissed without a pension, despite the efforts of the Lieutenant-Governor. His action in acquiescing in the decision of the new Ministry was attacked in the British House of Commons on 26 March 1849, but was vindicated by the Government.[3]

New Brunswick had lagged behind in the matter of responsible government, and in 1842 the elections returned a majority opposed to the system. The action, however, of the Lieutenant-Governor, Sir William Colebrooke, in appointing his son-in-law to the post of Provincial Secretary, when the incumbent of that office died at the end of 1844, elicited from Mr. L. Wilmot, the chief member of the Executive Council, which since 1832 had been a distinct body, a protest on the score that this officer

[1] *Parl. Pap.*, H. C. 621, 1848, p. 15.

[2] Ibid., p. 29. See also Earl Grey's dispatch, 3 Nov. 1846.

[3] Ibid., pp. 33–40.

should be a member of the Legislature, and the Imperial Government disallowed the appointment. It was not, however, until 1847 that, as a result of strong representations from Earl Grey, who insisted on the weakness of the existing Government and its supineness in securing progress and giving a lead to the Legislature, the Assembly on 24 February decided on the application to New Brunswick of the principles regarding tenure of office suggested for Nova Scotia.[1]

In Prince Edward Island matters were complicated by the existence of difficulties regarding landholding, the Crown having recklessly alienated the land in 1767 to a number of absentee owners who neither themselves utilized the land nor cared for others to do so. In 1839 the Assembly seemed to have reached the point of demanding responsible government, but even in 1847 it contented itself with asking that four members of the Executive Council should be chosen from its ranks, though the full system was not applied until 1851 after an address to the Crown adopted by the Assembly on 23 March 1850.[2]

In the case of British Columbia responsible government was one of the conditions on which the province was prepared to enter the federation, and accordingly an Imperial Order in Council of 9 August 1870 created a representative Legislature which enacted a measure for the bringing into existence of a purely elective Assembly to which the Government would be responsible. A limited measure of self-government was granted by Canada in 1897 to the North-west,[3] but it was only in 1905 that Alberta and Saskatchewan were accorded provincial status with responsible governments, following the model set in 1870 when Manitoba was created with full provincial status.

Matters in Newfoundland went more slowly. Strife between the two Houses of the Legislature resulted in 1837 and 1839 in failure to pass appropriation Acts, questions of privilege were fiercely contested, and clerical intervention in elections roused bitterness. The Imperial Parliament intervened in 1842 to

[1] Ibid., p. 40; J. Hannay, *Wilmot and Tilley* (1907); Canada *Sess. Pap.*, 1883, No. 70, p. 18.

[2] See *Parl. Pap.*, H. C. 566, 1847. The legislature in 1834 and 1838 petitioned for a separation of the Executive and Legislative Councils; the request was conceded on the second occasion. In Canada it was granted by 31 Geo. III, c. 31.

[3] 60 & 61 Vict. c. 28; Canada *Commons Debates*, 1897, ii. 4115.

empower the Crown to modify the constitution of 1832 by prescribing property qualifications for membership, by requiring two years' residence, by forbidding money votes being proposed save on governmental recommendation, &c. These provisions were made permanent in 1847, but the demand for responsible government on the Canadian analogy became stronger, and finally overcame the reluctance of the Imperial Government to relax control over an island whose administration was rendered complex by the existence of both French and American rights of fishery. The Assembly agreed to provide compensation for officers losing office on the establishment of the new scheme and to increase the number of members, and in return Mr. Labouchere, as Colonial Secretary, sanctioned the adoption of responsible government and gave a pledge that no change in the treaty obligations of the island would henceforth be made without consultation.[1]

§ 4. *Responsible Government in Australia and New Zealand*

The policy of strict control of governments in Canada, induced by the revolt of the American colonies, had been partly instrumental in causing the Imperial Government narrowly to restrict the powers of the Australian settlement, and similarly the grant of responsible government to Canada resulted in the recognition that it must be conceded to Australia, where the Durham report early attracted enthusiastic admiration and support.[2] That responsible government should be conceded was recognized fairly early by the Imperial Government, and the Act of 1850 contemplated that New South Wales, Tasmania, the newly created colony of Victoria, and South Australia would desire to create two Houses in lieu of the single chamber, partly nominee, which the Act approved for the time being. The Legislatures took up the issue, and their course was largely guided by a dispatch from Sir John Pakington of 15 December 1852 which conceded the principle of responsible government, and promised the surrender of the land revenues and the control of the waste lands. In New South Wales the unlucky idea of trying to create a hereditary Upper House on the model of the House of Lords obscured the issues, and evoked counter-pro-

[1] *Parl. Pap.*, H. C. 273, 1855; Prowse, *History of Newfoundland*, pp. 406 ff.

[2] E. Sweetman, *Australian Constitutional Development* (1925).

posals for an elective Upper House, or one of nominees for five years in lieu of life, while it was claimed that the northern districts should be given independent colonial status, a desire conceded by the creation of Queensland in 1859. The Duke of Newcastle on 4 August 1853 strongly advised that no experiment of responsible government should be made with a single chamber, and in the long run a Bill was passed by the Council providing for the creation of two Houses, the upper nominee, and for the grant of pensions to officials who had to retire on political grounds, that is on the establishment of ministerial tenure. Victoria followed suit, but made her Upper House elective. South Australia passed two Bills, Nos. 3 and 7 of 1853, creating a bicameral Legislature with a nominee Upper House and granting, like its sister colonies, the usual Civil List with pensions for officers dispossessed. The Duke of Newcastle, however, on 3 July 1854 disappointed the colonies by reporting that it had not been possible to dispose of the Bills at the recent session of Parliament, whose intervention was required in view of the fact that all the measures contained clauses beyond the powers of the Councils to enact. A month later he advised the Lieutenant-Governor of Tasmania that there was no objection to the application of responsible government to the colony, but that it was desirable that the enactment should strictly conform to the limits of the powers of the Legislature; the result was the enactment of 17 Vict. No. 18 creating a Parliament with an elective Upper House, and granting a Civil List.

The Bills of New South Wales, Victoria, and South Australia agreed in the effort to distinguish between classes of legislation as of Imperial or of local interest, and to limit the powers of the Governor in regard to the latter class of measures. He had the formal right of withholding assent, which it was presumed he could hardly use, with regard to Acts of local interest. As regards those of Imperial interest he might assent, refuse assent, or reserve for the consideration of the Crown, subject to the royal instructions, and in these cases even after assent disallowance by the Crown was possible. South Australia made no effort to define which Acts should be deemed of Imperial interest, leaving the issue to the Privy Council if any dispute arose; New South Wales and Victoria set out lists, Victoria adding divorce measures to those of Imperial concern. The

topics contemplated by both colonies as of more than local importance were: (1) Bills affecting allegiance and naturalization; (2) Bills relating to treaties or political intercourse or communications between the Colony and officers of foreign powers; (3) Bills relating to the employment, command, and discipline of Her Majesty's sea and land forces within the Colony and matters pertaining to its defence, including the command of the local militia and marine; and (4) Bills regarding high treason. Disputes were to be decided by the Judicial Committee on the request of the two Houses of the Legislature. The proposal, though carefully considered by Mr. W. E. Gladstone among others, was felt to be open to objection, and in confirming the Bills from New South Wales and Victoria the clauses were omitted. Powers of alteration of the constitution, though limited by the necessity of complying with certain rules, were also conceded in the Acts, and a further measure completed the scheme of responsible government by giving power to deal with the Crown lands. The question of assent to Acts was disposed of by giving instructions to the Governors that they need not reserve Bills of local interest, nor even Bills altering the Civil Lists, save if the changes affected existing holders of office. Distinctive treatment was allotted to South Australia; she was advised to recast the Bills and to omit any attempt to restrict the power of disallowance; if this were done, it was stated in a dispatch of 4 May 1855, it would be possible to give the royal assent to the Act without requiring Imperial legislation. The Governor, in accordance with the suggestion of the Secretary of State, dissolved the Council; he also suggested as an alternative the creation of a composite House of four official nominees, twelve members elected on a restricted franchise, and twenty-four on a low franchise; but this idea was conclusively rejected, and the Council passed an Act, No. 2 of 1855–6, which created a bicameral Legislature with an elective Upper House, provided for a Civil List, pensions for dispossessed officers, and ministerial tenure of office.[1] Tasmania was still more fortunate; her Act 17 Vict. No. 18 was held to be *intra vires* and received assent.

The introduction of ministerial responsibility gave rise to a few curious incidents. In New South Wales the officials liable to be dispossessed on political grounds wished to be allowed to

[1] *Parl. Pap.*, 24 July 1856, pp. 65 ff., 109.

take their pensions forthwith, but were told that they could not obtain them until they had been found wanting by the Assembly. In Victoria, on the other hand, it was not realized that responsibility was to become operative when the new Legislature had been formed, and the existing Council proceeded to defeat the officials of the day. Then the Governors of New South Wales and Victoria were confronted with the question what to do with ministers who on defeat were reluctant to resign membership of the Executive Council; royal instructions of 10 March 1859 gave the Governors power to remove members, but, while the practice was adopted in New South Wales, in Victoria it was decided to allow members of the Council to remain members for life, unless removed specially on account of some grave cause, a distinction being drawn between members under summons, the Ministry, and ex-members of the Ministry. In South Australia the model of New South Wales was followed, in Tasmania that of Victoria. In Victoria the Major-General commanding the Imperial forces was allowed anomalously to be a member of the Council, though not a member of the Ministry, on the score that he was to succeed to the administration in the event of the incapacity of the Governor.

The Act of 1855 gave power to the Crown to create a new colony out of New South Wales, and this was done after petitions from the inhabitants of the northern districts by letters patent of 6 June 1859, confirmed by an Imperial Act,[1] which established the Colony of Queensland with a constitution based on that of New South Wales, the Upper House being nominee. The Governor, Sir George Bowen, had to govern without a Legislature for six months; his Colonial Secretary accompanied him from England, and he and the Attorney-General and Colonial Treasurer presented themselves as candidates for the Assembly at the first general election, securing appointment and thus giving the Colony experienced officers for its early days of existence. The Upper House was nominated by the Governor of New South Wales, who, happily, consented to act on the advice of the Governor of Queensland.

In Western Australia the attainment of representative government was the prelude to a demand definitely formulated

[1] 24 & 25 Vict. c. 44. The difficulty arose as to the franchise laid down in the letters patent; *Parl. Pap.*, Aug. 1861.

in 1874 by the Council for responsible government, but Lord Carnarvon on 18 November pointed out that the tiny population of 26,000 rendered the grant premature, and it was not until 1883 that the matter began to be pressed as a result of the influx of population from the eastern colonies attracted by the gold discoveries. Lord Derby, however, pointed out[1] that the population was small, the area enormous, and, if responsible government were conceded, it might be necessary to separate the tropical north from the south. The Colony, however, persevered in its wishes and an animated correspondence followed; the Governor opposed the idea of partition, and objected to the proposal that the British Government should retain control of the lands above the 26th parallel for purposes of settlement; the fear lest immigration should be discouraged under responsible government he sought to dispel by addressing a letter to *The Times*. He recognized, as opposed to the Council, the desirability of assigning independence as regards the control of the aborigines to the Governor, who should remain solely in authority over the Aborigines Protection Board instituted in 1886 and control both the protectors of natives and the witnesses to native labour contracts. Sir H. Holland suggested that a single elective chamber might suffice as a beginning as in Ontario, but the Governor and Council objected, legitimately, that Ontario was not a real parallel, as it was only part of a federation, and that a barrier against hasty legislation was desirable. A compromise on the character of the Upper House was arrived at in favour of a nominee House of fifteen members, to be followed in six years by an elective body of equal size, if the population had then reached 60,000. A Bill was at last passed by the Council on 26 April 1889 and sent to England, together with a draft of an Imperial Act to permit the effective operation of the measure. Fear as to the effect of the new status on emigration hampered action on the Bill in 1889, and the Colony dispatched a deputation including the Governor, Sir N. Broome, to press on the British Government the merits of the case, which had strong support from the eastern colonies, which had at last come to recognize their essential solidarity with the west.[2] The Bill was referred by the House of Commons

[1] *Parl. Pap.*, C. 5743. Cf. on the whole subject, Battye, *Western Australia*, pp. 293 ff., 311 ff., 374 ff.

[2] *Parl. Pap.*, C. 5919.

to a select committee, and, after evidence had been taken, the decision was come to to abandon the idea of seeking to withhold from the Colony full control of her lands, and the necessary Imperial Act was duly passed, giving the Colony full responsible government, due provision having been made both for a Civil List and pensions to displaced officers.[1]

Matters in New Zealand went in a rather curious fashion. The Legislature constituted in 1854 under the Act of 1852 promptly proceeded to ask the Lieutenant-Governor to administer on the plan of responsible government. His Executive Council, however, advised him that he could not properly do so without special sanction from the Imperial Government, and in the interim a compromise was come to by which three members of the Lower and one of the Upper House were added to the Council, and the composite body carried on the administration for a couple of months when the representatives of the Legislature decided that their position was anomalous and resigned. The Administrator then with some difficulty induced the Legislature to grant provisional supply, and a dispatch of 8 December 1854 announced that the Imperial Government had no objection whatever to full responsible government, provided the Legislature secured pensions for officers retiring on political grounds, a step readily taken.[2]

§ 5. *Responsible Government in South Africa*

Responsible government was made an acute issue in the Cape of Good Hope by the action of the Imperial Government, which on 26 January 1867 intimated, to the consternation of the Colony, that the Imperial Government had decided to apply to the Cape the rule laid down for other colonies that Imperial forces maintained for the protection of the Colony must be paid for, though the strict principle would not be applied until 1870–1, and the whole situation would be reviewed in 1872.[3] The Legislature objected strongly to the proposal, declaring that the military dangers from the natives which rendered necessary the maintenance of the forces were caused by the policy of the Government, over which the Legislature had no control. The

[1] Ibid., H. C. 160, 1890; 53 & 54 Vict. c. 26.

[2] Ibid., H. C. 160, 1855, pp. 1 ff.; Rusden, *New Zealand*, i. 543 ff.

[3] Ibid., H. C. 181, 1870, p. 1.

Governor, Sir P. Wodehouse, repudiated the arguments of the Legislature, but contended that the position of the Executive was deplorably weak and objectionable ; a Governor not supported by a responsible Ministry could not, if deprived of Imperial troops, control affairs at all, while, if responsibility were conceded, it would be right, in view of the racial strife in the country, to remove entirely the Imperial forces, instead of allowing them to be used as instruments of a policy which the Imperial Government could not control. The Duke of Buckingham consented on 9 December 1867 to drop the question for the moment, but Lord Granville revived it just two years later in a dispatch [1] pointing out that the Legislature had refused to reform the finance of the Colony as suggested by the Executive, while its own proposals were unacceptable ; the Imperial Government had determined to withdraw a regiment in 1870–1, and another in 1871–2, leaving one only to protect Simon's Bay, and the Governor was directed to place before the Legislature the necessity either of conceding more authority to the Executive, or of adopting responsible government with its pecuniary and other burdens.

The Governor replied on 17 January 1870 [2] deprecating very definitely responsible government, which he deemed a contradiction in terms, as had Lord John Russell thirty years earlier. How could a Ministry responsible to its own constituencies render obedience to the paramount power ? The issue between them might be shirked or postponed, but it must come to a head. Responsible government was only suited as a preliminary to independence, as suggested by the history of events in British North America, Australia, New Zealand, and Jamaica, an allusion to discussions especially in Canada and Australia of the possibility of securing a new status either of independence or neutrality for the colonies. Justice and humanity demurred to the surrender of the native population to the unfettered control of a Legislature with utterly different habits, interests, prejudices. But despite these forcible arguments the Governor had no better alternative to propose than the reduction of the two Houses to one with a nominee President, four officials, and thirty-two elected members, suggesting, quite

[1] *Parl. Pap.*, H.C. 181, 1870, p. 15.

[2] Ibid., pp. 17 ff. Cf. Walker, *Lord de Villiers*, pp. 44 ff.

unconvincingly, that the Executive might thus obtain the necessary support of the Legislature for reforms. Naturally the Assembly rejected the plan by 34 votes to 26, and neither the remonstrances of the Legislature nor the appeals of the Governor on the score of the situation in Natal sufficed to move the Imperial Government from its decision that the Colony must put its finances in order and pay for its defence. Meanwhile the discovery of diamonds in territory claimed by the Orange Free State complicated matters, and Lord Kimberley in dispatches of 17 October and 17 November, while permitting the retention of a second regiment pending the decision as to responsible government, insisted that the Imperial Government would not maintain Imperial forces in South Africa save for Imperial purposes, and no extension of British South Africa would be contemplated unless the Cape accepted responsible government.[1] Provisionally, however, as the Legislature undertook to provide for the administration and defence of Waterboer's territory, the Imperial Government agreed to annexation by a commission of 17 May 1871. Before this arrived the chief officials drew up, on 26 April, a weighty memorandum[2] against responsible government, stressing the racial cleavage, the preponderance of natives and the necessity for their protection, the lack of education among Europeans, difficulties of communication, and the impossibility of effective representation of the eastern province, as the leaders of the people could not afford long periods of absence at Capetown. The one defect of the memorial was that it offered no real hope of any improvement in the financial chaos, and in June Mr. Molteno obtained approval of the principle of responsible government in the Lower House, which finally passed by 31 votes to 26 a Bill for its introduction; this included the curious provision that the Governor might select as ministers persons not in the Legislature, who would then have the right to speak in either House. The Upper House, however, rejected the Bill by 12 votes to 9, the eastern members being decided against the Bill.[3] But the Governor prophesied that opinion would change, and in fact in June 1872 the Council passed the Bill by 11 votes to 10, two of the western members, who had helped to give the opposition the majority in 1871,

[1] *Parl. Pap.*, C. 459, pp. 46, 66.
[2] Ibid., pp. 173 ff.
[3] Ibid., pp. 186 ff.

having ascertained from their constituencies their demand for the measure, while the Lower House affirmed it by 35 to 25. The measure only authorized the holding of certain offices by Members of Parliament, and provided pensions for the Colonial Secretary, Treasurer, and Attorney-General if they retired on political grounds, and it readily received Imperial approval. Sir H. Barkly, whose efforts had conduced to this end, after offering the premiership to the leader of the movement for responsible government, who declined on the score of age, appointed Mr. Molteno first Premier. The eastern members of the Legislature protested against the decision of the Imperial Government,[1] but met with scant sympathy ; their suggestion for partition as in the case of Queensland was rejected on the score of comparative size ; the suggestion was thrown out that if necessary the local Legislature might create two provincial Councils with a central Parliament, but even this was deprecated.

In Natal[2] there was discussion *ad nauseam* of responsible government ere it became law. Representative government as granted in 1856 was carried a step farther in 1869, when power was given to add to the Executive Council two elective members of the Legislative Council, then consisting of nominee and elective members, with a view to help the Executive to harmonize the views of the Government and the Legislature. In 1870 a Bill for responsible government, which also contemplated possible union with the Transvaal and Orange Free State, failed ; in 1873 three elective and one nominee members were added to the Legislature ; while in 1875 eight non-official nominees were added to the Legislature for five years, and the rule was laid down that taxation Bills must be carried by two-thirds of the members present when they were debated. In 1880 the Legislature passed a Bill for responsible government and petitioned the Queen, but Sir Garnet Wolseley, then Governor and High Commissioner for South-east Africa, on account of the native disturbances there, declined to support it ; and Lord Kimberley on 15 March 1881 pointed out that responsible government implied responsibility for internal and external defence, which could not be undertaken by the Colony,

[1] *Parl. Pap.*, C. 732, pp. 8 ff., 21 ff., 60 ff. Griqualand West became a Crown Colony, and in 1872 the Cape refused to annex.

[2] *Parl. Pap*, C. 6487.

while the Imperial Government could not consent to bearing responsibility for a policy which it could not control; federation with the neighbouring states was therefore a necessary preliminary to a change of Government. The Legislature pointed out that the Colony already bore the chief burden of internal defence, and that federation was not in sight, and on 2 February the Colonial Secretary suggested that the matter might be raised at the next general election. The question, however, was then shelved, responsibility seeming too great a burden, and, while the number of members of the Legislature was increased and the franchise extended, practically nothing was done to grant the natives the franchise, a most unfortunate omission, wholly contrary to the Cape tradition which declined distinctions on race grounds. It was sought in 1884 to elicit from the Imperial Government what measure of defence would be provided if responsible government were adopted, but that Government declined to answer so hypothetical a question. In 1881, however, the Council returned to the attack, pointing out that the slow progress of the Colony was due to the divorce between Executive and Legislative, that its views were not adequately represented to the Imperial authorities by a Governor in lieu of a Ministry, and that an elective minority by combining with nominees could defeat the will of the elective majority. The difficulties of defence, of the native question, and of Zululand, whose annexation was desired, were recognized, as also the problem of providing party politics in so small a population; but solutions were suggested, including the initiation of all measures affecting natives in the Upper House, which would be nominee. Lord Knutsford on 5 March 1889 was not opposed to responsible government, if the people at a general election approved it, but he could only offer a transition period of five years before the removal of the Imperial forces, and Zululand could not be annexed for a considerable period to come. Further provision for native affairs was necessary; Bills affecting natives must be reserved, measures imposing compulsory labour, infringing freedom of contract, increasing the hut tax, imposing further restrictions by pass laws on movements, and altering native law, would not be likely to receive assent. A Natives Protection Board on the Western Australian model would be desirable, and the Governor should have £16,000 at his disposal

yearly for native purposes, free from ministerial control. The general election of 1890 showed 14 members for, and 10 against, responsible government, and a Bill was passed which, as amended in the Council after being drafted by a committee, provided for a single chamber; six ministers; the provision of pensions for retiring officers; and the transfer of all the powers of the Governor as Supreme Chief of the natives to the Government, their interests to be safeguarded by requiring reservation of Bills affecting them, by preliminary consideration of such Bills by a committee, and by the requirement that differential measures must secure a majority of two-thirds; a permanent Under Secretary for Native Affairs was to be appointed and a permanent grant made. The Governor was dubious of the wisdom of one chamber; desired freedom in regard to native affairs, but thought a Protection Board of no value; he recommended responsible government on the score that the expenditure was high, loan commitments heavy, and the Colony should face the burden on its own responsibility. But petitions from considerable bodies of the people showed that responsible government did not possess universal favour, and a referendum was suggested.[1] On 28 May 1891[2] the Secretary of State conveyed approval of the principle of responsible government; doubted the wisdom of a single chamber; demanded the freedom of the Governor as Supreme Chief from ministerial control; approved the requirement of reservation of Bills affecting Asiatics and natives; asked that the special appropriation for native welfare should be made part of the constitution, and deprecated those clauses which endeavoured to define ministerial government as undesirable. The Council, as reported by the Governor on 10 August 1891,[3] conceded certain points but kept the Legislature unicameral, claimed control over the Supreme Chief, and the power to decide as to the use of the £20,000 allocated yearly for native welfare. This was declined assent mainly on the score of the failure to concede what was desired regarding native affairs and the unicameral Legislature, and in 1892 the Council sent home another Bill which created a nominee Upper House, granted £10,000 yearly without conditions for native welfare, but deleted the former provision for reservation of

[1] *Parl. Pap.*, C. 6487, pp. 58 ff.
[2] Ibid., pp. 71 ff.
[3] Ibid., C. 7013, pp. 5 ff.

Bills affecting non-Europeans and the consideration of such Bills by a committee, and claimed control over the Supreme Chief. The claims of the Council were pressed by Sir John Robinson and Mr. Sutton as a deputation; but the Imperial Government remained firm, though it was conceded that the Governor should discuss his actions in native affairs with ministers, and the view was expressed that differences of opinion would be rare. The question of the security of civil servants was disposed of by giving an appeal to the Secretary of State against dismissal without adequate grounds. After the Bill with the amendments necessary in the eyes of the Imperial Government[1] had been laid before the Council, it was dissolved, and unexpectedly the voting gave 10 members for to 14 against responsible government, but four were unseated on election petitions, and the new members voted for the change, the measure beoming law as Act No. 14 of 1893. It must be admitted that the Colony was not ripe for responsibility; the enormous mass of natives and the large British Indian population, introduced as indentured immigrants but gradually settling as free men, presented complications far beyond the power of the territory to handle successfully, and in particular the record of native administration is one of unrelieved incompetence and error. But the Imperial Government must bear a great share of the responsibility; it had shirked its duties when it had the control, and it showed a lamentable eagerness to hand over the problem to hands which it knew could not be fit, although it also knew how feeble was the real demand for responsible government in the Colony. The best that can be said for the transaction was that responsible government was clearly necessary as a preliminary to any federation of South Africa.

In the case of the Transvaal and the Orange River Colony, which had enjoyed as republics a form of representative government with much power vested in the elected Executive heads, the terms of peace on the surrender of the burghers still in the field included the promise of representative institutions leading up to full colonial self-government as early as possible.[2] It was proposed to carry the first branch of the undertaking into effect for the Transvaal by letters patent of 31 March 1905

[1] Ibid., pp. 39 ff. [2] Ibid., Cd. 1096.

which contemplated a Legislature of from thirty to thirty-five elected and six to nine nominated members, the latter to be officials.[1] It was hoped thus to secure touch with the elected representatives of the people without surrendering control, it being felt to be dangerous to give power to those who lately had been in arms against the Crown. It was also argued that the Boers had only known representative government, ignoring the vital distinction between the old and the new Executives, the one chosen by themselves, the other imposed by armed force. The British elements of the population, many of whom were used to responsible government in the Cape and Natal, disliked the proposed régime, and there was every prospect that the Executive would find itself spending its time in conflict with the Legislature. On the other hand, it was claimed that native interests would be more wisely treated by a Government under Imperial control, especially as the franchise had been denied to the natives in accordance with the settled policy of the Boer republics and the promises given to them in the terms of peace. Moreover, the grant of responsible government to the Transvaal, which was more of a practical proposition than its concession to the Free State with its overwhelming Boer majority, would interfere with the arrangement under which an Intercolonial Council dealt with railway and police problems affecting both colonies.

These considerations, however, were justly regarded as inadequate by Sir Henry Campbell-Bannerman's administration when it took office on the resignation of Mr. A. J. Balfour's Ministry, and the decision was taken to grant responsible government without a previous period of representative government. It would have been impossible to secure the passage of an Act for this purpose through the House of Lords, but, on the suggestion of the writer, it was decided to revive the form of legislation for the constitution of a conquered colony by letters patent which could not be effectively challenged in the Lords. Letters patent, therefore, conferring responsible government, were issued for the Transvaal on 6 December 1906[2] and for the Orange Free State on 5 June 1907.

[1] *Parl. Pap.*, Cd. 2400, 2479, 2482, 2563, 3250.

[2] See *Hansard*, ser. 4, clxvii. 939 ff., 1063 ff. For the efforts made to manipulate the franchise cf. Walker, *Lord de Villiers*, pp. 418 f.

The intercolonial arrangements as to railways were to remain in operation until denounced by either colony, while in both an effort was made to set up independent boards to secure the interests of those land settlers who had been brought into South Africa on the advice of Lord Milner in order to strengthen the British element in the population. These boards, it need hardly be said, proved of little effect. The grant of responsible government, statesmanlike and inspired by true insight into Boer psychology as it was, was denounced in both the Commons and Lords by Conservative and Unionist leaders, including Mr. Balfour, with a vehemence only matched by the lack of judgement shown; indeed no more sombre record exists of the want of foresight and of moderation which can be shown by able men when smarting under a political *débacle* brought on by their own defaults. The appointment as Premier of General Botha when the elections proved that the Boers had a clear majority proved a brilliant success, and he most wisely, at great personal inconvenience, attended the Colonial Conference of 1907, only five years since he had been the ablest and most generous of opponents of the British Crown. In the Orange Free State auspicious beginnings were obscured in 1909 by the bilingual policy of General Hertzog [1], who thus began his policy of discriminating between two streams in South Africa, Boer and British, the outcome of which has still to be decided.

The grant of responsible government was also shortly fully justified by the decision of the four territories already enjoying it to form the Union of South Africa, which entered on its existence with full self-government, as had done both the Dominion of Canada and the Commonwealth of Australia as the result of the federation of the Canadian and Australian colonies.

The Union Act of 1909 contemplated the addition to the Union of the territory of Southern Rhodesia, if and when that area desired to join the Union. With the gradual increase of population the people of Southern Rhodesia had begun to demand control of the administration which, under the Orders in Council of 1889 and subsequent years, was still vested in the British South Africa Company, subject to the supervision, especially as regards native affairs, of the Imperial Government

[1] See *House of Commons Debates*, 27 July 1909.

through the High Commissioner for South Africa and his representative, the Resident Commissioner, while the police and armed forces were under the control of an Imperial Commandant-General, as an outcome of the misuse of the local forces made by Mr. L. S. Jameson in the discreditable raid on the Transvaal. By 1914 the issue between the people and the Company came to a head ; the question of the renewal of the charter had arisen, and the issue was complicated by the claim of the Company that it owned the lands of the territory, while the representatives of the people on 17 April maintained that it had no proprietory rights in them at all. The Company also protested against any grant to the elected representatives of unfettered legislative power, as it might be used adversely to affect the property interests of the Company under the royal charter. It was finally decided to continue the charter for a further period of ten years, subject to the right to determine it earlier if it were decided to establish responsible government.[1] The vexed issue of the lands was referred to the Privy Council, and in 1918 that body gave an opinion of the most embarrassing kind.[2] It repelled, as it could not but do, the claims of the Company, which rested on no legal foundation; it ignored unexpectedly the rights of the people of the country, and laid it down that all land not held by some title from the administration was Crown property, thus enunciating the principle that it is lawful for the Crown when it declares a protectorate to appropriate all the land. Finally it ruled, in a manner difficult to follow, and by arguments derived from private concerns without any close parallel to public transactions, that the Company was entitled to expect from the Crown repayment of its administrative expenses so far as they exceeded administrative revenue from the proceeds of land sales, or, if the lands were not sold, but given away, from other public funds. The Company thus found its real claim disallowed, but a handsome present awarded in lieu, the total being fixed eventually at £4,400,000 less some uncertain amounts, but plus the value of property which might be taken over by the administration.[3]

[1] *Parl. Pap.*, Cmd. 1273, 1471, 1573 ; Cd. 7509, 7645 (1914). Though an elective majority was agreed to, control of expenditure was reserved.

[2] *In re Southern Rhodesia*, [1919] A. C. 211. Cf. *Sobhuza II* v. *Miller*, [1926] A. C. 518.

[3] *Parl. Pap.*, Cmd. 1914, 1984.

The people of Rhodesia were thus faced with a most difficult problem, for the burden of debt threatened to swamp the new Government if they demanded responsibility, but in 1919 and 1920 they reiterated their demand in no uncertain terms and the Imperial Government determined to yield. It was, however, clearly anxious to meet the wishes of General Smuts and the Union of South Africa and to induce Southern Rhodesia to enter the Union. General Smuts toured the country for this purpose and made generous offers, doubtless dictated in part by the desire to have available considerable areas of land for white settlement. But a referendum on 27 October 1922 was decisive, 8744 to 5989 votes being cast for responsible government as an independent colony, the issue being considerably affected by the obvious anti-British trend of Dutch opinion in the Union and by recollection of the rebellion there during the war crisis. The British Government, accepting the will of the people, arranged to compromise the Company's claims by a payment of £3,750,000 and a recognition of its right to the minerals of the country, as well as a waiver of cross-claims in respect of war expenditure which should have fallen on the Company.[1] Moreover, it recognized the mineral rights of the Company in Northern Rhodesia, receiving a surrender of all land claims there. Further, it consented to require the reservation of any Bill affecting mineral revenue or imposing a special tax on minerals, and any Railway Bill, unless the Colony enacted a law adopting the principles of the British Acts relating to the Railway and Canal Commissioners and the Rates Tribunal provided by the Railway Act, 1921, a precaution necessary to prevent the Company suffering loss through the construction of rival lines by the Government. Finally, after the formal annexation of the territory, responsible government under letters patent of 1 September 1923 became operative on 1 October 1923, the Ministry formed enjoying almost a complete control of the newly elected Legislature, which, after full consideration, was made at first unicameral. A further limitation of the power of the Legislature was imposed by insistence on the maintenance of a certain measure of Imperial control in native affairs.

[1] £2,000,000 was required to be paid by Southern Rhodesia, for which purpose a loan was raised in 1924.

§ 6. *Responsible Government in the Irish Free State*

The union of Ireland with the United Kingdom of Great Britain created by the union of England and Scotland was effected, if not by perjury and fraud, at least by means which are significant of the low standard of political morality of the day. The union was not intended for the benefit of Ireland, but for the security of the United Kingdom, and it was followed by governmental neglect and over-taxation. The discontent caused by the loss of an independent Legislature, which from 1782 had been free from the control of the British Parliament, became intensified by the famine of 1845–6; moreover a wretched land system, absence of municipal government, and an alien Church with its demand for tithes, added to the misery and resentment of the people. O'Connell's constitutional agitation for repeal of the Union was defeated by Peel's use of armed force in 1843, and the effort of the extremists in 1848 to raise a revolt was a dismal failure. But the refugees from Ireland after the famine carried hatred of Britain to the United States, and the Fenian Brotherhood, founded in 1858, entertained plans of winning by terrorism freedom for Ireland; 1,200 Fenians invaded Canada in 1866 and a year later sporadic outbreaks in Ireland and outrages in England proved the activity, if also the lack of popular support, of the movement. The disestablishment of the Irish Church in 1869 and the passing of a Land Act in 1870 by the Gladstonian Government eased the situation to some extent, but agrarian crime and constitutional agitation headed by C. S. Parnell again became menacing, and a generous Land Act in 1881 was followed by the murder of the Chief Secretary and a régime of great strictness. No permanent solution, however, could be hoped for in this way, and a decisive step was taken when Gladstone was converted to Home Rule for Ireland, though at the expense of grave disunion in the Liberal ranks. The Bill of 1886, which resulted in the Liberal loss of office, was renewed in 1893, and after its failure and the Liberal loss of office until 1905, the Government of Sir H. Campbell-Bannerman came into power determined to pave the way for Home Rule, though debarred from taking action in its first Parliament by election pledges. A necessary preliminary to any concession was the power to overrule the House

of Lords, which, for grounds partly patriotic, partly selfish, was steadily opposed to the project, and the passing of the Parliament Act, 1911, rendered the question more possible of solution. The Bill of 1912, however, was denied its normal fruition in 1914, by reason of the outbreak of war; it was indeed passed[1] but suspended in operation and never came into effect. The injudicious excitement of popular feeling in Ulster had in any case rendered it necessary to provide some measure of safeguard for the interests of that territory, which had just claims to consideration, though unfortunately its moral claims had been grievously diminished by the criminal recklessness of its opposition to the equally valid moral claims of Southern Ireland. With the postponement, however, definitely disappeared the last chance of a satisfactory settlement in Ireland. The constitutional Nationalist party had received a fatal blow and power was to pass to the revolutionary side of the movement, represented especially by the Sinn Fein organization, which sprung into power on the ruins of John Redmond's efforts.

The fatal mischief revealed itself in the abortive rebellion of 1916[2] which showed the Irish seeking German, as formerly French, aid against Britain. The movement was easily enough suppressed, but nothing was attempted to remove its causes, and in May 1917 Mr. Lloyd George resorted to the device of a large and representative conference to seek a solution of the Irish difficulty. The body laboured hard, but Sinn Fein was contemptuous, doubtless with good cause, and its chance of achieving any reconciliation of quite disparate views was rendered of no account by the decision of the British Government, under the stress of the breaking of the British line in March 1918, to seek to apply compulsory service to Ireland, contemporaneously with conferring on it a measure of self-government.[3] The period which followed is one of the most dismal in British history. Patriotism must be the excuse for the deplorable crimes of the Irish rebels; unhappily the repression of the movement was carried out in part by the employ-

[1] 4 & 5 Geo. V, c. 90.

[2] *Parl. Pap.*, Cd. 8279, 8311; W. O'Brien, *The Irish Revolution* (1923): S. Desmond, *The Drama of Sinn Fein* (1923).

[3] *Parl. Pap.*, Cd. 9019.

ment of undisciplined forces who improved on the methods of barbarism of their adversaries, and atrocities were committed on either side which no sophistry can excuse. The Imperial Government persisted in the idle task of enacting in 1920[1] a Government of Ireland Act, which purported to create both in Northern Ireland and in Southern Ireland, the country being redivided so as to excise from the north the areas populated by people of the south, responsible administrations with fairly generous powers, while a Council of Ireland representing the two Parliaments was to deal with private Bill legislation affecting both areas, fisheries, contagious diseases of animals, and railways common to both. The Northern Government and Parliament were duly constituted and commenced an energetic and fairly prosperous existence under the prudent Premiership of Sir James Craig. The south would have nothing to do with the British scheme ; the members elected under it for Southern Ireland in lieu of functioning as proposed by the Act treated themselves as the Legislature of an independent State. It was obvious that a steady process of reconquest of Ireland was the only step available to the Government, but this would have involved serious expenditure and the raising of a large force, and the Government, conscious of the unwisdom of its action, yielded at last to the advice given by detached observers and determined to treat for peace. In the discussion between representatives of the rebel forces and the Government the British demands, though stated in advance by Mr. Lloyd George with wonted decision, were steadily whittled away, almost any concession being made in order to obtain recognition of the paramount authority of the Crown in Ireland. Mr. de Valera, head of the *de facto* Government of the rebels, was prepared to meet British wishes regarding security, but demanded recognition of independence, and it is possible that a greater statesmanship than was available to Britain might have hit upon a compromise which would have satisfied the desires of the Irish republicans without materially injuring British interests. But this was not to be ; a threat of renewed war, on the one hand, and a promise to revise the boundaries between the two parts of Ireland, which the Irish negotiators interpreted with some warrant as meaning the bringing of pressure to bear

[1] 10 & 11 Geo. V, c. 67.

on Northern Ireland to accept inclusion in the new Irish Free State, induced the Irish negotiators to give way, but only when they had attained the withdrawal of demands shortly before declared by the Prime Minister to be vital.[1] Northern Ireland was treated with a measure of bad faith; the concession regarding her boundary was made after a formal promise had been given that no change in the terms proposed would be carried out without informing her Government, and she was put in the humiliating position of having to secure exclusion from the Free State by passing addresses to the King through both Houses of Parliament. The British Government secured the formal recognition of the Crown as occupying to the Free State the same position as it did to Canada; the acceptance of an oath of allegiance by members of Parliament to the constitution of the Free State and to the King 'in virtue of the common citizenship of Ireland with Great Britain and her adherence to and membership of the group of nations forming the British Commonwealth of Nations'; the reservation for five years, and until other agreement was made, of naval defence to Great Britain; the provision of British control over the naval defences of Berehaven, Queenstown, Belfast Lough, and Lough Swilly, with the right to extend this control in time of war or strained relations; and the limitation of the Irish forces to a number proportional to the British on the basis of population. On the other hand, it abandoned its original claim for free trade between the countries or even most-favoured-nation treatment, and, though the Free State was to bear a just share of the British national debt and the cost of war pensions, the amount to be fixed by arbitration in lieu of agreement, it is dubious if any person concerned in the negotiations took the proposal seriously. The Irish boundary, in the event of the decision of Northern Ireland to withdraw from the Free State, was to be decided by a Commission of three persons appointed by the Governments of Southern and Northern Ireland and the British Government. The British Government was also to transfer to a provisional Government, constituted by the decision of the members elected to Parliament under the Act of 1920, the necessary power to administer the country pending the drawing up of a new constitution. By an unprecedented decision the

[1] *Parl. Pap.*, Cmd. 1539, 1688.

agreement was cast in the form of a treaty between the two countries, Great Britain and Ireland, a style which it was hard on any ground save that of meeting Irish demands to justify.

The Imperial Parliament on 31 March 1922 gave the force of law to the treaty,[1] there being no serious opposition, though the decision was a confession that the long opposition to Home Rule had been motived by a total lack of statesmanship. In Ireland the republicans fought a long struggle against ratification with those who, without being in the main less sincerely anxious for a republic, thought it wiser to accept the substance of independence without troubling regarding the form. Unhappily the result was indeed the acceptance of the treaty but also a war, in which victory was achieved by the provisional Government only by the base process of the wholesale execution of opponents whose views they had once shared and with whom they had fought side by side, including the able and disinterested Erskine Childers, who had thrown away all personal ambitions in the interests of what he believed to be an oppressed country. A constitution was duly framed, in which the nearest approach possible was made to republicanism, it being expressly declared that all powers of government and all authority, legislative, executive, and judicial, were derived from the people of Ireland. Britain, however, was in no mood to criticize, and on 5 December enacted a measure [2] to give statutory effect to the constitution of the Free State, merely seeking to mitigate the effect of the claim of authority by asserting the right of the Imperial Parliament to legislate for the Free State in any case where, according to constitutional practice, Parliament would enact laws affecting other self-governing Dominions. The constitution claimed the right to set up a distinct Irish citizenship whence British subjects of the United Kingdom were excluded, and the sole control of armed forces in the Free State.

The generous assistance given by the British Government to the Free State in establishing its position led to the illegal arrest and detention and transmission to the Free State for imprisonment of a number of British subjects both in Scotland and England ; this deplorable breach of the law was fortunately vin-

[1] 12 Geo. V, c. 4. Cf. W. A. Phillips, *The Revolution in Ireland*, 1906–23 (2nd ed., 1926).

[2] 13 Geo. V, cc. 1 and 2, and Irish Act No. 1 of 1922.

dicated by the Court of Appeal in England, and indemnities awarded to the sufferers under the authority of an Imperial Act indemnifying the usurpation of the Government.[1]

The trend of legislation in the Free State has definitely been in the direction of eliminating any symbol of royal authority from legal procedure,[2] from the armed forces, from the stamps, and even from the coins. Nothing was naturally done to meet the British claim for aid in bearing the burden of debt, and the issue was cleared up at the end of 1925 by a compromise. The attempt made to settle the boundary question by direct negotiations failed, and in 1924 the issue of appointing a Commission came to a head. The Northern Government naturally declined to appoint a Commissioner under an agreement concluded with flagrant breach of good faith, and the Imperial Government had no alternative but to consult the Privy Council as to the legal position resulting. The Council[3] advised, obviously rightly, that the Commission could not proceed to a determination without the appointment of a representative of Northern Ireland, that the only mode in which such a representative could constitutionally be appointed was by the Ministry of the territory, negativing any power of the Governor or the Imperial Government to act independently of the Ministry, and it also ruled that a decision could be come to by a majority. The British Government accordingly made a fresh treaty with the Free State, empowering it to appoint a representative for Northern Ireland, and both Parliaments accepted the new treaty. The outcome of the deliberations of the Commission proved to be hostile to the hopes of the Free State, whose Commissioner promptly withdrew, resigning also his membership of the Ministry in which he had held the portfolio of education. The remaining Commissioners were clearly competent to pronounce a decision which would *ipso facto* have changed the boundary to the benefit of Northern Ireland; but the British Government, anxious to strengthen the Free State administration against its republican opponents, who were denouncing its mismanagement of the issue, made great sacrifices of the taxpayers' money to attain a settlement. A fresh treaty was

[1] 13 & 14 Geo. V, c. 12; *Ex parte Art O'Brien* (1923), 39 T. L. R. 487, 638.

[2] *Criminal Justice (Administration) Act*, 1924, No. 44, ss. 10, 14; *Defence Forces Act*, 1923, No. 30.

[3] *Parl. Pap.*, Cmd. 2214.

negotiated and signed for Northern Ireland as well as the other two parties, and approved by Parliament. Under it the existing boundary under the Act of 1920 was stereotyped, Britain remitted its enormous claim of 128 or with interest 155 millions for war debt, the Free State relieving it of the most improper burden accepted in 1922 of reimbursing those injured by British action when putting down the rebellion, and increasing by 10 per cent. the beggarly awards made by it to loyalist victims of republican outrage.[1] Northern Ireland was given a grant of £1,200,000 in respect of the cost of her police, who immediately set a disgraceful example of illegal refusal to accept disbandment until bribed to do so, and further allowances for relief of unemployment. It is clear, and it was not denied in the House of Commons, that the one reward for these sacrifices which can be attained is peace in Ireland, and the two Irish Governments agreed in the new treaty to consult with each other regarding those matters of common interest which under the Act of 1920 were ascribed to the control of the Council of Ireland, but which, after being left in abeyance by the legislation of 1922, were handed over to Northern Ireland as part of the terms of settlement.

§ 7. *Representative and Responsible Government in British India*

The rule of Britain in India[2] began with the commercial transactions of a Company, and, interesting as is the history of the East India Company, it is impossible not to recognize that this commercial origin was hostile to the development of a true political sense. The Company obtained administrative power over Indian territories by grant and conquest, and, like the rulers whence it took or derived power, it governed its territories in absolute sway primarily for its own interest and very secondarily if at all in the interest of the governed. Parliament early claimed sovereignty on the score that no British subject can acquire sovereign power save for the British Crown—a doctrine which gave interminable trouble when a Raja of Sarawak was

[1] 15 & 16 Geo. V, c. 77; Free State Act No. 40 of 1925. In Nov. 1926 final settlement of financial issues was reached.

[2] See especially *Parl. Pap.*, Cd. 9109; Cmd. 207, 950, 1671, 1672; H. C. 143, 1919; H. C. 202, 1921; H. C. 171, 1922; Cmd. 1961, 2311.

a British subject—and laid down regulations regarding the exercise of the sovereign authority of the Company, the Act of 1773 marking the beginning of a long series of enactments. The Charter of the Company was renewed in 1813; in 1833, when Macaulay defended it on the amazing ground that it was better to leave to the Company the dangerously attractive patronage which it wielded; and tentatively in 1853. But the Sepoy revolt of 1857–8, brought about by gross mismanagement, led to the termination of the Company's rule and the direct control of India by the Crown under an Act of 1858, while an Act of 1876 authorized the assumption of the title of Empress by the Crown. But this meant no change in the paternal character of British rule, though it probably gave greater reality to the epithet, as the Government had no profits to seek. Centralization of power had been aimed at in 1833 when all legislative authority was confined to the Governor-General's Council at Calcutta, the legislative activity of Bombay and Madras being terminated. In 1853 the Council was enlarged to twelve members and began to claim the functions of a Parliament on a small scale. This insolence was repressed in 1861 when it was reduced to the function of a purely legislative body, while similar narrow powers, under central control, were conceded to the Councils at Bombay and Madras. Councils were conceded to Bengal in 1862, to the North-western Provinces and Oudh in 1886, and in 1892 the Councils were increased in size, and indirectly a measure of election introduced into their composition. Burma and the Punjab received Councils in 1897, in 1905 Bengal was partitioned into Bengal and Eastern Bengal and Assam, while Lord Morley's reforms in 1909 increased further the size of the Councils, added to their financial and deliberative competence, and allowed election by bodies such as Chambers of Commerce; unofficial majorities were also allowed in the provinces, and in Bengal even an elective majority. In 1912 Delhi became the capital of the Empire, Bengal was reunited and became a Governor's Province like Madras and Bombay, a new province of Bihar, Chota Nagpur, and Orissa was created, with a Council, and in 1912–13 Assam and the Central Provinces received Councils.

The Councils, however, were essentially merely convenient instruments of legislation; even that of Bengal could not

control the Government, for the Governor-General's Council was always available to legislate over the head of any provincial Council, its authority being supreme in India. Lord Morley emphasized in his reforms his doubts whether India was suited for Parliamentary institutions, and it was left to Indians themselves to prove that they had acquired a political sense. In September 1916 a Home Rule League was formed at Madras, in October nineteen members of the Indian Legislative Council prepared a reform scheme, while in December the Indian National Congress and the Muslim League, meeting in Lucknow, decided to drop their internecine feuds and work for self-government. The support of India in the war was too valuable to be jeopardized, its position was recognized by representation at the Imperial War Cabinet and Conference, and on 20 August 1917 Mr. E. S. Montagu announced the governmental policy of 'the increasing association of Indians in every branch of the administration and the gradual development of self-governing institutions, with a view to the progressive realization of responsible government in India as an integral part of the British Empire'. This declaration was followed by his mission to India during which, with Lord Chelmsford as Viceroy, he adumbrated a scheme of reforms. After exhaustive investigations and study by a Joint Committee of Parliament an Act was passed in 1919 as a first step in the process of reform.

The Act of 1919 was passed by a Parliament which was by no means convinced of the wisdom of the new move in India, but which felt constrained to do something to make good the promises given by the British Government during the war, to which India had responded by great services. The opposition to it was based on the belief that democratic institutions have never been evolved in the East and therefore could not apply adequately to it, a view recently maintained by Earl Balfour. A more generous conception held that the British rule in India existed for the benefit of the lower classes of the population who were exposed to injustice at the hands of the wealthier classes and the higher castes; the difficulty that after a long period of British autocracy nothing of substance had been done to raise the position of the depressed classes either economically or in point of education and self-respect was ignored. Nor were the critics aware of the remarkable assimilation of democratic

principles by such a race as the Filipinos under the more enlightened generosity of the United States. The apparent development of democracy in Japan was explained away, and the autocracies of the Spanish Directory, Signor Mussolini and General Pangalos had not yet occurred to prove the unfitness of European democracies for liberty. At any rate the Act was marked by a spirit of distrust and caution in strange contrast with the generosity which conceded responsible government to the Transvaal and Orange Free State. It is true that certain extremists in India put forward ludicrous claims and refused to recognize fundamental facts, but none the less a more generous measure would have been well worth risking.

As it is, the Act of 1919 declined any measure of responsibility in the Central Government, and only conceded the creation of an enlarged Legislature with two Houses, the Council of State with 60 members, 34 elective, the Assembly with 144, 103 elective, members of the Executive being given seats in one House or other. But the Legislature is limited in power, the Governor-General's previous sanction being required not merely in financial matters but for measures affecting religion; military, naval, or air forces; external relations, and provincial subjects. Moreover, the Governor-General was given the right to secure appropriations denied by the Legislature, and to pass laws by certificate over its head, the salt tax thus being imposed in 1923, while he retained the power to legislate by temporary but renewable ordinance. Moreover, large blocks of expenditure, including army expenditure, were withdrawn from control as well as the salaries of certain classes of Indian civil servants, whose independence of legislative authority was emphasized in 1925. The Legislature of India, therefore, might be deemed to be representative, but it differed essentially from a true representative Legislature by having ultimately no power to prevent legislation by the Crown.

A limited measure of responsible government was conceded in the provinces by reorganizing each under a Governor who was given two sets of advisers with different functions. Certain matters were transferred to control by ministers commanding majorities in the Legislative Councils, which were reconstituted, enlarged, and given elective majorities; others were reserved for the Governor in Executive Council independent of ministers,

though joint deliberation might be encouraged. Complex arrangements were made for the division of funds between the two sides of the Government, while full control was to be exercised by the Government of India over all reserved matters and over transferred matters in so far as the interests of other provinces might be concerned. In practice, as the evidence adduced before a Committee of Enquiry in 1924 showed, the whole system was too cumbrous. The Governor in his dual capacity was far too powerful for effective responsibility on the part of ministers, the Legislatures had no opportunity of learning prudence by experience, and they had really no funds effectively at their disposal to promote the essential improvements in education, sanitary conditions, and local government which they might else have attempted. The situation, of course, was rendered more unsatisfactory by the foolish policy of non-co-operation which weakened the personnel of the Councils and strengthened the case of those who denounced the Indian people for lack of political capacity. Moreover the Mahomedans,[1] whose co-operation had largely been motived by desire to secure Hindu support for propaganda in favour of Turkey—badly requited by the abolition of the Kaliphate as soon as Turkey felt strong enough to rid herself of that incubus—soon became suspicious of the superior intelligence of their Hindu associates, and fresh outbreaks of internecine feuds destroyed the hope that in a common political undertaking effective co-operation was possible between the rank and file of the two religions.

The Commission [2] was unable to agree on any substantial proposals for advance, but the best Indian opinion put forward as ideals to be sought constitutionally a series of claims of a reasoned character. These included the grant of provincial responsible government; the introduction of responsibility in the Central Government save as regards foreign affairs—including relations with Indian States—and defence; the extension of the franchise; clear definition of the powers and finances of the Central and Provincial Governments; and control of the Civil Service by a Commission. Lord Birkenhead as Secretary

[1] Some tendency on the part of the Civil Service to prefer Mahomedans to Hindus doubtless exists, as stated by Lord Olivier; the former undoubtedly lack political sense in a marked degree.

[2] *Parl. Pap.*, Cmd. 2360–2.

of State suggested that agreement in India might result in substantial concessions, but clearly the condition precedent negatived much chance of advance. On the other hand, a definite step at asserting the continuance of British control was afforded by the Act of 1925 strengthening the position of the Civil Service as regards tenure of the higher and more responsible posts, though it was agreed that the Provincial Governments should begin to recruit and control the services engaged in dealing with transferred subjects in the provinces. The measure was prompted by the decline in the number of candidates for the Indian Civil Service ; the assurances given by the India Office indicated that there was no desire to relax the control of India in essentials at any early date.[1]

The justification for this attitude was, of course, the fact that India, specially vulnerable to attack through the growth of the strength of the tribes on the frontier, the doubtful friendship of Afghanistan which in 1919 launched an unprovoked and rather badly [2] parried attack on India, and the advance of Russian power towards Afghanistan and Chinese Turkestan, must for long be defended by armies partly of British troops, partly of Indian troops with trained officers. The duty of training Indians as officers is still in its initial stages ; race prejudice, which has been overruled as regards the Civil Service, in which arrangements were made in 1925 to increase steadily the proportion of Indians in the Indian Civil Service to fifty per cent., remains to be overcome in the Indian army. Moreover, until India can dispense with British forces for her defence, the British Government clearly cannot surrender to Indian hands the final control of policy ; British troops cannot properly be available for the suppression of unrest caused by misgovernment which British authority has not been able to prevent. But these considerations should have rendered all the more eager the endeavour to open up military careers for Indians and to train the people to defend themselves as a necessary condition of self-government.

[1] *Parl. Pap.*, Cmd. 2128 ; H. L. 112, 1925.

[2] Whose fault this was, is obscure ; policy dictated drawing a veil on the episode. Lord Roberts has no successor in India.

§ 8. *Responsible Government in Malta*

A minor outcome of the war was the determination at length to make concessions to the long-expressed desire of the people of Malta for a measure of self-government. This had been refused consistently, not because there was any reason to deny the compositive population with its complex culture, borrowed as regards the upper classes from Italy, the right to manage its own local affairs, but because it was difficult to concede authority when the essential function of Malta from a British point of view was the use of the place as a naval base in the Mediterranean. The issue was also complicated by sporadic movements among the Italian elements of the population, manifested also during the war, to claim the right of self determination in the shape of union with Italy. The idea, however, of creating a composite form of government in the Indian provinces led to the decision, announced in November 1919, to entrust to the people of Malta full responsible government in all local affairs, while reserving to the Imperial Government control of the naval, military, and air forces and such matters as pertained to the control of Malta as an Imperial fortress and harbour. At the same time it was decided to aid by an Imperial contribution the needs of the island consequent on the diminution of the garrison. Special provisions were rendered requisite to secure the position of the English language and religious toleration, a request to make the Roman Catholic religion, as the official religion of Malta, part of the constitution being refused, and the new constitution came into force on 16 May 1921. The concession was greatly appreciated by the public, which immediately found itself plunged into a lively contest of contending parties with diverse views on the language issue, economic development, and aspirations for union with Italy.[1]

[1] *Parl. Pap.*, Cmd. 1321. In July 1926 the governmental energy in ejecting opponents from the Legislature aroused deep feeling. Lack of self-control of this kind explains some of the discredit now attaching to Parliamentary institutions.

II

THE LEGAL BASIS OF RESPONSIBLE GOVERNMENT

§ 1. *Responsible Government in Canada*

IT was held by Mr. George Higinbotham, the distinguished Victorian Chief Justice and defender of the autonomy of the Colonies, that there was a vital distinction between British and Colonial self-government in that the latter rested on statute, the former on common law.[1] This assertion, while it possessed some validity for Victoria, was historically without foundation. Responsible government as introduced into Canada left no trace in the Act of 1840 reuniting the provinces, nor in the royal instructions issued to Mr. Poulett Thomson and his successors; indeed, they merely repeat the old rule still applicable to any Crown Colony that the Governor should govern with an Executive Council whose views, however, he may disregard if he think fit. In 1854 the Attorney-General of New Zealand advised that the instructions to the Governor must be held to be incompatible with his adopting the system of responsible government.[2] Responsible government in Canada was due to the intimation in Lord John Russell's dispatch of 16 October 1839 that the Governor-General in his treatment of the chief officers of his Government was to be at liberty to regard them not, as formerly, as permanently appointed but as liable to removal if political considerations rendered this desirable. The only supplementary remark by the minister was the suggestion that officers called on to retire abnormally might be given pensions.[3]

In Nova Scotia[4], as has been seen, Lord Falkland insisted on governing with a composite Executive, and responsible government was only forced in 1848 when Mr. Howe insisted on a homogeneous Ministry, and one recalcitrant Executive councillor was removed under the prerogative. The further step of

[1] Morris, *Memoir of George Higinbotham*, pp. 170 ff.
[2] *Parl. Pap.*, H. C. 160, 1855, pp. 2 ff.
[3] *Parl. Pap.*, H. C. 621, 1848, p. 5.
[4] Ibid., pp. 9 ff.

providing a Civil List by Act 12 Vict. c. 1 in no wise established responsible government; it followed the model of the Act of 1840 for the union of the Canadas, and was of importance merely because it guaranteed a certain minimum expenditure on civil government and secured the Governor from yearly discussions of his emoluments. New Brunswick followed the model of Nova Scotia, but Prince Edward Island desired something more definite. The Colonial Secretary offered responsible government in exchange for a Civil List, partly to make up payments hitherto borne by the Imperial Government, and the Legislature in 1850 passed a bill in which the grant of the Civil List was made conditional on the grant of responsible government, as in Canada, Nova Scotia, and New Brunswick, and the surrender of the Crown land and other revenues. The Secretary of State declined to accept the measure in this form; responsible government, he insisted, was a system well understood but not legally defined, and its insertion as a condition in an Act was therefore deprecated; it must rest on the faith of the Crown and pensions must be provided for those officers who retired on political grounds. The Legislature yielded and enacted the requisite Civil List with pensions in Act No. 3 of 1851.

The constitutions of Manitoba, British Columbia, Alberta, and Saskatchewan similarly assume but do not enact responsible government. They do not require that the Executive Councils shall be composed of officers holding seats in the Legislature; they merely either give a general power of appointment to the Lieutenant-Governors or assign certain officers to the Council, while they permit either members of the Council or specified officers to sit in the Legislature, subject to re-election on appointment to these offices.

None the less the rule of responsible government, resting on constitutional practice, is regularly obeyed. There is, of course, ultimately a legal sanction available as in the case of conventions of the constitution in the United Kingdom. While the provinces have no need for army Acts passed annually, appropiation Acts are essential, and an Assembly can always withhold funds from a minister it dislikes and compel his retirement. A Lieutenant-Governor may, as in the case of Mr. McInnes, in British Columbia, seek to maintain a minister against the majority, but the only result must be dismissal by the Governor-

General in Council,[1] while a similar fate would await a colonial Governor at the hands of the Crown. Exceptional cases of unauthorized expenditure can occur, but only in rare circumstances; the Governor and Ministry of the Cape were compelled in the Boer War to ignore the necessity of Parliamentary sanction, as there were dangers in summoning the Legislature. But this policy was not merely approved by the loyal section of the people, but it was rendered possible by the approval of the Imperial Government and the protection of the Imperial forces in the Colony.[2] When Lord Chelmsford's Ministry in Queensland in 1907 proceeded to expend funds without legal sanction, the opposition threatened to decline to legalize the expenditure, and, when they attained power, might have made good their threat but for the formation of a new coalition which prevented the difficulty coming to a head.[3]

While adequate provision existed for the responsibility of ministries to the legislatures, it must be admitted that cases could be imagined when ministries and legislatures might defy their obligation of responsibility to the electorate. The power of a Legislature to prolong its own life by simple legislation is normal, and, if a Governor is willing to give his assent, the people can be and indeed occasionally have been deprived of an opportunity of calling a Ministry to account. Thus in New South Wales in 1916 Mr. Holman's support of the recruiting schemes of the federal Prime Minister, Mr. Hughes, induced a violent breach with Labour, and Mr. Holman escaped defeat in the Assembly merely by a coalition with the followers of Mr. Wade, who was induced to accept the post of Agent-General in London, while his followers adopted co-operation with Mr. Holman, and together carried a proposal for an extension of the life of Parliament, the Governor's natural doubts as to the propriety of thus depriving the people of their chance of disapproving the manœuvre being overruled and censured by the Colonial Secretary.[4] It is easy to understand how this action

[1] Canada *Sess. Pap.*, 1900, No. 174.

[2] *Parl. Pap.*, Cd. 1162.

[3] *Parl. Debates*, c. 1735 ff.; ci. 38 ff. History repeated itself in 1926 when Lord Byng placed in office a Ministry which had no Parliamentary authority; the people rejected it, and the Imperial Conference of 1926 condemned it; Part VIII, chap. iii, § 8.

[4] Keith, *War Government of the Dominions*, pp. 211 f., 272; *Journ. Soc. Comp.*

was taken in view of the anxiety of the Imperial Government to further the recruiting scheme, but it is dubious if it was a desirable precedent to set, as theoretically a dishonest Ministry with a Parliamentary majority might thus entrench itself in office and defy the electors. It is noteworthy that in 1918 the Federal Government in Canada acquiesced similarly in an extension of the duration of the Ontario Legislature. But the circumstances of war conditions are abnormal, and it would certainly not be safe to assume that it is a constitutional principle that a legislature may extend its existence at will. On the other hand there are instances, as in the case of the provinces of Canada before federation and in that of the South African Colonies save Natal before union, where assent has been given to federation or union by a legislature without consulting the wishes of the people, and occasionally clearly against the verdict which the people would have given if it had been consulted.

§ 2. *Newfoundland*

Even more clearly is the rule of responsible government based on usage only in the case of Newfoundland.[1] The only conditions exacted by the Duke of Newcastle on 21 February 1854 were the provision of pensions for officers displaced on political grounds, and the increase of the Assembly to 30 with a redistribution of seats in justice to the Protestant majority. These conditions were complied with in Acts 18 Vict. cc. 2 and 3, whereupon a fresh commission was issued to the Governor providing for the creation of a distinct Executive Council, relegating to purely legislative functions the old Legislative Council. The Executive Council was to be constituted as provided by the royal instructions, which merely gave the power of appointment at pleasure to the Governor, limiting the number to seven. The later instruments merely provide for membership either under a law—none has been enacted—or by appointment by the Governor, nor is there any law requiring that members of the Council should have seats in either House of the Legislature, though they normally have such seats.

Leg. 1917, pp. 227 ff. The more it is considered, the more deplorable the precedent seems, and if excusable at all, it can only be so on the score of war.

[1] *Parl. Pap.*, H. C. 273, 1855.

§ 3. *The Australian Colonies and States*

While responsible government in Canada has thus rested on convention, a certain degree of legal compulsion appears from the first in the constitutions of the Australian colonies. The New South Wales constitution of 1855 [1] distinguished between ministers and other officials by vesting the appointment of the former in the Governor, of the latter in the Governor in Council or some other authority, and it provided pensions for officers retiring on political grounds. But it did not require that the Executive Council should be constituted of ministers ; it merely forbade holders of offices of profit under the Crown sitting in the Assembly, unless these offices were included among five enumerated posts or other posts not exceeding five, which might be brought by the Governor in Council under this provision. Re-election of persons in the Assembly appointed to office—not merely changing office—was required until 1906. But even in the Constitution Act, No. 32 of 1902 there is no further provision to secure responsible government, though it is recognized that ministers will be members of the Executive Council. Strictly speaking, there is no legal necessity for a single minister to be in Parliament.

In Victoria the matter was carried [2] beyond the provision for the appointment of political officers by the Governor and for pensions for displaced officials ; s. 18 specified that of seven heads of departments four at least must be members of the Council or Assembly, re-election being still required on acceptance of office. The *Officials in Parliament Act*, 1883, provided (s. 2) for the appointment by the Governor of not more than ten officers who might sit in Parliament, ' provided always that such officers shall be responsible ministers of the Crown, and members of the Executive Council, and four at least of such officers shall be members of the said Council or Assembly '. This provision was revised by Act No. 1864 of 1903, which in view of federation limited the number of officers to eight, and added the provision that not more than two should be members of the Council or six members of the Assembly. It added (s. 6) : ' No responsible Minister of the Crown shall hold office for a

[1] 18 & 19 Vict. c. 54, altering and confirming 17 Vict. No. 41.

[2] 18 & 19 Vict. c. 55, altering and confirming a reserved Bill of the Legislature.

longer period than three months, unless he is or becomes a member of the Council or Assembly.' These provisions do not constitute the Executive Council, which could still be made up in part of persons not ministers, the Governor having under the royal instructions unfettered power of appointment—which can be used to appoint a minister without portfolio. But the system provides the Governor with a body of ministers who are members of the Executive Council. On the other hand, of eight ministers only four must at any given moment be in Parliament, though an appointment as minister lapses after three months if the holder of office does not obtain a seat. But, even so, there is no provision whatever compelling responsible government; ministers with the aid of the Governor might indefinitely retain power though they had no majority in Parliament, while a Governor might swamp the Executive Council with non-ministers and with their aid exercise his powers as Governor in Council.

The New South Wales model was followed closely when Queensland obtained responsible government, appointments of ministers being vested in the Governor.[1] No further effort has been made to enforce responsible government by legislation; the Act 60 Vict. c. 3 merely authorizes ministers to sit in Parliament and abolished re-election on acceptance of office.

In South Australia [2] a more determined effort was made to enact responsible government. Pensions for retiring officers were granted to those 'liable to loss of office by reason of inability to become members of the said Parliament or to command the support of a majority of the members thereof'. The Governor alone was to appoint or dismiss officers who were required to be members of Parliament, and after the first general election, the Chief Secretary, Attorney-General, Commissioner of Crown Lands, and Commissioner of Public Works were not to hold office for longer than three months unless members of either House; moreover, these officers were to be *ex officio* members of the Executive Council. But most striking was s. 33:

No officer of the Government shall be bound to obey any order of the Governor involving any expenditure of public money, nor shall

[1] Order in Council, 6 June 1859; *Constitution Act*, 31 Vict. No. 38.

[2] *Constitution Act*, No. 2 of 1855–6; *Parl. Pap.*, 24 July 1856, p. 68.

any warrant for the payment of money or appointment to or dismissal from office be valid except as herein provided, unless such order, warrant, appointment, or dismissal be signed by the Governor and countersigned by the Chief Secretary.

Ministers were exempted from vacating seats on appointment to office. Act No. 5 of 1873 made it possible for the Attorney-General to be a member of the Ministry without having a seat in Parliament, but retiring with it, while another minister might be appointed. The number of ministers was reduced to four on federation by Act No. 779 of 1901, but increased to six by Act No. 959 of 1908, of whom one should be an honorary minister and not more than four members of the Assembly. The honorary minister—who in fact has usually been paid—disappeared by Act No. 1492 in 1921 when all six were recognized as salaried. The existence of these statutory members of the Executive Council is recognized in the royal instructions, but the Governor's power to make further appointments is not limited, and the Chief Justice, in virtue of his succession to the administration on the absence of the Governor, has been usually given a seat on the Council.

In Tasmania, on the other hand, the effort of South Australia to insist on responsible government, which evoked some doubt in 1855, was severely ignored. The Act 18 Vict. No. 17 does indeed, like all the other colonial Acts, provide a Civil List and pensions for officers 'more liable to loss of office on political grounds than heretofore', but it does not even vest ministerial appointments in the Governor as opposed to according other appointments to the Governor in Council, as in the other Acts. Provision was indeed made for vacation of office on the acceptance of an office held under the Crown at pleasure, but strictly speaking this did not discriminate between political and other offices. This was remedied by 34 Vict. No. 42, which restricted the election of officers to Parliament to the Colonial Secretary, now Chief Secretary, Treasurer, Attorney-General, and Minister of Lands and Works. Re-election on acceptance of office while in Parliament disappeared by 64 Vict. No. 5, s. 8, but nothing whatever was done to bring the Ministry into legal connexion with Parliament by compelling membership or even conferring membership of the Executive Council.[1] It is

[1] Ministerial salaries were voted annually until 1910. In 1919 (No. 5)

interesting to note that as late as 1925 an acting Governor attempted to assert the right of adding members to that body without the approval of his ministers, though ultimately he desisted from the attempt.

In Western Australia, as was natural from the date of its attaining responsible government, more precise provision is made. Besides the Civil List, provision for officers retiring on political grounds, and the assignment to the Governor of the appointment and removal of political officers, it provided that no holders of offices of profit might remain in their posts if elected to Parliament, unless they held one of the five executive offices liable to be vacated on political grounds, one of which must be held by a member of the Legislative Council. Re-election on acceptance of office was required. The Act 63 Vict. No. 19 fixes at six the number of offices liable to be vacated on political grounds, and continues the requirement that one must be held by a member of the Legislative Council. But here again the constitution of the Executive Council and the relation of ministers to Parliament is left undetermined by law.

§ 4. *New Zealand*

Absolute dependence on custom marks the New Zealand constitution. Not unnaturally, it was hardly realized by the Attorney-General of 1854 that no legal enactment was required to effect so momentous a change, but Sir George Grey on 8 December 1854 [1] expressed the position with perfect clarity. He pointed out that in the United Kingdom the system of ministerial responsibility rested essentially on custom, and that in Canada the only legislation undertaken had been in connexion with the surrender of the territorial revenues of the Crown in return for a Civil List, this being normally a feature of the settlement; that in New Zealand these revenues had already been conceded, and that all that was requisite was the provision of pensions for officers retiring on political grounds. Any further definition might prove inconvenient by hampering detailed changes which might become advisable.

The *Parliamentary Disqualification Act*, 1878, went further by

salaries of £700 are given to the Chief Secretary, Attorney-General, Minister for Lands, and Minister for Works, if these offices were separated.

[1] *Parl. Pap.*, H. C. 160, 1855, pp. 39 ff.

disqualifying for membership of the General Assembly persons holding Government appointments with an exception for members of the Executive Council, not more than 10 in all, of whom two must be of the Maori race. The *Legislature Act*, 1908, omits the limitation of number. The only further definition is given by the Acts consolidated in the *Civil List Act*, 1908 (now No. 31 of 1920), which assigns salaries to ministers who are to be members of the Executive Council and to hold certain specified offices. There is, however, no legal restriction on the appointment of non-ministers to the Executive Council nor any definition of the necessity of ministers commanding the support of Parliament.

§ 5. *South Africa*

A similar simplicity marked the case of the Cape. Act No. 1 of 1872 merely created two new ministerial posts, to which appointments were to be made by the Crown. At the same time it was declared that these ministers and the Colonial Secretary, Attorney-General, and Treasurer might be members of Parliament, and pensions were provided for the incumbents of these offices at the time, while the posts were declared non-pensionable in future. No further effort was made to define responsible government, the composition of the Executive Council and its relation to the Legislature remaining to be decided by practice.

In Natal, however, we find a deliberate effort to enact responsible government; after providing for ministers who must be or become within four months members of the Legislature, the Bill of 1892 declared that 'ministers shall constitute the Executive Council'. Lord Knutsford, however, on 5 July 1892[1] desired all reference to the composition of the Council to be omitted from the Constitution Act, which, rather quaintly, he held ought to be restricted to the composition and function of the Legislature. He pointed out that the Australian practice was to constitute the Council by letters patent, and that the resignation of ministers rested normally on practice, not on positive law, though dismissal was possible if they should refuse to retire; the exception of Victoria and Tasmania, where ex-ministers remained nominally members of the Council but were not summoned to meetings, was, he held, the less con-

[1] *Parl. Pap.*, C. 7013, p. 42.

venient. Accordingly the reference in the Act of 1893 was confined to requiring ministers to be or become within four months members of the Legislature, not more than two of the six to be members of the nominee Upper House; appointments of ministers were left to the Governor and pensions provided for those retiring then on political grounds. The letters patent, as in the case of the Australian colonies, merely provided that the Executive Council should consist of any persons who might by law—there was none—be members and such others as the Governor might appoint.

In the case of the Transvaal the Natal model was fairly closely followed; there were to be six ministers, appointed by the Governor, who might be members of Parliament without requiring re-election; they were, as in the Cape and Natal, to have the right of speech in either House, while the usual Civil List and pensions for retiring officers were enacted. There was, however, no requirement that ministers must become members of the Legislature. The letters patent of 6 December 1906 provided that ministers should be made Executive Councillors, but did not make them constitute the Executive Council. In the Orange River Colony the same model was adopted in the letters patent of 5 June 1907, but only five ministers were appointed.

In Southern Rhodesia the letters patent of 1923, following the earlier models and that of Malta, provided for the appointment of no more than six ministers who must be or become within four months members of the Legislature. The Executive Council includes but does not necessarily consist only of ministers.

§ 6. *The Federations and the Union*

A decidedly different aspect is presented in the case of the federations. The reason is simple: in the case of ordinary colonies no doubt ever existed of the royal prerogative to create Executive Councils,[1] but there was no such clear authority for the creation of such a Council for what was a group of colonies united into a federal whole. By parity of reasoning it might have been held that the right to appoint the Council followed naturally from the Act of Federation, but this was by some

[1] Compare *Parl. Pap.*, C. 6487, p. 72.

deemed dubious, and the two federal constitutions, followed by that of the Union of South Africa, do definitely create Executive Councils.

In Canada the style of Privy Council was adopted, but the only provision of the *British North America Act* is that which (s. 11) empowers the Governor-General to summon and remove members, nor does the constitution itself provide for the re-election of ministers on accepting office, though this is required by a Dominion Act. The relations of ministers to Parliament are essentially based on convention,[1] and under it, as in Victoria and Tasmania, ex-ministers remain members of the Privy Council as in the United Kingdom, though not under summons; they may be removed, but this is only done in cases where removal for misconduct would be adopted in the United Kingdom. In the Commonwealth constitution the matter is carried further: the Executive Council is not merely created by s. 62, but authority is given by s. 64 to the Governor-General to appoint officers to administer the chief departments of state, and these officers are to be members of the Executive Council and the Queen's ministers of state for the Commonwealth. Ministers must be members of Parliament, re-election not being required, or they must become members within three months after appointment. But there is no rule limiting to ministers the numbers of the Executive Council, the right of appointment given to the Governor-General being indefinite, though the number of ministers at any time is limited.

The model of the Commonwealth was carefully followed in that of the Union,[2] though the original number of ministers there prescribed was ten as against the seven of the Commonwealth, as a result of the wider sphere of action of the Union Parliament and Government. Ministers in this case also though members of the Executive Council do not constitute it, a system which allows of the appointment of ministers without portfolio. The Canadian practice of not resigning from the Council on ceasing to be ministers is adopted in Australia and the Union.

[1] Bourinot, *Constitution of Canada*, p. 163.

[2] 9 Edw. VII, c. 9, ss. 12, 14.

§ 7. *Malta*

The Maltese constitution [1] provides for the appointment by the Governor of not more than seven ministers, who must be members of the Legislature, re-election being dispensed with, and who may speak in either House. But by a novel precision the Governor is required to designate one of the ministers as the Head of the Ministry, a provision included also in the Rhodesian constitution. It is further provided:

> The Head of the Ministry shall be the official channel for communication between the Governor and the Ministry, and the relations between the Governor and the Ministry and between the Governor and the Legislature, and between the Ministry and the Legislature, shall, subject to the provisions of these our letters patent, be regulated as nearly as possible by the constitutional practice obtaining in like matters in our United Kingdom.

The Executive Council, which is constituted by separate letters patent as usual, is to contain the ministers and such other persons as the Governor may appoint. There is, however, a further complication in the constitution in view of the fact that only in certain matters is responsibility given to ministers. For reserved matters the Governor has a Nominated Council, and he is empowered to convene sessions of a Privy Council composed of the members of the Executive and the Nominated Council to consider matters not exclusively within the competence of the former. Further, he may refer to a Committee consisting of three members of either Council matters in which action by the legislature of Executive Council seems to affect reserved matters of imperial property and interests and kindred issues. But towards these bodies other than the Executive Council he stands in an independent attitude, and is not bound to accept their advice if he sees reason to dissent from it. The matters are *ex hypothesi* not within full ministerial competence.

§ 8. *The Irish Free State and Northern Ireland*

Quite distinctive is the effort of the Free State Constitution [2] to define responsible government. Nothing is left for the prerogative to determine by the constitution, which declares the

[1] *Parl. Pap.*, Cmd. 1321.

[2] See the Irish Act, No. 1 of 1922; Imperial Act, 13 Geo. V, c. 1.

executive authority to be vested in the King and to be exercisable according to the law, practice, and constitutional usage governing the exercise of the executive authority in the case of the Dominion of Canada by the representative of the Crown. A Council is created to advise in the government, and is declared to be responsible to the Chamber of Deputies; it shall consist of not more than seven [1] or less than five ministers appointed by the Governor-General on the nomination of the President of the Executive Council, a statutory recognition of the Prime Minister's right to select his colleagues. The ministers who make up the Executive Council must be members of the Chamber of Deputies, and the President is no longer, as in the normal Dominion procedure, to be selected by the Governor-General, but by the Chamber itself; he is empowered to nominate a Vice-President and the other ministers who are to be members of the Council are nominated by him but only with the approval of the Chamber. He and his nominees must retire from office, should he cease to retain a majority in the Chamber, but President and ministers must carry on their duties until their successors are appointed, subject to the express provision that a dissolution of Parliament may not take place on the advice of a ministry which has ceased to enjoy the confidence of the Chamber. Beside the Executive Council there may be five ministers, selected by the Chamber on the nomination of a representative Committee; these ministers are individually responsible to the Chamber for their departments, and may be removed after investigation by a Committee by the Chamber, but otherwise hold office for the duration of the Chamber and thereafter until their successors are appointed.

In the case of Northern Ireland a Privy Council is provided for by the Imperial Act of 1922; [2] the power of appointment rests in the Governor, and ministers must be Privy Councillors, though that body is not restricted to them. Further, a minister cannot hold office for longer than six months unless he is or becomes a member of the Parliament of Northern Ireland.

[1] In Dec. 1926 it was decided to increase the maximum to twelve, so as to permit of dropping the extern ministers.

[2] 13 Geo. V, c. 2, Sch. I, ss. 1, 2; 10 & 11 Geo. V, c. 67, s. 8.

PART II

THE EXECUTIVE GOVERNMENT

I

THE GOVERNOR

§ 1. *The Appointment of the Governor*

THE appointment of the chief executive officer, styled Governor-General in Canada, the Commonwealth, New Zealand, the Union of South Africa, and the Irish Free State, Governor in Newfoundland, the Australian States, and Northern Ireland, is vested in the Crown, and like all official Acts of the Crown is exercised on ministerial advice, that of the Secretary of State for Dominion Affairs. But in the case of the major posts the Prime Minister claims a decisive voice, and in all matters affecting the selection of his personal representative the King takes a measure of personal interest, especially of course if, as in the case of the appointment of the Duke of Connaught to Canada or Prince Arthur of Connaught to the Union, the question of a royal prince is involved. The suggestion, occasionally mooted, that the great Dominions should normally have princes in the office of Governor-General, has never won general approval. Personal distinction of some kind naturally appeals to the Dominions, and it is a matter for regret that so few men of high talent and accomplishment care to accept the rather tedious burden of office overseas.

Originally no idea of consulting the wishes of any colony regarding its head entered the minds of British statesmen, who sometimes at least regarded a colonial appointment as a convenient method of disposing of a troublesome supporter or importunate friend. But, though this mode of procedure had champions in the colonies, men so different as Sir John Macdonald [1] and Mr. Justice Higinbotham [2] declaring themselves opposed to any interference with Imperial discretion, the more common-sense view was often expressed that a Colonial Secretary ought to show his good sense by making certain that a nominee of his would meet the needs of the colony. The matter

[1] Pope, *Correspondence of Sir John Macdonald*, pp. 300, 433.
[2] Morris, *Memoir of George Higinbotham*, p. 203.

came to a head [1] in October 1888 when the Agent-General of Queensland was commissioned to ask that his Government might have private information of the name of the officer proposed as the next Governor; Lord Knutsford solemnly rebuked the Agent-General, insisting that the Governor, as responsible for the external relations of the Colony and matters of Imperial interest, must owe his appointment solely to the Imperial Government. He then appointed Sir H. Blake, bringing a vehement protest from all parties in the Colony, and, when the Colonial Secretary took exception to communications through the Agent-General, the Ministry informed him through the usual channel that Sir H. Blake was inexperienced, and that, although an Imperial officer, a Governor ought also to be acceptable to the Government with which he was to work, and which paid his salary. South Australia, first through the Agent-General and then directly, suggested that, despite the argument that, apart from Imperial functions, it was essential that the Governor should not appear to be the nominee of any party when he was required to act impartially in such issues as the grant of a dissolution, none the less it was wise that the Colony should have the chance of expressing its view on any name suggested; objections would not be lightly made, but if desired a name would be suggested. New South Wales on 22 November intimated an address from the Assembly asking that no one be appointed who had not held high political office, and stated that it would be in accord with constitutional propriety if ministers were informed in advance of any proposed selection. Fortified, however, by the dissent of the Victorian Premier, the silence of New Zealand and Tasmania, and the known opposition of Canada, Lord Knutsford on 8 July 1889 [2] declined to adopt the practice. He claimed success for the past, insisted on the Imperial functions of the Governor and the necessity of his being above party, pointed out that men who had held high political office at home could not be expected to bury themselves in a colony, and observed that it would be difficult to expect a nominee to allow his name to be submitted to criticism by those who knew him not. The position, however, was really indefensible; an effort to impose that most parsimonious of peers, Lord Normanby, on South Australia, could not be carried

[1] *Parl. Pap.*, C. 5828. [2] *Parl. Pap.*, C. 6487, p. 20.

out, Sir H. Blake's resignation having proved to Australia that, if the opposition were strong enough, the Colonial Secretary would yield.[1] New Zealand was sounded regarding Lord Onslow's successor, and the practice speedily established itself. The result has been to give the Dominion or State a veto on appointment, but not the right to appoint, and there has been very little evidence of any desire to claim that right, though suggestions from Prime Ministers are clearly permissible and may be valuable, and there is now, however, on the score of status a desire in the Union and the Irish Free State to control appointments.[2] Nor in the main have Governments when consulted shown any tendency to captious criticism, though the veil of secrecy has, it may be feared, rather too often been raised prematurely. The necessary submission of any name for the King's approval must, of course, wait for intimation of acquiescence. The effort to meet Dominion views is often considerable ; thus Mr. T. Healy was selected as Governor-General of the Free State to gratify the desires of the Government, and New Zealand's curious taste for peers has been respected by conferring the office on peers or persons suited for ennoblement.

§ 2. *The Governors of the Australian States*

Apart from approval of proposed appointments a more important issue has long been raised in Australia, the question of discontinuing the practice of making appointments from outside the Commonwealth. The advent of federation deprived the office of practically all Imperial duties of any consequence, and reduced the Governor to functions of more ceremonial than practical importance. To one section of opinion, which disliked the rights of the States and would have preferred union to federation, the Canadian practice of appointment by the Governor-

[1] Dilke, *Problems of Greater Britain*, i. 336 f., 366.

[2] It now seems popular that the Governor-General should be a local man approved by Parliament, as was in effect Mr. Healy. Lord Byng's action in June–July 1926 in refusing Mr. Mackenzie King a dissolution and granting one to Mr. Meighen emphasizes the unwisdom of an outsider interfering in Dominion politics. Contrast the wise reticence of earlier Governors-General; Skelton, *Sir Wilfrid Laurier*, ii. 86; Borden, 3 *Can. Bar Review* 517 (Aug. 17, 1925). The result of the Imperial Conference of 1926 will ultimately be to favour local nominees since the post loses in the great Dominions Imperial functions; Part VIII, chap. iii, § 8.

General on ministerial advice would have appealed; others, supporters as they were of State rights, still thought that the functions of Governor might be carried out by the Chief Justice with greater economy. But nothing was done except to diminish in certain cases salaries, in most allowances, and hand over the fine government houses at Sydney and Melbourne to the Governor-General, housing the Governors more modestly elsewhere, a process which later deprived the Governor of Queensland of his excellent house in order to make it the nucleus of the University—for which it was quite unsuited. But the Brisbane Conference of Premiers in 1907 [1] was opposed to any change in the system, South Australia dissenting. In 1908, however, a resolution favouring local appointments passed the Victorian Assembly despite the Premier's opposition, and in the same year the South Australian Premier, Mr. T. Price, visited England and asked for a local appointment on the occurrence of a vacancy, his purpose being, if the principle were conceded, to ask for the selection by the Crown of a prominent ex-politician. On his return to Adelaide he made a formal request, urging that it was only proper that it should be accepted that the highest post in the State should be regarded as open to one with distinguished local service, as an incentive to public spirit and a due reward for worthy service. Lord Crewe's reply of 9 October 1908 was conciliatory; [2] it did not negative the possibility of choosing one born in a State, or who had spent part of his life there, for the Governorship, but it indicated difficulties in restricting choice to local men, which must mean selecting one thoroughly acceptable to a particular Ministry. A change of this kind was far-reaching and could hardly be adopted except for all the States and at the desire of the great majority of the people. The Canadian system had indeed advantages; if desired by Australia the Imperial Government would probably accept it, but it was understood that the States did not wish to suffer such diminution of status as would be associated by a change which placed the selection of the Governors in the hands of the Commonwealth.

The views of the South Australian Government were opposed

[1] Victoria *Parl. Pap.*, 1907, No. 23, pp. 298–301.

[2] *Parl. Pap.*, Cmd. 2683, pp. 43 ff. The Western Australian correspondence is given, ibid., pp. 49–52.

by the Legislative Council,[1] but Victoria in 1909 and 1910 showed favour to them, Queensland evinced in 1909 some inclination to consider them, and Western Australia in 1910 discussed the matter, but negatived the proposal; it was, however, carried on 27 November 1912, but a formal request for an Australian appointment was negated by Mr. Harcourt on 19 September 1913. The discussions revealed the fact that the proposal to select Chief Justices was not free from difficulty; it was obviously desirable, if he acted as Governor, to relieve him from trying any cases where the Executive Government was concerned; moreover, he might be placed in a difficult position as regards the exercise of the prerogative of mercy, even though normally the matter was one for a responsible minister. Further, a charge was made against a Chief Justice of Tasmania that he had used information obtained in an official capacity to serve private ends, and, though a Commissioner who examined the question exonerated the judge,[2] the episode hinted at difficulties in local associations. The question in the case of New South Wales was complicated by the jealousy felt of Melbourne as the normal head-quarters of Parliament, and by friction between the two Governments of the Commonwealth and the State. The State Government, in order to annoy that of the Commonwealth, terminated the occupation by the Governor-General of the old colonial government house, for which it must be admitted that the Commonwealth equally unreasonably refused to pay rent; a protracted litigation followed, carried to the Privy Council, which established the right of the State to possession, and the sensible step was taken of re-installing the State Governor in the comfortable mansion.[3] This sort of contest emphasized the impossibility of giving the control of appointments to the Commonwealth and this was accentuated by Labour proposals to abolish the States, creating a central Legislature of 100 members with thirty councils having local authority but subject to the central authority. As a result, in 1918 the Premiers' Conference, which had been expected to pronounce for local appointments, that is selection by the Ministry for royal appointments, decided against any change. The issue, however, was merely postponed, nor were matters rendered

[1] *Parl. Deb.*, 1908, pp. 158 ff., 175 ff. [2] Hobart *Mercury*, 14 May 1910.
[3] *Attorney-General for New South Wales* v. *Williams*, [1915] A. C. 573.

easier when a Governor of South Australia threw up his post in disgust at the high cost involved—perhaps also at the inglorious ease of the life of a 'rubber stamp', and a Governor of Tasmania frankly confessed his inability to remain in office in view of the small salary. Even before these untoward events the issue had been raised again. Sir W. McPherson in Victoria in 1919 pronounced for local appointments; Mr. Theodore for Queensland, when in England in 1920, pleaded the cause with Lord Milner, who then and in 1921 made it clear that the Imperial Government would not refuse to meet Australian wishes if these were clearly expressed. In Tasmania the issue came to a head in 1924 in view of the unexpected vacancy. A motion against imported Governors was carried in the Assembly by fourteen to twelve, but the Council would have none of it, and eventually the two agreed to ask for an imported Governor, who was given to them in the acceptable person of a Labour politician, Mr. O'Grady, who, somewhat comically, accepted a knighthood on setting out, ostensibly to show how the dignity of the post could be maintained by character on modest means. The South Australian vacancy was solved by appointing a popular Australian figure in the person of Sir T. Bridges.[1] In 1925, however, all the States save Victoria, where a contrary resolution was carried by twenty-nine to twenty-seven in the Assembly, united in asking for local appointments. The weight of the request was weakened, however, by the fact that the requests were all made by Labour Governments and that forty-four out of ninety members of the Assembly of New South Wales, as well as large majorities in the Councils of that State and South Australia,[2] were among the voices raised in protest, and no great surprise was felt at its refusal on the score of grave conflict of opinion on 3 March 1926. The matter, it is clear, is one in which the Imperial Government has no real interest in imposing outsiders, who are now hard to find of any good quality, on the States

[1] By Act No. 1548 the salary was raised from £4,000 to £5,000 and made free of income-tax in the State as in the Commonwealth. Similarly, the Newfoundland salary is exempt by Act 1921, c. 33.

[2] 16 out of 20, and 19 out of 46 members of the Assembly; in Tasmania 14 of 18 Councillors, 13 of 30 Assembly members; the Western Australia Council dissented 25 Aug. 1925. Various protests from public bodies were unconstitutionally forwarded by the Governor-General; Cmd. 2683, pp. 31 ff., including a protest from the Queensland opposition.

against the will of the majority of the people. The perfectly valid argument that the lack of respect for constitutional maxims shown by Governments in the States renders impartial Governors important is in part invalidated by the obvious tendency of all Governors to accept ministerial advice without question, and by the consideration that after all it is better that the necessity of observing constitutional principles should be learned by experience of the disadvantages of breaking them than that third parties should step in to save democracies from the result of their own errors.

§ 3. *The Administration of the Government*

Provision is normally made for the devolution of the administration of the Government in the event of the absence of the Governor-General or Governor on the Chief Justice of the territory, unless a Lieutenant-Governor has been appointed distinct from the Chief Justice, as has from time to time happened, for example in Queensland when the Chief Justice was regarded with hostility by the Ministry of the day. The older —not the oldest [1]—rule was to appoint the senior officer commanding the Imperial forces to act; thus in Canada it was not until 1903 that, owing to disappearance of the garrisons, the Chief Justice was called on to act. But the removal of Imperial forces early terminated this custom in Australia and New Zealand. Newfoundland had no such forces stationed there, and in the case of the Union the Chief Justice of the Union was of such high standing that he was made a peer, as Lord de Villiers, and given the right to administer. The plan is not without difficulties, and, on the whole, of recent years efforts have been made by sending out Governors-General to take office immediately on the departure of the outgoing officer to avoid long interregna, which have the awkward result of throwing doubt on the value of Imperial officers. In the case of the Commonwealth the objections to appointing a judicial officer of the multifarious duties of the Chief Justice to administer led to the

[1] Thus in Canada before 1840 the Senior Executive Councillor acted; Bourinot, *Constitution of Canada*, p. 51. Originally in Queensland the Colonial Secretary acted, later the President of the Legislative Council, if not partisan. The appointment of Mr. Lennon in 1919 was a deplorable departure from precedent, as he was a strong partisan of Labour.

grant of dormant commissions to the two senior State Governors with preference for the Governor of New South Wales or Victoria as more readily accessible.

The constitutions [1] of Canada, the Commonwealth, and the Union authorize the Crown to permit the appointment of deputies by the Governors-General to perform such functions as may be delegated to them, though in the case of the Union the power applies only in the absence of the Governor-General. The power is freely used in both federations for minor or ceremonial duties. The Lieutenant-Governors of the provinces in Canada have similarly been given powers of appointing deputies for specific purposes.[2] Moreover, the letters patent for New Zealand, Newfoundland, the Australian States, Malta, and Rhodesia contain curious provisions; they permit a brief absence from his Government of a Governor, provided that he appoints a deputy, but allow him to exercise his powers fully during such absence, thus preventing the operation for the time of the rule that, in the case of absence, the administration of the Government passes over to the Lieutenant-Governor or other official. They also accord the more normal power to appoint deputies in the case of absence from the seat of Government. The validity of these delegations was called into question by Sir S. Way as Chief Justice of South Australia, and in 1906 the Assembly of that State endeavoured by legislation to remove all doubts; it was conceded that prerogative powers might be delegated, but not statutory authority. The Council rejected the measure, but in 1910 another Bill passed both Houses, was reserved and finally assented to, while New Zealand and others of the States followed the example set. The issue is clearly not free from doubt, though the long continuance of the practice without any legal decision questioning it stood in favour of its validity. Much more curious is the provision for permitting the Governor to retain full authority when absent,[3] which runs contrary to the sound view that the place where a Governor should exercise his powers is his Government. But it appears

[1] 30 Vict. c. 3, s. 14; Constitution, s. 126; 9 Edw. VII, c. 9, s. 11. Cf. *R.* v. *Amer*, 1 Cart. 718.

[2] *Provincial Legislation*, 1867–95, p. 196.

[3] This principle was adopted in the case of the mandated territory of New Guinea in 1926; *Commonwealth Deb.*, p. 2239.

that a deputy Governor, if granted a full measure of authority, may attain the status of an officer administering the Government within the meaning of the letters patent constituting the office of Governor, and may become entitled, e.g., to exemption from customs duties on the importation of commodities in cases where that is conceded to the Governor.

§ 4. *The Salary of the Governor*

In all cases the salary of the Governor in the Dominions and the States is paid by the Government; it is fixed by a permanent Act, and it is a rule that it shall not be diminished during his actual tenure of office; if a reduction is desired, it must be made on a change of officer.[1] The proposal to do so in Canada cost the Dominion[2] the services of Lord Mayo, who accepted instead the fatal Governor-Generalship of India. Since then Canada has treated its Governors-General generously as regards allowances. In the Commonwealth there has been more parsimony, and an effort to obtain in 1902 an entertainment allowance for the Governor-General was defeated in Parliament and brought about Lord Hopetoun's hasty resignation. In the States since federation there have been persistent efforts to cut down expenses, partly by reducing salaries, but still more by stopping or cutting down allowances and expenditure on staff, upkeep of houses and grounds. Canada has provided an efficient official staff placed under the Governor-General's control during his tenure of office; the Commonwealth provides an Official Secretary who is subordinate to the Governor-General, but also a permanent officer, and adequate aid is given in the Union and New Zealand; elsewhere less is done, the necessity being smaller. Salaries vary from £10,000 in Canada, the Irish Free State, and the Commonwealth, to 18,000 dollars in Newfoundland.

A Governor is not permitted, of course, to accept presents while administering; the rule is relaxed in the case of retiring Governors *de facto*, although efforts have been made from time to time to check the practice, and some Governors, such as Lord Carrington and Sir T. Carmichael, have used their best

[1] *Parl. Pap.*, C. 7910 (1895), when a change was made before office was assumed, and the Governor did not refuse to take office.

[2] *Sess. Pap.*, 1869, No. 73.

efforts to prevent the customary presentations to the Governor and his wife on leaving Australia. The matter is one of good taste, and as regards it opinions curiously differ; it hardly seems a desirable usage. Services of a distinct kind seem much more fittingly marked by the collection of funds for some public object and the association of the name of the person to be commemorated with the resulting endowment. Wholly deplorable is the practice of Governors interesting themselves in any form of undertaking while administering, and there are disadvantages of a minor type in their doing so after they have left office.

Governors-General and Governors—and by usage Lieutenant-Governors—receive locally the style of Excellency, which is accorded by the Imperial Government to the former also in formal correspondence. The Governor as the King's representative is entitled to give the 'word' (parole) in all places within his Government. He is entitled to certain salutes from His Majesty's ships of war, and the ceremonial of naval visits is carefully regulated and observed. He is also authorized to receive the usual honours from Dominion military forces and to require the firing of the usual salutes at the opening and closing of Parliament. He wears a special uniform, takes precedence over even members of the royal family in his territory, and is entitled to receive the respect and consideration due to a representative not merely of the Imperial Government but of the King himself.

§ 5. *Correspondence Rules*

The Governor-General or Governor is required to address to the Secretary of State for Dominions Affairs any communication which he desires to make to the Imperial Government whether for his own account or for his ministers. Permission was, however, given in 1907–8 [1] for direct correspondence on minor matters between the Secretary to the Imperial Conference and ministers of the Dominions, a matter of no consequence, and, more important, the right of direct communications between the Prime Ministers of the Empire was established in 1918 as a result of the War Cabinets and Conferences, though the prac-

[1] *Parl. Pap.*, Cd. 3795 (1908).

tice has not developed very greatly. There are, it is clear, strong reasons of public policy for preserving the Governor as the channel for all important communications both for purposes of record and in order to make use of his services as a link between the Imperial and local Governments. It is, indeed, obvious that he must be kept informed of communications between his ministers and the Imperial authorities or his post would become irksome and almost impossible of successful tenure. The Imperial Conference of 1926, however, while admitting this doctrine, left it open for any Dominion to institute direct correspondence with the Dominions Secretary of State, cutting out the Governor-General.[1] This has, however, no application to the Australian States, Southern Rhodesia, Malta, or Northern Ireland.

Dispatches are classified as numbered, confidential, and secret. The Governor is required to lay all numbered dispatches before his ministers unless for grave reasons which he must report; confidential and secret dispatches deal with such matters as foreign affairs, military or naval or air policy, constitutional or personal questions. These are normally intended for communication in confidence—the degree being indicated by the use of one term or the other—to ministers, but secret dispatches may be intended for the Governor's eye alone. In no case may a Governor publish such dispatches from or to himself without permission,[2] and the Secretary of State, while reserving the right to publish, never does so without consultation. The right, of course, applies merely to what the Governor writes; the confidential or secret minutes of ministers are exempt from publication save with their consent. The taking the Dominions into confidence on foreign affairs has naturally enormously increased such correspondence, both telegraphic and by dispatch, and inevitably a good deal of difficulty has arisen, especially in Canada where the House of Commons chafes at being unable to have laid before it the communications on vital issues such as the Locarno pact from the Imperial Govern-

[1] See Part VIII, chap. iii, § 8. Lord Byng's grave error was the cause of this important decision as regards Canada. It has no application to the power of reservation; Part II, chap. vi, § 3.

[2] See the censure on Sir G. Grey in *Parl. Pap.*, 5 May 1868; Rusden, *New Zealand*, ii. 355 ff.

ment. Requests for such correspondence have necessarily to be refused unless the Imperial Government consents, while at times it is possible that the reluctance of that Government is not unwelcome to a Dominion Government, though this is normally stoutly denied. The insertion in a numbered dispatch of a reference to a confidential or secret dispatch is of course censured. Special importance attaches to the prompt transmission of Acts, and Governors are required to furnish reports from their Law Officers specifying whether the Act may properly be assented to, and to supply information as to the purpose of the Act.

Persons in a Dominion may address the Governor on matters of public or private concern; his duty is to deal with these communications, if necessary with the aid of the Executive Council, in such manner as seems best and he may refer them to the Imperial Government. But apart from this any resident may address the Secretary of State through the Governor; the same rule applies to public bodies, and no communication received direct will be answered except through the Governor and after it has been referred to the Governor for verification and report. Sir George Grey, when he settled in New Zealand after his retirement from the Governorship, claimed the right of writing direct, but was reminded that he had denounced the Imperial military officers who thus acted during the period when he himself was Governor. Petitions to the King, or King in Council, and memorials to British public departments must also be forwarded through the Governor. He is bound to transmit to the Secretary of State every communication so sent to him, with such report as he may deem necessary.[1]

A distinction must here be drawn between the case of petitions to the King and other communications. It is quite possible that an action may lie in a Dominion or in England against a Governor who fails to forward a petition duly presented to him for transmission, while clearly in the case of other communications no such liability could be incurred. But an omission to forward any document is a clear breach of

[1] The effect of the Imperial Conference Resolution of 1926 on this doctrine is uncertain. Where the Governor is eliminated as a channel of communications, any representations will have to be sent direct to the Imperial Government. A Governor will cease to be bound to forward petitions to the King.

official duty which might result in severe censure. It is clear that a Governor may refer any document to his ministers and may await their observations for a reasonable period before dispatching the communication; but obviously he would not be entitled to accept advice from his ministers to refuse to forward any communication, though this was alleged to be the case in 1925 in respect of the remonstrance of the Legislative Council of South Australia against the proposal to confine State Governorships to local nominees.[1] Withholding such a document would of course be wholly improper, since the Imperial Government is entitled to full information of the views of a legislative body, and it is not right that it should be left to learn these from the public prints.

Rules are also laid down for communications between a Governor and British Consular Officers and naval officers; curiously enough, the topic of communications with other Governors is left to practice.

[1] In fact it was forwarded; *Parl. Pap.*, Cmd. 2683, p. 28. There was some delay in forwarding a memorandum from a number of members of the Opposition (ibid., p. 26). The protest of the Queensland Opposition came irregularly via the Governor-General (ibid., p. 31).

II

THE POWERS OF THE GOVERNOR

§ 1. *The Letters Patent*

THE office of Governor is now normally constituted by letters patent under the Great Seal of the United Kingdom, and this instrument is accompanied and supplemented by royal instructions under the sign manual and signet.[1] It is important to note that the act of constituting the office is a prerogative action, resting on the authority of the Crown to exercise executive authority in so far as no other provision is made by legislation. The provisions, therefore, of such letters patent are not legislative in character; they differ essentially from such provisions as those creating a Legislature of a representative character. Such provisions exhaust the power of the Crown, as was decided in *Campbell* v. *Hall*; they cannot be revoked, unless perhaps an express power were retained to this end. But matters dealing with the executive, whether contained in the same instrument or not, are revocable. The commission of 1832, which created a representative Legislature in Newfoundland, also dealt with the office of Governor. To alter the provisions as to the Legislature Imperial Acts were needed; those as to the Governor have been varied by letters patent. Under the modern system it is normal to use distinct instruments for the two different purposes; thus the Transvaal letters patent constituting the Legislature were distinct from those dealing with the office of Governor; the former contained no claim of the right to revoke, the latter contained the claim; similarly in the case of the letters patent of the Orange River Colony, and those of Malta and Southern Rhodesia.

The new form dates from the seventies and superseded an inconvenient mode by which, whenever a new Governor was appointed, a commission was issued to him which appointed him to his office, defined his authority, reconstituted the Legis-

[1] There is no vital difference between the two forms of instrument as regards effect, and in the case of the Union and the Federations pardon is dealt with in the instructions only. But for legislative matters letters patent are used.

lature, and gave him instructions as to exercising his powers, which were further supplemented by an instrument of instructions. The reconstitution of the Legislature was a meaningless formality, both useless and confusing, and the new system is one of letters patent which are not varied for each Governor, but made applicable to him by the commission which appoints him to the office defined in the letters patent and regulated by the instructions. In addition to the formal instructions[1] accompanying the letters patent, the Governor is required to obey such other instructions as he may receive, whether in the form of instructions under the sign manual and signet or in that of dispatches from the Secretary of State. In the latter case it seems to be immaterial whether the King's name is used or not, as the Secretary of State is only *ex officio* the mouthpiece of the King, and the formal style is normally used only on specially solemn occasions.

Disobedience to instructions from the Crown forms a good ground for censure of the Governor, who holds office at pleasure, though normally for a period of five or six years, and in important cases of recall, though such disobedience is rare and recall has chiefly been resorted to, as in the case of Sir Gerald Strickland in 1916, on the score of friction with ministers, nor necessarily due to any error on the Governor's part.[2] But disobedience does not invalidate acts of the Governor within his legal powers ; a dissolution, for instance, is valid even if the Governor defies the Secretary of State. The claim has indeed been made that in the exercise of statutory powers the Governor is free to act without regard to the Crown, but the contention had been emphatically rejected and rests, it is clear, on no intelligible foundation. The Governor is merely an instrument to exercise powers which the Crown cannot perform, by reason of space, in person, and he cannot claim to act against the expressed wishes of him whom he represents. The Governor as an Imperial officer is, of course, liable to attack in Parliament, but normally this is difficult to carry out owing to the rule that the House of Commons will not discuss matters which fall within the sphere

[1] The Imperial Conference of 1926, by enunciating the doctrine that the Governor-General should cease to represent the Imperial Government, would point to the disuse of instructions in these cases.

[2] Keith, *J. S. C. L.*, 1917, pp. 227–32.

of action of independent Governments, and, so long at least as he acts within his instructions, he would receive the protection of the Government of the day. Any action done on ministerial advice would normally escape possibility of attack in the Commons as in effect such an attack would be directed against an independent Government of the Empire.

The validity of the issue of letters patent constituting the office of Governor has not been and could not seriously be questioned in the case of an ordinary colony or state. But, although the acute mind of Mr. E. Blake [1] found no fault in the procedure when in 1876 he applied a mordaunt criticism to the commission of the Canadian Governor-General then in force, exception was taken to the following of this model in the case of the Commonwealth.[2] But the criticism is largely captious. It is true that the office of Governor-General is recognized by the Federation Acts of the two Dominions, but the matter contained in the letters patent is largely useful. Chief exception can be taken to the powers in clauses III–V to appoint, and dismiss officers, and to summon, prorogue, and dissolve the Parliament, the clauses having been copied too slavishly from the Canadian model without regard to the exact wording of the Australian constitution. But clauses II, VI, and VII are proper to delegate the custody of the Great Seal, to provide under the powers of the constitution for appointing deputies, and to define the mode in which the administration of the Government is to devolve. In the royal instructions the power to administer oaths was requisite to authorize the Governor-General to impose the oaths in question, and not only was it desirable to grant the power to pardon, it being a moot point [3] whether without express delegation such a power passes, but it was necessary to regulate the mode of its exercise. The Australian model was followed in the case of the Union, omitting the power regarding appointment and dismissal of officers, though in that case as in that of the Federations the constitution makes formal provision for the office of Governor-General, which possibly could not have been created by the prerogative.

[1] Canada *Sess. Pap.*, 1876, No. 116; 1877, No. 13.

[2] Garran, *The Government of South Africa*, i. 375.

[3] See *The Pardoning Case*, 23 S. C. R. 458, 468, *per* Strong, C.J.

§ 2. *The Governor and the Prerogative*

How far is a Governor invested with the royal prerogative by the letters patent and Acts constituting his office, where such exist, in matters on which the statute law of his territory contains no precise enactment? The answer to this query, long and confusedly debated, must be gathered from consideration of the evidence afforded by decisions of the Privy Council in cases where claims were put forward, which in the view of a recent writer [1] on colonial law establishes the principle that Governors are exempt from suit in civil actions for actions of state both in the local and English courts. It seems, however, impossible to establish this theorem. The leading case is that of *Musgrave* v. *Pulido* [2] in which the Governor of Jamaica sought to escape responsibility in an action based on his seizure and detention of the 'Florence' by the plea that he had acted as Governor in reasonable exercise of his discretion and that the action taken was an act of state. The Judicial Committee repelled, as did the court below, the contention that this was any answer; it emphatically asserted that

> the Governor of a colony in ordinary cases cannot be regarded as a Viceroy, nor can it be assumed that he possesses general sovereign power. His authority is derived from his commission and limited to the powers thereby expressly or impliedly entrusted to him. Let it be granted that for acts of power done by a Governor under and within the limits of his commission, he is protected because in doing them he is the servant of the Crown and is exercising its sovereign authority, the like protection cannot be extended to acts which are wholly beyond the authority confided to him. Such acts, though the Governor may assume to do them as Governor, cannot be considered as done on behalf of the Crown, nor to be in any proper sense acts of state. When questions of this kind arise it must necessarily be within the province of municipal courts to determine the true character of the acts done by a Governor, though it may be that, when it is established that the particular act in question is really an act of state policy done under the authority of the Crown, the defence is complete and the Courts can take no further cognizance of it.

There can be no doubt of the doctrine of the Privy Council;

[1] Tarring, *Law relating to the Colonies* (3rd ed.), p. 44.

[2] (1879), 5 App. Cas. 102; contrast the absolute immunity of the Lord-Lieutenant of Ireland, *Tandy* v. *Earl of Westmoreland*, 27 St. Tr. 1246; *Luby* v. *Lord Wodehouse*, 17 Ir. C. L. R. 618; *Sullivan* v. *Spencer*, Ir. R. 6 C. L. 173.

a Governor has no special privilege like that of the Crown; he must show in any court that he has authority by law to do an act, and what is more important for our purpose, he must show not merely that the Crown might do the act, but that he personally had authority to do the act.[1] In the case in question it might have been pleaded that the action taken could be defended on the basis that it was an act of state against a foreigner; had this been done, the Privy Council would have had to decide, in the absence of express ratification of the act by the Crown, whether the Governor had sufficient delegation of the royal authority to enable him to commit such an action.

There is therefore no alternative but to hold that, apart from statutory powers, the Governor has a delegation of so much of the executive power as enables him effectively to conduct the Executive Government of the territory. The legal instruments are vague but general. The Commonwealth constitution declares that the executive power of the Commonwealth is exercisable by the Governor-General as the representative of the Crown and extends to the maintenance of the constitution and the laws of the Commonwealth. The Union constitution vests the Executive Government in the King and allows it to be exercised by him in person or by his representative. Canada still more vaguely vests the Executive Government and authority in the Crown, leaving unsolved the question whether, if present in Canada, the King could exercise his authority in person. The letters patent are as vague; they authorize, empower, and command the Governor to do all things that belong to his office in accordance with the letters patent, the royal instructions and any laws in force in the territory. Doubtless this is all very indefinite, but it is in accord with the British love for leaving matters of this kind to be regulated by practice.[2]

The extent of a Governor's authority is sometimes more widely stated as perhaps by Mr. Todd [3] and certainly by Sir H. Jenkyns, who wrote: [4]

There is no doubt that a Governor will be always held to have had

[1] Compare *Cameron* v. *Kyte*, 3 Knapp, 332.

[2] Constitution, s. 61; 30 Vict. c. 3, ss. 9, 10; 9 Edw. VII, c. 9, s. 8.

[3] *Parl. Govt. in the British Colonies* (ed. 2), p. 36.

[4] *British Rule and Jurisdiction beyond the Seas*, p. 103.

all the power necessary for meeting any emergency which may have required him to take immediate action for the safety of the Colony. If he acts in good faith and having regard to the circumstances reasonably, he will be held harmless.

This is doubtless unsound doctrine, if it suggests that there is any special privilege in the case of a Governor or that mere reasonable action in good faith will cover any act. Every member of the executive may violate in case of emergency ordinary laws, but the Governor, like every other officer, runs the risk of finding that a Court of law may conclude that the emergency was not such as to justify his action despite its good faith and apparent reasonableness. Some indication of what may be done in emergency may be gained from the charges in *R.* v. *Pinney*[1] and *Phillips* v. *Eyre*,[2] but normally a Governor will require an Act of indemnity for any violation of law.

§ 3. *The Limitations of the Powers of the Governor*

It is by no means easy to decide how far the powers of the Governor to exercise prerogative rights extend. Certainly it is possible only where the Privy Council has definitely decided an issue, and few of these have arisen. Moreover, in an important Canadian case[3] the Privy Council most unexpectedly decided that the power to grant charters of incorporation without a special delegation of the authority belonged to Lieutenant-Governors in the provinces, a decision which clearly carries with it the conclusion that it belongs to every Governor. The result came as a complete surprise to Canada, where every one believed that the right was non-existent, though it is true that a very few cases of grants of charters to cities before federation were known. At any rate the decision stands to prove that a right thought obsolete may be revived at the discretion of the Privy Council. Distinct from this, of course, is the privilege of the Crown itself to grant charters valid in oversea territories, so far as they do not run counter to the statute or perhaps the common law of the area in question. A charter cannot, of course, repeal a Colonial Act, though occasionally it purports to do so. But it can be expressed to extend throughout the

[1] 3 St. Tr. (N. S.) 11. [2] L. R. 6 Q. B. 1.
[3] *Bonanza Creek Gold Mining Co.* v. *The King*, [1916] 1 A. C. 566.

Empire, and it is not wholly obsolete in the case of banks, of universities and nursing associations, and similar bodies.

The doctrine of the Privy Council as to charters seems to run counter to the view of the House of Lords [1] that a prerogative, however undoubted at one time, may become obsolete when full statutory provision is made otherwise, as was certainly the case of Canada. In any event it is most improbable that any court would hold that the Governor possessed the prerogative of coinage, which has always pertained to the Crown and has been used in colonies possessing representative institutions, as it is not a legislative act, and therefore is not barred as is legislation proper by the doctrine in *Campbell* v. *Hall*.[2] In the United Kingdom and the Empire, however, the need of reliance on the prerogative has disappeared with the passing of the *Coinage Act*, 1870, under which Imperial coinage so far as it is employed in the Dominions is still regulated. Local coinages are dealt with by local Acts.[3]

The prerogative of honour is neither delegated to nor possessed by a Governor; indeed the Privy Council appears to hold that it would have to be delegated by statute.[4] The matter indeed was formerly carried so far as to render it desirable to cover with royal sanction *ex post facto* the grant of a medal in New Zealand for meritorious service,[5] and, though power has been taken under local Acts to award military medals, the preference for Imperial decorations was shown by the decision after the war of 1914 to issue Imperial medals to the Dominion forces. The Governor has not even the unfettered right to regulate precedence in his Government, but is merely permitted to do so in so far as there is no ruling by the Crown, or, of course, local enactment. Even the right of investiture of recipients of Imperial honours has been sparingly bestowed; in 1879 the Marquess of Lorne was given the power in respect of six Canadian K.C.M.G.'s, and in 1902 the Governors-General were authorized by letters patent to perform investitures in the case of the G.C.M.G. and the K.C.M.G., an authority since extended to the other Governors-General. Special authority to invest

[1] *Attorney-General* v. *De Keyser's Royal Hotel*, [1920] A. C. 508.
[2] 20 St. Tr. 239. [3] Cf. Chalmers, *Colonial Currency*, pp. 38 ff.
[4] *A.-G. for Dominion* v. *A.-G. for Ontario*, [1898] A. C. 247, 252.
[5] *Parl. Pap.*, C. 83, pp. 42, 190.

has from time to time been given as on the occasion of the opening of the Union Parliament in 1910 and that of Southern Rhodesia in 1923. Authority to dub a knight was not, however, conferred on the Governors-General in 1902, the privilege being reserved for the Crown, but the honour is also conferred by letters patent.

It is wholly undecided whether it is possible for the Governor to exercise the right of excluding aliens in the absence of any legislation on the ground that the privilege exists in the United Kingdom and may be deemed to pass by a general grant of executive power. The matter may be regarded as part of the wider issue of the power to commit, without delegation and without ratification, an act of state, which was evaded in *Musgrave* v. *Pulido*.[1] The question was discussed and decided in the affirmative by the Chief Justice and one judge in *Toy* v. *Musgrove* [2] in Victoria, but the Privy Council [3] disposed of the case on appeal in such a manner as to leave, as too often happens, the essential question unanswered. All that can be said is that, if it is desired to commit an act of state against an alien, it is advisable that the act should be done by the Governor and be ratified by the Crown.

It has been held by the Chief Justice of South Australia [4] that the Governor has not without special delegation the right to declare a ferry; whether this doctrine is sound or not can hardly be determined, but it is clear that the prerogative, assuming its existence, is practically obsolete.

The general executive power of the Governor, even when it is sufficiently extensive to cover his action, may be limited by some constitutional convention. This is apparent in the case of contractual obligations entered into by a Governor with or without ministerial advice. It is settled law that a Governor or other servant of the Crown does not create a personal liability by contract; he binds only the Government, and, save where special provision exists for suing the Government, the only remedy is by petition of right. But the Privy Council has held [5] that it is an implied term in contracts that the Legis-

[1] 5 App. Cas. 102. [2] 14 V. L. R. 349. [3] [1891] A. C. 272.

[4] *Dewar* v. *Smith*, 1900, S. A. L. R. 38, 41. Cf. *In re International and Interprovincial Ferries*, 36 S. C. R. 206.

[5] *Commercial Cable Co.* v. *Newfoundland Government*, [1916] 2 A. C. 610.

lature will provide funds and, if a contract is made of which the Legislature disapproves and for which it provides no funds, the funds of the territory cannot be made liable.

§ 4. *The Appointment of King's Counsel*

The nature of the executive power in its relation to the prerogative was bitterly contested in Canada over the question of the appointment of Queen's Counsel.[1] The Imperial law officers in 1872 laid it down that the Governor-General alone had power to appoint under the prerogative, but that the power could be given by provincial Act to the Lieutenant-Governors to appoint and to regulate precedence between their appointees and those of the Governor-General. When, therefore, the Lieutenant-Governor of Ontario made certain appointments under what he held to be his power to do so, the Dominion Government induced the province to regularize the position by legislation,[2] a plan adopted by other provinces, including Nova Scotia in 1874.[3] Now the Nova Scotian Act deprived of his precedence Mr. Ritchie, who held an appointment from the Governor-General. He claimed that the Nova Scotia Legislature had no power to authorize appointments of Counsel or the regulation of precedence, and the Canadian Supreme Court[4] ruled that the matter was one of conferring a dignity, and that, the Crown not forming part of the provincial Executive or Legislature, the Lieutenant-Governor and the Legislature alike could not act. The Court ignored the pertinent question whether the Governor-General had any delegation of the prerogative of honour, assuming as obvious that he had. But the fundamental principle of the decision, with its depreciation of the position of the provinces, was reversed by the Privy Council when it held that the Crown was part both of the Executive and the Legislature of the provinces in *The Liquidators of the Maritime Bank of Canada* v. *The Receiver-General of New Brunswick*.[5] It remained only to raise once more the issue of

[1] Canada *Sess. Pap.*, 1873, No. 50. Similarly as to marriage licences, *Prov. Leg.*, 1867–95, pp. 665, 668. See also *C. L. T.* xl. 92 ff.

[2] 36 Vict. cc. 3, 4; Quebec, 36 Vict. c. 13. [3] 37 Vict. cc. 20, 21.

[4] *Lenoir* v. *Ritchie*, 3 S. C. R. 575. For the Court below, see 2 R. & C. 450; *Sess. Pap.*, 1877, No. 86, pp. 25–43.

[5] [1892] A. C. 437; Ontario *Sess. Pap.*, 1888, No. 37.

Queen's Counsel, and the Privy Council[1] readily determined that the Legislature of Ontario had full power to confer the right to appoint and to regulate precedence under its authority to change the constitution, appoint officers, and arrange judicial matters. It is clear that the basis of the judgement is that the provinces have the right to appoint provincial officers, just as the Federation can appoint federal officials, and it seems clear that no legislation was really needed to give the Lieutenant-Governors power to appoint, just as the Governor-General needed no special legislation. There was no question of an honour in either case; it was matter of Executive Government and the provinces under the *British North America Act* carried on unaltered, save in matters removed from their control by federation, the old executive and legislative powers. It follows, of course, that the Governor-General had no real right to create provincial Queen's Counsel, and the whole matter was definitely then settled by provincial Acts. Long before, colonial practice, for instance in 1863 in Victoria, had decided that the office fell within the ordinary power of the Governor to make appointments, though the adoption of this view in New Zealand was delayed until 1903.[2]

§ 5. *The Alteration of Seals*

The absence of any right in the Governor to alter seals was established in a controversy in Canada after federation. It was deemed improper to continue the use of the old provincial seals and a new seal was necessary for the Dominion, and on 8 May 1869, the designs having been approved by the Queen, the Colonial Secretary sent five seals to the Governor-General, one for Canada, the others for the provinces, with a royal warrant directing their use.[3] The Dominion Government demurred regarding the provincial seals; they held that under s. 136 of the British North America Act the duty of change rested with the Lieutenant-Governors in Council and that direct action by the Crown was not proper. The Secretary of State took a different view; he held that the design and appointment of a seal were matters for the Crown, and that

[1] *A.-G. for Canada* v. *A.-G. for Ontario*, [1898] A. C. 247.

[2] Morris, *Memoir of George Higinbotham*, pp. 81, 82.

[3] *Sess. Pap.*, 1877, No. 86.

the section quoted merely prescribed the mode in which the new seals were to be introduced in Ontario and Quebec, while in the case of Nova Scotia and New Brunswick the royal prerogative was clear. But, if this view were not acceptable, then the other provinces as well as Ontario and Quebec should be given authority either by federal or provincial Act to alter the seals. The Dominion Government then sent the seals to New Brunswick and Novia Scotia advising their use, and suggested to Ontario and Quebec their adoption. Nova Scotia, however, disliking the new seal, asked for authority to use the old, and to legislate to empower alteration in future by the Lieutenant-Governor in Council. Unfortunately this request was ignored by the Dominion Government, and meanwhile the old seal continued in use. But in *Ritchie* v. *Lenoir* [1] the Supreme Court declared that the use of the old seal was quite illegal, and invalidated patents sealed with it. The Provincial Government then asked for an Imperial Act to clear up the tangle, but the Imperial Government, though advised by the law officers that the directions of 1869 were mandatory not imperative, so that disobedience did not invalidate the use of the old seal, suggested Dominion legislation, which was duly passed (40 Vict. c. 3), authorizing provincial Lieutenant-Governors in Council to alter from time to time the seals and validating the Nova Scotia use. The province itself (40 Vict. cc. 1, 2) authorized the Lieutenant-Governor in Council to change the seal, and validated all that had been done until a new seal was adopted, and the Dominion Government allowed the Acts to stand though holding that the matter was not provincial.

It is easy to see that all was confused. In fact the Governor-General and Lieutenant-Governors never had prerogative authority which remained in the Crown, but as regards Ontario and Quebec the matter was disposed of by the British North America Act, very naturally because the new provinces had to have some seal to use forthwith. For the rest the prerogative or local Acts were proper, not Dominion legislation which could have no validity. And now provincial Acts regulate the matter, the constitutions of Manitoba, Alberta, and Saskatchewan containing express provisions to that end.[2]

[1] 3 S. C. R. 575.

[2] See 33 Vict. c. 3; 4 & 5 Edw. VII, cc. 3, 42.

In the Dominions and the States the whole is still dealt with under the prerogative by the Crown, which authorizes by letters patent the keeping of the seal by the Governor and his use of it; new seals which are provided on the demise of the Crown are appointed by the Crown.[1] In the case of the Commonwealth and the Union the Governors-General were authorized to use their private seals, pending the issue of seals, while the State Governors were authorized to use the old Colonial seals for the time being. New Zealand dispensed with a new seal on becoming a Dominion.

It must remain of merely theoretical interest whether a Governor would enjoy as part of the general executive power the right to keep and use the seal without express mention in the letters patent. These instruments are not so meticulously accurate as to permit of the conclusion that any power expressly given in them would otherwise be withheld. They grant, for instance, the power of appointing and dismissing officers, and, even apart from the statutory power often given in local Acts, there is no doubt that the power would be implied in the executive authority. Historically such unnecessary insertions are explained by the fact that the powers used to be given in pre-responsible government days subject to careful directions as to procedure to secure their proper exercise, and, even after 1875, when the old instruments were drastically revised by omitting these restrictions as inappropriate, the general authority was illogically and unnecessarily retained, being defended sometimes on the plea that it authorized the use of an instrument in the King's name in making appointments under statutory powers.

§ 6. *The Prerogative of Mercy*

The same issue arises in a more important form regarding the prerogative of mercy. Has a Governor without special delegation the power to remit sentences of courts? It seems that it should be held to be implicit in the executive power, but against this it may be argued that it is a high prerogative which the Crown cannot be presumed to delegate by anything short of express terms, and, for what it is worth, there may be

[1] See New Zealand *Parl. Pap.*, 1904, A. 2, pp. 8, 9. Cf. Southern Rhodesia Letters Patent, 1 Sept. 1923, s. 4.

cited on this sense the view of the Imperial law officers [1] that the Superintendent of British Honduras had not the power *ex officio*. Unluckily there is no authentic decision on the matter. In Canada [2] it was the intention of the Imperial Government to confer the power of pardoning offences against provincial laws on the Governor-General, to whom the power was accorded in the letters patent or instructions down to 1905, despite the anomaly thus created. The same view appealed to the Dominion Government and to the Supreme Court of Canada, which, as has been seen, held that the Crown had no part in the Legislature or Executive Government of the provinces. But the reversal of this doctrine by the Privy Council [3] had an immediate effect on the issue of pardoning power, and the Supreme Court of Canada [4] held that the Legislature of Ontario was entitled to enact a law conferring the power of pardon on the Lieutenant-Governor as a matter essentially appropriate to the provincial Legislature as a constitutional amendment or otherwise. The Supreme Court, however, was not prepared to recognize any other source of the power save delegation or legislation, denying an implied power, while the provinces in their Acts grant the power but do not admit that the grant is essential. A decision is unlikely ever to be obtained as delegation of the power is regular in the Dominions, States, and Colonies, and even in Papua a Commonwealth Act ascribes the power to the Lieutenant-Governor. In the Commonwealth, though the instruments are not quite explicit, the clear intention is to confer the pardoning power in the Commonwealth, in respect of offences against its laws, on the States in respect of offences against State laws or punishable in the State, as for instance admiralty offences.

[1] Forsyth, *Cases and Opinions on Constitutional Law*, p. 74.

[2] *Sess. Pap.*, 1869, No. 16; 1875, No. 11.

[3] *Maritime Bank of Canada* v. *Receiver-General of New Brunswick*, [1892] A. C. 437.

[4] 23 S. C. R. 458; see Ontario cases, 22 O. R. 222; 19 O. A. R. 31; Blake, *The Executive Power Case* (1892), Ontario *Sess. Pap.*, 1888, No. 37.

§ 7. *War and other Prerogatives*

The status of a Dominion even not being that of a fully sovereign state, there can be no doubt that the executive power of the Governor does not extend save by special delegation to declaring war, making peace, entering into negotiations with foreign powers, accrediting or receiving diplomatic agents, making treaties or any similar actions; the Chief Justice of Victoria, who held that a Governor by virtue of the executive authority had the right to exercise the prerogative of excluding an alien from the Colony, adduced as cases clearly not within that authority, prerogatives relating to war and peace and the conduct of foreign affairs.[1] At one time indeed it used to be thought desirable to insert clauses in commissions forbidding Governors to declare war against frontier enemies.[2] Similarly, it is clear that the Governor could not claim the executive right to seize enemy merchant vessels in harbour on the outbreak of war, or to grant days of grace, or to exercise as regards neutral ships the sovereign droit de prince, nor,[3] when the practice was legitimate, to grant to privateers letters of marque. Even the statutory delegation of executive authority in the federal and union Acts cannot be deemed to import any such power, and in point of fact for war purposes any authority necessary was conveyed specially in anticipation, or after war broke out, to the Governors-General and Governors. Similarly, the power to enter into treaties has from time to time been granted, as to the Governors of the Cape and the Transvaal or the Union, just as large powers in regard to external relations are granted to the Governor-General of India.

Further, the Governor has clearly no right to annex territory without express authority, and an annexation such as that of New Guinea attempted by the Queensland Government in 1883 is worthless unless ratified *ex post facto*, as that one was

[1] *Toy* v. *Musgrove* (1888), 14 V. L. R. 349, 406, 407.

[2] Canada *Sess. Pap.*, 1906, No. 18, p. 83.

[3] For such issue, Hannay, *New Brunswick*, i. 322; Haliburton, *Nova Scotia*, ii. 311. Objection has been taken to the term prerogative in the case of war powers (cf. *The Zamora*, [1916] 2 A. C. at p. 92; *In re Ferdinand ex-Tsar of Bulgaria*, [1921] 1 Ch. at p. 139; *Netherlands American Steam Navigation Co.* v. *H.M. Procurator-General*, [1926] 1 K. B. (C. A. 784), but cf. Chitty, *Prerogative*, p. 44, and Atkin L.J.'s judgement in the last-named case.

not by the Crown.[1] The necessary authority for annexations of Arctic islands to Canada was formally given to the Governor-General on that ground. Manifestly, the Governor has not the wide prerogative of constitution giving, being merely himself a part of a constitution, nor does it seem that he could, without express delegation, create Courts of law.

There remains, however, a wide field of power which passes essentially to a Governor, whether it is reinforced by statute or not. In point of fact statutory regulation seldom makes prerogative rights of much importance, and cases where they have been successfully alleged are not numerous. All the discussions of act of state in *Toy* v. *Musgrove*[2] were wasted, as the Privy Council decided the vexed question of the refusal to allow a Chinaman to land by ruling that an alien had no right enforceable by action to land on British territory. The Commonwealth High Court in *Joseph* v. *The Colonial Treasurer of New South Wales*[3] had to consider a defence by the Colonial Treasurer alleging that certain acts *prima facie* illegal to the detriment of the petitioner were justified by the fact that the New South Wales was exercising by agreement with the Commonwealth the royal prerogative as to war. The jury in the court below held that the Wheat Pool scheme, under which action was taken, was not calculated for the benefit of the Commonwealth as a whole, and, when the Full Court of New South Wales set aside the verdict, the High Court restored it, holding that the war prerogative, so far as it could be exercised in Australia, appertained to the Governor-General and could not be delegated in such a way as to validate the action taken. It was admitted that possibly the existence of war might justify invasion of private rights, but it was pointed out that there was no relevant effort made in the case to establish such a doctrine.

A case of conflict arose during the war between the right of the Crown in the United Kingdom to requisition British ships in United Kingdom ports and the right of Canada to requisition Canadian registered ships. Sir R. Borden contended that the

[1] See *Parl. Pap.*, C. 3617, 3691, 3814.

[2] 14 V. L. R. 349; [1891] A. C. 272. A prerogative to expel is obsolete according to *Brown* v. *Lizars*, 2 C. L. R. 837; *Hazelton* v. *Potter*, 5 C. L. R. 445.

[3] (1918) 25 C. L. R. 32.

constitutional position involved the sole right of Canada to requisition such ships despite their presence in British ports, and he gave assurances of the readiness of the Dominion to consider favourably any request to this end, while asserting that, just as it was the Canadian Parliament which must decide the sacrifices to be made by Canadian domiciled inhabitants, so, when the prerogative was concerned, it must be the Governor-General who acted, on ministerial advice. It was made clear that no claim was made that the British action was illegal, nor of course could it have been made, as the Crown is absolutely sovereign in the United Kingdom and Canadian ships are British ships, while the constitutional propriety of the contention is obvious. It is clearly implied that, even apart from statute in war-time, a Governor-General may requisition British ships; in virtue, however, it may be assumed, of the war prerogatives delegated to him, not merely as an adjunct of executive power.[1]

The executive power, however, is limited whether in war or not by the rule that it cannot usurp legislative authority. Thus, as in England,[2] so in Australia [3] it has been ruled that sums exacted by an Executive Government as the price of its consenting to confer certain privileges which it could have withheld are illegal exactions as being taxation without the assent of Parliament. This is the counterpart of the doctrine above noted, and also asserted in the Commonwealth that the Executive cannot bind the Government by contracts entered into without legislative authority, inasmuch as remuneration for such services would be equivalent to appropriation without the sanction of Parliament; there, however, the matter has been carried to the extreme of denying that a subsequent appropriation validates a contract.[4]

§ 8. *The Liability of a Governor to Suit*

Nothing is more characteristic of the limited representation of the Crown by a Governor that he is in no wise exempt from

[1] Borden, *Canadian Constitutional Studies*, pp. 121 f.; minute 30 Jan. 1917.

[2] *A.-G.* v. *Wills United Dairies, Ltd.* (1922), 91 L. J. K. B. 897.

[3] *The Commonwealth* v. *Colonial Combing, &c., Co.* (1922), 31 C. L. R. 421; *MacKay* v. *A.-G. for British Columbia*, [1922] 1 A. C. 457.

[4] *The Commonwealth* v. *Colonial Ammunition Co.* (1924), 34 C. L. R. 198.

suit. The Lord-Lieutenant as Viceroy of Ireland, so long as that officer existed, was like the King exempt at least as regards any official act from any suit or criminal proceeding. It is clear that the courts on being apprised that any such proceeding was directed against that officer would simply strike it out, leaving, of course, his subordinates to bear the brunt, as is the rule of law in the United Kingdom, where the King can do no wrong.[1] It may be that for private debts he could have been sued, a contingency which His Excellency's handsome remuneration rendered remote. A Governor, however, is liable to suit [2] for actions done in his private capacity, e.g. for debts contracted in or without the Colony. What is far more important, he can be sued in respect of any official action which can be made out to be a tort; on contract he is exempt like all officers of the Crown. Liability for tort also exposes him to suit in England under the ordinary principles of private international law as applied in English courts. This was decided beyond doubt in *Fabrigas* v. *Mostyn*,[3] when it was held that Mr. Mostyn, Governor of Minorca, was liable in damages for using unnecessary violence towards Fabrigas, although he sought to justify his action by claiming that the ground of his action was an effort to raise mutiny. Lord Mansfield in this case seemed to admit, however, that an action could not have been brought locally against a Governor when actually administering the Government, but in *Cameron* v. *Kyte* [4] the Governor of Berbice was successfully sued locally, the judgement being affirmed by the Privy Council. The issue involved was his right to withhold a commission allowed by the Dutch Government to the Vendue master on sales, and it was held that even if the Crown could take the step, the Governor having no general grant of the prerogative must show some specific authority for his act. But success in an English action may be barred by the action attached being indemnified locally, for a tort is a ground of suit in England if, when committed

[1] See § 2 above.

[2] *Hill* v. *Bigge*, 3 Moo. P. C. 465. This overrules *Harvey* v. *Lord Aylmer*, 1 Stuart, 542.

[3] 20 St. Tr. 81. Cf. *Glynn* v. *Houston*, 2 M. & G. 337; *Wall* v. *Macnamara*, cited 1 T. R. 536.

[4] 3 Knapp, 332; *Musgrave* v. *Pulido*, 5 App. Cas. 102.

abroad, it is tortious under the local law, and that quality has not been removed by a local law before the case is brought to trial.[1] So in *Phillips* v. *Eyre*[2] the rather disgraceful inhumanities of Mr. Eyre in the repression of the rising in Jamaica, provoked by a brutal and incompetent Government, were rendered immune by the local Act of Indemnity, though an effort was made to impugn it as passed on the initiative of Mr. Eyre himself. The precedent has been regularly followed in order to avoid claims against Governors after periods of martial law.

Nor is the Governor subject to civil proceedings only. An old Act 11 & 12 Will. III, c. 12 provides for the punishment in England of any Governor who oppresses British subjects abroad or commits any offence against English or local law, and 42 Geo. III, c. 85 provides for the punishment of military or civil officers abroad guilty of any offence in their employment, a term held to apply only to misdemeanours. The Acts were invoked in *The Queen* v. *Eyre*;[3] the Queen's Bench decided to grant a *mandamus* to a metropolitan magistrate to hear under 11 & 12 Vict. c. 42 evidence against Eyre with a view to his committal to stand his trial on indictment, but the Grand Jury, despite an eloquent address by Blackburn J., ignored the Bill. The second Act was used as a basis for a charge[4] against General Picton of the torture of Luisa Calderon in Trinidad, but the General fell at Waterloo and escaped condemnation. But much more serious than these relics of musty antiquity is the provision of the *Offences Against the Person Act*, 1861, which prescribes the trial in England of any British subject who has any where committed murder or manslaughter. No Governor has been condemned under this clause, but Governor Wall in 1802 was proceeded against under its predecessor 33 Henry VIII, c. 23 for having a soldier flogged to death in the island of Goree, convicted and executed for a crime committed nineteen years before and hardly intentionally.[5] No Act of Indemnity can bar an Imperial Act creating

[1] Dicey and Keith, *Conflict of Laws*, chap. xxxi.

[2] L. R. 4 Q. B. 225; 6 Q. B. 1. Cf. Forsyth, *Cases and Opinions on Constitutional Law*, pp. 551 ff.

[3] L. R. 3 Q. B. 487. For the Act 42 Geo. III see *Rex* v. *Shawe*, 5 M. & S. 403. See also the charge of Cockburn, C. J., in *The Queen* v. *Nelson and Brand* (published separately).

[4] 30 St. Tr. 225.

[5] 28 St. Tr. 51; Campbell, *Lives of the Chief Justices*, iii. 149.

a crime, and a Governor who is responsible for executions under martial law might be tried in England.[1] A *nolle prosequi* might, of course, be entered or a pardon granted on conviction, but the mere fact that an effort was made in 1906 to induce a magistrate to issue process against the Governor of Natal shows the inconvenience of these provisions.[2]

Moreover, the whole procedure is out of place[3] now that Governors have declined from the status of potential despots to 'rubber stamps'. A Governor normally acts on ministerial advice, and it seems unfair that he should in such cases be liable to stand trial or at any rate be sued, with the necessity of finding the expenses for his defence and the uncertainty whether he will be reimbursed. If it is contended that it is desirable thus to secure a check on illegal actions, it must be pointed out that the Governor can hardly ever be in a position in which the possibility of suit could be a dominant feature in deciding his attitude to ministerial requests. He is most likely to be asked to consent to illegal or doubtful deeds in times of crisis when martial law or some equivalent is held to be necessary by his Government. To decline to accede to such a request would impose a very grave responsibility on a Governor: his ministers might resign, throwing all into confusion, for no Ministry would be likely to accept office under these circumstances, and in the absence of Imperial troops to support him the Governor would be in a hopeless position. To leave full responsibility for illegality on ministers would be more likely to encourage them to prudence and moderation than the present condition in which they can to some extent relieve themselves of responsibility by arguing that the Governor has concurred and therefore indicated his assent to the necessity for drastic action. It must be remembered also that though serious difficulties have not occurred in the past by efforts to take legal action in his Government against the Governor, there is no security that such may not arise in the future,

[1] See the opinions of James and Stephen in Forsyth, op. cit., p. 563.

[2] *Parl. Pap.*, Cd. 4403, p. 129.

[3] Cf. the views as to criminal liability of the New Zealand Government in 1869; *Parl. Pap.*, H. C. 307, 1869, p. 400; C. 83, pp. 33, 191. The result of the Imperial Conference of 1926 should be to abolish responsibility where the Governor-General represents the Crown in the Dominion.

especially if the course of political events should cause a sharp conflict of views between the judiciary and the executive of the day.

§ 9. *The Governor's Liability to Mandamus*

The question of the possibility of a *mandamus* being issued to a Governor was discussed fully by the High Court of the Commonwealth in *The King* v. *The Governor of South Australia*.[1] The matter at stake was whether a *mandamus* could be issued by that court to the Governor of that State requiring him to cause a writ to be issued for a new election for a Senator for the State in the Commonwealth Parliament. At the election for Senators three had been returned, but the election of one was held invalid, and the Governor had on ministerial advice secured the election of another by the two Houses of the State Parliament sitting together under the procedure laid down for the case in which a senator's place became vacant before the expiry of the normal period. It was claimed, on the other hand, that a new election should have been held. The High Court refused a *mandamus*; it was pointed out that, though the State constitutions enjoined on the Governor the issue of writs for elections on the dissolution of the Assembly, it had never been held that *mandamus* lay to compel him to act; he owed a duty no doubt, but the appropriate way of securing its fulfilment was action by the Crown. In the case in question a State ministry might prefer to keep the post vacant, and might refuse to aid the Governor in securing an election. He could not act without ministers, and he would have, if he wished to act, to dismiss those he had and find others, and clearly only the Crown could pass judgement whether he should attempt so strong a step. More generally it held that *mandamus* to compel an act of this kind was contrary to the spirit of the constitution, being without parallel in the United Kingdom, nor was the responsibility of a Governor to suit for wrongful actions really parallel.

Similarly, in *Horwitz* v. *Connor*[2] the High Court rules that no *mandamus* would lie to the Governor of Victoria in Council to require him to consider the release under s. 540 of the Victorian *Crimes Act*, 1890, of a criminal who claimed that his good conduct had earned him the right under the regulations to

[1] 4 C. L. R. 1497. [2] 6 C. L. R. 39.

remission of part of his sentence, and that no court had power to review the exercise of the Governor's discretion as regards the prerogative of mercy. It may be admitted that there is a measure of anomaly seeing that, if a duty is imposed upon a minister which imposes on him a special obligation to individuals, he may be required by *mandamus* to act. But the answer to this objection clearly is that, if a matter is sufficiently important for the consideration of the Governor or Governor in Council, it must be deemed to be of too essentially discretionary a kind to be subjected properly to judicial intervention, and it must remain for Parliament to decide what cases fall within this category.[1]

§ 10. *Petitions of Right and the Prerogative*

As has been mentioned, no personal liability can be incurred by a servant of the Crown who contracts for his Government, a doctrine applying equally to the Governor and every other public servant.[2] It follows, therefore, that if the subject is to have any remedy in the case of a dispute, it must be provided by some form of action against the Government. It is, however, a maxim of English as opposed to Scottish and many other laws that the sovereign cannot be impleaded in his own courts save by his consent, and the English mode of procedure is by petition of right, which is a request for permission to bring proceedings against the Crown. It is referred in England to the law officers, who examine it from an Imperial legal aspect, and, if they advise that there is a *prima facie* case to be dealt with by the Courts, a *fiat* is granted. The procedure which is based on the prerogative is regulated by Act.[3] In the Dominions and States it is customary to provide by legislation for suits against the Crown, and these Acts often cover much more than falls under the petition of right procedure, as a remedy is given

[1] See also for Canadian Lieutenant-Governors, *Church* v. *Middlemiss*, 21 L. C. J., at p. 319, *per* Taschereau J.; *Molson* v. *Chapleau*, 6 L. N., at p. 224, *per* Papineau J. Cf. *Hamburg America Packet Co.* v. *The King*, 33 S. C. R. 252; *In re Sooka Nand Verma*, 7 W. A. L. R. 225.

[2] *Macbeath* v. *Haldimand*, 1 T. R. 172; *Palmer* v. *Hutchinson*, 6 App. Cas. 619; *Dunn* v. *Macdonald*, [1897] 1 Q. B. 555; *Bombay and Persia S. N. Co.* v. *Maclay*, [1920] 3 K. B. 402.

[3] 23 & 24 Vict. c. 34; Robertson, *Civil Proceedings by and against the Crown*; Clode, *Petition of Right*.

in the case of torts, which in England give merely rights against the actual wrongdoer, no Government officer being entitled to misuse his office.[1] But the royal prerogative to *fiat* petitions of right in respect of claims against local Governments exists where not barred by legislation, and its exercise in a series of Western Australian cases aroused decided annoyance and formed the subject of discussion at the Colonial Conference of 1897. The essential point then at issue was on what advice the Crown should act in granting a *fiat*; should it be that of the legal advisers of the local Government or of the advisers of the Imperial Government? The latter view was held by the law officers to be sound, and it was therefore impossible to meet the views of the Colonial Government. Fortunately, the existence of local Acts renders resort to the Imperial Government rare and obsolescent, though it does not appear that in any territory whose fundamental law is English there is any doubt as to the right to resort to the procedure of petitioning the King, unless the prerogative to grant such petitions has been clearly barred.

The question, however, has been discussed,[2] but never authoritatively settled whether the power to *fiat* a petition exists in the case of territories which do not enjoy the English common law, for instance, the South African Colonies and now the Union, Quebec, or colonies like Ceylon, Mauritius, St. Lucia, or possibly Trinidad. The right, it is said, being a common law one, is inseparable from the system of law, and the Canadian Supreme Court in one case [3] certainly suggested that in the province of Canada before federation no petition could have been brought owing to the impossibility of obtaining the royal *fiat*, there being no delegation of the right to *fiat* to the Governor. This view, however, did not rest on the system of law in Lower Canada as a feature of the case, and therefore is not an authority of any sort either way. The alternative is to regard the right, being merely the privilege of waiving immunity of suit, as one of those essential prerogative rights which the Crown imports into any colony by reason of its sovereignty, in which case the right to *fiat* would exist. The case, however, is not

[1] *Canterbury* v. *A.-G.*, 1 Ph. 305; *Tobin* v. *R.*, 16 C. B. (N. S.) 310; *Leather* v. *R.*, 6 B. & S. 257.

[2] Clode, p. 36.

[3] 36 S. C. R., at p. 34.

likely to arise; the Dominion Parliament has provided procedure for all Canada, including Quebec, which like the other provinces has a local Act for claims against itself.[1] In the Transvaal and Orange River Colonies Acts were passed soon after the organization of Colonial Government giving a remedy not merely in contract but in certain cases of tort, while in the Cape and Natal Acts No. 37 of 1888 and No. 14 of 1894 early made similar provision. The Union Parliament consolidated the legislation in Act No. 1 of 1910. Provision was also made by the Commonwealth.

The local Acts must be deemed as dealing with the Crown in its local aspect, and not as authorizing claims against the Imperial Government thus to be decided. Such claims could, it is clear, be dealt with in England under a *fiat*, for the locality where the claim arose is indifferent,[2] if the claim be one against the Imperial Government as in the case of the claim of Dinizulu for withholding of emoluments which the Imperial Government had assured him, though it did not actually pay them. It seems further[3] that the Crown could *fiat* a petition of this kind for trial in a local court if that were the more convenient course of action. It is, however, a moot question whether a Dominion Act could impose liability on the Crown in its Imperial aspect; the Commonwealth High Court has decided in *Amalgamated Society of Engineers* v. *Adelaide Steamship Co., Ltd.*[4] that within its sphere of legislative authority a Commonwealth Act, if so expressed or by necessary implication, may bind the Crown in its right of the States, the indivisibility of the Crown being insisted upon in that case, and there seems no reason whatever to question the soundness of the judgement in law. On the other hand, no general conclusion as to the effect of the unity of the Crown can be derived from such a case; it must be read in the light of the fact that it seems perfectly clear law that a petition of right cannot be brought in the High Court in England in order to recover from the Crown sums which, if due, fall to be

[1] *Reg.* v. *Demers*, [1900] A. C. 103; for a Dominion claim from Quebec, *R.* v. *Belleau*, 7 App. Cas. 473.

[2] *West Rand Central Gold Mining Co.* v. *R.*, [1903] 2 K. B. 391, *Parl. Pap.*, Cd. 4194, p. 115; contrast *Holmes* v. *The Queen*, 31 L. J. Ch. 58.

[3] *Murray* v. *Johnstone*, 1866 *Mauritius Decisions*, 21; *Fraser* v. *Sivewright*, 3 S. C. 55 (Cape). Cf. *Palmer* v. *Hutchinson*, 6 App. Cas. 619.

[4] (1920) 28 C. L. R. 129.

met by the exchequer of a Dominion, such as the Irish Free State.[1] The English view of a governmental contract, as laid down by the House of Lords, involves constantly the speculation whether funds to pay will be provided by Parliament, a doctrine strengthened in the Commonwealth into a denial that contract can be made by executive save under a statutory power, which is hardly in keeping with British law or usage, the Privy Council holding that the absence of an appropriation is not necessarily a bar to a petition of right.[2]

The Crown's prerogatives, apart from those which have already been mentioned, apply generally in the Dominions, and, unless diminished by local legislation, are the same as in England.[3] The Crown is exempt from liability from the seizure of its vessels for damage done or for liability for salvage, a doctrine which has, like the parallel doctrine affecting foreign governmental ships, been the cause of dissatisfaction resulting in agreement in principle that the Government which uses vessels in commerce should waive immunity in respect of their Acts of damage.[4] The general doctrine is clearly laid down in *The Liquidators of the Maritime Bank of Canada* v. *The Receiver-General of New Brunswick*,[5] and, before forfeiture for felony ceased, it was applied to a felon's goods,[6] a principle now abolished in the Dominions as in England. Similarly, where not statute barred as in England, the Crown can claim priority in

[1] *A.-G.* v. *Great Southern and Western Railway Co.* (1925), 94 L. J. K. B. 772; *Price* v. *R.* (1926), 42 T. L. R. 179.

[2] *Rex* v. *Fisher*, [1903] A. C. 158, 167 as against *The Commonwealth* v. *Colonial Ammunition Co.* (1923), 34 C. L. R. 198.

[3] The Crown is liable to direct suit in certain colonies, without legislation; e. g. Mauritius, *Colonial Government* v. *Laborde*, 1902 *Mauritius Decisions*, 19; Ceylon, *Hettihewage Siman Appu* v. *Queen's Advocate*, 9 App. Cas. 571, 587; Fiji, *Marks* v. *A.-G.*, 1875–97 F. L. R. 219, 226; perhaps Trinidad, *New Trinidad Lake Asphalt Co.* v. *A.-G.*, [1904] A. C. 415, 419, 420. St. Lucia adopted a Crown Suits Ordinance, No. 1 of 1911 and British Guiana a similar measure in 1904. For Quebec dicta against the possibility of a petition of right see *Laporte* v. *The Principal Officers of Artillery*, 7 L. C. R. 486; but the claim was similar to that in *Tully* v. *The Principal Officers of H.M.'s Ordnance*, 5 U. C. Q. B. 6, and in Upper Canada a *fiat* could certainly have issued. Neither case is thus of value. That the matter can now be settled is improbable.

[4] *Young* v. *S. S. Scotia*, [1903] A. C. 501. Cf. Dicey and Keith, *Conflict of Laws* (ed. 4), p. 208; *L. Q. R.* xlii. 308–12.

[5] [1892] A. C. 437.

[6] *In re Bateman's Trust*, 15 Eq. 355.

bankruptcy [1] and in the winding up of companies.[2] So again the Crown is the ultimate owner of the land, is the sole owner of all waste lands, and is entitled to escheats, treasure trove, and intestate estates where there are no relatives.[3] The prerogative right to gold and silver mines applies generally; that to swans and sturgeons is in abeyance, and in New Zealand it has been decided that the statute 17 Edw. II, c. 2 regarding the royal claim to whales is not in force in New Zealand.[4]

It must, however, be remembered that all these prerogatives may be barred by local law, as in the case of Quebec [5] and Mauritius [6] local enactments have been held to take away the Crown's priority in matters of bankruptcy.

How far a prerogative right can be lost by disuse is uncertain. The question of the right to extradite without statutory authority, which has formed the subject of discussion,[7] was decided in the negative by the High Court of the Commonwealth in *Brown* v. *Lizars*.[8] From this right must be distinguished the right to refuse admittance to any alien seeking entry. The latter cannot now be denied in the sense affirmed in *Musgrove* v. *Toy* [9] that an alien has no right to bring an action to enforce his entry into a British Colony. An alien, however, once admitted to the territory enjoys the full protection of its laws, and to judge from the case of *Johnstone* v. *Pedlar*,[10] even if he acts with hostile intent towards the Government, he cannot be made the object of an act of state, though he certainly owes local allegiance.[11]

[1] *New South Wales Taxation Commissioners* v. *Palmer*, [1907] A. C. 179; *A.-G. of N. S. W.* v. *Curator*, [1907] A. C. 519, overruling *In re Baynes*, 9 Queens. L. J. 33; *Clarkson* v. *A.-G. of Canada*, 15 O. R. 632; 16 O. A. R. 202.

[2] *In re Oriental Bank Corporation*, 28 Ch. D. 643.

[3] *Falkland Islands Co.* v. *The Queen*, 2 Moo. P. C. (N. S.) 266; *A.-G. of Ontario* v. *Mercer*, 8 App. Cas. 767.

[4] *Baldick* v. *Jackson*, 30 N. Z. L. R. 343.

[5] *Exchange Bank of Canada* v. *R.*, 11 App. Cas. 157. Cf. *A.-G.* v. *Black* (1828), Stuart, 324; *Monk* v. *Ouimet* (1875), 19 L. C. J. 75; *A.-G.* v. *Judah*, 7 L. N. 147.

[6] *Colonial Government* v. *Laborde*, 1902 *Mauritius Decisions*, 20.

[7] *Mure* v. *Kaye*, 4 Taunt. 35; *East India Co.* v. *Campbell*, 1 Ves. 246. Contrast Clarke, *Extradition* (ed. 4), pp. 23 f.

[8] 2 C. L. R. 837.

[9] [1891] A. C. 272. See the Scottish case, *Poll* v. *Lord Advocate* (1897), 1 F. 823.

[10] [1921] 2 A. C. 262; Keith, *J. C. L.* iii. 312 ff.

[11] *De Jager* v. *A.-G. for Natal*, [1907] A. C. 326; *Calvin's Case*, 7 Rep. 9.

III

THE GOVERNOR AND MINISTERS

§ 1. *The Governor and the Executive Council*

THE transition from Crown Colony to representative government in the Colonies meant no diminution of the duties of the Governor, but rather an increase of anxiety and worry due to the fact that he no longer commanded the control of the Legislature. From representative to responsible government, on the other hand, the position is altered.[1] 'A Governor', wrote Mr. Goldwin Smith, 'is now politically a cipher; he holds a petty court and bids champagne flow under his roof, receives civic addresses and makes flattering replies, but he has lost a power not only of initiation but of salutary control.' This was composed in view of the disappointment felt in Canada at the failure of the Governor-General to prevent the Pacific Railway scandals of 1873 and at the ready grant to Sir J. Macdonald of a dissolution in 1891 merely for party advantage, but doubtless the statement is a good deal truer now than it was even a dozen years ago with the growth of Dominion self-consciousness. Time has antiquated the very much more flattering picture of Todd,[2] who regarded the Governor as a benevolent genius presiding over the destinies of the country, controlling the excesses of party, and exercising all the influence which in the United Kingdom he attributed to the Crown. As he exaggerated the power of the sovereign, so he still more seriously over-estimated the role of the Governor. Nevertheless, there is no doubt that the influence of that officer varies greatly with his personal character, tastes, and abilities. If, as one distinguished Admiral when he governed an Australian State used to do, he accepts the advice of ministers that, despite his instructions, he need not trouble to attend Council meetings,

[1] *Parl. Pap.*, C. 911, pp. 18, 19, 26; C. 3382, p. 268; Transvaal *Leg. Council Deb.*, 1907, p. 135; Cape *Parl. Pap.*, 1878, A. 2, p. 14; Lord Lansdowne, House of Lords, 10 Apr. 1905; Col. Seely, House of Commons, 29 June 1910; *Norton* v. *Fulton*, [1908] A. C. 451.

[2] *Parliamentary Government in the British Colonies* (ed. 1), 1880.

and remains in dignified remoteness from the petty politics of his Government, he cannot expect to wield any influence of importance. On the other hand, if he has tact and ability, there is open a wide field of influence. He is in theory entitled to similar treatment by his Ministers to that received by the King; he should be taken into their confidence in all weighty matters, and be informed as early as possible of the outcome of deliberations in Cabinet on important issues. He can point out objections, he can criticize, suggest, and obtain alterations even in purely local policy, apart altogether from his function of dealing with Imperial interests. But he can do so only by remaining behind the scenes and avoiding any rumour that the Governor controls the progress of affairs, as was sometimes asserted of Sir Gerald Strickland, because when in Tasmania he placed at the disposal of Ministers his great experience and very genuine abilities. If he remains in one Government for a full term of office, he may easily come to acquire much weight especially if Ministers are unaccustomed to office. But it must be admitted that no Governor has anything resembling the prestige of the Crown, and Ministers in the Dominions have never adopted towards their Governors the attitude that full trust and consideration are his due, and must be rendered as a matter of course. Governors have succeeded in winning confidence and admiration; it is not, however, always easy to overcome suspicions, and one great difficulty remains still to render unsatisfactory relations between Governors and Ministries. So long as Governors are held to have the duty of independent action on requests for dissolutions of Parliament, so long will there exist a certain reticence in the attitude of Ministers. A Prime Minister will hesitate to unburden himself freely to a Governor who may remember afterwards his confidences and feel bound to take them into account when later he has to come to him to ask for the exercise of the prerogative of dissolution. Often too a Governor may be new to the work, and at the best only a few can have anything like the experience of business which a King inevitably acquires in the United Kingdom.[1]

[1] Lord Byng's refusal to grant Mr. Mackenzie King a dissolution, followed by the grant to Mr. Meighen in July 1926, is a good instance of political inexperience and lack of judgement. The Duke of Connaught's absolutely con-

There are, of course, many fields open apart from interest in politics, and Governors are expected and normally do their best to further all social work in the interest of their people, and to patronize science, arts, and letters, though social circles in Australia are apt to look with surprise on Governors who show a liking for educated society in preference to indulging in patronage of the national sport of horse-racing. Real enthusiasm among the public is also more easily roused by interest in and former skill in cricket than by more recondite studies. Too much weight is undoubtedly often attached to mere social qualities in a Governor, ignoring the fact that Society seldom represents more than a mere fraction of the people, who are indifferent to the question whether a Governor is popular as a giver of expensive entertainments or not, seeing that they do not share them. They prefer the Governor who cares to travel and make himself acquainted with the land and the people, enabling those distant from the capital to see and hear the representative of the Sovereign, who else remains to them but a mere name. No more important service than this can be rendered to his Government by the average Governor, who thus can serve an Imperial purpose of making more real the ties between the Mother Country and the people of the Dominions overseas. Classical instances of tours undertaken with the definite view of aiding Ministers are those of Lord Dufferin to the West Coast in order to reconcile the Dominion and British Columbian Governments in connexion with differences arising from the slow progress of the railway, and Lord Grey's expedition to Hudson Bay as a symbol of the determination of his Government to open up that route for the export of the products of the West to Europe.

The relation of the Governor to his Ministers is governed essentially by constitutional practice rather than by positive law. He is given in every case an Executive Council, created by statute in the case of the Federations, the Union, and the Canadian provinces of Ontario, Quebec, Manitoba, Saskatchewan, and Alberta, but by letters patent in the other provinces where the old councils now exist as continued by statute, in the States of Australia, New Zealand, Newfoundland, Malta, and

stitutional attitude led him, perhaps, to appear indifferent; Skelton, *Sir Wilfrid Laurier*, ii. 86.

Southern Rhodesia; those of the Free State and Northern Ireland are statutory, while the South African Colonies had councils under the prerogative. The Constitutions, Interpretation Acts, or, most often, authoritative usage provide that, when a Governor in Council is given powers, he must act on the advice of the Council; he cannot, that is to say, overrule his Council, as in a Crown Colony, and still claim to be acting as Governor in Council. But, even if the power is given, as often enough, to the Governor, and that term is not legally defined to mean Governor in Council as in some cases it is,[1] authoritative usage requires that he shall act on the advice of the Council or in lesser matters of a Minister. In other cases powers are given by the Legislature merely to a Minister. Legally, it must be noted, the Governor is not thus reduced to impotence. He may not act without advice, but he can always refuse to act, and his refusal, whatever its constitutional result, is clearly legal. Similarly he can dismiss a Minister who insists on acting, even within his own sphere of authority, contrary to the wishes of the Governor, and cases of actual removal of individual Ministers for improper conduct are on record. He cannot, however, undo any action taken legally by his Ministers; at most he can obtain another Minister to cancel the act of his predecessor. In the case of the Council he could swamp it by adding non-ministers; such an action would be unconstitutional in normal circumstances, but it would not be illegal. It is possible to conceive of occasions in which it might become the duty of a Governor to assert the principles of a Constitution by exercising his legal powers. If, for instance, a Government declined to give him the necessary aid to bring about an election after a dissolution, and sought to rule without a Legislature, it is clear that it might well be his higher duty to provide himself with a Council which would secure the steps necessary for the election.

The instruments which deal with the position of the Council indicate with more or less distinctness the relations which normally must prevail. In those cases where Councils are created by letters patent they merely empower the Governor to appoint to the Council such persons as he thinks fit, in

[1] Formerly in the Cape, Act No. 5 of 1883; now in the Union *Interpretation Act*, 1910; in Tasmania, *Interpretation Act*, 1906, s. 12; the Commonwealth, *Acts Interpretation Act*, 1901, s. 17.

addition to any persons who by law are members of the Council. There is normally no limit whatever to the number; none is imposed even where the Council is statutory except in the Irish Free State,[1] Nova Scotia[2] and New Brunswick where it is nine, and British Columbia where it is eight. It is only in the instructions that we find anything more definite. Those of Newfoundland of 28 March 1876 may be cited as of the oldest form.[3] They require a quorum of three in addition to the Governor or member presiding, enjoining him to preside whenever possible, his place being taken in absence by a member designated by him or the senior member of Council; require full minutes to be transmitted every six months to the Secretary of State; and instruct the Governor to consult the Council in all cases of the exercise of his powers under the letters patent, unless he thinks that such consultation would cause material prejudice to His Majesty's service or that the matters are too unimportant or too urgent;[4] in the latter case he is to report his action and the grounds for it to the Council as soon as may be. Further, he is authorized to overrule the Council, reporting to the Secretary of State his reasons for such action. These quaint instructions are derived, of course, from Crown Colony days, but they remained in the Cape until its disappearance in the Union. In 1892, however, changes were made which took away the rule exempting the Governor from consulting his Council in certain cases, and this form was adopted for the Australian Colonies and New Zealand. In 1900 it was revised to meet the transformation of the Australian Colonies into States. In 1893 the same form was used for Natal, with the important exception that in his actions as Supreme Chief the Governor was to inform the Ministry of his proposed actions and if possible arrange the matter with them, but the final decision was to be his. In 1906 and 1907 the same rules as for Natal were adopted for the Transvaal and

[1] See Constitution, ss. 52, 53.

[2] This limitation is a relic of colonial days; so in New Brunswick (letters patent, Nov. 2, 1861).

[3] Compare those of May 4, 1855, and those to the Governor-General of Canada, Aug. 30, 1840; Canada *Sess. Pap.*, 1906, No. 18, p. 116.

[4] It is now the Governor who is liable to be left out, but this is still quite illegal; see *Mackay* v. *A.-G. for B. Columbia*, [1922] 1 A. C. 457, 461. For another case of acting without due form cf. a Manitoba dispute in 1923; *Canadian Annual Review*, 1923, pp. 688 ff.

Orange River Colony, with, however, the omission of this provision as to the acts of the Governor as Supreme Chief, doubtless because in practice the proposed independence of the Governor has proved a sham. It may, however, be noted that in the letters patent creating the Legislature the Governor was given all power as Paramount Chief over the natives, while to the Governor in Council was assigned the power to hold native conferences if desired, a hint that as Paramount Chief he might act independently—a power certainly never exercised. These parallels are copied in the Maltese and Southern Rhodesian instructions. In these we find provision for the Governor presiding, or in lieu his nominee, or the senior member, a quorum normally of two in addition to the President, and a general rule that

> In the execution of the powers and authorities vested in him the Governor shall be guided by the advice of the Executive Council, but, if in any case he shall see sufficient reason to dissent from the opinion of the said Council, he may act in the exercise of his said powers and authorities in opposition to the opinion of the Council, reporting the matter to us without delay with the reasons for his so acting. In any such case it shall be competent to any member of the said Council to require that there be recorded on the minutes of the Council the grounds of any advice or opinion that he may give upon the question.

In the case of Canada, the Commonwealth, and the Union, the letters patent make no provision for the Executive Council, which is statutory, and the instructions merely bid the Governor-General communicate them and others to Ministers. On the other hand, the instructions in the case of New Zealand, issued when it was given the style of Dominion in 1907, still retained the power to disregard advice, and this is retained in the instructions to the Governor-General of 11 May 1917.

§ 2. *The Views of Mr. Blake*

The simplification of letters patent and instructions is due largely to the activity of Mr. E. Blake when Canadian Minister of Justice.[1] In 1875 Lord Carnarvon addressed the Governor-General explaining changes proposed to be made in the form of letters patent. It had been the custom to issue to each new

[1] Canada *Sess. Pap.*, 1877, No. 13; 1879, No. 181.

Governor-General a commission of a comprehensive type which passed under the Great Seal, a slow process, necessitating the issue to him of a temporary commission under the Sign Manual empowering him to act under his predecessor's commission. This was a process of dubious legality, and it was therefore proposed to lay down permanent letters patent and to appoint Governors-General merely by Sign Manual commissions. Mr. Blake visited England to discuss with the Secretary of State the proposed new form, and achieved considerable success. The model form sent to the Governor-General was a quite antiquated one, including such obsolete powers as land grants ;[1] the grant of letters of administration, probates of will, marriage licences, and the custody of idiots and lunatics and their estates ; the summoning, proroguing, and dissolving of Parliament ; the constitution of officers and other matters, many of which were formally regulated by the British North America Act. But in addition to securing the removal of much of this lumber, of which some was not even included in the commission of 1872 to Lord Dufferin, Mr. Blake offered some very important criticisms on the clauses affecting the relation of the Governor-General and the Privy Council. The draft submitted contained the usual clause requiring the Governor-General to preside ; exempted him from consultation in unimportant or urgent matters or where consultation would prejudice materially Her Majesty's service ; and allowed him to overrule the Council at his discretion and if it appeared to him right. Mr. Blake objected that in practice in Canada the Governor-General never presided save on formal ceremonial occasions ; that business was done by sending him for approval the recommendations of the Council, any points arising being discussed by the First Minister with the Governor-General if necessary, and he objected to the proposed new practice. He took exception to any dispensation of the Governor-General from the need to consult, it being the rule that government was carried on by advice. His more important criticism was of any suggestion that the Governor-General could normally dissent from Ministers. He admitted that no exception could be taken to the proposed clause so far as it was intended by it to vest in the

[1] For New Zealand cf. *The Queen* v. *Clarke*, 7 Moo. P. C. 77 ; South Australia, *The Queen* v. *Hughes*, 1 P. C. 81.

Governor-General the full constitutional powers which Her Majesty if ruling personally could exercise. 'The Governor-General had an undoubted right to refuse to comply with the advice of his Ministers, whereupon the latter must either adopt and become responsible for his views or leave their places to be filled by others prepared to take that course.' But the language of the clause might suggest action in opposition to the advice of any set of Ministers, a power which could seldom be exercised, 'for as a rule the Governor does and must act through the agency of Ministers, and Ministers must be responsible for such action'. He assumed that 'the power in question is to be exercised only in the rare instances in which, owing to the existence of substantial Imperial as opposed to Canadian interests, it is considered that full freedom of action is not vested in the Canadian people'; in all other cases the Governor would of course act on the advice of Ministers.

Mr. Blake applied these principles in the case of pardon; he deprecated the grant of any personal discretion, save possibly where Imperial interests were involved, and even then he desired no reference to this to be made in the formal instruments. Similarly he desired that the Governor-General should assent to all measures, leaving the Crown to disallow on Imperial grounds. He was in fact the first to express with perfect clarity the conception of Canada as an autonomous Dominion with rights only limited in a very few cases where its character as a dependency, not a State of international law, gave the Imperial Government the right of intervention. He had departed wholly from Lord John Russell's indignant refusal to admit that even in internal affairs there could be any responsible Government in a Colony. Moreover, he was the first of Colonial statesmen to realize that the rule of the United Kingdom was complete ministerial responsibility;[1] the Colonial Conference of 1887 proved that many colonial politicians still believed in the exercise of a wide discretion by the Crown in the United Kingdom, a doctrine which indeed has persisted in many minds down to the present time.

In minor matters Mr. Blake was more successful than might have been expected; he induced the dropping of the provision

[1] Cf., however, Gavan Duffy, *Parl. Pap.*, H. C. 346, 1873, pp. 7, 8. See also Gladstone, *Gleanings of Past Years*, i. 203–48.

formerly inserted giving power to the Governor-General to grant lands, though it was retained in other cases, despite its supersession by legislation. It was omitted for the Commonwealth and the Union, but in the former case only because the Commonwealth at creation had no lands to grant; it reappears in the Maltese and Southern Rhodesian letters patent. Powers as to marriage licences vanished; in Canada they had been given on federation to the Governor-General until the provinces had the sense to legislate regarding them as was their constitutional right;[1] similarly, provincial Acts disposed of the old power of the Governor-General after federation to exercise the right of presentment to benefices enjoyed under the pre-federation period by the Lieutenant-Governors of the Provinces.

Mr. Blake did not criticize the powers included of summoning, proroguing, or dissolving Parliament, although these matters are covered by the Constitution Act. In the case of Newfoundland the letters patent give also, as in the case of New South Wales, and of Queensland before the abolition of the Upper Chamber rendered the power otiose, and in Natal when a Colony, the power of appointing members of the Legislative Council; in Newfoundland, and formerly in the Cape, the power is also conferred to make laws. In all these cases, and in the Federations and the Union, the power of summoning, proroguing, and dissolving the Legislature is given, though it was sensibly omitted in the case of the Transvaal and the Orange River Colony, as it was contained in the Constitution letters patent.[2] It seems that it should be always omitted as needless, just as assuredly is the power to make laws conferred nominally in the Cape and Newfoundland, where it existed by the Constitution. On the other hand, power was requisite in the case of Newfoundland to decide the exact composition of the Council.[3]

[1] *Prov. Leg.*, 1867-95, pp. 407 ff.

[2] In the Irish Free State and Northern Ireland the powers are statutory.

[3] Permanent letters patent were issued for Canada, 5 Oct. 1878; Newfoundland, 26 Mar. 1876; New South Wales, 29 Apr. 1879; Victoria, 21 Feb. 1879; Queensland, 13 Apr. 1877; South Australia, 28 Apr. 1877; Western Australia, 25 Aug. 1890; Tasmania, 17 June 1880; New Zealand, 21 Feb. 1879; Cape, 26 Feb. 1877; Natal, 20 July 1893.

§ 3. *The Views of Mr. Higinbotham*

The views so ably maintained by Mr. Blake were expressed in a more extreme and even exaggerated form by Mr. Higinbotham,[1] Chief Justice of Victoria, who conceived the impression that the Colonial Office, rather indeed the permanent staff than the Secretary of State, was engaged in efforts to exercise illegal and improper interference with the Government of the Colony. When as a judge he was asked to attend an Executive Council meeting in accordance with the royal instructions which in the case of a death sentence bade the Governor obtain a report from the judge and invite his attendance at the Council, he refused to act under the instructions, and tactfully the issue was evaded by an invitation being sent by the Ministry. His fullest expression of disapproval was conveyed to Sir H. Holland on 28 Feb. 1887, in response to a request from that official for his views on the royal instructions to Colonial Governors. He was at pains to explain that he regarded his correspondent as a private gentleman, not as Secretary of State, and cited the resolution which he had induced the Assembly to pass in 1869 by 40 votes to 18,[2] in which he denounced the sending of instructions to the Governor on any topic except the assent or reservation of Bills—provided for in the Constitution Act—as illegal, derogatory to the position of the Governor, and a violation of the principle of responsible government and the constitutional rights of the people. He drew a complete distinction between the two aspects of the functions of the Governor; as regards control of His Majesty's military and naval forces and relations with foreign states the Constitution Statute had nothing to say; in these matters the Governor was responsible to the Imperial Government, though Ministers would doubtless be glad to aid him in carrying out his duty in that regard. But the creation of responsible government meant 'the vesting in the representative of the Crown upon his appointment and by virtue of the statute, of all powers and prerogatives of the Crown necessary in the conduct of local affairs and the administration of law'. These prerogatives and powers were no longer vested in the Sovereign but transferred to the Governor, and there was no

[1] Morris, *Memoir of George Higinbotham*, pp. 209 ff.
[2] *Parl. Deb.*, ix. 2670 f.; Morris, pp. 160–89.

power in the Crown by letters patent apart from the statute to confer on the Governor any powers in regard to internal government. The powers which he derived from the statute were only exercisable by him on the advice of Ministers precisely as in the United Kingdom, and no outside interference was permissible.

On these general principles was based his criticism of the letters patent. They purported to grant powers already conferred by Act, and sought to subordinate the Governor's action under his powers to instructions from the Crown, which was illegal. The instructions came in for equally severe condemnation; the instruction to consult the Executive Council was meaningless as it stood, if it referred to the whole body—ex-Ministers remaining members; if it referred to the Cabinet it was otiose, for the duty to consult rested on the system created by statute; if it were interpreted as referring to Imperial matters, then it sought illegally to impose on Ministers a duty of advising on matters not concerning them, though in courtesy they might be willing to advise. Clause VII was denounced as an indignity and a menace to the Governor and his advisers because it permitted him to act against their advice. The instruction XI as to pardon was condemned, the right being essentially already possessed by the Governor, and it being wrong to instruct him to use his own judgement or to call for a report from the judge. With more reason he ridiculed clauses VIII and X with their instructions that laws should deal with one subject only, and have marginal abstracts and so forth, and in fact these details were dropped in the Instruments of 1892 together with the instruction to obtain a report from the judge, as a result of his strictures.

On the other hand, he condemned strongly the Colonial Office for permitting Colonies to interfere with matters not in their power, e. g. foreign affairs, while, on the other hand, it objected as it had in 1864–8 to the passing of a protective tariff, a matter essentially of local concern. He admitted the propriety of the grant of honours on Imperial advice, but desired that the highest honours for life should be awarded by the Governor on ministerial advice and the recommendation of both Houses of Parliament.

The views expressed thus unofficially were set out at length

in his judgement in *Toy* v. *Musgrove*.[1] Toy was a Chinaman who arrived at Melbourne in a British ship which carried more immigrants than could be admitted under the quota system of the Victorian law. Musgrove was instructed by the Commissioner of Trade and Customs, the responsible Minister, to refuse entry to any Chinese not being British subjects, and Toy brought an action against him. The defences were that the action taken was an Act of State authorized by the proper Minister, or that the Crown has a power to exclude aliens, that this power was vested in the Governor, and properly exercised by a Minister. The first defence was rejected by the Court; the Governor had no right, they held, to perform an Act of State, and there had been no ratification by the Crown. The Chief Justice accepted the validity of the second defence. He expressed quite clearly his views that the Constitution Act did completely if obscurely create a scheme of government for Victoria; the executive power fell to be exercised by the Governor on the advice of Ministers, and it extended, subject to any statute law or treaty binding the Crown, Government and Legislature, to doing all acts necessary or expedient for the administration of law, the conduct of public affairs, and the security, welfare, or comfort of the people of Victoria, its authority in its own sphere being exactly the same as that of the Imperial Government in the United Kingdom. The Crown had in the United Kingdom a prerogative to exclude aliens, it therefore existed in Victoria and could properly be exercised by Ministers. The majority of the Court dissented, and found for Toy, but the Privy Council [2] restored the situation by reversing the decision, on the ground that an alien had no right enforceable by action to enter British territory, and further that, as the ship had brought more than its legal quota of immigrants—1 to 100 tons—there was no obligation to admit any of the excess number. The Privy Council, unfortunately, were careful to avoid answering any of the important points raised.

There is a good deal to be said for many of Mr. Higinbotham's contentions. It was rather absurd to give by letters patent powers of appointment already given by s. 37 of the Constitution, or the right to summon and prorogue Parliament and to

[1] 14 V. L. R. 349, especially at pp. 396, 397. [2] [1891] A. C. 272.

dissolve the Assembly given by s. 22, and it is arguable that the right to pardon might have been assumed to pass without special delegation. Some trivialities in the instructions were wisely excised from those issued in 1892 to the Colonies in Australia, New Zealand, and Newfoundland. His doctrine that the Governor possesses essentially without specific words all the Executive authority necessary for the conduct of the Executive government is clearly justifiable, if it does not solve the question what his powers include. But it was impossible to force from the Statute the legal doctrine that the Governor of Victoria must act solely on ministerial advice and could not receive instructions from the Crown; Mr. Higinbotham's persistence in this view rendered it necessary to prevent the possibility of his becoming Acting Governor in the absence of that officer.[1] Nor was it possible to accept his effort to divide sharply two spheres local and Imperial; the people of Victoria could not even then be content to have no say whatever in matters of foreign relations, and similarly the Imperial Government could not draw a clear line between internal and external matters owing to their interaction. Matters were to advance indeed to increasing exemption from Imperial intervention in domestic affairs, but simultaneously to increasing concern with external relations. It is noteworthy that Mr. Higinbotham held that there could be no territorial limitation to Victorian legislation based on mere Colonial status; yet this was hardly compatible with his effort to distinguish between internal and external relations, and the lack of acceptance of this aspect of his views is shown sufficiently clearly by the fact that about this time Mr. Deakin with others was meditating a hopelessly foolish plan of forcing the hand of Britain by action against the French penetration of the Pacific.

§ 4. *The Dual Position of the Governor*

It is one merit of both Mr. Blake and Mr. Higinbotham that they drew perfectly clearly a distinction between the functions of the Governor as head of the Local Government and as an Imperial officer carrying out duties to the Imperial Government. The Governor, it is true, can owe direct responsibility to one

[1] Dilke, *Problems of Greater Britain*, i. 233 ff.

master only, the Crown, as was asserted in one of the resolutions of 3 September 1841 regarding responsible government in Canada, but none the less he owes a duty to the people of the territory inasmuch as he is Head of the State, and on him depends the orderly carrying out of the working of responsible government. To regard the Governor as performing an Imperial function [1] when he refuses a dissolution, because he thinks that it is unnecessary and contrary to local constitutional usage is utterly misleading and invidious. Cases may occur where a Ministry is thus treated because of some Imperial interest, but these are exceptional and they should not be confused with the ordinary case where no Imperial issue is involved.

The duty owed to the territory cannot be enforced directly by dismissal; when, during the proposals for responsible government in Australia, it was desired to secure the power to remove the Governor by two-thirds majorities of both Houses, the Imperial Government very wisely rejected the idea. But clearly, if a Governor does not conform to regular constitutional usage, he cannot be maintained in office, if the majority in the Legislature really decides that it will not work with him. But a proposed censure by a Legislature must be weighed by the Imperial Government and not every censure need be taken seriously. There is further a grave difference of importance between censures according as they are based on actions of the Governor on local or on Imperial grounds; to desert a Governor censured on the latter score would be pusillanimous and foolish, though removal to a higher post is a possible mode of proving that the censure was improper. If the views of the Imperial Conference of 1926 become effective then the Governors-General may cease to hold any dual position, but this does not apply to the States, Southern Rhodesia, or Malta, and it appears from Mr. Baldwin's statement on 25 November that as regards reservation of Bills the Governor-General's position is not to be altered.

In 1861 [2] a vote of censure was moved but not passed in the Assembly of New South Wales on the action of Sir W. Denison

[1] The Dominion Secretary of State in July 1926 quite properly repudiated any responsibility for Lord Byng's refusal of a dissolution to Mr. Mackenzie King; see also Commons Debates, 29 July 1926.

[2] *Leg. Ass. Votes*, i. 58, 416, 647–743.

in sealing himself a land grant, which the responsible officer declined to seal; he had acted on what he believed to be Imperial instructions, completing a transaction arising out of the commitments of the Imperial Government when it controlled, as it did until 1855, the waste lands. In 1866[1] an effort was made to censure the Lieutenant-Governor of New Brunswick for disagreeing with his Ministers, and a couple of years later a censure was passed by the Assembly of Nova Scotia on its Lieutenant-Governor, which he strongly resented and insisted on their expunging from the records.[2] In 1875[3] Sir H. Robinson was assailed for liberating a convict without ministerial advice, and he also was criticized for his action in connexion with the dismissal of a volunteer officer. In 1877[4] the Lower House of New Zealand censured Lord Normanby on the score of his refusal to appoint Mr. Wilson to the Upper House, while a motion of non-confidence in his Ministers was pending, on the ground that he had no right to take notice of proceedings in the House as a ground for refusing to act on ministerial advice. Lord Normanby then asked his Ministers for advice as to the reply which he should return to the resolution of the Lower House but got none; and they declined to accept his view that they must either resign and let him find Ministers to support his action or support it themselves. The Colonial Secretary upheld his action as fully constitutional. He also supported Mr. Weld,[5] Governor of Tasmania, who was censured in that year by the Assembly for granting Ministers a dissolution. No Imperial element was involved in these cases, but in 1878[6] Mr. Merriman assailed the Governor, Sir Bartle Frere, in the Cape, for unconstitutional action in insisting on the control of the Colonial Forces being placed under Imperial authority, on the ground that the action had been prejudicial to the Colony and had delayed the suppression of the rebellion. The Speaker, however, demurred to the censure proposed, on

[1] Pope, *Sir John Macdonald*, i. 297. [2] Ibid., i. 299.

[3] *Parl. Pap.*, C. 1202, 1248.

[4] *Parl. Pap.*, 1878, A. 1, p. 1; A. 2, p. 7; *Gazette*, 21 June 1878; Rusden, *New Zealand*, iii. 206 ff.

[5] *Leg. Council Journals*, 1877, Sess. 2, No. 45; Sess. 4, No. 19.

[6] Molteno, *Sir John Molteno*, ii. 383; *House of Assembly Votes*, 29 May 1878; *Parl. Pap.*, C. 2144, pp. 196 ff.

the score that by constitutional usage the Ministry must be regarded as responsible, and the form of motion was changed; even so, it did not pass. On purely local grounds an attempt was made in 1908 [1] to censure the action of Sir T. Gibson Carmichael, Governor of Victoria, for his action in granting a dissolution of Parliament in the preceding year to Sir T. Bent. The Governor, at the request of the Assembly, submitted to Parliament a statement of the reasons for his action and the matter then dropped. More serious was the attack made on Lord Chelmsford [2] in Queensland for his refusal to grant an increase in the number of members of the Legislative Council in order to compel its acceptance of proposals by the Lower House. Mr. Kidston's Ministry resigned as a protest and the new Premier, Mr. Philp, had to obtain a dissolution without supply and to expend money illegally. The general election gave him not a third of the seats, and he had to resign, while the Assembly addressed a remonstrance to the Governor for his action in dissolving without supply, which had hampered important public works being carried out. The Government, however, did not desire to press the point, and the matter dropped. In 1914 [3] the Assembly of Tasmania disapproved of the action of the Governor, Sir W. Ellison Macartney, in imposing on a new Ministry as a condition of giving them office an undertaking to dissolve Parliament, irrespective of the approval or otherwise of the Assembly. The Governor's action in a difficult situation brought about by the bad faith of his new Premier was disapproved by the Secretary of State, on confused and sophistical grounds, intended doubtless to dispose of an inconvenient issue with the least trouble. More serious was the fate of Sir Gerald Strickland,[4] recalled in 1917 from New South Wales on inadequate grounds. He had done nothing more than point out to his Premier, Mr. Holman, that, in view of the fact that he had for the time being lost control of the Assembly, he could not expect the Governor to go beyond routine actions on his advice, a hint which was promptly followed by an agreement by Mr. Holman to coalesce with the following of Mr. Wade, thus regaining a majority in the Assembly. The only other ground of complaint was that he was

[1] See chap. iv.
[2] *Parl. Deb.*, ci. 38 ff., 60 ff., 88 ff., 122 ff.
[3] *Parl. Pap.*, Cd. 7506.
[4] Keith, *J. S. C. L.*, 1917, pp. 227 ff.

dubious as to whether he could properly agree to the extension for a year of the life of Parliament, thus depriving the Labour Party of the right to give its verdict at the polls. The only plausible reason for his recall is that his attitude in this regard was embarrassing to the Imperial Government and to the Commonwealth, as Mr. Holman was co-operating with Mr. Hughes in the effort to keep up the strength of the Australian Forces, and the advent of a Labour Government to power might have had inconvenient results from the Commonwealth and Imperial point of view. The episode, however, proves clearly that a Governor cannot rely on much moral support in any dispute with a Ministry.

Analogous cases have occurred in Canada in respect of the Lieutenant-Governors who owe their position to the Dominion Government. In 1878,[1] on the Conservative defeat of the Liberals, both Houses of Parliament censured, and, despite all the suggestions of the Governor-General, the Government insisted on the recall of, Mr. Luc Letellier from Quebec because he had dismissed a Ministry possessing a majority in the Lower House, and replaced it by another which on a dissolution was upheld only by a small majority. In 1900[2] the Liberal Government had to remove one of their own adherents because, as Lieutenant-Governor of British Columbia, he dismissed a Ministry with a majority, if an uneasy one, in the Legislature, and appointed another which had only one member in the Legislature, no substantial backing in the country, and postponed as long as it could the evil day of meeting the Legislature, the Government thus being conducted for some months without any popular approval.

Censure, of course, is possible by the Imperial Parliament, though it is rare. In the early days of responsible government Earl Grey had to defend on 26 March 1849[3] in the House of Lords the Lieutenant-Governor of Nova Scotia, attacked because he had allowed his Government to cause the retirement of the Provincial Treasurer without pension. In the Commons on 20 March 1866[4] Sir C. Darling was bitterly attacked for his action in regard to the dispute between the two Houses of

[1] *Parl. Pap.*, C. 2445.
[2] Canada *Sess. Pap.*, 1900, No. 174.
[3] *Hansard*, cliii. 1262–89.
[4] *Hansard*, clxxxii. 621; cxci. 1976.

Victoria. On 25 March 1879 [1] a strong attack was made by the Opposition upon the Imperial Government and Sir Bartle Frere for his action in declaring war on Cetewayo without instructions from the Crown; though defeated by a strict party vote, the action of the Opposition was shown to be justified in some degree by the partial supersession of the Governor by the appointment of Sir Garnet Wolseley as High Commissioner for South-east Africa.

Of interest from the complex issues involved was the attempt which just failed by the efforts of the Speaker to censure in 1908 [2] the Lieutenant-Governor of British Columbia for his refusal to assent to an Immigration Bill in the previous year. He acted, of course, out of deference to the wishes of the Dominion Government, which in its turn was co-operating with the Imperial Government in the effort to avoid complications regarding exclusion of Asiatic immigrants in view of relations with Japan.

§ 5. *The Dismissal of Ministers*

That a Governor has a right to dismiss his Ministers is legally certain; they hold during pleasure, and the wording of the instruments of the Constitution is regularly framed so as to secure that the right of appointment of Ministers is vested in him alone. It is significant of the attempt to differentiate consciously striven for, that the Irish Free State [3] deprives the Governor-General of this discretion by insisting that the Premier be the nominee of the Chamber of Deputies and the other Ministers be his nominees, appointed with the approval of the Chamber. But the question how far this right should be used is very different. There is an obvious similarity to the case of refusing a dissolution inasmuch as often that leads to the retirement of the Ministry, and the plan of refusal may definitely be adopted towards this end. But questions of dissolution often present the Governor with the probability that he can find other Ministers to take responsibility *ex post facto* for his action, while this feature may be less obviously present in cases of dismissal.

In this matter, again, British practice and Dominion usage

[1] *Hansard*, ccxliv. 1606, 1865. Cf. Walker, *Lord de Villiers*, pp. 139, 144.

[2] *Canadian Annual Review*, 1908, p. 537; *Leg. Ass. Journals*, 1908, pp. 7, 21, 31.

[3] Constitution, s. 53.

differ. As has been pointed out, the precedent of 1784 is the last of dismissal in the United Kingdom, and the controversy over the Parliament Bill shows how foolish it would be for the Crown to make use of the power.[1] The only result of its employment then would have been to convert an agitation against the Lords into one against the Crown, and, whatever the immediate result, the ultimate outcome would have been the conviction of a vast mass of the people that the Crown interposed an obstacle to the carrying out of the popular will. It is true that royal influence is obvious in the holding of the second election of 1910, and that without it there might have been a severe strain in the relations between Ministers and the Crown, but it may safely be assumed that, however strong the temptation may be for the Crown to exercise the prerogative, it will never be resorted to, except for the purpose of saving the State against a Ministry which is determined to prevent the people from having their say. If a Ministry should seek to cling to office by prolonging the duration of Parliament in which it had a majority, or to govern without Parliament, the reserve powers of the Crown would doubtless be available to expel them from office, but it may earnestly be hoped that no such catastrophe may arise. In the Dominions the reserve power may easily be held to be more necessary, in view of the fact that parties sometimes seem to have little regard for anything save their immediate advantage,[2] but that it should be rarely used is undoubted, and examples of its employment are rare.

The disadvantage of the belief in the constitutionality of the use were distinctly visible in Canada in 1849[3] in the disputes over the Rebellion Losses Bill. Lord Elgin was denounced and even plots for his assassination brewed, because he would not dismiss his Ministry, which was clearly representative of the public will as a whole, however far from satisfactory to loyalists. In 1856,[4] however, a case which may be deemed illustra-

[1] For the possibility of its use see e.g. Dilke, *Journal of the Royal Society of Arts*, lvi. 344.

[2] Cf. Mr. Holman's action in procuring an extension of the duration of the New South Wales Parliament in 1916, while he awaited a favourable chance of dissolving.

[3] *Parl. Pap.*, May and 7 June 1849; Morison, *British Supremacy*, pp. 206 ff.

[4] New Brunswick *Ass. Journals*, 1856, pp. 8, 23; 1857, p. 88; Hannay, *New Brunswick*, ii. 180 f.

tive of a not unjustifiable dismissal took place. The Legislature of New Brunswick had passed a quite unworkable Liquor Prohibition Act; the Lieutenant-Governor, with good sense, felt that there should be a consultation of the people on the wisdom of the measure, and asked Ministers to dissolve. They were unwilling to do so, and he assured them that he would not dream of dissolving without their consent; it was indeed clear that in this, as in every other case, a Governor could not carry out by himself the machinery of a dissolution and a new election. But he gave them the alternative of advising a dissolution or resigning, and they resigned, after the Provincial Secretary had actually issued the dissolution proclamation. The result of the election completely vindicated the Lieutenant-Governor, for he secured a majority of 38 to 2 for the repeal of the offending measure, and both Houses of the Legislature expressed satisfaction with his action, making it plain that he had secured the removal of an administration which was in effect legislating over the heads of the people. Sir W. Denison [1] has recorded that in 1859 he insisted on his Ministers abstaining from pressing an illegal measure, and that he had determined to dismiss them if they had refused to act as he desired. In 1861 the Governor of Newfoundland [2] actually dismissed Ministers as they tendered him unpalatable counsel, and appointed Mr. Hoyles, Leader of the Opposition, Prime Minister, giving him a dissolution against the protest on 5 March of the Assembly.

The position of the Governor-General was much canvassed in Canada during the Pacific Railway scandals. The general election of 1872 had seen the Government of Sir John Macdonald pressed for funds, and it had accepted considerable subventions from Sir Hugh Allan, who paid on the understanding that he would be made President of the Pacific Railway undertaking when a contract was finally awarded; excuses may be made for the action; Sir John himself pointed to the extraordinary efforts of his opponents in the Government of Ontario to use their influence to secure support for the Federal Liberals, and ultimately the contract was awarded in such a manner as to give no undue authority to Sir H. Allan, or to those whom he

[1] *Viceregal Life*, i. 468; cf. i. 435.

[2] *Ass. Journals*, 5 and 6 Mar. 1861; Prowse, *History of Newfoundland*, pp. 488 ff.

represented. Still, the action was indefensible, and a theft of papers made the secret known. Mr. Huntingdon, a Liberal member, moved in April 1873 for a select committee of investigation, alleging that not only did the Government accept money, but that it was aware, when it did so, that Sir H. Allan was largely backed by Americans who found the cash. The proposal was defeated on a strict party vote, but the Prime Minister himself moved for a Committee in view of the outburst of feeling in the country, justly suspicious of any American intervention in the great transcontinental railway project. Unhappily, the Bill to give the Committee power to take evidence on oath was disallowed on the advice of the British law officers that it was not within the powers of the Parliament under the British North America Act. A Royal Commission was then offered, but the members of the Committee were not agreed on this being desirable, and on 13 August the House of Commons, which had been adjourned to that date in lieu of prorogation, to prevent the Committee lapsing, met without any settlement. As it had been understood that the meeting would be merely formal, many Government members had not attended, while the Opposition with its main strength in Ottawa was there in force. The Governor-General, however, accepted his Ministers' advice and prorogued the House despite the objections of the Opposition, who had wished to carry a vote of censure. The Government now secured a Royal Commission of three Judges, despite the protests of Mr. Huntingdon that the will of the House of Commons was being ignored. In October, however, the report of the Commission proved the case against the Government to the hilt, and the Prime Minister resigned without waiting for the decisive vote, Mr. Mackenzie forming a Ministry which held power until 1878. During this trying time, strong requests were made by the Liberal Press and a Parliamentary deputation to the Governor-General to force his Ministers to resign and have the matter impartially investigated, but Lord Dufferin in his official report[1] claims credit for having decided to allow the pressure of events in the normal way to determine the outcome. He recognized that he had the power to dismiss, he would have used it had it been essential as a means to elucidating the facts,

[1] *Parl. Pap.*, C. 911; *House of Commons Journals*, Oct. 1873. Cf. Pope, *Sir John Macdonald*, ii. 174–89.

but its use would have told against the Opposition, as showing the Government a means of confusing the issue by raising the cry that the people of Canada were being interfered with by an outsider. A rather different light is cast on the episode by the story told by Sir Charles Tupper.[1] He asserts that, during the no-confidence debate initiated in the autumn session by Mr. Mackenzie, Lord Dufferin asked Sir John to resign, whereupon Sir C. Tupper went to the Governor-General, pointed out that his action in asking for resignation would turn him into the head of the Liberal Party and expose him to Conservative denunciation for having violated every principle of responsible government, adding, ' If Her Majesty should to-morrow undertake what you have done, she might lose her throne '. He accordingly told him he should telegraph for instructions to the Colonial Office, which Lord Dufferin did, with the result that Sir John was aroused from his bed at two o'clock in the morning and told that the decision had been recalled.

The Liberal view of the position of a Governor was soon after to receive formal expression in the action of Mr. Luc Letellier de St. Just, formerly a member of the Federal Liberal administration, when he dismissed on 1 March 1878 his Premier.[2] The grounds he alleged were primarily the failure of his Ministers to keep him informed of their legislative projects, introducing Bills into the Legislature without his knowledge ; one of these measures, the Quebec, Montreal, Ottawa, and Occidental Railway Bill, he especially signalled out as unjust ; moreover, he pointed out that the Government had spent money rashly ; had been compelled to borrow wholesale to prevent repudiation of obligations ; and had heeded none of his advice to economize and avoid fresh taxation, lavishing railway subsidies at a time when all effort should have been concentrated on finishing the line from Quebec to Ottawa. Further, he pointed out that petitions against the new Railway Bill had been withheld from him until the moment when he was asked to sanction it, which he declined to do. He then sent for Mr. Joly and gave him a dissolution when he was upheld only by the device of securing

[1] *Recollections of Sixty Years*, pp. 156 ff. Goldwin Smith resented the inaction of the Governor-General, and see the views of Sir A. Gordon, *Parl. Pap.*, C. 3382, p. 6 ; Rusden, *New Zealand*, iii. 435 f.

[2] *Parl. Pap.*, C. 2445, pp. 102 ff.

an Opposition Member to take the Speakership. His action was challenged at once by the Conservatives, who censured him in the Federal Senate, and whose onslaught in the House of Commons was only parried by the Governmental party declaring that the matter was one of local concern, not of federal competence. The fall of the Liberal Government in Canada later in the year brought the Conservatives into power; a private member's motion resulted in condemning the Lieutenant-Governor, and the Ministry advised his removal from office. The Governor-General objected to so drastic a step, and the matter was referred for observations to the Colonial Office. Sir J. Macdonald's attack of 14 April 1879 [1] deals largely with the Lieutenant-Governor's action after the dismissal; Mr. Joly had merely a precarious majority in the Legislature; despite it, he was formally disapproved by both Houses; yet the Governor kept him in power, because he was anxious thus to help the Liberals in the electoral struggle for the Federal Parliament then in preparation. It was true that the Legislature had not carried its dislike to the point of refusing supplies; such a procedure was obsolete, a vote of want of confidence, such as had actually been passed, being sufficient; the refusal of supply would have interfered with the railway construction and imposed much hardship on contractors and workers. There was therefore good ground for the removal of the Lieutenant-Governor, and the Ministry advised definitely that this should be done. A difficulty had arisen, because, while the appointment [2] of the Lieutenant-Governor was given to the Governor-General in Council, he was stated to hold office at the pleasure of the Governor-General, and there was a rule that he was not to be removed within five years of appointment except for cause assigned, which must be notified to both Houses of Parliament. It had hence been argued that it was desirable that no dismissal should take place without grave reason, and that, in view of the difference in wording as to the right of appointment and of removal, the Governor-General had a special duty in respect to removal, the implication being that he must not act, save with full concurrence personally in the proposal. Sir J. Macdonald had no difficulty in showing that nothing could be made of the difference; the distinction between Governor in Council and Governor in

[1] *Parl. Pap.*, pp. 107–9.

[2] 30 Viet. c. 3, s. 59.

the Constitution itself and in statutes generally was largely due to historic accident; responsible government made the Ministry the authority for all acts of the Governor-General, and the principle was enshrined in the preamble to the British North America Act, which recites the desire of the Provinces to be united under a Constitution similar in principle to that of the United Kingdom. The argument that, as the Dominion House of Commons had at first declined to pass censure on the action of the Lieutenant-Governor, it was undesirable to reopen the case, was met by pointing out that the House was influenced by reluctance to intervene in the election then pending in Quebec, and that the whole matter had been a prominent feature of discussion at the Federal General Election, and the motion in favour of the censure of the Lieutenant-Governor had been passed by a majority which was overwhelming and such as could not be overlooked; Mr. Letellier was discredited and could render no further useful service, and in similar circumstances in a Colony the Imperial Government would have recalled the Governor. The argument that the Lieutenant-Governor was not really responsible, as Mr. Joly by assuming office had assumed responsibility, was met by the ingenious retort that the appointment or recall of a Lieutenant-Governor was not a matter within the provincial sphere at all. The Dominion had no right to interfere with Imperial action in these matters as regards the Governor-General, nor the Province as regards the Lieutenant-Governor. The responsibility was one shared only by the Dominion Government. The Secretary of State[1] admitted that it was impossible to rely on the terms of the Act to impose an obligation on the Governor-General personally, conceded the rule that a Ministry's advice must normally be accepted, and only suggested further consideration now that passion had calmed down. The suggestion was not taken, but Mr. Letellier was removed.

The ingenious manner in which Sir J. Macdonald evaded the issue of the responsibility of the incoming Minister is noteworthy. In truth the whole doctrine of the responsibility of an incoming Minister for the refusal of his predecessor's advice, or his dismissal from office, is a fiction necessary only to satisfy the doctrine that a Governor must always act on ministerial advice.

[1] *Parl. Pap.*, C. 2445, pp. 127 ff.

There is little to be said for the fiction, because it is perfectly obvious that in refusing advice or dismissing Ministers the Governor does not act on advice, and it would at least have more resemblance to truth if it were stated that a Governor must always act on ministerial advice or have his action ratified by ministerial approval and acceptance of responsibility *ex post facto*. Even in this form it must be pointed out that it is impossible to lay it down that an incoming Ministry must always be willing to defend a Governor. He might get rid of a Ministry, and have to appoint a Ministry which, while not approving his action, was prepared in the public interest to carry on, and such a Ministry might perfectly properly decline to accept responsibility, declaring, if pressed with the constitutional doctrine above mentioned, that it declined to recognize a doctrine resting on nothing better than dicta, and one which flagrantly violated common sense if made universal.[1] It was all very well for the Liberal Government in 1896 to approve and defend Lord Aberdeen's pressure on Sir C. Tupper to resign, but no one could doubt how Sir Wilfrid Laurier would have felt in 1911 if he had been treated thus by Lord Grey, and Mr. Mackenzie King in July 1926 showed clear resentment of Lord Byng's partiality. There is very little use in keeping fictions in being after they have served their time, and there is no reason why it should not candidly be admitted that in all internal matters the Governor must act on ministerial advice unless he can find, in the event of the removal from office by resignation or dismissal of a Government, other Ministers who are willing to take office and carry on the government with the approval of the Lower House of Parliament. Of course, if they are not prepared to defend the Governor's action, he may have to resign or be recalled, but a courageous or reckless Governor may face this.

Nor is the refusal to accept responsibility *ex post facto* unknown. There is the obvious instance of Mr. Kidston's Ministry in 1908, after the defeat and resignation of Mr. Philp's Government. So far from deeming themselves bound to uphold the Governor's action, they would probably have proceeded to

[1] Mr. Meighen was curiously cautious in July and August 1926 in defending Lord Byng's action. Obviously he should have saved Lord Byng by resigning at once when he found the Progressives would not aid him.

render his position untenable but for a reshuffling of parties,[1] and, as it was, so far from defending him in the Assembly they secured the passing of a very definite censure of his conduct. A Ministry in fact should be held responsible for what it actually does, not for what it does not do. The error has arisen from the erroneous application of an English convention to Dominion circumstances; the King can do no wrong, and cannot be criticized in Parliament; hence any action, even if it amounted to dismissal, would theoretically have to be defended by an incoming Ministry; there is no real parallel in the case of the Dominions where a Governor can do wrong and can be recalled. That Sir John Macdonald did not thus argue, but adopted another line of contention, was obviously due to his insistence that in the Dominions as in England action should always be on ministerial advice, any discretion on the part of the Crown being wholly denied.

None the less, despite the removal of Mr. Letellier, another Liberal Lieutenant-Governor in British Columbia decided to dismiss not one but two Ministries.[2] In 1898 Mr. T. R. McInnes dismissed Mr. Turner's Government on the ground that it was without solid backing, but the new administration was very weak also. It only met the Legislature on 4 January 1900, and clung desperately to life after a definite defeat by one vote or the casting vote of the Speaker. It requested Mr. McInnes to sign warrants for expenditure which it could not show to be authorized by law, and asked for an important change in procedure as to certificates of improvement under the Minerals Act in lieu of securing an amendment of the Act from the Legislature. Further, the Government declined to obey an order by the Lieutenant-Governor to issue a certificate of grant under s. 39 of the Minerals Act to one Dunlop. Accordingly, on 27 February, he removed his Government from office, just before the arrival of a telegram from the Dominion Secretary of State, who suggested that he ought to allow matters to take their course, as apparently there was a chance that the Government would secure adherents from the Opposition. Mr. McInnes then appointed Mr. Joseph Martin Premier, and on 10 April, on urgent advice from the Dominion Government, arranged for a dissolution,

[1] See Bernays, *Queensland Politics*, pp. 173 ff.

[2] Canada *Sess. Pap.*, 1900, No. 174.

though it was found impossible to secure an election before 9 June. The Dominion Government demanded explanations of his action, which the Legislature reprobated by passing a vote of regret at the dismissal of the Ministry, and Mr. McInnes made a very ingenious defence. He insisted that there had been no interregnum, a new Prime Minister having at once been appointed and two colleagues also sworn in on 27 February, while two more were added within thirty-five days, for which there were Dominion precedents in the Ministries of Mr. Mackenzie in 1873, Sir John Macdonald in 1878, and Mr. Laurier in 1896. The fact that the new Ministers were untried men was not his fault; it was his Premier's right to choose, and with it he could not properly interfere. It was true that Ministers had not faced by-elections, but he was advised that, as dissolution was imminent, this was not necessary nor desirable. He cited instances of double dissolutions at no great distance of date in Manitoba in 1878–9 and 1886–8, and in Quebec in 1890–1. He repelled the suggestion that he should have sought a Ministry in the Legislature without dissolution by insisting that the two wings there would not coalesce, not even having agreed to censure his action. The delay in his new Government meeting the Legislature had a parallel in the action of the Lieutenant-Governor of Quebec, who dismissed on 16 December 1890 his Ministers while the general election was delayed until 8 March 1891, giving an interregnum of about the same period as in British Columbia. The whole reasoning was very specious, but the Dominion Government would not accept it, relying in lieu on the damning fact that Mr. Martin and his colleagues had been allowed to govern the country for months without a vestige of support in the Legislature. It was, however, admitted that while Mr. McInnes had acted in a manner subversive of constitutional government, he had had to face a very difficult situation in which personalities took the place of rational divisions on issues of public policy.

The case of Quebec [1] in 1891, to which Mr. McInnes referred, probably helped to mislead him. Mr. Angers in December 1891 dismissed the Mercier Ministry; he had for some months withdrawn from them his confidence, and only kept them in office

[1] *Canadian Gazette*, xviii. 4, 9, 81, 289, 300, 398, 471, 513, 565, 584, 588; Canada *Sess. Pap.*, 1891, No. 86; 1892, No. 88.

pending investigations by a Commission of three judges into allegations against them in respect of payments made to certain persons in connexion with the Chaleurs Bay Railway. The Commission showed that payments had been made to the Premier and others, and the Lieutenant-Governor dismissed them from office, on the grounds *inter alia* that they had illegally spent money without his sanction and had misinformed him regarding matters of public importance. His action was vehemently attacked as unconstitutional and attributed to party prejudice—he being a Conservative nominee of the Dominion Government, his Ministry Liberal. But he obtained a Minister, Mr. de Boucherville, to take office, and in March 1892 the election gave him a majority of 31 in a House of only 73 members, a triumphant vindication of public probity. In the contest a vehement attack was directed against Mr. Angers on the ground that, by dismissing the Ministry and dissolving the Legislature without allowing it to do any business, he had violated the rule of the Constitution that there must be one session every year, the answer being that the summoning of the Legislature was all that was essential to comply with the letter of the law,[1] while the right to have a business session every year was subject to the law providing for the right of the Lieutenant-Governor to dissolve that body. It was in fact clear that it was necessary to have a second general election in order to decide whether the new Ministry could carry on, and it would have been absurd to seek to work with a Legislature selected by the people at a time when the Commission's findings were not before them.

Another successful case of dismissal took place in 1903, when the Lieutenant-Governor of British Columbia dismissed on 1 June Col. Prior's Ministry.[2] The grounds for his action were connected with irregularities of a financial character, and, as regards the Premier, the charge that he had secured the grant of a Governmental contract to his firm after he had seen other firms' tenders. He sought to excuse his action on the score that the Attorney-General was allowed to promote private Bills, but the Lieutenant-Governor declined to accept this sophism.

[1] Cf. *Provincial Legislation*, 1867–95, p. 456; in 1910 there was only a formal session in Saskatchewan.

[2] Cf. *Canadian Annual Review*, 1903, pp. 213 ff.

Mr. McBride, who accepted office, announced his intention of carrying on politics on Dominion party lines. The Lieutenant-Governor had already refused Col. Prior after defeat in the Legislature a dissolution; he now granted one to his new Premier, who won a fairly contested fight, and began a long period of successful administration. There is no doubt of the use of the power to dismiss in such a case, and in 1915 the same thing was repeated in Manitoba. The Government had been discredited by various scandals, and in 1914 it lost much of its majority. In 1915 the Lieutenant-Governor forced it to appoint a Commission to investigate allegations of its having obtained subsidies from the contractors for the new Parliament Buildings, and the Premier, feeling that the Government was hopelessly weakened and compromised, resigned office, a new Liberal administration being formed.[1]

It is mainly in cases where responsible government is not fully appreciated by the public that these instances occur. In Newfoundland cases have occurred in which the Governor has actually had to dismiss a Minister from office, without his action involving the removal from power of the Ministry as a whole, a proof of imperfect solidarity in Ministries. In 1912 [2] strong pressure was brought to bear on Sir R. Williams to dismiss a Minister accused of using official place for private advantage, but the Governor, who took the responsibility of investigating all the circumstances personally, was able to find that the Minister had acted unwisely indeed, but not in such a way as to merit the severity of dismissal from office. The necessity for firm governmental handling in Newfoundland was evinced in 1919,[3] when in connexion with the general election a petition was brought against Mr. Woodward. He resigned his seat, but the Court insisted on evidence as to whether there had been collusion, and Mr. Woodward then deposed to an unlawful agreement made between him, the Premier, and a member of the Upper House, under which an offer of a governmental post was made to him. There was considerable excitement as a result of this disclosure, but reliance was placed on the Governor, whose intervention secured the announcement by Mr. Warren, Minister of Justice, of a Commission consisting of two judges

[1] Keith, *Imperial Unity and the Dominions*, pp. 116, 117. [2] Ibid., p. 115.
[3] Keith, *War Government of the Dominions*, pp. 241 ff.

and a member of the Council to investigate the charges. The obscure currents of politics in that Colony are obvious when it is remembered that in 1917 a sensation was caused by the publication of a letter from Sir W. D. Reid, long the leading spirit of the Reid-Newfoundland company, to Sir T. Shaughnessy in Canada, in which he alleged that he had financed the elections of 1908, 1909 and 1913, had induced Mr. A. B. Morine to retire from politics in order to facilitate the formation of a coalition between Sir E. Morris and Messrs. Lloyd and Coaker, and had sent the last-named as President of the Fishermen's Union to tour Canada in 1917 in order to consider the possibilities of federation. A prosecution directed against Sir W. Reid failed with the Grand Jury, but obviously proceedings of this sort are not compatible with a high standard of political morality.[1]

§ 6. *The Assimilation of Dominion Practice to the British Usage*

Other cases may easily be enumerated of differences between Governors and Ministers, which seldom, however, become public property, for a Ministry which acquiesces in a Governor's views and does not resign cannot with any dignity or consistency appear in public in the attitude of a complainant, save, of course, in those instances in which it appeals to the Secretary of State and remains in office pending his decision. Such an attitude, though sometimes objected to by Governors, is clearly perfectly constitutional. The Governor is not a final authority; his decisions may be and often are revised by the Secretary of State, and, if a Government prefers such a reference to immediate resignation, the Governor cannot well object. A Ministry may often not think it worth while either resigning or appealing to the Secretary of State. Thus, when in August 1920 the Chief Justice of Queensland, who was acting as Governor through the ill health of Mr. Lennon, an ex-Minister of the Labour party who, rather absurdly, had been appointed Lieutenant-Governor, though a notorious partisan, declined to appoint that gentleman to the Legislative Council, the Ministry simply waited until Mr. Lennon recovered his strength, when he reassumed the administration and gravely assented to his own addition to that

[1] Keith, *War Government of the Dominions*, pp. 241 ff.

already doomed body. Ministries again occasionally agree to the elimination of Ministers who have made themselves impossible, on the advice of the Governor, who can always point out that he would have great difficulty in meeting at the Executive Council a Minister, for instanee, who was guilty of aspersions on the Crown or incitements to illegal action.

There is no doubt, however, that apart from the exercise of legitimate personal influence which is always approved, there has been a distinct tendency in successive Secretaries of State to encourage Governors to assimilate their procedure to the rules in force in the United Kingdom and to act on ministerial advice, if Ministers persist in offering it after remonstrance in lieu of bringing about resignations or enforcing dismissals. The motive of the Secretary of State is simple ; as long as ministerial advice is acted upon, then Ministers can be blamed for anything irregular, and by the invariable practice of the Imperial Parliament no question of their conduct can be made the subject of animadversion of the Imperial Parliament. No Secretary of State desires to be troubled by disputes, and it may safely be said that for thirty years at least the advice given to Governors has always tended directly or indirectly to the side of acceptance of ministerial advice if persisted in after full discussion. We have already seen Lord Dufferin asked to accept ministerial advice in 1879 regarding the dismissal of Mr. Luc Letellier, just as in 1873 he had been counselled not to dismiss Sir J. Macdonald. An instance of great importance was the decision of the Secretary of State in 1892 [1] to advise Lord Glasgow to give way to his Ministers regarding the addition of a number of members to the Upper House of New Zealand in order to aid the newly appointed Ministry of Mr. Ballance. But it is unquestionable of late that the tendency of the Colonial Secretary to advise, and of Governors to adopt the principle of, non-intervention with more than advice has become more and more marked.

Thus in 1911, when Sir Wilfrid Laurier's administration was defeated on appeal to the people by reason of the fear that the reciprocity proposed with the United States would bring Canada too closely into the orbit of that country, as suggested by the President himself, Lord Grey treated the defeated Prime Minister

[1] *Parl. Pap.* H. C. 198, 1893–4.

with the most scrupulous courtesy, despite the precedent of peremptory handling exhibited by Lord Aberdeen in 1896. He justly thought that respect for the people of Canada dictated that he should accept advice until it was deemed fit by his Ministers to clear up arrears of business and resign their portfolios, leaving it to the new Government to commence a long course of cancelling many of their predecessor's appointments, both important, as those of the Waterways Commission, and unimportant. In the following year Lord Islington [1] in New Zealand was confronted by a chaotic scene as the result of the defeat of Sir J. Ward's bid for renewal of his mandate in the election of 1911. His acceptance of a baronetage turned the scales against him, and, with nearly an equality of members, four Labour representatives held the determining voice. The Opposition claimed that it was the duty of the Governor to see that the Parliament met at an early date, since the people were clearly not behind the Ministry, and their representatives should be allowed to express their will. But the Governor declined to do anything drastic; he allowed the Ministry to meet Parliament on 15 February, when they offered a rich feast of benefits. They were, however, sustained merely by the casting vote of the Speaker, and Sir J. Ward very properly recognized that to one who had gone with a substantial majority to the polls this was a conclusive ground for resignation. Mr. T. Mackenzie succeeded him, and from March to July Parliament stood adjourned with an administration without authority. More suggestions appeared in the Press in favour of the Governor bringing matters to a head, but he still declined to intervene, and on the re-assembling of the House in July the Ministry fell by eight votes, a result which was in considerable measure brought about by the delay of the Government in facing Parliament.[2] Very probably intervention by the Governor would merely have strengthened the Ministry, and resulted in that worst of all things, an indeterminate vote in the House.

Much more striking was the case of Australia,[3] where a completely new spirit was introduced into the exercise of the

[1] Keith, *Imperial Unity and the Dominions*, p. 117.

[2] Its leasehold policy dissatisfied the growing demand for freehold; Egerton, *Brit. Col. Policy in the Twentieth Century*, pp. 47 ff.

[3] Keith, *Imperial Unity and the Dominions*, pp. 106–12.

Governor-General's functions by Sir R. Munro-Ferguson, who went to Australia after long experience as a member of the Imperial Parliament, accustomed to the doctrine of the duty of the Crown to act on ministerial advice, lately vindicated so signally by the passing of the Parliament Act on the strength of the royal promise to create peers enough to overcome resistance in the House of Lords. The situation in the Commonwealth was complex. The Labour Government of Mr. Fisher had been victorious at the election of 1910, but in 1911 its referendum for the alteration of the Commonwealth Constitution to extend the powers of the Commonwealth had been rejected, and, though the Government remained unaffected in its actual power, it had suffered a diminution of prestige. At the general election of 1913, while Labour secured 11 out of 18 seats in the Upper House, it lost by one vote control of the Lower, there being 38 of the Opposition. Mr. Cook thus became Prime Minister in a hopelessly unenviable position, as in the House of Representatives he had to carry on by means of the Speaker's casting vote, while the Senate did what they liked with his proposals, Labour there having in all 29 votes to 7. It was determined, therefore, to attempt to secure the operation of the clause in the Constitution which provides that, if a Bill is passed twice at an interval of three months by the Lower House and twice rejected by the Senate, the Governor-General might dissolve Parliament, whereupon the Bill would fall to be submitted to a joint vote of the two Houses, becoming law if passed by an absolute majority of members. Accordingly, they succeeded in passing twice a Bill to prohibit preference being given to Unionists by Government Departments, on the score that this was an unjust discrimination between classes of citizens, and on the strength of this asked the Governor-General for a double dissolution, which he accorded. It is clear, as Mr. Hughes asserted in a denunciation of the Governor-General's action on 9 June, that the whole weight of Australian precedent was dead against his action; thrice Governors-General had refused dissolutions because they thought that in Australia the constitutional rule was that before granting a dissolution a Governor should exhaust every possibility of carrying on in Parliament. It is true that *prima facie* it might seem that no other Ministry could be formed, but there was clearly no certainty

of that; a single defection would have been enough to enable a Labour Government to carry on in view of its perfect discipline, and its overwhelming majority in the Senate would secure it full authority for its measures there. But at any rate the attempt to form an alternative Government would have been the normal course under Australian precedent. What, however, is still more clear, is that it was asking the Governor-General to take a very strong step to dissolve the Senate on the strength of the advice of a party which possessed but a single vote more than the Opposition in the Lower House. The electors to the Senate might well feel that they were being treated very summarily by being compelled once more to vote, especially since there was never the slightest probability in the mind of any reasoning person that the Government of Mr. Cook, after a period of futile struggles, would command a majority in the Senate. Indeed, if a dissolution had been given to a Labour Government after it had been given a fair chance to manage, it would doubtless have been able to win a decisive victory. The action, therefore, of the Governor-General was explicable on one theory only, that he had decided to act strictly on the British principle and to throw responsibility on his Ministers and not on himself. If this had been realized, the attacks made on his impartiality and capacity would have been avoided.

The Senate, which was very naturally and justifiably indignant at the attitude of the Government towards it, cleverly put the Governor-General in a very inconvenient position by suggesting that he should exercise his power under the Constitution and place before the electors the six Bills to alter the Constitution, which had been passed in 1913 by that House, and which had again been passed in 1914, in order to comply with the provision of s. 129 of the Constitution which authorizes the Governor-General in the event of constitutional amendments being passed by either House and rejected by the other, to submit them to a referendum. There was no doubt that if the Constitution were to be given any reasonable meaning, the matter must have been intended to be one to be dealt with by the Governor-General at his discretion. To suppose that he was to exercise the power on ministerial advice would reduce the section to a farce, for it is not conceivable that the Ministry would consent to submit to a referendum Bills which they had

prevented passing in the Lower House, and thus the Senate would have been given purely nominal equality with the Lower House. The framers of the Constitution treated the Upper House as representing States, the Lower as representing the people, and they meant to allow amendments to come from either and to be dealt with by the people at a referendum. But Ministers advised the Governor-General not to submit the Bills, and he accordingly refused to take this step. Here again his action is explicable only on the theory of conformity to British usage, a fact which was overlooked in Australia. Curiously enough, it is probable that in their advice Ministers were very badly guided. It certainly seemed obvious to many outside ministerial ranks that the referenda were more likely, if submitted along with the voting for candidates for Parliament, to induce voters to support the Government than the reverse, and that this was a correct reading of the position was indicated by the complete *débacle* of the governmental party at the election. That the Government completely misunderstood the position is also indicated by the fact that it somewhat imperiously declined the proposal of the Opposition, when war broke out, that the Parliament should be revived despite the Dissolution Proclamation by means of an Imperial Act, with a view to avoiding the turmoil of an election in war-time. At any rate, the war made no difference to the Labour success. It laid stress on its action in securing compulsory service for local purposes which had rendered available the material for the Expeditionary Force, and it secured 42 seats in the Lower House and 31 in the Upper, leaving the Liberals to regret that they had rejected the offer that, failing a recall of Parliament, the sitting members should be re-elected unopposed.

Mr. Fisher, who became Prime Minister, yielded place on 27 October 1915 to Mr. Hughes, himself going to London in lieu of Sir George Reid as High Commissioner. His anxiety for a more effective carrying on of Australian participation in the war, heightened by his visit to England in 1915, led him on his return to propose a referendum on conscription, which cost him the retirement of Mr. Tudor, Minister of Trade and Customs, on 14 September.[1] The referendum was a fiasco, and on 14 November the Parliamentary Labour caucus, which

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

distrusted Mr. Hughes, passed by a majority a vote of no confidence in him. He then retired from the meeting with a following of 23, and placed his resignation in the Governor-General's hands, thus dissolving his former Ministry.[1] The Governor-General then on his advice entrusted him with the formation of a new Ministry, which he selected himself—the former had been elected by the Labour caucus as usual, and which was essentially composed of moderate Labour. The action of the Governor-General in this again was entirely based on the British model; otherwise he could have sent for Mr. Tudor, and asked if he could form a Ministry. In the same spirit he consented to a further resignation and reconstruction, this time on a coalition basis on 17 February 1917, and remained quiescent, although the effort of Mr. Hughes to secure the passage through the Senate of an Act to prolong the life of the Commonwealth Parliament for a year, in order to permit of his taking part in the first Imperial War Cabinet meeting, involved a very discreditable transaction in order to win over a vote, of which bitter denunciations were made by the Labour Press. The attempt miscarried, and a dissolution was inevitable. But a serious error in policy was made; Mr. Holman, Premier of New South Wales, was co-operating, and had secured an extension of his Parliament for a year through the intervention of the Colonial Office, which instructed the Governor to accept advice to assent, thus compulsorily assimilating his action to that of the Crown, though with very dubious propriety, seeing that the Ministry was thus enabled to escape the due verdict of the people for the time. He realized, however, that he must dissolve in 1917, as public opinion in Australia would not have tolerated the spectacle of a further extension of its own life by a State Parliament against the desires of the Labour Party, whose vehement opposition to the war was distinctly intensified by the unfortunate episode of Colonial Office intervention to overrule the Governor. But victory was dubious unless he dissociated himself from conscription, and he gave a formal pledge that, if a referendum were introduced, his Government would work against conscription. The Commonwealth Government, in a similar spirit of cowardice, agreed that

[1] General Botha in 1912 similarly rid himself of General Hertzog on his refusal to resign.

they would not introduce a measure for conscription, but, if the war went against the Allies, would consult Australia by means of a referendum. This policy met the deserved defeat in the referendum of 20 December, the attitude of the Cabinet, against which Sir William Irvine, to his credit, vainly protested, being sufficient to render their verbal support of conscription suspect. Now a formal pledge had been given on 12 November by Mr. Hughes at Bendigo that, if the Government were not given power to compel men, it would not continue in office, and this pledge incidentally had done much to induce voters who disliked the Government to defeat the referendum. But the love of office blinded the Ministry to considerations of honour; it consoled itself with the sophism that it really had had no right to pledge its action, which it had done without consulting the party as a whole, and that to desert office would mean handing over Australia to a party which was not fit to govern. On 3 January 1918, therefore, the party expressed confidence in Mr. Hughes, and all the efforts of Sir William Irvine and others on the following day were unable to persuade them that the only honourable courses open were either resignation, leaving to the Labour Party the responsibility of facing the situation, or a dissolution with a frank appeal for a mandate. Self-interest prevailed, and on 8 January a farce was begun. Mr. Hughes resigned office, thus keeping in name his undertaking, but after consulting the leader of the Opposition, Mr. Cook, Sir J. Forrest, Mr. Watt, and three other gentlemen, the Governor-General announced on 11 January his decision to entrust to Mr. Hughes the formation of another Ministry. He based his action on the Parliamentary situation, which, he held, must govern his position; there was no doubt the Nationalist Party would hold together, that it must be led by Mr. Hughes, and thus Mr. Hughes was deserving of a fresh lease of power. His action was doubtless taken on the advice of Mr. Hughes, and he cannot be regarded as in any way a consenting party to the breach of faith on that politician's part, which unhappily has had a distinctly depressing effect on the Australian standard of political morality, already sufficiently low.

The same attitude of disinclination to intervene was shown by the new Governor-General in 1923, when events had turned against Mr. Hughes, who on his return from the Peace Confer-

ence had been able in 1919 to win a very real victory for his party, 38 Nationalist confronting 23 Labour with 14 of the new Country party. In 1922, however, the Nationalists were reduced to 29, the Country party remained intact, and Labour increased to 29. The Country party moreover denounced Mr. Hughes, whom it disliked because of his vituperation of it during his recent period of power, his autocracy, extravagance, and predilection for State Socialism of the fig-leaf-disguised variety, and whom it declared to have been rejected by the people because five of his Ministers went down in the election. Nothing was done by the Governor-General to put pressure on his Prime Minister, and not until 1 February 1923 did Mr. Hughes bow to the inevitable and resign office, advising the Governor-General to entrust to Mr. Bruce the formation of a Ministry, which was secured by a coalition with Mr. Page, in which his party was conceded representation far beyond its numerical strength.

After the example set by Sir R. Munro-Ferguson it becomes easier to understand the proceedings in Queensland over the abolition of the Legislative Council.[1] In 1908 it had been agreed that differences between the two Houses of Parliament should be decided by referendum, and the danger of swamping seemed gone for ever. But in 1919 Mr. Theodore, who had succeeded Mr. Ryan as Premier on the departure of the latter for the sphere of federal politics, induced the Governor to secure the appointment of an ex-Labour Minister, and for a brief period Speaker of the Assembly, as Lieutenant-Governor, despite the fact that the post was normally filled by the Chief Justice or the President of the Legislative Council,[2] both people not likely to be mere partisans. The action of the Secretary of State in accepting this strange proposal can be explained only by the theory that ministerial advice ought to be acted on, though it is difficult to see how it could be thought justifiable to appoint a strong partisan as the representative of His Majesty. The effect of this appointment was revealed in February 1920, when Mr. Lennon was acting as Governor; a Lands Act Amendment Bill, which the Council had previously rejected on the ground that it was confiscatory in effect, was re-introduced; on 10 Feb-

[1] Keith, *War Government of the Dominions*, pp. 252–4.

[2] See Bernays, *Queensland Politics*, p. 25.

ruary the debate was adjourned, the Minister in charge being defeated, and, on the following day, declaring he did not propose to take another division. But on 19 February the motion for the second reading was revived, 14 new members having been added by Mr. Lennon on the advice of Mr. Theodore in order to swamp the Council, with the result that the Bill was passed and assented to on 9 March by Mr. Lennon. Much indignation was created by this action of Mr. Lennon, and there can be no doubt that it was unconstitutional.[1] The mode of settling disputes between the two Houses had been laid down in 1908 by Act No. 16, and in 1917 the Government of Mr. Ryan had submitted to the electorate by means of the referendum procedure thus provided the issue whether they would desire the Council abolished. A majority of 63,000 denied its desire to see the abolition, which meant, of course, that they desired to see it maintained as an effective body. The interests affected by the Act, unable to obtain Imperial intervention, were able to block the loan which Mr. Theodore sought then to raise in London, investors realizing that one confiscation might be followed by another, and after a prolonged period forced from him valuable concessions to those who were unfairly treated in the Act of 1920. But the fate of the Council was sealed and its demise in 1922 was inevitable.

A similar fate obviously seemed to await the Legislative Council of New South Wales,[2] through its nominee character and the adoption by the Colonial Office of the doctrine of ministerial responsibility as covering every act of the Governor. In the election of 1925 the mismanagement of the Ministry resulted in giving New South Wales a Ministry with a majority of four (46 to 42). Shortly after coming into power it suggested to the Governor the appointment of members for the purpose of swamping the Council and inducing it to accept its own destruction. But the project was for the moment dropped. The Ministry, however, under pressure from its supporters, soon renewed the attack and demanded the addition of 25 members to the Upper House, to which the Governor naturally demurred, contending that this number was decidedly excessive, and he

[1] My view to this effect was adopted by petitioners against the abolition of the Council; *Parl. Pap.*, Cmd. 1629, p. 25.

[2] Keith, *J. C. L.* viii. 129 f.

offered 15. He found no aid, it may be said, from the Secretary of State, who merely told him that it was a matter to be settled with his Ministers. Ultimately he gave way and appointed 25, on being assured that this addition would still leave the House with possibility for good service, and that the Attorney-General held his action constitutional. It was asserted also that there was not at the time any idea of the destruction of the House. If this were the case, which seems implausible, opinions promptly changed when the numbers were added, for February 1926 saw a heated strife to secure the abolition of the House, the bribe offered being railway passes for life with an intimation that, if the Councillors would not extinguish themselves, they might later find themselves abolished without any amenities being provided in compensation. Nevertheless the bribe failed, there were defections, and the Council for the moment survived, the Governor declining to add any more members at once.

These cases of the overthrow, actual or in effect, of second Chambers are the more remarkable because it was possible to argue that important constitutional changes ought not to be possible by the mere device of a Ministry with a small majority advising a Governor to swamp a Legislative House. When it is considered how grave were the grounds on which the Crown in 1910–11 consented to action against the Lords, it is curious how slight has been the basis of action especially in the case of New South Wales, where the election of 1925 was not contested in any sense on the issue of the Council, and where the Council has certainly not been a very formidable obstacle to reform.

The new spirit was seen rather markedly in the Canadian proceedings on the result of the general election of 1925.[1] The outcome of the polling was to give the Conservatives the largest number of seats of any party, 117, while the Liberals had but 100, leaving the Progressives to dominate the situation. Moreover Mr. Mackenzie King and eight of his Ministers suffered defeat, creating thus a very unusual position. Quaint doctrines were adduced by the Opposition; in sheer oblivion of the utterly non-parliamentary origin of Executive Government, the view was propounded that by ceasing to be a member of Parliament Mr. King had ceased to be able to be a Prime Minister, and that his Ministry was therefore dissolved. Much

[1] Keith, *J. C. L.* viii. 128 f.; *Canadian Annual Review*, 1925–6, pp. 46 ff.

less excusably Mr. Meighen declared very energetically that it was improper for the Prime Minister to remain in office, and that he owed the country an immediate resignation, which it was evidently hoped the Governor-General would insist upon, as in the case of Sir C. Tupper. Mr. King with much good sense issued a manifesto on 3 November in which he explained his reason for staying in office. He pointed out that there was no doctrine which required resignation in favour of Mr. Meighen, when the latter had not command of a majority of votes in the House of Commons; that the proper place to decide whether the Government commanded the support of the people was the House of Commons, which would therefore be summoned to meet as early as was legally possible; and that pending this event it was not his intention to take any steps by creating vacancies to secure election to Parliament for himself or any of his Ministers who had been defeated, while equally he would not suggest to the Governor-General the holding of new elections. This attitude was, clearly, perfectly sound. It was obviously necessary that the Government should continue to be carried on, and the introduction of new Ministers would have meant endless confusion and delay with loss of efficiency from inexperience. That, of course, would have been justifiable if there had been any likelihood that the Progressive party would coalesce with the Conservatives and give the Ministry a chance of life; as this was implausible, to let a new Ministry take office only to be defeated on meeting Parliament, would have been absurd and objectionable. In the result, when the House of Commons met in January 1926, despite the grave handicap of the absence of the Prime Minister and his ablest colleagues from the House, and the effect of reckless offers by the Conservatives to the Progressives for support at the expense of fundamental principles such as higher protection, the Ministry was upheld. It is noteworthy that the Prime Minister declined during the period prior to the meeting of the House of Commons to exercise other than routine powers; thereafter he claimed full freedom of action, and secured his own return [1]

[1] On 17 Nov. he emphatically denied any intention of being a candidate for Bagot, Quebec, where the member-elect had died, on the ground that such action would defeat his desire to have Parliament meet as soon as possible to decide the issue.

to the House of Commons for a seat vacated in his favour by a supporter. This strict observance of constitutional action was the more praiseworthy in that it contrasted strangely with the step taken by Mr. Meighen himself when his Government was defeated at the general election of 1921. Then he took care before leaving office to have a seat vacated for himself —the general election having witnessed his own discomfiture— by the device of appointing the member-elect for Grenville to a nominal position in the Department of Soldiers' Civil Re-establishment at a salary of 50 dollars a month, thus vacating his seat, for which Mr. Meighen was elected in January 1922.[1] Moreover, as time was to show, Mr. Meighen was himself, when for a brief period in nominal power, though censured by the House of Commons, to spend enormous sums of money without legal sanction, and unnecessarily to make a considerable number of appointments and to award contracts, which Mr. Mackenzie King, on the emphatic verdict of the people at the general election of 1926, had no alternative but to disapprove in the interests of the people of the Dominion.[2]

§ 7. *Lord Byng and the Colonial Status of Canada*

In June 1926 an episode occurred in Canada which ran entirely counter to the whole trend of constitutional usage, and showed that in the opinion of Lord Byng as Governor-General, Canada was in constitutional usage as in law no more than a Colony, subject to the rules applicable to Newfoundland or an Australian State.[3] Mr. Mackenzie King's Government had learned of serious malpractices in the management of the Customs Department, and Mr. Boivin, the new occupant of the Ministry, was eager to probe the matter. A Select Committee

[1] *Canadian Annual Review*, 1921, p. 524.

[2] Mr. Meighen's retirement from the Leadership of the Conservatives on his defeat in 1926 was a just recognition of his failure to interpret the true spirit of Canadian Conservatism, its affection for the British connexion and its respect for constitutional law.

[3] See Keith, *Manchester Guardian*, 8 July 1926 (reprinted in Canada on 10 July), accepted by Mackenzie King, Ottawa, 23 July 1926; *J.C.L.* viii. 275 ff.; ix. 126 f. *The Times* in its account of the struggle systematically and stupidly misrepresented the issues, treating Mr. King as anti-Imperial and ignoring Mr. Meighen's anti-British tariff and defence principles. This policy is deplorably mischievous.

was accordingly appointed on the proposal of the Government to investigate the issues, and it prepared a report which took exception to some actions of the late Minister, but in no wise attacked the Government, which was willing to accept the report and to proceed in its determination to terminate scandals which had been long inherent in the Department and which had existed in equal virulence under the Governments of Sir R. Borden and Mr. Meighen. They were, however, met with an amendment to the proposal to accept the report, moved by a member of the Opposition,[1] which attacked directly the Ministry, and the position of the Government became endangered, because, in its determination to secure the continuation of the *status quo* in Alberta as regards educational matters, in the interest of the Roman Catholic minority, it had offended a section of opinion in Alberta. On 25–26 June the House of Commons rejected by 117 to 115 votes a non-partisan sub-amendment by a Labour member, overruled by 118 to 116 votes the decision of the Speaker, hostile to another attempt—this time by an unfriendly Progressive member—to bring forward a similar sub-amendment to be coupled with the Opposition amendment, and declined to adjourn by 115 votes to 114, though after a late sitting adjournment was carried for the Government by the same vote. Mr. King then very properly advised Lord Byng to grant a dissolution of Parliament, on the score that it was clear that the Government, to carry on effectively its duties, ought to be supported by a vote of the electorate. He very justly insisted that the status of Canada was co-equal in these matters with that of the United Kingdom; that the duty of the Governor-General was to act on the same principles as would have applied to the King; and that it was not within his province to argue, as in effect Lord Byng did, that Mr. King 'had had a chance to govern and that Mr. Meighen had not been given a chance of trying to govern or saying that he could not do so, and that all reasonable expedients should be tried before resorting to another election'. There is no answer to Mr. King's arguments; the precedent of the King's immediate grant [2] to Mr. Ramsay MacDonald of

[1] *Canadian Annual Review*, 1925–6, pp. 64 ff.

[2] Foreseen in my *Constitution, Administration, and Laws of the Empire*, pp. xiii ff.; *J. C. L.* vii. 101.

a dissolution in 1924, without even considering whether the Government could be carried on without a dissolution, ought to have been conclusive, for it put an end at once to whatever value might have attached to the dictum of Lord Oxford and Asquith that the King still preserved an independent judgement in matters of dissolution, a dictum denounced at the time by all sound constitutional opinion and evidencing the spokesman's obvious and regrettable decline in mental power and sense of political realities. Lord Byng, however, refused to yield and Mr. King then on 28 June resigned office, tendering no advice as to a successor. Mr. Meighen was then asked to form a Government and at once undertook to do so. It must have been clear from the first that he could not carry on without a dissolution, and must exact a promise of one. That fact condemns utterly Lord Byng's action, for, by accepting as a Prime Minister one who equally must have a dissolution, he converted himself into an out-and-out partisan of the Conservative party, and degraded the office of representative of the Crown by perverting it for party purposes. Worse, however, was to follow. The Prime Minister, who by accepting office on 29 June assumed responsibility for all that had transpired and was to follow, was unwilling to carry out his obvious duty and to face Parliament. He himself, by accepting office, vacated his seat, and, if he selected colleagues and had them appointed in the ordinary way, they also must have vacated their seats. A wholly discreditable piece of tactics followed. The Prime Minister and a knot of seven Privy Councillors constituted themselves the advisers of the Governor-General, though one only held office, and on the advice of these men the Governor-General appointed the seven to act as Ministers, so that they could perform the duties of their offices without incurring the obligation of vacating their seats. Lord Byng's error of judgement had thus led him into the necessity of concurring in the most deplorable piece of jugglery [1] yet recorded as regards a Dominion Constitution. This farcical Ministry faced the Commons on 30 June, hoping by large promises to dupe

[1] Governor Head's action in 1858 towards the Macdonald Government is the nearest parallel for neglect of the rules of constitutional law. Sir R. Borden on 17 Aug. 1925 had expressed the true doctrine (3 *Can. Bar Review*, 517).

a section of the Progressives—the most unintelligent [1] party yet produced by Canada—into supporting them. But a sense of their folly had returned to the Progressive ranks, and the proceedings of the new Government offended the most elementary sense of political honour. On 1–2 July (2 a.m.) the House of Commons by 96 to 95 votes passed a resolution in the following terms :

That the actions in this House of the Hon. Members who have acted as Ministers of the Crown since 29 June 1926 . . . are a violation and an infringement of the privileges of this House for the following reasons :

1. That the said hon. gentlemen have no right to sit in this House, and should have vacated their seats therein, if they legally hold office as administrators of the various Departments assigned to them by Order in Council.

2. That if they do not hold such offices legally they have no right to control the business of Government in this House and to ask for supply for the Departments of which they state they are acting Ministers.

The just censure of the House was followed by a further departure from constitutional usage by Mr. Meighen. Not daring to face the House of Commons, the Ministry obtained an immediate dissolution from the Governor-General, which was at 1 p.m. intimated to members by messengers as they prepared to re-assemble on 2 July. Had a dissolution been granted to Mr. King, the Governor-General would have been advised to prorogue as usual the Parliament, after assenting to such Bills as were in a state to receive assent, and a dissolution proclamation would then have been issued in due course. But by the informal procedure adopted, contrary to all British and Canadian usage, the Bills already passed by the Houses, including the divorce Bills of private persons, were wasted. Suggestions of illegality both as to the constitution and action of the Government and the mode of dissolution were made by the Liberals in the electoral campaign. But in strict law these cannot be sustained. It is open to a Governor-General to select any Privy Council which he pleases, whatever its position,

[1] New Brunswick in 1925 returned not a single member of the United Farmers as against seven at the previous election ; Ontario had already rid herself of its ineffectual and corrupt Farmers' Government.

and to exercise on the advice of this body all his great powers. But constitutionally his action was wholly irregular, and Mr. Meighen's advice on this head is open to the severest criticism. Similarly the intimation of dissolution was adequate in law, but it was a deplorable act of discourtesy to the House of Commons, and one of which it is quite inconceivable that the King would be guilty as regards the Imperial House of Commons. The case against Mr. Meighen was admirably put by Mr. King in an exhaustive indictment at Ottawa on 23 July 1926:

> We are the custodians of the honour of the British Crown and of the sanctity of the British Constitution, not for Canada alone, but for Australia, for New Zealand, for Africa, for Newfoundland, for the Irish Free State, for India, yes, and for the British Isles themselves. The violation of its usages, its practices, its law, in one part of the Empire, cannot fail to have far-reaching reactions in every other part. Free representative institutions cannot be threatened in Canada without their being everywhere threatened. If Mr. Meighen's unconstitutional course is permitted to go unchallenged by the people of this country, then may we question on behalf of all self-governing British communities whether the British Constitution may not become a phantom to delude to destruction, instead of being, as we believe it is, the day-star of our dearest liberties.

A dissolution granted, Mr. Meighen proceeded to regularize his Ministers, who had no longer to face the necessity of immediate re-election, and an electoral contest of great severity was begun by the new Administration ejecting from office the incumbents of the posts of Returning Officer in the hope thus of winning seats. An arrangement was made with Quebec under which [1] Mr. Meighen recanted his former loyalty to the Conservative doctrine of standing firmly beside the United Kingdom in critical issues affecting the life of the Empire. Mr. E. L. Patenaude was induced to accept his leadership and to seek to carry Quebec for Conservatism on the strength of Mr. Meighen's pledging himself that not a Canadian soldier would leave Canada in any future war until after a general election fought on that issue, thus paralysing Canadian power to interfere in even the gravest emergency. Further disregard of the British

[1] See his speeches at Hamilton, 16 Nov. 1925, re-affirmed at Montreal, 4 June 1926, *Canadian Annual Review*, 1925–6, p. 49.

connexion was shown by Mr. Meighen's avowed intention to follow the course already laid down by General Hertzog in the case of the Union of South Africa, of placing the British preference on a strictly business footing of reciprocity, thus ignoring the fact that the preference as given in 1897 was Canada's most effective mode of recognizing the boon of the protection of the British fleet and of British diplomacy. A threat of tariff war with the United States was added. It is small wonder that the wiser heads among the Conservatives saw with dismay this repudiation of traditional policy, undertaken without the general assent of the party, and Conservatives who were loyal to the ideal of the British connexion refused to vote for supporters of a policy which induced Mr. Rowell to mount a Liberal platform for the first time since his participation as President of the Council in Sir R. Borden's administration, and to denounce a foreign policy which would plunge Canada at a time of crisis into a bitter election fought on racial grounds, and paralyse her capacity of assisting the rest of the Empire.

The result of the election was decisive of Canadian disapproval of Lord Byng's intervention and of Mr. Meighen's acceptance or approval of it. Whereas, had Mr. King been allowed to appeal to the people, he would have done so under the handicap of the Customs disclosures, the Conservatives fought under the triple disadvantage of the abuse of the royal prerogative for party ends; the surrender of party independence for mere expediency in the effort to seduce Quebec from her principles; and the menace of injury to British trade. The Customs charges, unwisely pressed for party reasons, and not as they should have been in a deep sense of the moral corruption which admittedly pervades a large section of Canadian political life, despite the personal integrity of the Heads of the Government since Sir John Macdonald, recoiled on the heads of the attackers. The solid Conservative Opposition of 117 members was reduced to 91, the Liberals increased to 119, with 11 Liberal Progressives pledged to support the Liberals, 8 Progressives whose support was little less assured, 5 Labour and Independent, the former generally sympathetic, and Mr. Bourassa as an Independent but a valiant supporter on the constitutional issue. The Conservatives held only the four seats already theirs in Quebec; the return of 60 Liberals mocked the vain effort to

bribe the Province to renounce its principles. The United Farmers of Alberta returned a solid group of 11; in Saskatchewan and Manitoba the Progressives recognized that the day for a distinct party was over, and Canada gladly [1] saw the return to a normal two-party régime.

The sequel to the decision of Canada was not long delayed. The Imperial Conference of 1926 [2] could not hesitate to enunciate the doctrine that the true position of the Governor-General or Governor of a Dominion (not of the Governor of a State) [3] was similar in all essentials to that of the King in the United Kingdom in respect of the administration of public affairs, thus accepting the view pressed for many years by the writer. The resolution, it will be seen, does not decide the question of appointment, nor was there any reason to do so. It has long ceased, as has been seen, to be possible for the Imperial Government to present any Dominion with a Governor-General to whom it is opposed, and the tendency must be for the initiative in appointment to pass more and more into the hands of the local Government, which need not, of course, restrict its choice to local men, but may easily prefer to invite a distinguished outsider to fill the office. As will, however, be seen,[4] the proposal to deprive the Governor-General of any function as representing the Imperial Government is likely to render the office unattractive to any person of intelligence normally resident in the United Kingdom, and to restrict the choice to local residents to whom, especially in old age, the ceremonial and pomp of office may appeal. But, as Mr. Baldwin stated in the House of Commons on 25 November 1926, the Governor-General is still to retain the duty as to reserving Bills, and therefore, for the present, and in any case until legislation, Imperial and Dominion, cancels this obligation, he must remain a representative of the Imperial Government.

[1] See Mr. Bennett's declaration as a Conservative leader, *The Times*, 12 Nov. 1926.

[2] See Part VIII chap. iii, § 8.

[3] The problem raised in Australia on this point is otiose. The Conference could not deal with State issues. The same remark applies to Malta and Southern Rhodesia. Northern Ireland again follows the British model.

[4] See Part II, chap. vi, § 3.

IV

THE GOVERNOR AS HEAD OF THE DOMINION GOVERNMENT

1. *The Dissolution of the Lower House*

AS Mr. Blake rightly insisted in his comments on the Canadian instruments, a Governor can normally only act through Ministers; he has no staff at his disposal to carry out instructions, and the Civil Service could not be expected to accept, save possibly in an obvious emergency, directions from him, in view of the possibility of their loss of office as a result. Occasionally he can act because there is little to be done. Thus in New Zealand in October 1864 [1] Sir George Grey offered rebels a pardon if they submitted on his own authority, the Ministry resigning as a result. But the war against the Maoris was being carried on with the aid of Imperial Forces, and their presence gave him a very different position from that of a Governor without such moral aid. Sir W. Denison's action in sealing a Land Grant himself has been referred to,[2] but it was simple for him, as legal custodian of the Seal, thus to act, and he was obeying what he held to be Imperial instructions. Similarly, on the same authority, Sir William Macgregor in Newfoundland made arrangements for the publication in the Government Gazette of the Imperial Order in Council of September 1907 overriding Newfoundland legislation regarding the fisheries, in order to give effect to the *modus vivendi* arranged with the United States pending reference to arbitration of the matter at issue. But normally the Governor has merely the power of resistance; he can refuse to accept advice, and the Ministry must then either withdraw the advice—appealing if necessary to the Secretary of State to overrule the Governor—or resign.

But, if Ministers insist on resignation, then the Governor must be prepared in any case in which he is not acting on Imperial instructions, to find other Ministers who will accept the responsibility for his action in driving the outgoing Ministers

[1] *Parl. Pap.*, 2 Mar. 1865, p. 4.

[2] *Leg. Ass. Votes*, 1861, i. 58, 416, 647–743; Rusden, *Australia*, iii. 498, n. 2.

to resignation. As Sir J. Harvey in Nova Scotia was told in 1846,[1] it is impossible to carry on a Government against the will of the people, and, knowing this, it is the duty of a Governor to consider carefully, before refusing any advice of his Ministers, whether they are really in their action not in harmony with the wishes of the people of the territory. Conviction that this is the case is the one justification for refusing advice; it is not part of the duty of a Governor to seek by manipulation to secure office for an Opposition, however much he may share its views, however much he may hold that its advent to power would be in the real interest of the country or the Empire. His surmises may be wrong, his Ministers are *prima facie* the spokesmen of the people, and it requires a very steady and reasoned conviction that they are not, to justify the use by the Governor of the power he has to refuse advice.[2]

The normal case of refusal to accept ministerial advice is when a Ministry defeated in the Lower Houses, or no longer sure of a majority, asks for a dissolution in order to strengthen itself by an appeal to the electorate. The practice in the United Kingdom in this regard is perfectly clear. The Crown expects not lightly to be asked for a dissolution, but it will grant a dissolution when advised by Ministers without seeking to find an alternative Ministry. Much confusion has prevailed on this point by inaccurate assertions as to the royal power, but these assertions will not bear examination. The case of the alleged dismissal by the Crown of the Melbourne Ministry in 1834 ought now to be regarded as an exploded myth;[3] it is perfectly true that in 1784 George III had dismissed a Ministry and that William IV was anxious to be rid of his. But what actually happened was that, on the removal of Lord Althrop from the House of Commons, Melbourne, who was not anxious to stick to office, on 12 November suggested resignation, and that the King very eagerly accepted it. Queen Victoria, also, in her youth, spoke of the right to dissolve as a discretionary power, involving an appeal by the Crown to the country on behalf of Ministers,

[1] *Parl. Pap.*, H. C. 621, 1848, pp. 7, 8; *Hansard*, ciii. 1262–89.

[2] The Governor is not an umpire between parties, as Lord Byng erroneously held in June 1926.

[3] *Melbourne Papers*, pp. 220–6; Maxwell, *A Century of Empire*, ii. 37–9; Anson, *Law of the Constitution*, II, i, p. xxxi, 38, 39.

and, therefore, one not to be used unless with certainty of success.[1] But she never put these views into operation, and, when Lord Derby in 1858 asked her for an assurance that he would receive a dissolution if he asked for it, she consulted Lord Aberdeen. That statesman in advising her spoke of a dismissal of Ministers as out of the question and unprecedented, and he said that the Queen would undoubtedly give Lord Derby his dissolution if he advised it, even if it were not necessary for her to pledge herself in advance. The Queen, however, let it be understood that the dissolution would be forthcoming, and Lord Derby as a result survived the attack of a vote of censure, unquestionably in large measure because it was known that he would be able to dissolve if he were defeated. If any doubt could longer exist in the matter, it would be removed by the events of King George V's reign. In 1832, when Lord Grey resigned on discovering that the Reform Bill would be amended in Committee in the Lords, the King sought for new Ministers, and commissioned Lord Lyndhurst and the Duke of Wellington to form a Government.[2] The attempt failed because of the refusal of Peel to consent to Reform, and then and then only did the King give reluctant consent to the creation of peers if necessary to force through the Bill. In 1910–11 the King, however anxious to avoid swamping the Lords, never looked for an alternative Ministry, so essential was it deemed to keep the Crown out of controversy.[3] None the less it seems to have been imagined by Mr. Asquith that in the event of the Labour Government in 1924 asking for a dissolution the King might refuse it and send for the Liberal leader. This course, as was pointed out by the writer at the time, would have been wholly unconstitutional,[4] bringing the King into party politics and alienating as many of his subjects as it gratified. Happily the matter was never in doubt; the King, acting with the same constitutional propriety as he had displayed towards the Liberals in 1910–11, accorded a dissolution in 1924 to Mr. Ramsay MacDonald without a moment's hesitation, to the great

[1] *Letters of Queen Victoria*, iii. 289–91.

[2] Maxwell, i. 335 ff.; Anson, op. cit., i.[4] 355 f.

[3] Asquith, *House of Commons Debates*, xxix. 811 ff.; Lord Crewe, *House of Lords Debates*, ix. 836 ff.

[4] Keith, *The Constitution, Administration, and Laws of the Empire*, pp. xiii ff.

benefit of the country. There is indeed an obvious absurdity in royal reluctance to consult the people in a democracy. It is not, of course, contended that the right to receive a dissolution can be placed as absolute; it is obvious that a Ministry, which has obtained a dissolution, is not entitled, if it is barely sustained in office, to ask for one again at an early date, and if a Ministry neglects its duty, it may be the obligation as well as the right of the Crown to decline to accept advice. So, also, it might be necessary for the Crown to dismiss a Ministry which defied the will of Parliament and would not advise a dissolution, but there is a world of difference between critical emergencies and normal practice.

In the Dominions, on the other hand, the discretion of the Governor is still constitutional and real, however much it may be deemed preferable that the British plan should persist, and however clearly events are moving in that direction. The ground for this is simple enough; in the United Kingdom the King has no superior and is subject to no control; loyalty to him is based on his freedom from the dislike which must attend every party leader, and is conditional on his recognized impartiality. The Governor is not permanent like the King; he is not independent; if he errs he can be recalled, and, if errors do create injury to the Imperial connexion—his mistakes being assigned without justification but inevitably to the Imperial Government—still, that can be undone by a successor with tact, and, as time passes, the bitterness of the old controversies between Ministers and Governors is gradually being lessened, as Ministries cease to be dominated by the suspicion, born of the early days of responsible government, that their freedom is a tender plant apt to be blighted by the jealousy of the Governor, anxious to regain power of which he is really deprived by the new system of government.

The result of these considerations is that there is a vital distinction between the position of the King and the Governor, which is completely misunderstood when it is stated, as by Mr. Harcourt in a dispatch to the Governor of Tasmania of 5 June 1914, that 'a Governor must be clothed with ministerial responsibility for all acts in relation to public affairs to which he is party as head of the Executive'. This is true of the King; it is not and never has been true heretofore of a Governor, nor

was any answer attempted by Mr. Harcourt [1] to the criticism of his dispatch in *Imperial Unity and the Dominions*. In fact, the statement is palpably inconsistent with the remark made in the same dispatch that the Governor has a discretion to refuse a dissolution. For if it be contended, *per impossibile*, that the term 'act' is not meant to apply to a negative matter like a refusal of a dissolution, it must be added that, when Ministers resign and the Governor sends for others, this deed and their formal appointment are acts which can only be performed without ministerial responsibility, for there are no Ministers to be responsible. The rule is really quite different; it is, that save in very rare cases, such as the resignation of a Ministry without any suggestion as to a successor,[2] the King always acts on advice tendered to him by Ministers who accept responsibility for it; in the Dominions, on the other hand, the Governor must act on ministerial responsibility (save in these few cases where he acts on Imperial instructions), but this responsibility may be either assumed in advance by a Ministry in office whose advice he accepts, or assumed *ex post facto* by a Ministry which has taken office after he has forced one to resign. The latter kind of action no longer is constitutional in the United Kingdom, and could be resorted to only in a grave emergency involving national stability, and, it must be added, it could only be resorted to at grave risk to the stability of monarchical institutions.

These misconceptions removed, it is possible to appreciate clearly the constitutional position of the Governor in regard to dissolution. It differs, in practice, essentially from most other cases in which the Governor and his Ministers may not see eye to eye. It implies that the Government is in difficulties, and that its Parliamentary position is not secure, for, of course, difficulty arises practically only in connexion with premature dissolutions, not those which take place by routine at the close of the period for which Parliament may endure. It means that there may be an alternative Government which could carry on for the rest of the period of the life of the Parliament, either because it has already secured a superiority in number, or

[1] Keith, *Imperial Unity and the Dominions*, pp. 100 ff. Cf. above, pp. 128 f.

[2] Queen Victoria doubtless held the view that she did not wish advice (e.g. on Gladstone's resignation), but that view is doubtless obsolete.

because, if given the opportunity to form a Ministry, it will succeed in detaching enough supporters of the Government to have a working majority. Moreover the country, as a rule, expects the Governor to exercise his discretion; he can perhaps shield himself behind assimilation to the British practice, but that is very imperfectly understood in the Dominions, and at any rate long usage in some territories is clearly in favour of the view that the Governor has not merely a right to exercise his discretion, but that he is worthy of censure, if he does not do so.

In exercising this discretion a Governor may legitimately consider many different points of view. If he refuses a dissolution, the short duration of Dominion Parliaments will ensure that the people at no very distant date will pass judgement on the refusal. Further, the loss of time, expense, and dislocation of a general election, which are relatively as serious in a new country as in the United Kingdom, have to be weighed, in view of the comparatively brief duration in any case of Parliament. Again, there must be taken into consideration the strong conviction of the average Member of Parliament that, once he is elected, he is entitled to continue to draw his salary for the full period of the normal duration of Parliament, in lieu of being put to the expense, anxiety, and risk, of an election. Then the question of supply is serious: it cannot be made a *sine qua non* for a dissolution that the Government must obtain supply before the polls, but still it is unfortunate that no funds should be legally available, and that there is the risk of trouble when it becomes necessary to ratify *ex post facto* the moneys spent. Moreover, it must be remembered that in such circumstances it is really improper to undertake any large scheme of expenditure, and that accordingly important public works, not controversial, may be delayed simply because of the dissolution. A vital element in every case, moreover, is the question of the length of time to go before a dissolution must come. If it is comparatively short, it may be a valid ground for hastening a dissolution; if, on the other hand, it is long, there is a better case for refusing one. But regard must be had to the chance of obtaining an effective Government, if a dissolution be refused; it may be better to allow the country a chance of making up its mind, or, *per contra*, this may be useless, in view of the division of opinion, and it may be wiser to allow the

formation of a new Ministry in the hope that things will gradually be cleared up.

Of the many early cases of refusal of dissolutions, the most notorious is the action of Governor-General Sir E. Head in August 1858, when Mr. Macdonald resigned in Canada.[1] He sent for Messrs. Brown and Dorion, and suggested the formation of a Ministry. Mr. Brown agreed to this, and, as he had no possibility of securing a majority in either House, asked for a dissolution. This, however, was refused on the broad ground that the new Government had no programme likely to solve the difficulties of the hopeless situation arising from the combination of the two Provinces into one, and that harvest time was unsuitable for a general election. The new Administration resigned on refusal, and the old Ministers were allowed back into office, evading by-elections by the curious device of a 'double shuffle', criticized adversely in Canada at the time. To comply with the terms of the Canadian Act 20 Vict. c. 22 they accepted new offices, whence they migrated without delay to their old offices, both actions, according to *McDonell* v. *Smith* and *Macdonell* v. *Macdonald*,[2] coming within the provisions of the Act which allowed of change of office without re-election, and the brief interregnum being held to be too slight to prevent the operation of the Act. In 1860[3] the Lieutenant-Governor of Nova Scotia, in refusing a dissolution to defeated Ministers, pointed out that he did not, as they claimed, stand in the position to them of the Crown to an Imperial Ministry; he was responsible to the Imperial Government, and could not excuse his action by saying, 'I did so by the advice of my Council'.

In 1871,[4] in South Australia, the Governor granted a dissolution to a Ministry defeated in the Assembly by the Speaker's casting vote, despite addresses against a dissolution by both Houses; it is clear that no stable Ministry could have been formed without the decision of the people. Next year in New

[1] *Leg. Ass. Journals*, 1858, pp. 973–6, 1001; Pope, *Sir John Macdonald*, i. 188, 337–41; Goldwin Smith, *Canada*, pp. 136 ff.

[2] 17 U. C. Q. B. 310; 8 U. C. C. P. 479; Act 20 Vict. c. 22. The Governor-General's action in allowing this dodge would doubtless not be repeated, though Lord Byng connived at certain irregularities in July 1926.

[3] *Ass. Journals*, 1860, App. pp. 11–46; 1861, App. No. 2.

[4] *Leg. Council Journals*, 1871, p. 65; *Assembly Journals*, 1871, pp. 235, 237.

Zealand,[1] Sir G. Bowen declined a dissolution to Mr. Stafford, holding that a dissolution would have no satisfactory outcome; he asked instead for a reconstruction of the Ministry, which took place in October under Mr. Waterhouse; he, however, quarrelled with Mr. Vogel and retired in March 1873, while his successor, Mr. Fox, held office for but a month; Mr. Vogel, however, then took charge and held office until 1876, when he became Agent-General. In 1873 Lord Canterbury refused a dissolution to the Duffy Ministry in Victoria,[2] which contended that he was bound to accept their advice as was the Crown in the United Kingdom. It was also pointed out that the Assembly had been elected under the aegis of their opponents, that they had not asked previously for a dissolution, that successful government without a new House was impossible, and that they had good hopes of victory in an appeal to the electors. The Governor, while not contesting the position of the Crown, pointed out that he had duties of a different kind, and refused a dissolution, managing to find a Ministry to carry on, much to the indignation of the ex-ministers who had grounds for feeling that they would have been upheld in the country. In 1875 the Acting Governor refused dissolutions successively to Mr. Kerferd and Mr. Berry, simply because there were no issues on which parties in the Colony could definitely divide.[3]

The question of the relation of supply to a dissolution was raised in 1877 in New Zealand. The Grey Ministry asked Lord Normanby for a dissolution, arguing that they had taken office in October on the resignation of Major Atkinson, and, before they could even formulate a policy, had been sustained in the Lower House only by the Speaker's casting vote. The House had been elected under the aegis of their rivals—a frequent ground for arguing for dissolutions and doubtless of importance—and they could hope for a victory at the polls. Lord Normanby demurred; no great issue was at stake, in any case supply should be obtained for three months. The Ministry replied that the power to dissolve rested on the Constitution, and should be exercised on ministerial advice without question, but the

[1] *Parl. Pap.*, 1873, A. 1, pp. 7–20; Rusden, *New Zealand*, iii. 38 ff.
[2] *Parl. Pap.*, H. C. 346, 1873.
[3] *Memoir of George Higinbotham*, pp. 194 f.
[4] *Parl. Pap.*, 1877, A. 7; 1878, A. 1, p. 3.

Governor retorted that the Constitution merely gave him the power to dissolve, and the royal instructions gave him a discretion in using his powers, and he would not dissolve. Ultimately Parliament was prorogued, the usual supplies having been granted. A month later the Governor replied to a renewed request for a dissolution, that he held that the Premier could carry on without one, while the Premier reiterated his belief that the Governor was bound when advised to grant the dissolution in question. The matter was referred to the Colonial Secretary, who on 15 February 1878[1] affirmed the position of the Governor, while emphasizing his duty of considering carefully ministerial advice. In July 1879, however, the Ministry was defeated on a vote of no confidence, and the new Governor consented to a dissolution on condition that the two Houses would be summoned to meet at an early date, thus avoiding the prolonged conduct of business by a defeated Ministry. This was agreed to, but, as the Houses both asked the Governor to secure their early meeting, a further assurance was obtained.[2] The assurance was kept, and on meeting the House defeated the Government by two votes, and Mr. Hall formed a Ministry. The ex-Premier revenged himself on the Governor by revealing the fact that he had been compelled by the Governor, with the alternative of resignation, to take the necessary steps to enable Mr. Hall, then a member of the Legislative Council, to resign his seat in order that he might stand for the Lower House.[3] The new Ministry was reconstructed under Mr. Whitaker in 1882, under Major Atkinson in 1883, and defeated in 1884, when, a dissolution being accorded, it was beaten at the polls and resigned.

In 1877 also the Governor of New South Wales asked advice from the Colonial Secretary regarding dissolutions and supply.[4] It had become habitual in the Colony to delay the grant of supply until long after the beginning of the financial year, and he himself had had to grant dissolutions in March and August, reserving the right to reconsider his decision, if supply were not granted temporarily by the Assembly. The matter was referred to Sir T. Erskine May, who was clear that it was not right to

[1] *Parl. Pap.*, 1878, A. 2, p. 14; *Gazette*, 1878, pp. 911–14.
[2] Ibid., 1879, A. 1 and 2; Rusden, *New Zealand*, iii. 278 ff.
[3] *Parl. Deb.*, xxxii. 283–9, 387, 397, 579.
[4] *Leg. Ass. Journals*, 1876–7, i. 179, 184–93.

allow the Legislature to decide whether it should be dissolved by letting it be known that a dissolution was conditional on supply being granted, and the Speaker, Mr. Brand, concurred generally in this view. In 1878 the Governor sought to obtain a more regular procedure; Mr. Farnell resigned, Sir J. Robertson was appointed Premier, and asked Mr. Farnell to secure supply; he was willing, but the Assembly would not provide for the costs of the exhibition; Sir J. Robertson resigned, Mr. Farnell reappeared, but the Assembly would not transact business with him as Premier. So Sir H. Parkes was commissioned, and formed a Ministry with Sir J. Robertson's aid, and Mr. Farnell helped them to secure supply.[1]

In 1877 Mr. Weld, Governor of Tasmania,[2] after full consideration gave a dissolution to the Fysh Ministry, which very unwisely laid on the table of the Assembly a statement of his reasons, which the Assembly criticized sharply. The Governor did not reply, and had his attitude approved by the Secretary of State. In 1879 Mr. Crowther asked for a dissolution to test the feeling of the country on direct taxation and the relations of the two Houses. This was declined by the Governor on the ground that the House had been elected under the auspices of the Government, that opinion in the country was not ripe to decide the points in question, and there was no likelihood that a dissolution would decide anything as to policies, not persons.

A similar principle was vindicated by the Lieutenant-Governor of Quebec in 1879, when asked for a dissolution by Mr. Joly, after being defeated in the Lower House by six votes and having supply stopped by the Upper. He was refused, because he had already had one dissolution, had never commanded a substantial majority, was not likely to gain one, and the Legislature, having but four years' duration, should not frequently be dissolved.

The whole question was elaborately investigated at the instance of Sir F. Dillon Bell for New Zealand at the Colonial Conference of 1887.[3] He admitted cases of utility of the discre-

[1] *Leg. Ass. Votes*, 1877–8, i. 451; Rusden, *Australia*, iii. 501 f.

[2] *Leg. Council Journals*, 1879, No. 66; Rusden, iii. 481.

[3] *Parl. Pap.*, C. 5091, pp. 555 ff. In favour of discretion, see Baker, *Constitution of South Australia*, p. xxv; Goldwin Smith, *Canada*, pp. 194 f.; Dilke, *Problems of Greater Britain*, i. 294 f.

tion of the Governor in the past, but held that the advantage was outweighed by the charges of partisanship which it evoked from those unfavourably affected, and commended the British practice. Sir W. Fitzherbert agreed also for New Zealand, and Sir Graham Berry supported the proposal for Victoria. But Mr. Service for Victoria, and Sir John Downer for South Australia, opposed change, and denied the truth of the claim that the Queen always acted on advice. Sir S. Griffith for Queensland insisted on the value of the discretion ; ministers sometimes asked for dissolutions, knowing they would not be acceded to ; on one occasion the Premier had been sadly disconcerted by an affirmative answer. Sir Robert Wisdom contended that the only inconvenience of the system was to the Ministry refused a dissolution, and that the public of New South Wales had never suffered from a refusal, while Sir Ambrose Shea for Newfoundland also deprecated change, and no resolution was passed. Sir R. Wisdom, it may be conjectured, had in mind the case of the refusal in 1886 by Lord Carrington of a dissolution to Sir J. Robertson, who was alleged to have admitted, in the picturesque phraseology of colonial Premiers of the time, that had he been in the Governor's place and been asked for a dissolution, ' I'd see you d——d first '.

The practice of Governors exercising discretion therefore continued, and in 1899 three cases of it took place in swift succession. On 7 September 1899 Sir G. Reid lost his chance of being the first Federal Prime Minister by being defeated over a financial irregularity, the payment of a Commissioner without sanction of Parliament ; a dissolution was refused, doubtless because Sir W. Lyne was willing and able to carry on the administration. On 28 November Mr. Kingston was defeated upon personal grounds in the South Australian Assembly, and Lord Tennyson declined a dissolution ; Mr. Solomon, however, who succeeded, was driven to resign in a few days, when Sir F. Holder, treasurer in the Kingston Ministry, took office, which he held for a couple of years. On 1 December Sir G. Turner, defeated in the Victorian Assembly, was refused by Lord Brassey a dissolution, Mr. McLean taking his place.[1]

With the creation of the Commonwealth wider views might

[1] Quick and Garran, *Const. of Commonwealth*, p. 464 ; South Australia *Assembly Debates*, 1899, pp. 917 ff.

have been hoped for, and the Governor-General's discretion might have been expected to become obsolete. But this was far from being the case. Three parties soon appeared, the old Free Trade group under Mr. Reid, the Protectionists under Mr. Deakin, and Labour under Mr. Watson; the latter two co-operated until Labour combined with Mr. Reid to eject the Deakin Ministry from office on its refusal to bring railway employees in the States under the control of the Federal system of arbitration, it being held then that such a step would hardly be constitutional, though that view is now disproved. Labour, which obtained office, was in turn defeated on the same measure by a combination of the rival parties, and the Governor-General was asked for a dissolution.[1] He refused it on the score that the possibilities of carrying on the Parliament were not exhausted, as indeed was the case, for a coalition had been arranged between Mr. Reid and Mr. McLean with the major part of Mr. Deakin's following and Mr. Deakin's acquiescence. But in July the short-lived coalition was destroyed by Mr. Deakin's decision to attack it, without, it must be admitted, due regard for his personal honour in view of the undertakings he had given on the formation of the Ministry. It was therefore very unfairly defeated on the reassembling of Parliament, and a dissolution was refused.[2] In both these cases of refusal a very fair case could have been made out for acceptance of ministerial advice and the establishment of a new precedent. The new Deakin Government carried on for a time with Labour support from outside the Ministry, but Labour was growing stronger, and finally withdrew its support, and formed a Ministry in November 1908. But Mr. Deakin had his revenge next year, when, on a wave of patriotic feeling sweeping over Australia on the news of the critical European situation, the Commonwealth hung back, while Victoria and New South Wales hastened to offer battleships to the Empire. A new coalition was formed between Mr. Deakin and Mr. Cook, Mr. Reid standing aside, and the Government defeated. A dissolution was asked for, and a good case might have been made out for its being granted, but it was refused.

[1] *Parl. Deb.*, 1904, p. 4625.

[2] Ibid., 1905, pp. 133 f.; Turner, *Australian Commonwealth*, pp. 97–100. For a defence see Murdoch, *Deakin*, pp. 244 ff.

[3] *Parl. Deb.*, 1909, p. 227; Turner, p. 221.

The Ministry, however, did not really represent the country; the general election saw its defeat[1] and Mr. Fisher installed in office in April 1910, an indication that the Governor-General acted unwisely in refusing a dissolution. In this case it may be surmised that desire to see effective aid rendered to the Empire was one of the causes influencing his decision, which *prima facie* was contrary to constitutional usage.

Naturally, in the States, the discretion admitted in the Commonwealth was freely exercised. In 1906 Mr. Price [2] in South Australia asked for a dissolution as a preliminary to steps to procure a penal dissolution of the House under the procedure laid down in the Act of 1901 as to disputes between the two Houses, then at variance on the issue of the franchise. The Governor first tried to find some other politician willing to carry on the Government, the House having still much of its term to run, and the Labour majority being small; failing, he recalled Mr. Price, promised him his dissolution, and matters were compromised by concessions by the Upper House, to the general approval of the public. In the next year the Governor of Queensland [3] refused the advice of Mr. Kidston to increase the number of members of the Upper nominee House if it persisted in refusing to accept the legislation sent up to it. The Government resigned, and the Assembly strongly protested against the Governor's action in preventing the carrying on of business. It gave no supply, and the new Premier had, of course, to have a dissolution. He was badly beaten and had to resign, the Assembly passing a censure on the Governor when it renewed its activity. But threats not to sanction the illegal expenditure were not acted on, for a new coalition was formed between Mr. Kidston and Mr. Philp's followers, ousting Labour from any share in the Government, and the strife over the Upper House was settled for the moment by arranging for disputes to be settled by a referendum. In December 1908 an interesting case arose in Victoria, when Sir T. Bent, having enjoyed a huge majority, was defeated by 15 Labour and 22 malcontents of his own following to 25, and asked for a dissolution,

[1] Murdoch, *Deakin*, pp. 278 ff.

[2] *Assembly Debates*, 1906, Sess. 2, pp. 654 ff.

[3] *Parl. Deb.*, c. 1735 ff.; ci. 38 ff., 361 ff., 566 ff., 606, 648 ff., 706, 717, 767, 801; Act No. 16 of 1908.

despite the fact that Parliament had still a full year to go and Christmas was an inconvenient season. He argued that the votes did not represent the feeling of the country as tested by by-elections; that attacks had been largely based on personal distrust in himself, on which the country should pronounce judgement; and that neither Mr. Murray, leader of the malcontents, nor Mr. Prendergast, leader of Labour, could form a stable Ministry as the Assembly stood. After an exhaustive review of the situation the Governor decided that a dissolution was justified in the interests of the State, and granted it. The Ministry fell, and, as the Governor had hoped, was succeeded by a more stable administration. But one feature of an unsatisfactory character was revealed; the Governor had been given satisfactory assurances as to supply, while in point of fact large sums were expended on the mere authority of the Treasurer without even a Governor's warrant. When Parliament reassembled, ministers resigned, and a Commission of inquiry showed that such irregularities had occurred in the past, that Sir T. Bent had done nothing disgraceful, and that the Governor had done all he could, being quite unable to go behind assurances of his Premier.[1]

In 1907 the Governor of Western Australia adopted an interesting course, on the defeat of the proposals for a tax on improved land values by a majority of two in the Upper House. He declined a dissolution on the score of his Ministry plainly commanding the approval of Parliament, and prorogued Parliament for the period 19 September to 8 October in the hope, which proved justified, that the two Houses would adjust their differences in view of the great authority properly attaching to the views of the Lower House on such an issue.[2]

In 1904 the Acting Governor of Tasmania had an unusual request for a dissolution from a Ministry possessing the confidence of the Assembly.[3] It had been fifteen months in office, and had assumed power pledged to revise the personal exertion clauses of the Income Tax Act, and to effect a change in the constitutional relations of the Houses. Its taxation and other

[1] *Parl. Deb.*, 1909, pp. 3 ff., 330–3; *Age*, 7 Dec. 1908; 19, 20 Jan., 24 Feb. 1909; *Argus*, 26 Dec 1908; 24 Feb. 1909.

[2] See his speech on closing the Session on 19 Sept. 1907.

[3] See the Acting Governor's memo., 5 July 1904.

proposals in 1903 were freely rejected by the Upper House, which in March 1904 also rejected revised financial proposals placed before it, in June rejected a proposal as to constitutional reform, and declined a conference on taxation or reform. The Government, however, had changed its views on taxation, as a result of the decline in revenue which rendered it impossible to dispense with the income-tax, and, on the score of the deadlock and the need for a fresh mandate from the electors, a dissolution was asked for by Mr. Propsting. It was refused, on the ground that the right to dissolve should be used only for the benefit to the State, and circumstances did not justify resort to this 'extreme medicine'. It was pointed out that the change of heart on the part of the Government as to the income-tax had really brought the Lower into harmony on one vital issue with the Upper House. The constitutional issue remained, but it had never been a burning question; the feeling on it was factitious, the result of the controversy over the income-tax; with that removed, more normal relations were possible. It was a serious waste of time to dissolve the House, would add to expense at a time when economy was admittedly necessary, and it was not clear that a Ministry might not be found to carry on without a dissolution, which would probably settle nothing. The action of the Governor was criticized adversely by Mr. Cook in 1914, but it is impossible to homologate his claim that the action was unconstitutional, having regard to the only criterion, Dominion practice. One point made by the Acting Governor was clearly sound: if the Ministry had new financial propositions to make, he suggested that they should be made in Parliament before a dissolution was desired, as only thus could a fresh issue be brought properly before the people.

In 1909 a fresh difficulty arose. Mr. Evans was Premier when the election of April took place, but he resigned in favour of Sir Elliott Lewis, who took office in June, only to be defeated ultimately by 18 votes to 10. Mr. Earle, leader of Labour, succeeded on 21 October, to be forthwith beaten by 16 votes to 10, and naturally asked for a dissolution, arguing that the Assembly had not been elected under his auspices; that his Government, therefore, had never had an opportunity of appealing to the people; that there was reason to believe that an appeal to the people would result in a verdict for the new

administration; that there was no possibility of finding in Parliament a stable administration; that the effort to combine in one party men elected to represent disparate views was an effort to defeat the will of the people; and that the Government had a new set of taxation proposals which it was desirable the people should have a chance of considering. The Governor declined to give a dissolution, on the unimpeachable grounds that there was no probability of the elections returning a majority for the Ministry, and that on the other hand the two sections of the Opposition had combined to form a group which would support an alternative Ministry, while no great issue had emerged on which the people really needed to be consulted.[1]

In the case of South Africa [2] the most important instance of difference of opinion with ministers falls under another category, but in 1907 a curious situation arose through the failure of Dr. Jameson's Ministry, which replaced that of Sir Gordon Sprigg in 1904, to retain its majority of one in the Upper House. It resulted, therefore, that, while it was just possible to proceed with supply when the House was sitting, by the President's casting vote, it was hopeless to make progress in Committee, which disregarded instructions from the House to proceed with consideration of the Bill. Finally, in despair, Dr. Jameson agreed to ask for a dissolution if supply were granted, and this was conceded by the Opposition, and, having obtained supply, he received from the Governor, who obviously had no alternative, the necessary authority, with the result that he was badly beaten and Mr. Merriman took his place.

In Newfoundland, in 1909,[3] a curious deadlock arose: the election gave eighteen on either side, with the result that Sir R. Bond asked for a dissolution in view of the fact that he could not carry on, nor could a Speaker even be elected. The Governor refused, on the score that he must seek first to see if a Government could not be formed. But, though Sir Edward Morris was willing to form a Government, he soon found that he could not even elect a Speaker, and asked in his turn for a dissolution, which Sir William Macgregor accorded. There was naturally

[1] *Parl. Pap.*, 1909, No. 52.

[2] *Ass. Deb.*, 1907, p. 589; *Council Deb.*, 1907, pp. 338–74.

[3] *Canadian Annual Review*, 1909, pp. 36 ff. The correspondence was published in Newfoundland as a pamphlet.

criticism of what seemed the anomaly that one minister should be granted what the other one was refused, but the reason for differentiation was plain. If, at an election held under his auspices, Sir R. Bond could not obtain a majority, a new dissolution would not improve the situation ; give his opponent the advantage of managing the elections—as to some extent they have always been on the Island—he would obtain a stable Government, as in fact he did for the time being.

The certainty that a Governor will refuse a dissolution had, naturally, sometimes been used as a political ruse. This was probably the case with the action of Sir Elliott Lewis in Tasmania in 1909 ; it was certainly so in Victoria in 1913 [1] when Mr. Watt, finding his followers troublesome, hit on the device of resigning when defeated on the issue of increasing the Assembly to 70 from 65 members. The Lieutenant-Governor, entering heartily into the plan, sent, not for the leader of the malcontents, but for Mr. Elmslie, leader of Labour, who naturally formed the first Labour Ministry of Victoria, but in his absence seeking re-election was defeated by 40 votes to 13. The dissolution he asked for was naturally refused, Mr. Watt's following having seen the error of their ways, and that politician resumed office with better control of his supporters. A dissolution was also refused by Sir A. L. Stanley as Governor, there being no difficulty in finding a stable Ministry, and in November 1924 an interesting case arose illustrating the system in a curious light. At the election of June, Labour had won 28 seats, the Nationalists 24, the Country party 12, with one Independent. This marked a distinct advance over the preceding state of affairs when it had but 20 seats to 32 of the Nationalists. The Ministry retained office until defeated in July on a direct challenge on the resumption of the Assembly, and Labour took office, being in turn defeated in November by 34 votes to 28. A dissolution was then asked for with some reason ; the trend to Labour was marked, as in the rest of the Commonwealth ; the issue should be squarely put to the electors, but a dissolution was refused.

The difficulties of these issues are seen clearly in the events in 1914 in Tasmania.[2] In 1912 Sir Elliott Lewis found himself unable longer to carry on with but 16 supporters to 14 Labour

[1] *Parl. Pap.*, Cd. 7507, p. 62.

[2] Ibid., Cd. 6863, pp. 111, 112 ; 7506.

members, the result of Proportional Representation, the Government side being less reliable in attendance and voting than the Opposition. He gave way to Mr. Solomon, who managed to carry on in 1912 until the close of the session, when one Independent Liberal threatened to abandon him; this he countered by getting the Speaker to undertake to resign, and the vote of censure was dropped. He asked therefore for a dissolution, received it, and was rid of his unreliable supporter. But the end came in 1914 in a definite defeat, and he asked for a dissolution, which the Governor felt he could not possibly grant if he could find a Ministry in the House. He proceeded, therefore, on 3 April, to accept Mr. Earle, head of the Labour party, as Premier on the formal conditions that he would advise a dissolution; that Parliament would be summoned before the end of May; and that, if the Attorney-General were not a properly qualified lawyer in practice, the Governor should be entitled to obtain advice from some other source. In office, however, Mr. Earle repented of his undertaking, and on 7 April protested that the Governor ought not to have exacted a pledge, and that, as it was possible to carry on without a dissolution, he should not attempt to insist on one. The Governor pointed out that he had not forced office on Mr. Earle, but had merely made stipulations which seemed best in the public interest; but the Assembly passed a resolution to the effect that his conduct in exacting a promise to advise a dissolution irrespective of the wishes of the House was unconstitutional, and asked that the matter be submitted to the Secretary of State. The Governor did so; apparently he held his action to be based on precedent, having unearthed a case in which the Lieutenant-Governor of Nova Scotia had refused a dissolution to one Premier on the score that this would interfere with the judicial investigation of certain contested electoral returns, and in summoning another Premier had impressed upon him the necessity of his giving an assurance that the law would be obeyed, and each case of disqualification examined, as rapidly as possible. The Secretary of State on 5 June disapproved the Governor's attempted insistence on a dissolution, in an unfortunately confused dispatch [1] in which he endeavoured to explain

[1] See Keith, *Imperial Unity and the Dominions*, pp. 102–4. It is utterly misleading and displays a total lack of historical sense to explain the past by

the episode of Lord Mulgrave's action on proper constitutional lines instead of recognizing that it simply represented the drastic attitude adopted by noble lords to petty Colonial Premiers in the days of the beginnings of responsible government. The truth was that it is idle to attempt in 1914 to apply blindly precedents of 1860, and the whole matter was perfectly simple. Mr. Earle's conduct in accepting office and then breaking his undertaking was politically beneath contempt, but constitutionally the Governor could only consider whether he could find other ministers if he insisted on getting rid of his untrustworthy minister. The answer probably was that he could not, and, that being so, the Governor should simply have expressed his opinion of his Premier's conduct and left matters at that, without giving publicity to one of the dark sides of Australian public life. In the circumstances, clearly the less said the sooner mended, and, as entirely disparate conclusions were drawn locally from the Secretary of State's dispatch, comparatively little harm resulted from the quaint reasoning it embodied.[1]

§ 2. *Relations of the Governor to a Defeated or Unstable Ministry*

It is perfectly clear on principle that a Government which is defeated or on the verge of defeat is not entitled to exercise the full authority of a Government resting on the will of the people, and that pending its rehabilitation, if that is possible, it should restrict its activities to routine duties, leaving to its successor, or to itself if restored to authority, the duty of decision on all important issues. This is in accord with the British principle, and it has often been invoked to restrain action by Colonial Governments. Thus in 1865 [2] Sir John Young reported that he had declined the advice of his Ministry to add certain members to the Upper House of New South Wales, because his Ministry had then ceased to command support in the country and was totter-

the present, and the Governor could justly feel that he had been silenced, not answered.

[1] A dissolution was refused in 1923 to Sir W. Lee, and Labour, which took office on his resignation, carried on successfully, gaining in the general election of 1925 a clear majority in the Assembly. In Dec. 1921 the Labour Government of New South Wales resigned on a defeat, and did not receive a dissolution; Sir G. Fuller formed a Government on 20 Dec., only to be forced to resign on the same ground, but won a victory at the general election of 1922.

[2] *Parl. Pap.*, H. C. 198, 1893–4, pp. 25 ff.

ing to its fall. Lord Normanby in New Zealand in 1877[1] declined, while a vote of censure was pending, to appoint a member of the Upper House; he did so as soon as the Government emerged victorious, and the Secretary of State did not homologate the attack made by his Government on him. In 1879[2] the Governor quite firmly insisted on Sir G. Grey doing nothing but ordinary business when he had given him, after a defeat, a dissolution of Parliament. Lord Onslow, on the defeat of the New Zealand Ministry of 1891,[3] declined to act on their advice to appoint eleven new members of the Upper House, but he conceded six, admitting that this was not in accord with the procedure of Lord Normanby, but preferring to leave punishment to the hands of the people of the country. The Secretary of State did not disagree with his action, but expressly dissented from the propriety of the advice of ministers, which was not in accord with British usage.

In 1893 a very difficult position developed in Newfoundland. The Ministry of Sir W. Whiteway had won at the elections a fine victory of 24 to 12, but it was secured by the normal practice of expending wisely the funds provided for road connexion, and unhappily a new Act had just become operative under which such expenditure might be reckoned a corrupt practice permitting elections to be attacked. The Opposition, well advised, waited until the last moment for presenting election petitions, and then brought them against seventeen members, including all of the Cabinet save Mr. Harvey. The Legislature met thus on 16 February 1894 in an anomalous position, and the situation was complicated by the fact that the Premier did not see eye to eye with the Imperial Government over the renewal of the legislation for enforcing the French fishery rights on the coast. The election petitions began to deplete the ministerial ranks, and therefore the Premier and twenty Government members approached the Governor, denounced the proceedings as an effort to prevent the Government spending money legitimately after a dissolution, and asked for a dissolution. The Opposition loudly protested that the Government was really in a minority

[1] New Zealand *Gazette*, 21 June 1878.

[2] *Parl. Pap.*, 1879, A. 1 and 2. A predecessor in 1869 had agreed to appointments before and after a vote of censure.

[3] *Parl. Pap.*, H. C. 198, 1893–4, pp. 5 ff.

of duly elected members, and the Governor, as was inevitable, decided he could not give a dissolution, whereupon on 11 April the Ministry resigned. The new Government was at once faced on 13 April by a majority in the Assembly, which protested vehemently against the action of the Governor, and demanded an immediate dissolution to prevent chaos in the absence of Supply and Revenue Acts and under the government of a mere minority. It rescinded its resolution for supply, and declared that any person who expended money without authority would commit a grave breach of responsible government. The Revenue Act was to expire on 11 June, and the situation was very difficult, as a Spring dissolution in the fishing season was really impossible, and the Governor, despite all protests, prorogued the Assembly to 23 May. None the less, the election petitions, which a dissolution would have terminated, went on too slowly to obtain supply by 11 June, and taxes were illegally collected by the Executive under the protection of a man-of-war on the fishery patrol. When, on 31 July, Sir W. Whiteway and others were declared unseated, the Legislature was again called together, various Bills passed, and supply secured. The new Government, however, was insecure, and fell later in the financial crisis of the year. The episode raises serious questions as to the wisdom of the Governor, but the position was so unique that it serves no useful purpose to determine now the merits of his action, which at least did not earn the censure of the Imperial Government, which had not found Sir W. Whiteway accommodating on the fisheries issue.[1]

Much more normal was the case of Canada in 1896.[2] Sir Mackenzie Bowell's administration had fallen on evil days largely through the educational dispute with Manitoba, and it failed to carry out its legislative projects, despite a nominal majority in the Commons and an overwhelming one in the Senate, by 25 April, so that Parliament expired by efflux of time. To meet the general election, the High Commissioner, Sir Charles Tupper, was hastily summoned from London and formed a new Government, but the polls by 4 July indi-

[1] *House of Assembly Journals*, 1894, *passim*.

[2] Canada *Sess. Pap.*, 1896, Sess. 2, No. 7. It was disputed exactly when the House expired, but the Government stuck to the letter of the law; Bourinot, *Constitution of Canada*, p. 61, n. 4.

cated clearly the fall of the Government. Lord Aberdeen then addressed a lengthy minute to his Prime Minister urging that the actions of his Government ought to be strictly limited to necessary work; he instanced as specially undesirable any further appointments of Judges or of Senators, having regard to these being life appointments, and there being already an enormous preponderance of Conservatives in these offices. Sir C. Tupper replied with much vigour by citing parallels to prove that he was perfectly in the right in not resigning until beaten in the Commons, following the precedents of Lord Derby in 1852 and 1859 and Lord Salisbury in 1892.[1] Further, he adduced many cases of appointments, including three Garters given by Lord Palmerston in 1858, and stressed the fact that Mr. Mackenzie, when beaten in 1878, had been allowed to make many judicial and other appointments. He protested against action calculated to bring the Governor-General into party politics, and ended by resigning his office. His attack was repeated with much vigour in the Commons,[2] where the Speaker had to remind him that he must not attack the Governor-General personally, but direct his onslaught on the Ministry, which had accepted responsibility for his decision,[3] and the Ministry naturally defended Lord Aberdeen as the vindicator of democracy. It must, however, be admitted that, viewing the matter dispassionately, it would have been wiser for Lord Aberdeen to avoid the charge of political favouritism by allowing matters to take their course. As Sir C. Tupper argued, the Secretary of State in 1891 had approved Lord Onslow's action, even if he had disapproved that of the Ministry. Moreover, while prima facie weight appears to attach to the argument regarding the Senate, it must be remembered that new appointments would not have altered in the least the essential fact of the overwhelming majority of the Conservatives. It is not, of course, to be supposed that the action of Sir C. Tupper was wise; the position is that it should have been left to the new Government to deal with it, as in fact they did as regards other appointments, by turning out wholesale the existing incumbents. Senators and Judges could not have been displaced, but the

[1] So also Mr. Baldwin in 1924.

[2] *Debates*, 1896, Sess. 2, pp. 1631–60; contrast Sir W. Laurier, 1660–71.

[3] Ibid., 163.

House of Commons could have censured Sir C. Tupper, and that would have had as much or more moral effect than the intervention of a Governor-General with strongly marked Liberal proclivities.

The effect of this episode was unquestionably to do something to reminding Governments of their duty of moderation, but in 1905 much indignation was expressed in Ontario when the outgoing Ministry made a considerable number of appointments,[1] and in 1908 [2] the defeated Government of New Brunswick found the Lieutenant-Governor immovable in his determination not to make certain appointments which they pressed on him. In 1909 the firm hand of Sir W. Macgregor ensured that the Newfoundland Government made no appointments when it was virtually defeated ; it did, however, enter into a contract with the Commercial Cable Co. under which certain concessions were made to the Company, but the Courts held without hesitation that the Government could not, without the assent of the Legislature, vary the existing statutory arrangement.[3]

A very difficult situation arose in New South Wales in 1911 as a result of dissensions in the Labour party, then in power, which balanced the parties at 44 to 44. The Labour Government proposed to the Lieutenant-Governor to have a prorogation in order to allow by-elections to take place to fill two vacancies caused by resignation of Labour members, in order to test the wishes of the people on public policy. He declined, because the Assembly had defeated the effort of the Government to secure an adjournment, and he felt he ought not to go behind the back of the Legislature. On the Ministry resigning, he endeavoured to have a new Ministry formed by Mr. Wade, but he said he must have a dissolution if he was to be able to carry on ; the Lieutenant-Governor did not feel entitled to give such an undertaking, and then granted ministers a prorogation to 23 August, supply until September being carried on 26 July by the casting vote of the Speaker, who laid it down that he ought not to vote in such a way as to render a change of administration proper. The by-elections ended in returning one member to either side, but Labour secured a defection from the Opposition by the bribe of the Speakership, on the under-

[1] *Canadian Annual Review*, 1905, p. 489. [2] Ibid., 1908, p. 402.

[3] *Commercial Cable Co.* v. *Government of Newfoundland*, [1916] 2 A. C. 610.

standing that business would not be controversial and that redistribution in accordance with the census of 1911 should be proceeded with. Deplorable scenes of violence, culminating on 19 September in the expulsion of seven Opposition members, resulted from the action of the Speaker, who was clearly unfit for his office, which should be one of conciliation, not exasperation. The Lieutenant-Governor was abused by both sides for partisanship, but clearly he did his best in a difficult position, feeling assured, as he did, that an appeal to the people as matters stood was not likely to do any good.[1]

The same State saw in 1916 an unfortunate contretemps, to which allusion has already been made.[2] Mr Holman, though a Labour minister, was genuinely convinced of the justice of the Allied cause, and thus lost popularity with his extreme supporters; he lost control of the Legislature at the moment when he was asking the Government to assent to a Bill to extend the life of Parliament, a step which the Governor was doubtful as to taking, seeing that thus the Labour party was being deprived of its right to express its views at the poll, and there was in any case objection to Parliament extending its own life on any excuse. He accordingly intimated to the Premier that he could no longer regard him as entitled to his unqualified support. Retribution came swiftly; Mr. Holman was co-operating with Mr. Hughes in the interest of recruiting, and he had no difficulty in arranging a coalition with Mr. Wade's followers, the latter being given the usual consolation of the Agent-Generalship. But he went further, and successfully induced the Imperial Government to recall the Governor, whose action had been successfully in some quarters made out to be an inroad on the self-government of the State, instead of being an effort to preserve the rule of responsible government. Neither State, Government, nor the Secretary of State can escape condemnation, though it is quite possible that a less capable or a more tactful Governor than Sir G. Strickland would have secured what was requisite without so much friction. The decision of the Imperial Government to approve the extension of the life of the Parliament in the interest of a particular political party may have been

[1] *Parl. Deb.*, 1911, Sess. 1, pp. 1813–1914, 1924 f., 1998 ff.; Sess. 2, pp. 2–128, 506 ff., 703 ff., 1707 ff.

[2] Keith, *J. S. C. L.*, 1917, pp. 227–32.

justified in its view by Imperial consideration, but it was clearly rather a deplorable precedent which cannot be invoked in future.

Very difficult conditions prevailed in Newfoundland in 1923–4, demanding very cautious action by the Governor.[1] In May 1923 a general election returned Sir R. Squires to power with a large majority, but ugly rumours of improper actions both by members of the Government and by departmental officials resulted in his sudden resignation on 23 July, followed by the appointment of Mr. Warren as Prime Minister. Steps were taken to improve the administration of the law; fees long unpaid by holders of forest and mineral lands were exacted on pain of forfeiture of the concessions; legislative sanction would be required for the remission or composition of payments by Canadian Companies operating in Newfoundland in place of mere Orders in Council, and a Commissioner, Mr. T. Hollis Walker, was nominated from the Colonial Office to inquire into the allegations of misconduct against ministers and others. The report of the Commissioner on 15 March 1924 was seriously unfavourable to the Prime Minister, whom it accused of having received improperly 20,000 dollars from the Liquor Control Department and 43,000 dollars from the British Empire Steel Company. Sir R. Squires protested that the findings were contrary to the weight of evidence, and that the payment of the Company had gone to help the St. John *Daily Star*, his party's organ, not in financial gain to himself. Mr. Warren announced on 8 April that prosecutions would take place of all accused, and on 22 April the ex-Prime Minister, the former Minister of Agriculture, and the ex-Controller of Liquor were arrested, but released on bail. The Legislature met on 22 April, and the associates of Sir R. Squires defeated the Warren Ministry, Sir R. Squires himself voting. Mr. Warren, however, by combinations with other groups, held out until 5 May, when the Ministry of Mr. Hickman was formed with the early prospect of a general election, the Governor having decided, despite the vehement denunciations of his incompetence and ignorance of the doctrines laid down by Todd and the writer, that he ought to grant a dissolution to Mr. Warren after his defeat. His decision was obviously a sound one, and the general election,

[1] *Canadian Annual Review*, 1923, pp. 145–7; 1924–5, pp. 76, 77.

which completely defeated Mr. Hickman's Ministry, gave Mr. Monroe a striking majority, making for effective administration and incidentally justifying the action of the Governor. It is satisfactory to relate that the Grand Jury in October was able to find no bill against Sir R. Squires, on the score of insufficient evidence. It is fair to say that political morality in these matters in Newfoundland is so deplorably low that any other decision would have seemed singling out an individual for specially harsh treatment; but prosecutions of others were proceeded with.

It is clear that the Governor's action in these difficult circumstances was prudent and effective; by avoiding any excessive pressure on ministers he escaped serious unpopularity, and it could not be contended that he was not right in giving Mr. Warren a dissolution, especially when Sir R. Squires took part in the voting against a Government which had decided to take legal proceedings against him. Charges of the kind made were obviously matters for judicial intervention, and any decision which had prevented matters going to a jury would, as events showed, have been disadvantageous for Sir R. Squires, even if some subordinates had escaped judicial or administrative measures of retribution. It is clear that public funds in Newfoundland have from the outset of responsible government been more or less systematically used for political ends by each Government in power.

An interesting case of the intervention of the Lieutenant-Governor is afforded by events in Manitoba in 1920 as described by Sir James Aikins.[1] The general election returned four parties, the Governmental the larger but in a minority. Sir J. Aikins and the Premier discussed the situation; they agreed that constitutional practice did not require the latter's resignation before the Legislature met, but that he should carry on as long as the Assembly gave him support. He did so for a whole session and part of another, when on defeat he asked the Lieutenant-Governor on 17 March 1922 to accept his resignation. The latter demurred; supply had not yet been granted; if a new Ministry could be patched up from the contending groups, it would have to take time to study a policy, and there would be further delay as to supply. He accordingly induced

[1] Keith, *J. C. L.* vi. 136, 137; *Canadian Annual Review*, 1922, pp. 767 ff.

the Premier to carry on to secure supply, and then a general election gave the country a majority for the Farmers' party. Thus by discouraging resignation, and inducing the Premier to advise a dissolution in lieu, the affairs of the Province were brought back into something approaching effective working order. An excellent example of the wisdom of the Lieutenant-Governor avoiding intervention hostile to a Ministry was witnessed in 1923 in Ontario,[1] when the Drury administration had lost public support, and very ugly rumours were afloat regarding irregularities on the part of the Treasurer. Undue pressure on the Government would doubtless have obscured the issue; pressure of public opinion was accentuated by the resignation of the Government Whip on 11 April, when he announced in the Legislature his disapproval of negotiations between the Premier and the Liberal party for a fusion of interests. The Premier, recognizing that feeling was turning against his party, asked for the passing of a Redistribution Bill and a Proportional Representation and Transferable Vote Measure, but these were vehemently contested and ultimately withdrawn, the Government being completely defeated at the ensuing election, and legal proceedings being taken only too successfully against the late Treasurer and others for malfeasance in office.[2]

[1] *Canadian Annual Review*, 1923, pp. 519–34, 570–2.

[2] See further chap. iii, §§ 3-5.

V

THE GOVERNOR AND THE LAW

§ 1. *The Expenditure of Public Funds*

THE development of the doctrine of acting on ministerial advice, except in very grave emergency, increases a difficulty which has always existed regarding the relation of the Governor to the law. That the Governor is charged with the duty of obeying the law himself, and of encouraging obedience to it in others, is not really in question, and it is enforced by his legal liability to suit for any breach of law, both in the Courts of the Dominion and of England. The position might be altered in some degree if he were made a Viceroy and immune from legal proceedings for any official acts, but even then it is extremely desirable that the head of the State should never be made a party, and certainly never be a willing party, to breach of law.

In the matter, however, of the expenditure of public funds, it must be admitted that in the Dominions there has been, and still is, much laxity, and that the Governor has frequently been involved in the issue of warrants for expenditure without Parliamentary sanction being obtained. We have seen that in the case of dissolution Governors have been wont to inquire as to the supply available ; thus in the case of the double dissolution of the Commonwealth Parliament in 1914 the Governor-General asked for, and obtained assurances, that supply had been obtained for a sufficient period before he gave the dissolution requested. In 1922 the Lieutenant-Governor of Manitoba, in lieu of accepting the proposed resignation of ministers, induced them to obtain supply and take a dissolution, partly because their proposed course of action would have left supply hanging in the air. But, whatever the care taken by Governors, a very long list of cases of disputes and discussions illustrates the complexity of the situation and the difficulty of carrying out the provisions of the law. The British practice, which has been recently revised so as to secure greater elasticity,[1] is superior

[1] So in the Dominions Canada Act 1922, c. 15 ; South Australia gives £200,000 a year to the Government, Nos. 1065 (1911), 1471 (1921) ; Common-

to that of the Dominions in general, and even in the case of the United Kingdom, reports of the Public Accounts Committee reveal serious possibilities of unauthorized expenditure, fortunately, however, not involving in any way the action of the Crown. In the Dominions, in many cases, a more personal intervention of the Governor is required, and he is brought nearer to responsibility for sanctioning irregularities. Historically it must be remembered that under Crown Colony Government the real authority for expenditure was the Governor, with the approval of the Secretary of State, legislative action being formal and often *ex post facto*, in lieu of resolutions and Acts forming the basis of expenditure, and traces of the old spirit naturally persisted long after the beginnings of responsible government.

In New South Wales the issue of warrants without authority led to a dispatch from the Secretary of State of 30 September 1868 [1] in which he recognized that issue of warrants must sometimes be unavoidable, and approved the Governor signing such warrants in cases of necessity or of strong expediency coupled with the assurance of subsequent sanction. He suggested, however, that the English habit of having a Civil Contingencies Fund might well be adopted in the Colony. On 25 March 1869 Lord Belmore reported that the Legislative Council had objected to his signing warrants for unauthorized expenditure, and put forward the view that under the Constitution he was entitled to sign before authorization, and that it was the Treasurer who ought not to act on his warrants without such authorization. He had acted in signing warrants on the belief that the withholding of salaries of civil servants would otherwise be inevitable. Lord Granville, however, on 16 June 1869 [2] was very emphatic in his dissent; nothing save absolute and immediate necessity—such as preservation of life—would justify authorizing expenditure without legal sanction, unless the Governor was sure that not only would both Houses of Parliament sanction the expenditure, but that they would approve action in anticipa-

wealth *Audit Act*, 1901–24, ss. 31, 32, 36 A, 37. For the rule that payments must be authorized by legislation see *Auckland Harbour Board* v. *The King*, [1924] A. C. 318, 326; *Commercial Cable Co.* v. *Newfoundland Government*, [1916] 2 A. C. 610; *Churchward* v. *The Queen* (1865), L. R. 1 Q. B. 173.

[1] *Parl. Pap.*, C. 2173, p. 117; Rusden, *Australia*, iii. 499 ff.

[2] Ibid., p. 122.

tion of their sanction. The Colonial Treasurer took issue on 18 September with the Secretary of State's view, which he regarded as a definite attack on the principle of self-government, the matter being one in which ministers must be free to act in anticipation of Parliamentary approval, as was the usage in England and as was, he contended, contemplated there by the Act 29 & 30 Vict. c. 39, s. 14. Lord Granville's reply of 17 January 1870[1] was very clear. He pointed out that no question of Imperial interest arose ; it was merely a case of the Constitution of the Colony, which could be altered by the Legislature without Imperial objection. But, as long as it stood, it must be obeyed by the Governor, and the effect of ss. 53 and 55 of the Constitution was clearly to prevent any lawful expenditure except under Act, and any issuing of warrants save for lawful expenditure. There might be emergencies, but these were covered by his permission already given to issue warrants in cases of necessity or of expediency, supported by certainty of approval by both Houses of the Legislature, both of the issue and of its anticipation of assent. He agreed, however, that if an alteration of law were not convenient, the Governor might act on ministerial advice regularly on receiving addresses from the two Houses. Needless to say these were not accorded.

In Victoria[2] matters had been decidedly livelier. In a famous dispute between the two Houses, the Governor, Sir C. Darling, threw himself heart and soul into the fray on the side of the Lower House, and to aid his ministers he consented to the raising of duties without the sanction of the Legislative Council on the strength merely of the resolution of the Assembly and its abortive Bill ; further, he allowed them to borrow money without legal sanction and to have it placed to an account at a bank to be operated on without the concurrence of the Audit Commissioners, whose consent as well as his own was essential to any use of money, the position of the bank being secured by the Government confessing the amount to be a debt so that it became a legal liability under the *Crown Remedies Act*, 28 Vict. No. 241, chargeable legally on the Colonial funds ; finally, he paid without legal appropriation the salaries of public servants, without even putting them to the necessity of asking the Supreme Court for a declaration of legal liability, apart from

[1] *Parl. Pap.*, C. 2173, p. 124.

[2] See Part III, chap. vii.

the fact that it was extremely dubious if the judicature would not have held that this remedy does not lie for a salary which is provided annually by Parliament and may be diminished by that body.[1] On 26 February 1865 the Secretary of State, reiterating and carrying further a rebuke sent on 27 November 1865, condemned wholeheartedly the Governor's action; he admitted that he was right in not interposing to prevent by any exercise of the prerogative the action of the Government in combining the Tariff and Appropriation Bills or even in their levying the proposed duties before legislation was or could be passed. But he utterly disapproved his permitting ministers to go on levying the duties, when pronounced invalid by the Supreme Court, and he could find no excuse for the loan transaction. Accordingly he removed him from office in view of his illegal actions. His successor had to be admonished also to observe the law, and on 1 February 1868[2] he was distinctly told that he must use his own discretion in any case in which he was able to prevent unauthorized expenditure, either by refusing the issue of public money under warrant or by declining to sign a contract in respect of which the Legislature had not approved expenditure. In 1878[3] the next great constitutional struggle between the Houses resulted in the Governor having to agree to the dismissal of a large number of public servants, as a means of bringing pressure to bear on the recalcitrant Upper House. His conduct was severely reviewed by the Secretary of State, who on 5 July 1878[3] admitted that on legal matters the Governor might act on the views of his law officers given as such, not as political officers, but not even then if he felt sure that the action was illegal. He might, indeed, have to break the law in case of necessity, but the necessity ought to be very clear, and action should only be taken under the most serious circumstances. The views of the Secretary of State were perhaps rather severe; the action of the Supreme Court showed that in the main the dismissal of the civil servants was actually not illegal, so that the Secretary of State was intervening rather in favour of the rule that civil servants should not be made pawns in the game of politics than for strict law, and an impartial

[1] A petition of right in such cases in England is only by favour, e.g. *Sutton* v. *A. G.* (1923), 39 T. L. R. 295.

[2] *Parl. Pap.*, H. C. 157, 1868, p. 50. [3] Ibid., C. 2173, p. 84.

consideration of the evidence adduced by the Governor explaining his action leaves the impression that his action really fell within one of the cases where extraordinary steps were justified.

None the less, irregularities in finance in Australia have gone on cheerfully. Thus in 1907–8, when Mr. Philp received a dissolution without supply, the new Government of Mr. Kidston, which took office on the utter rout of Mr. Philp at the polls, ostentatiously refused even to pay salaries without supply and only authorized the illegal expenditure at the close of the session when Labour was caught unawares, and could not block the Bill. In the same year, when Sir T. Bent obtained a dissolution on a misleading reply to the Governor's inquiry as to supply, he proceeded to allow £180,000 to be spent without even a Governor's warrant being issued, and the Committee appointed by the new Government revealed the astonishing fact that there had been quite as grave irregularities in the past.[1] In this year again [2] a very conscientious Governor of Tasmania had to sanction payments to the judges in the case of a vacancy in the Bench entailing extra work on them, without Parliamentary authority being obtained. Criticism in the Assembly was inevitable, but of course without effect. The same Governor had to allow the Government in Western Australia in 1909 to carry on without supply pending the Premier's return from England, and in 1910 his Government took pride in the fact that, although it had funds to carry out certain public works actually available, it had determined not to use them until it had a parliamentary vote.[3] In the same year one New South Wales Act sanctioned no less than £207,000 expenditure *ex post facto*. In South Australia [4] minister after minister has defended the practice of spending first and appropriating afterwards as both necessary and convenient. In point of fact, it is very advantageous from the point of view of a Ministry which has no majority in the Legislative Council, for that body cannot do anything effective when

[1] *Parl. Pap.*, 1909, Sess. 2, No. 1; *Deb.*, 1909, pp. 9 ff.

[2] Hobart *Mercury*, 15 Oct. 1908. For a case in 1877 see *Council Journals*, 1877, Sess. 4, No. 11, p. 13.

[3] *West Australian*, 4 July, 15 Dec. 1909; 15 Dec. 1910.

[4] Auditor's Report, 1910, pp. xi, xii. In 1911 and 1912 powers to expend money in anticipation of appropriation were conferred on the Governor. See also Act No. 1471.

money has been already spent; it is thus rendered definitely inferior in authority in regard to appropriation to the Lower House in addition to its inability to initiate. Nor has Canadian practice been much better. The period of weak government in Canada which culminated in the period after 1859, when Ministry after Ministry came crash and two general elections produced no real clearing up of the situation, was conducive to a complete breakdown of any financial scruples regarding anticipating supply, and the Provinces were still worse. Mr. Letellier's ministers were careless of his rights in these matters, but the new Ministry, that of Mr. Joly, seems to have been little better, though the Legislature did not go to the length of refusing him supply eventually, on the ground, according to Sir John Macdonald, that this form of overthrowing a Ministry is no longer appropriate, since a vote of no confidence ought to be enough to make any Ministry go. Mr. Angers[1] had to complain of illegal expenditure by Mr. Mercier, whom he dismissed in 1891, and the Conservative Government of 1896 went on spending money after it was defeated, though Parliament had expired by efflux of time without granting supply, and it is impossible to say how long it would have continued to do so had not the Governor-General forced a resignation, declining *inter alia* to agree to a contract for steamship service being awarded to the Allan Line. Mr. Laurier's Government vehemently denounced the action of its predecessor, but it was met by the retort that it itself was not consistent, as it was spending money which had not been appropriated.[2] Spending money in advance of authority was also very obvious in the case of the British Columbian Ministry of 1900 which Mr. McInnes placed in office without any Parliamentary support of importance, and Mr. Meighen in 1926 dissolved without supply and had to spend money illegally. On the other hand, it is possible to insist on financial rectitude when this is a convenient argument. Mr. Reid's chance of being the first Prime Minister of the Commonwealth was destroyed by the fact that he had authorized payment to a Commissioner without statutory authority, and Sir W. Laurier invoked the principle when in 1899 there was pressure brought to bear on

[1] *Canadian Gazette*, xviii, 296, 513.

[2] *Commons Deb.*, 1896, Sess. 2, pp. 1634 ff.; *Sess. Pap.*, No. 8. For a case in 1891 see Sir R. Cartwright, *Commons Deb.*, pp. 4537 ff.

him to send a Canadian contingent to South Africa.[1] Similarly in 1908 Civil Services salaries were withheld for a time in order to bring pressure on the Opposition not to hinder the grant of supply,[2] with which may be compared the fact that an Auditor-General had been driven to resignation by finding that no regard was had to the law of the land.[3] A more genuine case of financial purism may be reported from New Zealand; in 1909 the Prime Minister when invited to proceed to England for the Naval and Military Conference of that year declined to do so, simply on the ground of financial rectitude, until an Act was passed (No. 1) making provision for supply for a reasonable period, and in 1910 a very sensible Act, No. 43, was passed allowing expenditure to be incurred at current rates for the first quarter of each year if supply were not otherwise provided. On the other hand, Newfoundland has from its earliest days enjoyed an extremely bad reputation for irregularity of financial control.

The tendency of the Colonial Office to encourage ministers to be regarded as the decisive authority was markedly shown in 1910, when a curious case occurred in the Transvaal. The Ministry was anxious to pay its adherents a full sessional indemnity, though the Legislature had only to meet for the purpose of electing Senators to the Union Parliament. The members then received cheques on 28 April for the full amount of the salary. This waste of public money was unpopular; interdict was obtained on 2 May, and on 10 May the Chief Justice delivered judgement in which he laid it down that the complainers had no *locus standi*, and therefore could not obtain what they wanted, a declaration forbidding payment of the sums,[4] but he said that it was clear that the payment proposed was contrary to Act No. 12 of 1907 fixing members' salaries, and also to Act No. 14 of 1907 regarding audit, for that Act contemplated the issue of a warrant by the Governor for the issue of money from the Exchequer Account only when Parliament was not in session, and some emergency arose. Even if the Governor held

[1] Willison, *Sir Wilfrid Laurier*, ii. 339.

[2] *Canadian Annual Review*, 1908, p. 53. [3] Ibid., 1905, pp. 147-9.

[4] *Dalrymple and others* v. *Colonial Treasurer*, [1910] T. S. 372. See *The State of South Africa*, iii. 990 ff.; iv. 296 ff., 667 ff. The device may be ascribed to General Smuts rather than to General Botha.

that there was an emergency, still, Parliament was actually sitting when the cheques were issued. As a matter of fact the payments were made as they were, simply to avoid the opposition of the Upper House, which very naturally did not like this mode of dealing with public funds. None the less the Ministry proceeded to advise the administrator of the Government to sign warrants for the payments in question, and he did so on Colonial Office authority. His action was attacked in the Commons on 29 June, and responsibility accepted by the Secretary of State through the Under-Secretary; the technical defence then made was that under the *Audit Act* of the Transvaal, Governor was defined to mean Governor in Council,[1] and that, as the Council advised the signature, the Governor had no responsibility. It was not made clear whether this meant that the Governor was always to act on ministers' advice, or whether it would merely have been improper in the case in question for him to reject it. Lord Northcote naturally raised the issue in the Lords, where Lord Crewe on 25 July made a better defence. He admitted clearly that, whether a power was given to the Governor or the Governor in Council mattered nothing in principle; the law was superior to ministerial advice, and that, except in the case of the most urgent public necessity, it was his duty to refuse to approve an illegal action. But, whatever the value of these sentiments may be, Lord Crewe decidedly reduced their importance by insisting that the action of the administrator was legal, thus placing his opinion of the law above that of the Chief Justice of the Transvaal, a hardly excusable attitude. It was true that the warrant was signed when Parliament was not in session, and therefore that one ground of illegality was gone. On the other hand, the Chief Justice clearly held that the payment offended against Act No. 12 of 1907 in any event, and he strongly suggested that, as the need for the money arose when Parliament was sitting, both constitutional principle and the spirit, perhaps even the letter, of the law rendered it necessary that Parliament should be consulted. It must be added that the evidence adduced showed that there was no real check on expenditure being incurred in the Transvaal illegally. It was true that the warrant of the Governor, issued on a requisition from the Treasury and a

[1] So in the *Interpretation Act*, No. 5 of 1910 of the Union.

certificate from the Auditor-General, was required for a transfer from the Exchequer Account into the Paymaster-General's Account, but there was nothing to prevent the Treasury, when the money was transferred, applying it to any expenditure whatever, authorized or unauthorized. This system was in vain condemned by the Public Services Commission and the Auditor-General in 1907 and by that officer and the Public Accounts Committee of the Legislature in 1909.

The war inevitably led to constant cases of unforeseen expenditure, and weakened whatever remnants of financial purism existed. The effect of the system was seen at its worst in cases like Manitoba, where in 1915 the Lieutenant-Governor found it necessary to force his Ministers to resign because of accusations of financial impropriety made against them, or Ontario, where the fall of the Ministry of Mr. Drury was followed by the criminal prosecution and punishment of his Treasurer.[1] The Lieutenant-Governor in this case clearly had not the knowledge or means to check his minister, and the Ministry as a whole were not implicated, though much discredited. Reference has already been made to Newfoundland scandals, these also beyond the control of the Governor, who was not himself involved in illegal action of any kind. But the tendency to allow Ministries to do as they please is most strikingly illustrated by an amazing episode which occurred in 1924 in Tasmania. The Upper House of that State unquestionably possesses all the powers of the Lower House except where formally taken away by the Constitution, and therefore, as the Constitution is silent, it has the power to amend a Money Bill, and in fact it has often done so. In November 1924, however, it went a good deal further than usual, and cut down many items of expenditure of a more or less routine kind, undoubtedly violating in some degree the constitutional understanding on which it had formerly proceeded.[2] But the Assembly showed no discretion at all; it directed the presentation of the Bill without the Council's amendments to the Acting Governor for the royal assent, in order to obtain an authoritative ruling on the extent of the Council's rights. It is clear that the whole procedure was absurd; the only way of obtaining a decision would be by

[1] *Canadian Annual Review*, 1924–5, pp. 289–92. He was released on 31 May 1926. Ibid., 1925–6, p. 343.

[2] Keith, *J. C. L.* vii. 205 f.

decisions of the Courts, and it seems amazing that the Assembly should thus have proposed an illegal action. But the Acting Governor, the Chief Justice, invited the opinion of the Secretary of State, indicating his own view and offering, if it were left to him, to give a decision without hesitation. The Secretary of State informed him that the action to be taken on the resolution passed by the Assembly was a matter in the first place for the consideration of his ministers ; ' if after such consideration and if, after their Law Officers have given their formal opinion in writing that assent can be properly given, they then advise you to assent, and if you assent accordingly, responsibility will rest exclusively with your ministers, and no question can arise as to the constitutionality of your actions.' Ministers naturally procured a written opinion from their Attorney-General—a political officer—that assent could be given, and advised assent which the Acting Governor naturally accorded. Three weeks later a similar procedure was adopted in the case of the Land and Income Taxation Bill from which the Council deleted an important clause, the assent in this case being given by the newly arrived Governor, Sir James O'Grady. The Council naturally protested vigorously, but without effect.

The regrettable and unconstitutional and certainly unprecedented decision of the Secretary of State [1] presents serious difficulty, because it ignores the issue of legality, and proceeds on the basis that constitutional responsibility would fall exclusively on ministers. But there arises at once a distinction between legal and illegal acts ; no one doubts that, if the Crown were advised to swamp the House of Lords and so acted, constitutional responsibility would rest on ministers, nor that they are justified, if they think it necessary, in advising the use of any powers of the Crown. But, where there is no power and the fact is patent, how does the matter stand ? Could it be contended that ministers in the United Kingdom could in the days before the *Parliament Act* 1911 have advised the King to assent to a taxing measure which the House of Lords had not passed ? Would the action of the Crown in so assenting have been constitutional ? The answer seems to be clearly in the

[1] The office since Mr. J. Chamberlain's retirement has unhappily been regarded as of only second or third rate importance, and no Secretary of State has had adequate knowledge of constitutional law.

negative; the Crown by such action would have made itself party to a revolutionary movement, and it does not seem that the Governor is in any better case. Granted that he can constitutionally shelter himself behind the legal advice of his ministers when there is doubt, it does not seem that even a Governor should become so much of a cipher that he can be expected to believe that black is white on the bidding of a political partisan. Episodes of this kind afford perhaps the best argument for local appointments of State Governors, as the ruling of the Secretary of State is one which clearly places a man of character and intelligence in a hopelessly humiliating position. It is significant that no legal adviser of the Governor except the Attorney-General could be induced to certify that assent could properly be given. It may be said that the people have a remedy in the Courts, but clearly this is illusory to the average man, who has no funds to fight Governments and who is bound to meet taxation demands. Incidentally, the episode is a strong argument against the practice of allowing Chief Justices to administer Governments and to assent to Acts whose validity they will later be called upon to determine.[1]

§ 2. *Martial Law and Public Order*

It may be conceded that the implication of a Governor in financial irregularities is a minor matter, but more seriousness attaches to the question of his participation in authorizing the proclamation of martial law. Provision against public disorder exists, of course, under the common law of every Dominion, and in some cases, especially in the Union of South Africa, there exist special legislative provisions to deal with outbreaks of unrest, while most drastic of all was the legislation of the Irish Free State in 1923, under which one set of patriots executed in

[1] In 1925, in British Columbia, the Government in view of inadequate appropriation for University buildings obtained a special warrant for 500,000 dollars, but, apparently in view of Lieutenant-Governor W. C. Nichol's protest, no further sum was thus used, but the Premier, J. Oliver, gave a personal assurance to the contractor that the sums due would be paid on legislation being passed. This was done in 1926 after inquiry by the Public Accounts Committee and much wrangling; *Canadian Annual Review*, 1925–6, pp. 511 f. Note that the Government of Canada did not allow the Lieutenant-Governor of Nova Scotia in 1926 to swamp the Legislative Council, on the score of the illegality of the procedure; *Canadian Annual Review*, 1925–6, p. 408.

legal form another set differing merely in the greater sincerity of their convictions and superior purity of their motives, and extremely alike in disregard for the dictates of justice and the sentiments of humanity. Where, however, legal provision exists, there is really no doubt of the Governor's position. He must act on ministers' advice unless he thinks fit to supplant them by others, and it must be conceded that, when unrest is rife and ministers desire to use extraordinary powers, it is not usually a time for independent action on the part of a Governor. He must remember that time may be of the essence of the case, and that the delay and confusion of the formation of a new Government—if that were possible—might far outweigh the advantages of a change of Ministry. A Governor must, of course, retain his discretion, but it will always be very difficult to exercise it.

The position is more difficult when ministers ask for a proclamation of martial law, meaning, of course, thereafter to exercise all kinds of extraordinary powers with the intention of securing *ex post facto* an indemnity for all concerned. The Governor, of course, may argue that a mere proclamation can hardly be deemed illegal, and that he will not be held by any Court responsible for acts save such as he actually authorizes. But, on the other hand, he knows that such a proclamation will almost inevitably be followed by actions which may be indemnified, but which will be far from creditable, and he owes it to his Government to do his best to secure that matters are restricted as far as possible within the bounds of law. On this ground, it is clearly the duty of the Governor in case of emergency to remind ministers of their paramount duty of preserving law and order. Thus in December 1910 a serious state of disorder broke out in Adelaide, the food-supply of the town being menaced by an organized strike.[1] The Commissioner of Police seemed to hold that he had no powers to check rioting, and anarchy seemed imminent. The Governor, however, intervened, the Attorney-General issued a statement as to the powers of the Government, disabusing the minds of the rioters of the idea that they could act as they pleased, and order was soon restored. It appears from a speech made by the Premier that he most unreasonably resented the Governor's insistence on his per-

[1] Adelaide *Register*, 17–31 Dec. 1910; 9 Jan. 1911.

forming his duty, while the Opposition naturally rebuked the Government vehemently for their tendency to surrender control to the forces of disorder.

The common law of every territory, including the Roman Dutch law of South Africa, the French law of Quebec, and the law of Malta, affords protection to invasions of private right in time of revolt or other pressing necessity. Private property may be taken possession of for the use of the State, private rights invaded, and whether or not the uses to which such property is put are such as to excuse or render voluntary compensation or require the use to be compensated for, is of little account.[1] What matters is that the ordinary right of the owner of property to defend it disappears, because the act of the Government is legal; even private liberty may be invaded in case of absolute necessity. But the extent of the common-law right is always uncertain. There is no agreement among jurists whether the English cases can be summed up as holding that they sanction all acts reasonable to suppress a revolt, for instance, or merely as Dicey[2] held, all acts necessary. Moreover, if the matter should become the subject of legal investigation, action will be judged, not from the point of view of Executive officers, but of a judge viewing calmly past events. It is therefore necessary that acts done under martial law should *ex post facto* be validated by Indemnity Acts.

It was decided in the Irish case of *Wright* v. *Fitzgerald*[3] that an Indemnity Act does not avail to protect actions which go beyond the limits of what is reasonable in the suppression of rebellion, and in 1867[4] a New Zealand measure providing indemnity in respect of all acts done in suppressing rebellion was refused approval, and the Legislature was compelled to enact a law which limited the indemnity to acts done in good faith. The Acts of the Cape (Nos. 4 and 10) and Natal (No. 22) in 1902 after the Boer war were very carefully drawn to cover only proper actions, and no serious exception could be taken to them. It was very different with the Act of Natal No. 51 of 1906 to

[1] See *In re a Petition of Right*, [1915] 3 K. B. 649; (H. L.) 32 T. L. R. 699; *A. G.* v. *De Keyser's Royal Hotel*, [1920] A. C. 508.

[2] *Law of the Constitution* (ed. 8), pp. 538 ff. Cf. Pollock, *L. Q. R.* xviii. 152–8; xix. 230.

[3] 27 St. Tr. 759.

[4] *Parl. Deb.*, i. 1003.

legalize steps taken in putting down the native rebellion brought about by the gross incompetence of the Ministry. The Act not merely contained a section giving prospective power to the Government, but it legalized all acts done by military or civil officials, enacting that they were to be assumed to have been done in good faith, though in the case of private individuals it required good faith, unless they acted under military or civil authority. The Imperial Government, then in the feeble and vacillating person of Lord Elgin, showed much weakness, and allowed the Act to stand, on the futile plea that it was desirable to bring the régime of martial law to an end, and the local Government was not willing to do so without the protection of the Act.[1]

The legal effects of an Indemnity Act are of course complete as regards the Colony; this obvious doctrine was reasserted very decisively by the Privy Council in the case of *Tilonko*,[2] when they declined to grant leave to appeal on the simple ground that all they had to decide was whether the case in question was covered by the local Act; once this was ascertained, they had no concern with either the expediency or the wisdom of the Act. It bars also action in tort against any person indemnified if he is found in the area of jurisdiction of the English Courts, as was definitely decided in *Phillips* v. *Eyre*,[3] the action impugned having, by reason of the Indemnity Act, ceased to be tortious in the place where it was committed, and thus no longer affording ground for an action. Its limited effect criminally has been noted above, but is probably almost negligible.

The proceedings in the Cape and Natal during the Boer war, and in Natal during the years of rebellion in 1906–8, gave rise to various legal decisions by the Privy Council of considerable importance, though some queries were left unanswered. It was disputed whether a Governor had any right to proclaim martial law when there was no war in progress, but this was hardly an issue permitting of definite answer, for the mere proclamation of martial law, being merely an intimation of intention to do acts necessary for the safety of the State, even if not in accord with normal law, could not be illegal, though action

[1] *Parl. Pap.*, Cd. 3247, pp. 36, 92–4.
[2] [1907] A. C. 93.
[3] L. R. 4 Q. B. 225; 6 Q. B. 1.

taken under the proclamation might be. The Court, however, settled by the cases of *Marais* [1] and *van Reenen* [2] that *inter arma silent leges*, and that Courts cannot interfere in areas of war. But that really carries the matter a very little way, for it still remains open to the Courts to decide whether there is war being waged ; [3] it is not open to any officer to declare that he is acting in a war area and to exclude the jurisdiction of the Court. Any other doctrine would be intolerable, and the Natal Act (s. 6) was specially framed to evade the probability of adverse decisions as to the legality of acts done, by declaring that all its court-martial sentences were to be deemed valid, a decision of very dubious justification.

The Court further laid it down in perfectly clear terms—though it was already obvious law—that martial law Courts are not Courts of Justice from which appeals can be brought to the Council. It asserted [4] this emphatically when invited to intervene in the condemnation of twelve natives to death by a Natal court martial in 1906 ; it pointed out that any application should have been made to a Natal Court, and that it had not the necessary information to deal with the case, and it also asserted it in *Tilonko's* case, when it was urged that an appeal lay by right from the martial law Court. It is curious that in that case the point was not taken as it might have been for the appellant, that by s. 6 of the Indemnity Act the sentences imposed were to be deemed to be final sentences pronounced by the Colonial Courts, and that accordingly an appeal would lie from them by special leave. Very possibly the Court would not have accepted that reasoning, but it is unfortunate that it was not distinctly brought before it.

The Cape Courts during the operation of martial law were satisfactorily vigilant regarding the rights of the subject. In *Reg.* v. *Bekker* [5] a jailer was ordered to show by what cause Bekker was imprisoned ; in *Reg.* v. *Geldenhuys* [6] the Court

[1] [1902] A. C. 109.

[2] [1904] A. C. 114. Cf. the Natal case, *Msolo and Gwana* v. *R.*, Cd. 3247, pp. 8, 9 ; 26 N. L. R. 421.

[3] [1907] A. C. 93 ; *Egan* v. *Macready*, [1921] 1 I. R. 265 (declining to follow *R.* v. *Allen*, [1921] 2 I. R. 241) ; *R.* (*O'Brien*) v. *Minister of Defence*, [1924], 1 I. R. 32. Cf. *R.* v. *Strickland*, [1921] 2 I. R. 317, 333.

[4] *Parl. Pap.*, Cd. 2927, p. 9 ; *In re Clifford and O'Sullivan*, [1921] 2 A. C. 570.

[5] (1901) 10 Sheil, 407, 443. [6] 10 Sheil, 369.

declined to order military authorities to admit a prisoner to bail, on the ground that the Court ought not to interfere in a district under martial law in the absence of proof that martial law was unnecessary. It declined also during the existence of martial law to interfere with the arrest by the military authorities of persons admitted to bail under Act No. 6 of 1900, reserving the right to investigate the matter when martial law ceased to be in operation.[1] Similar was its attitude in *ex parte Marais*,[2] where it declined intervention *flagrante bello*, but asserted that it would act later if no Indemnity Act barred action. In *Reinecke* v. *Attorney-General* [3] it discharged Reinecke from the custody of a civil jailer who detained him under military orders, but declined to issue an injunction against re-arrest by military order and trial by a military Court; nor in *ex parte Minnaar* [4] did it order the military authorities to allow Minnaar to go home. Military Courts were not recognized by it as Courts of law; therefore it declined to permit convictions for prison-breaking under the Colonial law when the prisoner had been merely in military custody, as in *Rex* v. *Link and Wenner*.[5] In *Rex* v. *van Reenen* [6] and other cases [7] it was laid down that sentences imposed by magistrates under martial-law regulations would not be upheld by the Court, nor would it make any difference if the record were changed to show a purely military conviction. In short, the military Courts were treated in their proper light, namely, instruments for military coercion, which can claim no recognition as Courts of law, unless provision is made for this end by legislation. After the proclamation of peace a rule *nisi* was promptly granted calling on the officer commanding in the district to show why he should not be interdicted from selling confiscated goods of rebel British subjects whose goods had been seized after the proclamation.[8] Still more striking is the decision in *du Toit* v. *Marais* [9] that the plaintiff could recover his stock in the possession of the defendant who had received it from the military authorities on the

[1] *Rex* v. *Naude* (1902), 11 Sheil, 93.
[2] 11 Sheil, 467.
[3] 11 Sheil, 565.
[4] 11 Sheil, 217.
[5] (1903) 12 C. T. R. 144; *Rex* v. *Malan*, 259.
[6] 12 C. T. R. 557, 710.
[7] *Rex* v. *van Vuuren*, 12 C. T. R. 902; *Rex* v. *van der Merwe*, 805; *Rex* v. *Walters*, 805; *Rex* v. *Kalp*, 1008; *ex parte Gagiano*, 969.
[8] *Ex parte Botha*, 12 C. T. R. 612.
[9] (1904) 13 C. T. R. 139.

ground that such action was unavailing to change the ownership of the stock.

Of these Cape cases that of *Marais* [1] was affirmed by the Privy Council, but in a judgement of very inferior character, full of ambiguity. The one dangerous doctrine seemingly enunciated, that civil Courts should refrain from exercising jurisdiction whenever a claim was made that war existed in any area, was too absurd to have been enunciated by Lord Halsbury, and his own words in *Tilonko's* [2] case show that he desired to remove the impression that he meant this. In *van Reenen's* [3] case the Council reversed the decision of the Supreme Court, but no principle was affected. The Supreme Court had held that the papers in the case might seem to indicate that the sentence of van Reenen was given by the magistrate as such, whereas it must be deemed to have been given by him under martial-law regulations as administrator of martial law; it therefore reversed the decision if and so far as given *qua* magistrate. The Privy Council held that the decision was given as administrator and allowed the appeal from the Supreme Court. This, however, was merely a reiteration, rather unnecessarily, of what the Chief Justice had said in the Court below, when he ruled that, so far as a sentence was one of a military Court, it was not a matter to be revised by a civil Court, being as it is of the nature of a purely executive act.

The Natal Courts showed also an indisposition to allow unchecked licence. In *Morcom* v. *Postmaster-General* [4] it refused to interfere with the opening of letters by the Postmaster-General, but it declined to accept the view that it was sufficient to declare that action had been taken under martial-law regulations, and it had to be satisfied by evidence that General Buller was satisfied that the opening of letters, and their detention if necessary, was preventing leakage of information to the enemy and facilitating operations. In *Umbilini and others* v. *General Officer Commanding* [5] it enunciated the same doctrine of its right to investigate, though, after doing so, it pronounced that sentences passed on two natives in respect of espionage were a reasonable and proper exercise of authority in time of war.

[1] [1902] A. C. 109. For de Villiers' dissent see Walker, pp. 387 f., 401.
[2] [1907] A. C. 93, 95. [3] [1904] A. C. 114. Cf. Walker, *Lord de Villiers*, p. 88.
[4] (1900) 21 N. L. R. 32. [5] (1900) 21 N. L. R. 86 and 169.

These cases were decided before *ex parte Marais*, and, when the rebellion in Natal of the natives raised fresh questions, the Court showed a disposition to interfere less closely. Thus in *Msolo and Gwana* v. *Rex* [1] it accepted the Cape principle that it could not review a sentence passed by a magistrate under martial law, and in *Kimber* v. *Colonial Government*,[2] while it examined elaborately to find out whether a horse had been commandeered by a trooper for use against the rebels by martial-law authority or not, it declined to intervene when it held that the action was taken under martial law. A very important decision might have been reached in *Tilonko's*[3] case but for the Indemnity Act. Tilonko, who was rather unjustly treated by the Colonial Government, which behaved very badly throughout the rebellion, was tried by martial law about 30 July at Pietermaritzburg, and sentenced to imprisonment. The Court was asked to intervene, and on the other hand the Commandant of Militia in an affidavit declared that action had been taken under martial law, and that the case was not justiciable by the Court. Beaumont J. accepted this doctrine, though holding that the Court was entitled to satisfy itself that the action had been taken under martial law. This was a strange view, as there was certainly no war being waged when the trial took place, though martial law had been proclaimed and was in force at Pietermaritzburg. Dove Wilson and Broome JJ. were of less inclination to defer to the military authorities; they held that a mere allegation of the existence of martial law and the assertion that an act done under it was necessary was insufficient to oust the jurisdiction of the Court to determine the justice of the action, but they allowed time for better replies to be lodged, and the advent of the Indemnity Act, of course, rendered it impossible to carry the matter further locally. Two attempts to obtain redress for Tilonko,[4] first by bringing an appeal from the military Court, and then from the Supreme Court, naturally failed entirely in view of the Indemnity Act, the one arguable point mentioned above not being taken for the appellant.

[1] (1906) 26 N. L. R. 421.
[2] (1906) 26 N. L. R. 524.
[3] (1906) 26 N. L. R. 567.
[4] [1907] A. C. 93, 461. Cf. *ex parte Tilonko, The Times*, 14 Oct., 27 Nov. 1907, when an effort to challenge a removal order under 47 & 48 Vict. c. 31 was defeated.

The question was raised in connexion with the declaration and maintenance of martial law in Natal, how far a Governor was bound to act on the advice of Ministers. There was obviously no simple answer, and much that was said was confused. The Governor in declaring martial law runs a serious personal risk, and this was urged on the British Government in 1869 by the New Zealand Government,[1] and was quite inadequately answered by the contention that an Indemnity Act would bar proceedings, for it would not bar a criminal prosecution, as was proved in *Eyre's* case.[2] It is, however, reasonably certain that a Governor could not be proceeded against criminally by the fiction of making him out to be a fugitive offender so long as he was not in England, and *nolle prosequi* could always be entered to save him from trial. But annoyance and expense may easily be caused, as Eyre very deservedly found to his cost. On the other hand, as has been noted, it must always be a very difficult thing for a Governor to plunge a territory into political chaos by refusing ministerial advice on such a head. Equally difficult is it for the Imperial Government to refuse to assent to an Indemnity Act, especially if, as in the case of Natal, the alternative is to have martial law still in force. Thus the Imperial Government [3] agreed to the Natal Act No. 5 of 1908, though it indemnified far too widely, permitting crimes to go unpunished, though a clause providing that steps might be taken by the Governor against civil and military offenders indicated that even the Colonial Government could not ignore the brutality of its methods of repression. It is characteristic that the Act gave the power of pardon in respect of martial-law sentences which it legalized to the Governor in Council, thus negating his normal power to pardon, if he thought fit, on his own initiative. But this attitude was not surprising in a Colony in which a very prudent and moderate Governor recorded that he had not been able to find any justification for keeping up martial law for eight months when there had been neither war nor rebellion. The reason, of course, was that the Government did not dare to expose its agents to the scrutiny of the Courts until they

[1] *Parl. Pap.*, H. C. 307, 1869, p. 400; C. 83, pp. 33, 191.

[2] L. R. 3 Q. B. 487; cf. *Parl. Pap.*, Cd. 4403, p. 129.

[3] *Parl. Pap.*, Cd. 4328, pp. 88 ff., 103 ff.; *Hansard*, 1908, cxc. 102-29; cxciii. 2101 ff.; clxxxv. 336, 672; clxxxvi. 1076.

could secure an indemnity of sufficiently sweeping character to prevent judicial investigation of their methods. Sir M. Nathan might of course have refused to proclaim martial law on 3 December 1907, when desired to do so by his ministers, but he did not feel that he was called upon thus to assert Imperial disapproval of their attitude, even though his position was complicated by the presence of Imperial forces, not indeed directly employed in suppressing the rebellion—if that name can be given to such unrest as there was—but affording the background of the security of the Colony from the wholesale rising, which would have followed on the violent methods of action of the Government, had it been left to rely on its own resources. But for these forces matters might have gone better, for the Colonial Government was relieved by their existence from its primary duty of governing with a due regard to not irritating the people of whose welfare it had foolishly been made a custodian.

It must be admitted that violence was not confined to natives only; in 1907 a strike [1] on the Rand mines was overawed by the proclamation of martial law and the use of 1,419 of the Imperial forces, an unedifying employment which was repeated in a far more serious form during the great strike of 4 and 5 July 1913 [2] when 2,910 of the Imperial forces were placed at the disposal of General Smuts to aid the civil forces by the General Officer commanding with the approval *ex post facto* of the Governor-General. The Union defence forces were then in a chaotic state, as the result of the merger of the Colonies and the disbandment of their forces; and the danger to the sixty odd gold-mines, coal-mines, power-stations, municipal buildings, &c., was certainly great, while grave danger was to be feared from the 170,000 native workers in the mines if, as seemed probable, the strikers succeeded in cutting the railway, since there would in three days be no food for them. None the less the fact that the Imperial forces had to fire on the rioters, killing twenty-one, was deplorable, and the miners had some warrant for saying that General Smuts had used the forces of the Crown to shoot down men whose just demands he was refusing in the interest of capitalists. Certainly, despite the approval of the action taken by the Witwatersrand Disturbances Commission,

[1] *Parl. Pap.*, Cd. 6941, 6942. [2] Ibid., Cd. 7112.

consisting of two judges, who held that but for the presence of the troops grave loss of life and property must have ensued, the Governor-General realized and impressed on ministers the fact that Imperial forces were not maintained in the Union to suppress mining strikes. The hint was taken, and in January 1914, when a general strike was planned for the purpose of overawing the Government and compelling concessions, martial law was proclaimed in parts of the Transvaal, Orange Free State, and Natal, and the strikers found themselves faced by so strong an array of force that they could make no headway. The success indeed was so complete that reflections were made on the propriety of the Governor-General accepting ministerial advice to proclaim martial law. But Lord Gladstone pleaded successfully that his Ministry was most anxious to win a bloodless victory by proving its strength and determination, and thus to avoid involving the Imperial forces in the conflict. The excuse was adequate, but it revealed once more the false position involved by keeping Imperial forces in a Dominion.[1]

Unhappily, the wisdom of the whole proceeding was marred by one of those errors[2] into which prudent men like General Smuts seem specially liable to fall. To intimidate the strikers he decided to deport without legal authority ten leaders, and the Ministry forcibly sent the men from Natal to England, acting with such effective speed as to prevent any appeal to the Courts being effective. The step taken was wholly illegal, and it was attempted hastily by an Indemnity Act, No. 1 of 1914, to indemnify all acts done in good faith in the suppression of the movement, and to subject the deportees to deportation if they returned to the Union. It was inevitable that the action should be unfavourably canvassed in England, where the spectacle of ten British subjects deported illegally, and the passing of an Act to deprive them of recourse to British Courts, came as a painful revelation of the rough and ready methods of South Africa, which was not removed when it was found that General Smuts had admitted that he had had recourse to the illegal deportation because he knew that Parliament would never give

[1] *Parl. Pap.*, Cd. 7213, 7348.

[2] See Walker, *Lord de Villiers*, p. 498. For a defence see Egerton, *Brit. Col. Policy in the Twentieth Century*, pp. 52 ff. But see Keith, *Imperial Unity*, pp. 160 ff.

him authority in cold blood to expel the men in question. Strong representations were made that the Governor-General ought certainly to have refused to permit the deportations, and that the British Government should refuse assent to the Indemnity Act unless the deportees were allowed to test in the Courts the validity of their deportation. Doubtless the strained political conditions in the country added fuel to the fire of anger, but it is difficult not to understand the impression produced by such lawless proceedings in a Government which had just been denouncing the strikers for their disregard of law, and it was felt that it was very unjust that the deportees should have no better chance of obtaining redress than the problematic obtaining of damages against the line of steamships by which they were deported. None the less the case against intervention[1] by the Governor-General or the Imperial Government was convincing. There was no alternative Government possible, and no Imperial interest of the highest importance was involved. The Imperial Government indeed secured from the Union Government the modification of the Indemnity Bill so as not to extend to future acts, but it left unsolved one serious aspect of the question. If the deportees had been foreigners, it is certain that the Union must have been exposed to the risk of demands for indemnities, and that she must have agreed to arbitrate the issue ; in the case of the men deported, the fact that they were British subjects then precluded any idea of arbitration before an external tribunal, though the matter might have been pressed on the Union and a request made for decision by the Privy Council, if the Union Government had not finally decided that it need not insist on keeping out the deportees, while the advent of the war precluded any further possibility of friction. But, incidentally, one very unfortunate illegality was committed. By an almost incredible blunder, the Governor-General was induced to use his powers under a royal warrant to convene, and confirm sentences passed on persons tried by, General Courts Martial assembled for the trial of persons subject to military law, to sanction the trial by a General Court Martial of persons declared under the martial-law regulations of the Union Government subject to military law. The power given to Lord Gladstone was one under the *Army Act*

[1] See *House of Commons Deb.*, 12 Feb. 1914.

intended to be used in respect of the Imperial troops, and its application to civilians was wholly monstrous, and can only be excused by the Governor-General's ignorance of law and the carelessness of his legal advisers. But it was a serious blunder, for it attached to him personally responsibility for an action without shadow of right, and a misuse of power entrusted by His Majesty for quite a different purpose.

The outbreak of war was followed only too soon by the revolt of a considerable section of the Boers in South Africa,[1] partly induced by German intrigue, partly impelled by the old love of independence, and partly the result of the following of unscrupulous leaders by ignorant men who were assured that they were really seeking to free Botha, who was on their side, from the fatal influence of General Smuts. Martial law was proclaimed, but great leniency was shown in suppressing the revolt. A special tribunal was set up by Act No. 11 of 1915 to try the leaders, while an amnesty was offered to all who surrendered by 12 November, though all implicated lost political rights for ten years, an idea borrowed from the procedure adopted after the Boer war in the case of the rebels.[2] But much leniency was shown after the Court had tried and sentenced the ringleaders to fines and imprisonment; General de Wet and 118 others were set free at Christmas 1915, and the rest, about 50, a year later, and at the close of the war an Act No. 46 of 1919 blotted out all disabilities even in the case of those convicted of high treason; with prudent generosity it expunged also the deportations enacted in the *Indemnity and Undesirables Deportation Act*, 1914. In these proceedings the Governor-General and his ministers were in the most complete harmony, the Imperial Government fully realizing the difficulties presented by a situation in which ex-leaders of the Boer armies were obliged in loyalty to an allegiance imposed in 1902 to attack men who shared their general point of view and had been brothers in arms. The mildness of the treatment of the rebels presents a curious contrast to the savagery of the Irish action in the suppression of the rebellion of Mr. de Valera, though in that case also the full

[1] Keith, *War Government of the Dominions*, pp. 112 ff.

[2] The Act also in effect authorized indefinitely the continuance of martial law. The precedent for undue prolongation had been set in 1902, in Natal as well as the conquered republics, and in Natal in 1906–8.

support of the Imperial Government was extended to the Dominion Government.

In 1922 martial law on a large scale was again necessary in the Union. Disturbances of the wildest possible character broke out early in the year, and on 7 March a general strike was proclaimed, followed by a proclamation of martial law two days later. There followed severe fighting on the Rand, large bodies of burghers being called upon to support the Government, and by 18 March the forces of order prevailed. The strike was influenced by varied motives; many strikers—predominantly Boer by race, the proportion on the mines being not less than 75 per cent.—looked for aid from the Nationalists and believed that the burghers would not come to the aid of the Government; Mr. Tielman Roos was quoted as having advised them to refuse aid. The disturbances, therefore, by some of the strikers were purely revolutionary in aim, seeking a republic and independence. In other cases the desire was simply to seize the mines and compel concessions by the Chamber of Mines to the demands of the strikers; these men hoped that they would at the same time overthrow the Government and find a more sympathetic administration in its place. They were actuated in part by the belief that the Government contemplated the abolition of the legal and conventional colour bar which kept natives from entering skilled and many semi-skilled employments on the mines, and ensured posts for Europeans. The Communists, who did not sympathize with the desire of the workers to exclude natives from equality, simply supported the movement as a step to the overthrow of capitalistic tyranny. Severe punishments were inflicted on the rioters, but the Government suffered severely politically as the result of its action, which paved the way for the decision of the Nationalist and Labour parties to combine to eject General Smuts from office. It was clearly from every point of view fortunate that the removal of Imperial forces in consequence of the war relieved the Imperial Government from any complicity in the matter; it would have been deplorable, had they been employed for the very serious fighting which compelled submission.[1]

The difficulties arising from divided responsibilities of main-

[1] Martial Law Inquiry Judicial Commission Report (1922). For the Indemnity Act see No. 6 of 1922.

taining order have been illustrated by Canadian experience in regard to the unrest on the Nova Scotian coal-field. In June 1925 the prevalent unrest resulted in serious rioting, much property was destroyed, and in a clash with the Company's police a miner was killed and many injured on either side. Finally the provincial authorities invoked the aid of the militia, which is, of course, under Dominion control, but, as the only military force of the Dominion, is necessarily liable to be used to suppress excessive disorders. The repercussion of the action was not merely fatal to the Government, which after forty-three years of Liberal rule was overwhelmingly defeated by 40 votes to 3, but the Dominion Government lost in popularity considerably.[1]

In Australia conditions have on the whole tended rather to ineffective carrying out of the law than to undue exercise of authority. During the various important strikes of recent years there has been obvious an indisposition on the part of Governments to assert the importance of a rigid enforcement of law, and the matter has not been improved by the fact that the States have to rely on the Commonwealth for armed aid in case of rioting on a scale beyond local powers to handle, while the Commonwealth may be under a Labour Government and decline, as it has on occasion, as in 1912 in the case of Queensland, to supply armed aid. During the seamen's strike of 1925 the strongest remonstrances were directed by British shipowners at the failure of the Governments of the Commonwealth to prevent the rushing of vessels and the enticing or intimidating of crowds, and threats were made of putting in claims against these Governments for failure to perform effectively their functions. But naturally these claims remained in the air for lack of any suitable means of raising them, though the case might have been different had the claimants been foreign shipowners. They, however, were luckily exempt from interference. Inevitably the Governors were helpless to do anything effective to induce their Ministries to take serious steps to vindicate the law, as the Ministries were either in sympathy with the strikers or reluctant to antagonize them. In Queensland, indeed, the

[1] *Canadian Annual Review*, 1924–5, pp. 176 f. C. 57 of the Acts of 1924 regulates the procedure. The A.-G. of the Province must requisition, the Province must pay in full, and a report of the cause made to the Secretary of State of Canada.

Government intervened to prevent the farmers taking matters into their own hands, and loading the ships which the dock-workers refused to provide with cargoes, and it was complained that the Government was as ready to enforce laws against the farmers who desired to secure the dispatch of their cargoes as they were reluctant to put them in operation against men who were holding up the life of the country.[1]

The lamentable state of turmoil in Ireland in 1921 onwards necessarily produced pressing questions of martial law. In the case of Captain Erskine Childers, who, having remained faithful to his oath of fidelity to the Republican cause, was arrested by the provisional Government which had abandoned—if reluctantly—its pledges, and made peace with the United Kingdom, an application was made to the Irish Courts to secure his protection from military trial and execution. The Master of the Rolls, on 23 November 1922, dismissing the application, definitely asserted that it was now settled law that the Courts could not intervene when admittedly a state of rebellion and war was prevailing. The obvious argument that the Courts were functioning, seeing that in fact he was able to hear the application, was met by the retort that armed guards were necessary, that Judges were being molested, and that in some districts the County Court Judges could not venture to function.[2] A further issue was raised before the Court of Appeal in *Johnstone* v. *O'Sullivan*,[3] where it was decided that an appeal did lie from the King's Bench as to the validity of action taken by the military forces. It was contended that no appeal lay in a criminal cause to the Court of Appeal, but the Court ruled that, as a Military Court was no Court at all in the eyes of the law, a question of the validity of its action before the Court of King's Bench was not a criminal cause. The decision on the main aspects of the case was as before, that there was no power in the Courts to intervene when war was raging. There was, however, pressed upon the Court the fact that the military forces which were suppressing the revolt were unauthorized, not being His Majesty's forces and not being raised under any Act of the

[1] *Round Table*, xv. 583 ff.

[2] Keith, *J. C. L.* v. 122 f.; *R.* v. *Adj. Gen. Irish Prov. Govt. Forces*, [1923] 1 I. R. 5.

[3] [1923] 2 I. R. 13; cf. *In re Clifford and O'Sullivan*, [1921] 2 A. C. 570.

United Kingdom nor Act of a legislature authorized by the Imperial Parliament to raise forces. The Court, however, held that the forces were authorized by the representative of the Crown, and must be held to be legitimate forces of the Crown, a common-sense decision, if one a little hard to justify in strict law. There has also arisen the difficult question of the extent to which an alien found on British territory waging war against the Crown as part of a rebellion, is entitled to the protection of the law or can be made the object of an Act of State. The better opinion seems to be that such an alien owing local allegiance should be regarded as not subject to exemption by such an Act from legal protection, as opposed of course to an alien enemy properly so called.[1]

The Irish Courts are clear that it is for them to decide whether or not war is being waged,[2] and in August 1923 the Free State Parliament had hastily to pass legislation to legalize detention of hostile persons,[3] as the Courts negated the power to continue arrest and detention under martial law, owing to the cessation of the widespread armed rebellion which had formerly ousted their powers.[4]

The result of Irish experience is seen in the provisions of the Constitution of 1922. Article 6 expressly provides, when enacting the principle of the liberty of the person to be secured by *habeas corpus*, that ' 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 '. But an effort is made to avoid the undue extension of military control by article 70, which provides that

the jurisdiction of military tribunals shall not be extended to 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,

[1] *Johnstone* v. *Pedlar*, [1922] 2 A. C. 262.

[2] *R. (O'Brien)* v. *Minister of Defence*, [1924] 1 I. R. 32.

[3] The *Public Safety Act*, 1926, passed in four days in Nov. 1926, to meet Republican unrest, gives enormous power of detention to the Government.

[4] The *Public Safety (Occasional Powers) Act*, No. 28 of 1923, which was passed to undo the effect in the case of O'Brien, was held invalid by the Court of Appeal, because under s. 47 of the Constitution, to take immediate effect a declaration of necessity is requisite. The omission was remedied by Act No. 29 of 1923.

and in accordance with 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 from one area to another for the purpose of creating such jurisdiction.

The qualification 'all' did not appear in the original draft. From the action of tribunals under martial law, there must, of course, be distinguished the action of Military Courts duly empowered by law to deal with rebels and others, of which Ireland had considerable experience during the rebellion, the Civil Courts ruling that they could not interfere by prohibition, *certiorari*, or otherwise, save in the case of the exercise of jurisdiction not conferred upon them, as opposed to errors in the exercise of the jurisdiction conferred, e. g. as to admission of evidence.[1]

A rather striking vindication of the rule was given by Lord de Villiers in 1914 as Acting Governor-General of the Union.[2] Despite the outbreak of war he declined to sanction any action not legally authorized, and would not proclaim a censorship when asked to do so by the G.O.C. Imperial Troops, and only signed a proclamation forbidding export of foodstuffs on assurances that permission to export would only be withheld when export would actually be prejudicial to the country. It took some ingenuity on the part of Ministers to circumvent his objection to mobilizing the local forces without arranging for a meeting of Parliament in thirty days, as contemplated in the *Defence Act*, 1912,[3] by embodying the forces for peace training and meeting Parliament six weeks later.

It is clearly the duty of a Governor to impress on his Ministers the paramount duty of securing to the people the benefits of freedom from arbitrary invasion of their rights, especially since, as in the United Kingdom, the security of rights of freedom of person, of speech, and assembly rest essentially in the Dominions on the observance of the ordinary rules of law, and are not specially safeguarded by the Constitutions. It is satisfactory

[1] *R.* v. *Murphy*, [1921] 2 I. R. 190; *White* v. *R.*, ibid., 310. For the validity of the *Public Safety (Power of Arrest and Detention) Act*, 1924, see *R.* v. *Hare Park Camp (Mil. Gov.)*, [1924] 2 I. R. 104; *Murphy* v. *Walsh*, 216.

[2] Walker, *Lord de Villiers*, pp. 501 ff.

[3] No. 13 of 1912, s. 77. The Garrison Artillery was called out without demur, but Ministers also would not declare martial law, nor allow commandeering of necessaries.

to note that, despite the contagion of American police methods, public opinion in Canada showed itself keen in 1925 to resent the abduction of a Chinaman by the head of a detective agency, with apparently some connivance of British Columbian police, and the application of forcible measures to make him confess to a crime which he clearly had never committed.[1] The Grand Jury showed its sense of the outrage by ignoring the bill against the man, the Bar Association of Vancouver unanimously condemned the abductors, two of whom were sent to prison, and the Attorney-General of the Province, though asserting his determination to secure the maintenance of the administration of justice untarnished, added, 'I would with all my heart that these pages in our history had not been written'.

[1] *Canadian Annual Review*, 1925–6, p. 528 (Wong Foon Sing). For police inefficiency in Montreal see the report of Coderre J., Mar. 13, 1925; ibid., p. 392. But for the effective repression of banditry see ibid., 1924–5, pp. 330 ff. (Bank of Hochelaga Case).

VI

THE GOVERNOR AS AN IMPERIAL OFFICER

§ 1. *The Governor's Duty under Imperial Instructions*

THE Governor is required not merely to act according to law, but also, subject, of course, to the law, to follow the instructions of the Crown. This appears in the letters patent constituting his office as well as in his commission,[1] and, as we have seen, there can be no doubt, despite Mr. Higinbotham's plea to the contrary, that he is bound to obey his instructions, though disobedience does not invalidate his actions. Nor need the instructions of the Crown be given formally by instrument under the sign manual and signet, though the standing instructions issued to him take that form, and it is doubtless proper that any very important instructions, as, for instance, those regarding classes of Bills, to be reserved should rest on such an instrument. Other instructions may be given in the name of the Crown, but merely by the Secretary of State without special use of the name, for the Secretary of State is nothing *per se* but merely as an expression of the will of the Crown. It has indeed been suggested, in the Canadian case *Lenoir* v. *Ritchie*[2] that instructions from the Crown must be given formally, but this is quite fallacious; all that is necessary is that the instruction should come from the Secretary of State, and under present conditions of communication it seems probable that, even when not expressly authorized, instructions might be accepted as valid by telegram even for legal purposes, as of course they are for all practical ends.

It is obvious, as Lord John Russell stressed in 1839, that the whole difficulty of responsible government centres in this right of the Crown and its obvious difficulty of reconciliation with the principle of ministerial responsibility. The history of responsible government has been one of gradual acceptance by the Imperial Government of the principle that instructions must, as far as possible, be limited so that the principle of ministerial

[1] See e. g. Commonwealth Letters Patent, clause i; Commission, clause ii.
[2] 3 S. C. R. 575.

advice may prevail, and therefore we find that at the present day many rules once enforced have disappeared for good.[1] There are some traces of the old state of things, but in principle instructions operate essentially only in spheres where ministerial advice alone might clash with the fundamental fact that a Dominion is part of an Empire, and therefore there are more than local interests to be concerned. Common sense must admit that, if there are Imperial troops in a territory, anything which may involve them is a matter on which the Dominion Ministry cannot be expected to have the final say; British shipping, again, is a matter of definite Imperial interest, and a foreign power would have the right to protest against measures affecting its ships unfairly, which is all that the Imperial Government claims to have a right to do. The instructions, like other means of Imperial intervention, are a substitute for diplomatic representations and threats of retaliation by foreign powers.

The conception of instructions as legitimate only where there are true Imperial interests to consider is not visible in the older instruments, and will not be found in those for Newfoundland or the Cape, where, for example, the prerogative in death sentences was to be exercised by the Governor, after taking ministerial advice, on his own responsibility. In the case of the Commonwealth, the States, New Zealand, and Canada, the prerogative was made subject merely to regard for Imperial interests in the precise sense of the word, that is, as affecting non-local interests, on which the Ministry must be regarded as having the final voice. In the old Instruments for Natal, the Governor was given a special independent function in the exercise of his authority as Supreme Chief, and the letters patent of the Transvaal and the Orange Free State gave expressly to the Governor, as distinct from the Governor in Council, powers as paramount chief. It was, of course, due to considerations of the responsibility of the Imperial Government for security in South Africa, where it ruled large territories of native race, that these attempted restrictions of power were made, though in fact they were not exercised. In these three cases also, on the same

[1] Mr. Baldwin, in the Commons, 25 Nov. 1926, definitely asserted that it was not proposed to alter the Governor-General's power of reservation of Bills, which rests on Imperial control.

ground, the prerogative of pardon in capital cases was to be exercised on personal responsibility, and this rule was adopted even for the Union ; naturally it reappears in the case of Malta and Southern Rhodesia, in the latter of which the Imperial Government acknowledges its obligation to consider native interests, while in the former the presence of an Imperial garrison renders the retention of full control indispensable.

In the case of instructions as to the reservation of Bills, the Imperial aspect is now distinctly obvious ; the list includes any Bill, the provisions of which appear to run counter to treaty ; any Bill of an extraordinary nature and importance, whereby the prerogative or the rights and property of British subjects not residing in the territory, or the trade and shipping of the United Kingdom and its dependencies, may be prejudiced ; as well as Bills affecting currency or imposing differential duties, providing for divorce, or conferring favours on the Governor himself. The last-mentioned class is obviously designed to secure that the Governor shall not become the subject of bounties extended to divert him from his duty, while the other matters are all obviously Imperial, though currency, divorce, and differential duties are rapidly passing out of that category. Any measures contrary to treaty, of course, essentially interest the Imperial Government, which is answerable to the foreign power affected by the act.

A Governor is thus limited in action, even if Ministers advise it, by certain definite considerations. He ought not to act against law unless in cases of emergency, though that rule has been relaxed until it is becoming almost extinguished, but it cannot be deemed obsolete, and good cause for its application might easily arise. He ought not to purport to exercise prerogative powers not legally vested in him. He must obey his instructions whether as to the exercise of the prerogative of mercy, the disallowance or—as now alone occurs—the reservation of Bills, and any other matters on which he may receive orders. He is entitled to receive aid from his Ministers in obeying these instructions. In the case of laws, he is definitely required before assenting to receive a report from the law officer of his Government, declaring that he can legally assent, and that he is not required by any law, or royal instruction, to reserve the measure. The advice is not to be given by a Minister

as a political officer, but, if he certifies, he does so in his capacity as a law officer; thus, when Mr. Wade was Premier in New South Wales from 1907–10, he certified as Attorney-General. Where a Minister holds office both as Minister of Justice and Attorney-General, he certifies in the latter capacity; in New Zealand the certificate is not given by the political Minister of Justice, but by the Attorney-General;[1] in the Commonwealth the Minister certifies as Crown Law Officer only. It is only in Canada that no certificate is given, for historical reasons no doubt, owing to the fact that there are no classes of Bills which under the Canadian Constitution, or under royal instructions, must be reserved, a peculiarity otherwise unknown in Dominion Constitutions.

The nature and extent of the control exercised fall to be considered later, but here must be raised the delicate issue of the position of a Governor, acting under Imperial instructions, with regard to his Ministers, when they are opposed to his proposed action. The introduction of the telegraph has lessened one of the difficulties which marked the early days of responsible government, when a Governor had to make up his own mind how far he was to oppose Ministers in Imperial interests; if he erred, he might be recalled for neglect of his duty by the Imperial Government, while, if he insisted, he might find out that he had ruined his position with Ministers by fighting for shadows. The protagonists now in any case of this sort are, or ought to be, the two Governments, and the Governor should never, if time permits, as is normally the case, assert any Imperial interest without assuring himself that the Secretary of State is prepared to support his view. It is for the Imperial Government, and not for any Governor, to decide what is necessary to be secured in the interests of the Empire.

Despite its complexity, the problem now presents less difficulty of solution than in the past, because with the formation of great Dominions there are present in the Dominions larger and more responsible units than in the pre-Federation days. This result, on the one hand, ensures that the Imperial Government shall not lightly under-estimate the autonomy of the Dominions, while, on the other, it should secure that the grave question of a disagreement with the Imperial Government

[1] The Solicitor-General may act for him.

should be considered with a higher sense of responsibility and seriousness than could be expected from the third-rate politicians produced by petty Colonies, the best of whose population were engaged in development of agriculture and industry, and had no time to spend in the less important task of politics. The matter is essentially one requiring a high degree of statesmanship, if the unity of the Empire is to continue. Even at the present day, despite the growth of Dominion status, there are many respects in foreign relations in which a demand for redress in respect of a Dominion action would lie to the British Government alone as a matter of international law, and if, as is most unlikely but not inconceivable, the Dominion Government were to refuse, for instance, to agree to grant redress, or to refer the matter to the arbitrament of a Court, a dissolution of the Empire might become unavoidable, since the Empire could not be expected to accept war in an unjust cause. This is an extreme possibility, but it does illustrate the necessity of any Ministry weighing carefully the relative rights of a Dominion and of the United Kingdom and the rest of the Empire. There are, of course, cases of almost equal complexity in which only parts of the Empire are engaged. Thus, when pressure was brought to bear on the Indian Legislature to move the Government of India to persuade the Imperial Government to announce that it would disallow the legislation of the Union of South Africa aimed at the segregation of British Indians, and their ultimate expulsion from South Africa, there was raised a fundamental issue which must some day in the future be solved, —whether it is possible for the Union and India to remain parts of the same Empire, and, if so, on what terms. A minor difficulty was presented by the petition addressed to the King, asking for the disallowance of the confiscatory Queensland land legislation of 1920, which struck at the interest not merely of residents in Queensland but also of investors in Britain.

It is clear that on both sides there are serious obligations ;[1] the day is past when appeals can be made with any possibility of success, or serious consideration, for the revocation of re-

[1] See de Villiers' letter, 31 July 1899, in which he declares that in event of war, a Colonial Government was 'bound to place all the resources of the Colony at the disposal of the British Crown ; at least, if they did not do so, they would be liable to dismissal' ; Walker, p. 342.

sponsible government. Matters have advanced far since 1862–70, when a fair amount of New Zealand opinion held that the revocation of responsible government might be better than friction between the Governor and Ministers over the use of Imperial troops in the war against the Maoris; since 1894, when the Bank failure in Newfoundland led to serious consideration of the temporary suppression of self-government [1] in order to obtain Imperial financial aid; or the period of the Boer War, when Lord Milner no doubt would have been glad to see the destruction of the Cape Constitution for the period of hostilities.[2] But it is impossible to accept the doctrine that in a dispute the Imperial Government must always yield, and, if moderation and consideration are incumbent on the Imperial Government, they are obligations also of the Dominions.

Fortunately, disputes have been few, and seldom pushed to extremes. Normally a Ministry accepts the constitutional rule that, if a Governor acts on Imperial instructions, their duty is to acquiesce in his action and merely concentrate on seeking to have the instructions reversed. There is one notorious exception to this rule, which has sometimes been elevated into a principle of responsible government, as the right of a Dominion Government to compel acceptance of its views by the device of resignation, if the Imperial Government insists on any point against the wishes of the Dominion Government. This appears on the face of it preposterous, and the case on which it was based is wholly unsatisfactory. The difficulty arose in Natal in 1906.[3] The Imperial forces, which long had commanded the respect of the natives of the Colony, were being reduced with a view to complete removal, in accordance with the fundamental principle that a responsible government Colony ought to take all responsibility for its own defence as regards internal disorder, and only the remnant of the garrison was left. When, therefore, on 8 February, two police officers were murdered in the execution of their duty in attempting an arrest, the Colonial Government —not strong in ability or character—hastily secured the proclamation of martial law, and, after arresting certain natives accused of the murders, insisted, despite the objections of the

[1] *Parl. Pap.*, H. C. 104, 1895; C. 7686. [2] Ibid., C. 1162.

[3] Ibid., C. 2905; Egerton, *Brit. Col. Policy in the Twentieth Century*, pp. 11 ff.

Governor, on having them tried by court martial, though, as the Law Courts were sitting, and Pietermaritzburg was as safe as London, the procedure was quite inexcusable. Moreover, it had not even the excuse that it was desired to evade a reasonable trial; the court martial did its best to be fair, and the sentence of death passed on twelve natives was confirmed only after anxious thought by the Governor in Council. On the other hand, no doubt the natives would have been more justly tried by the very strong Supreme Court of the Colony, whose handling of the matter would have removed all suspicion of any desire to terrorize, or put men unfairly to death. It is not surprising, therefore, that the news of the condemnation raised strong feeling in England, while the Imperial Government was directly concerned by reason of the fact that it had, on the urgent request of the Colonial Government, sent from Pretoria to Pietermaritzburg the 2nd Cameronian Highlanders, whose presence calmed the whole Colony, and moreover it would fall to it to sanction in due course the necessary Indemnity Act. Accordingly, on 28 March 1906, when the Secretary of State received intimation of the condemnation of twelve natives and their intended execution, he telegraphed to the Governor, pointing out the Imperial interests involved, and instructed him to suspend the executions pending further consideration. The result was conveyed on the next day by the Agent-General, who reported the resignation of the Ministry, and, after receiving further information on that date and 30 March, the Secretary of State gave way, permitting the executions, if the Ministry still thought them essential. Mr. Ramsay MacDonald quite properly, on 2 April, moved the adjournment of the House of Commons to consider the mode in which martial law in Natal was being applied, and the grave danger involved to the native subjects of the Crown. The explanations given by Mr. Churchill were ingenious but not wholly satisfactory; he suggested that the Governor had failed fully to keep the Secretary of State informed of the movement of events, so that he was compelled on 28 March to ask for further information, and that his final decision was not motived by the resignation, but was based on the conviction that the action proposed could be justified. The Opposition was feebly represented, Mr. Long drawing a contrast between the treatment of Natal and of the great Dominions,

while Sir Gilbert Parker laid down the right of a Colony to manage its own affairs, and stressed the fact that the Commonwealth Government had telegraphed an objection to interference with the action of a self-governing Colony. New Zealand, with much greater common sense, merely asked for information, while Sir Wilfrid Laurier declined to allow Canada to be drawn into an impertinent intervention in matters which in no wise concerned that Dominion. An effort was made by sympathizers in England to obtain intervention by the Privy Council, which naturally declined on 2 April [1] to take any action, because no application had been made to a Colonial Court, and it had no information which would justify its intervention. There was, indeed, no conceivable reason why the local Court should not have been asked to intervene, seeing that it was sitting in full operation, and not even the most timid Minister could argue that there could be any reason for martial law prevailing in Pietermaritzburg with a battalion of Cameronians to protect him from the natives whom misgovernment had driven to a futile rising against authority.

The action of the Government of Natal was clearly unwise, and indeed quite unconstitutional. Its ignorance of constitutional practice and law was sufficiently revealed by its treatment of the matter at issue as one of Imperial interference in the exercise of the prerogative of mercy. The prerogative of mercy, as even Lord Elgin recognized, had nothing whatever to do with the question; martial law sentences are not legal sentences, and the prerogative of mercy refers only to such sentences. The absurdity of its attitude was obvious enough; if the Imperial Government had simply withdrawn the Imperial forces and granted leave of absence to the Governor, the Colonial Government would have been unable to remain in office for a day, in face of the dismay which would have been created in the Colony. Its defiance of the Imperial Government was simply due to its conviction that that administration would not fail in its duty, whatever others might do. There is clearly a complete incompatibility between begging with pusillanimous eagerness for the protection of a British battalion, and, when safe beneath its protection, defying the British Government, and Sir Gilbert Parker's comparison with the Commonwealth of

[1] *Parl. Pap.*, C. 2927.

Australia was rather derogatory to a Dominion which has long been fully prepared to defend itself. The most that can be said for the Colonial Government is that Lord Elgin's telegram, hastily dispatched without consultation with experts, was too peremptory, for he was unused to responsible government in the Dominions, and accustomed to Indian autocracy, while the Governor was well meaning but inexperienced, and failed to serve the function of a useful intermediary between the Imperial and Colonial Governments. It may be admitted also that Mr. Churchill's exposition in the Commons, though brilliant, showed as usual his failure to grasp clearly the precise constitutional points at issue, which he promised indeed to explain in a reasoned dispatch from the Secretary of State, which was, unfortunately, never sent.[1]

Against this isolated case there stands a long array of cases in which the point as to resignation has been deliberately raised and dealt with, in addition to the far larger number of instances in which it has not even been raised. In 1872 [2] a very curious case occurred. The Houses of the Parliament disapproved of a certain pardon granted by the Governor to Louisa Hunt, and in both, motions of censure of the Government for advising the pardon were carried. But the Ministry held that resignation was not appropriate, on the ground that the matter of pardon was not within their sole competence, under the instructions then in force, and that accordingly they could not be expected to accept full responsibility for a decision, which, if indeed in accordance with their advice, was nevertheless in law the decision of the Governor. In 1878 [3] a very critical situation arose in the Cape, where two Kaffir wars were raging. The Governor, Sir Bartle Frere, an officer of Indian experience, was anxious to concert measures between the Imperial forces and the Colonial troops, as was indeed appropriate, having regard to his position as High Commissioner as well as Governor, and therefore charged with the relations of the Imperial Government to natives outside the area of the Colonies of the Cape and Natal. But the Colonial Ministry did not wish for such co-operation,

[1] Keith, *Imperial Unity and the Dominions*, p. 80.

[2] *Leg. Council Journals*, 1878, Nos. 35 and 36.

[3] *Parl. Pap.*, C. 2079, 2100; Molteno, *Sir John Molteno*, ii. 300–401; Walker, *Lord de Villiers*, p. 136.

as it meant the subordination of the local to the Imperial forces, and so they refused co-operation, and in lieu appointed a member of the Government to manage the campaign, which they conducted without any regard to the Governor. He, not unnaturally, exercised his discretion, and dismissed them on 2 February 1878, entrusting the Government to Sir Gordon Sprigg, who succeeded in obtaining a substantial majority in the Lower House. The difficulty thus was solved, much as if the matter in question had been an ordinary disagreement with Ministers, say over a dissolution, and not on a question of Imperial interest. The Secretary of State, however, in approving the Governor's action, did so pointedly on the assumption that he was motived by his responsibilities as High Commissioner, an Imperial officer charged with the duty of considering the issue from the point of view of South Africa as a whole, and he intimated that in these circumstances the Colonial Government should have been prepared to yield to his judgement in the matter. In any case, it is quite clear that they should have appealed to the Imperial Government to cause the Governor to alter his policy, before taking the step of seeking to ignore him as a factor in the Government which, quite properly, was the ground of his dismissal of his Ministers. In 1880[1] Mr. Todd well laid down the constitutional rule applicable in such a case: 'In all such cases the responsibility of the local Ministers to the local Parliament would naturally be limited. They would be responsible for the advice they gave, but could not strictly be held accountable for their advice not having prevailed', and he justly cited the apposite doctrine laid down by Lord Carnarvon,[2] when dealing with the issue of responsibility in matters of pardon: 'If it be the right and duty of the Governor to act in any case contrary to the advice of his Ministers, they cannot be held responsible for his action, and should not feel themselves justified on account of it in retiring from the administration of public affairs.' The doctrines thus enunciated were deliberately and expressly adopted by the Government of Mr. Ballance[3] in 1892 in New Zealand, when it came into conflict with the Earl of Glasgow on the issue of adding members to the Upper House. The new

[1] *Parl. Govt. in the British Colonies*, p. 590.

[2] *Parl. Pap.*, C. 1248, p. 7; Canada *Sess. Pap.*, 1876, No. 116, p. 82.

[3] *Parl. Pap.*, H. C. 198, 1893–4, p. 48.

Government desired twelve—it may be added, a very reasonable number, as the Council was very much under the influence of the Opposition ; the Governor offered nine, and, when they would not accept, he urged that constitutionally they ought to resign, so that there could have been a new Government and a dissolution to test the feeling of the country. He acted on the theory that the Imperial Government expected him, as part of his duty, to prevent the Upper House becoming a Chamber with no real authority. The Ministry, however, reiterated the view that, if it were right that he should refuse assent on Imperial grounds, then it was their right and duty to remain in office, and the issue was referred to the Secretary of State, who on 26 September 1892—the date later chosen as Dominion Day —terminated the discussion by instructing in effect the Governor to accept advice from Ministers except where real interests of the Imperial Government were at stake.

The Commonwealth of Australia had raised objection to any interference with a Colonial Government in 1906, but in the same year it displayed its sense of the true state of affairs when the Governor-General received instructions from the Imperial Government, that a Bill just passed to confer on British goods a preference conditional on their being imported by British ships manned by white labour, should not be assented to. In lieu of resigning office, Mr. Deakin, most fiery of men, and eager to denounce interference with self-government, readily agreed that the Bill should be reserved, in the certain knowledge that it would never become law, because, apart from treaty difficulties, the British Government could not accept a preference which offensively differentiated against His Majesty's Indian subjects, and sought to expel them from their ancient occupation of serving on ships trading to Australia.[1] Mr. Deakin doubtless was aware that Canadian precedent was hopelessly opposed to resignation on such an issue ; in the vehement copyright controversy of 1889–94, when Canada found her right to regulate copyright freely utterly denied, no Canadian Government threatened to resign,[2] and in the similar controversies over the Merchant shipping legislation of the Commonwealth that device was never even hinted at.[3] In New Zealand, when

[1] *Parl. Pap.*, Cd. 3523.

[2] *Parl. Pap.*, C. 7781, 7783.

[3] *Parl. Pap.*, Cd. 2483, 3826, 3891, 4355.

Parliament in 1910 passed a very drastic Shipping Bill intended indirectly to drive lascars out of the shipping trade, and declared energetically that its coming into force was of essential importance, the Ministry readily agreed to reservation of the Bill, and when, in 1911, it was intimated that it would never be allowed to become operative, it acquiesced without a protest in the decision.

Still more apposite is the case of the attitude of the Government of Newfoundland,[1] when, in order to enforce a *modus vivendi* entered into with the United States regarding the fishery rights of American citizens in the Colony, under the old Treaty of 1818, an Imperial Order in Council was issued under the Imperial Act of 1819, passed of course thirteen years before the Act conferring representative government, under which Newfoundland legislation was overridden, in so far as necessary, to prevent interference with the *modus vivendi*. Great was the indignation of the Ministry, but Sir R. Bond declined absolutely to do anything so foolish. Still more significant was what happened in 1908 in Natal itself.[2] The Ministry proclaimed martial law, against the view both of the Governor and the Secretary of State—Lord Elgin's feeble personality unfortunately had little weight in Natal, and his services were immediately dispensed with on the formation of Mr. Asquith's Ministry; it arrested, under cover of martial law, the Zulu chief Dinizulu, who had been settled in Zululand by the British Government before its transfer to the mismanagement of Natal, and to whom Natal had undertaken to pay a salary which was not to be stopped without Imperial concurrence. It then stopped his allowance, hampering him in his efforts to defend himself against the charges made of disloyalty. The Imperial Government objected strongly, and prepared to pay the salary itself, as could have been enforced no doubt by a petition of right, and in any case was clearly morally binding, with the result that the Natal Government gave way, and provided means to the chief to prepare a defence. The Imperial Government also disagreed with the Colonial Government's proposals as to its Indemnity Bill, but the Colonial Government did not resign. No doubt it had been realized that the only result would have been indifference

[1] *Parl. Pap.*, Cd. 3765.

[2] *Parl. Pap.*, Cd. 4194, 4328. For a candid avowal of the demerits of the Natal case see Mr. Evans, Cd. 4328, p. 77; Sir C. Dilke, *Hansard*, cxc. 113–15.

on the part of the Imperial Government, which was not likely twice to be stampeded into precipitate action, and which realized that nothing could be more foolish than to accept the doctrine that a resignation of a Ministry should mean British surrender. The right of any Ministry to resign is obvious, but it is equally clear that it is not the business of the Imperial Government to find another Ministry to replace it, and the Natal Ministry of 1908 doubtless knew that, if they resigned, Sir M. Nathan would not fall into a panic like his predecessor, but would wait until a new Ministry presented itself.

Needless to say, during the war no absurdity of this sort presented itself; the demands of Sir R. Borden[1] and of Mr. Hughes for representation separately for the Dominions at the Peace Conference were energetically pressed, but neither of these politicians menaced resignation if they did not get what they wanted from Mr. Lloyd George. The doctrine that by resignation a Colonial or Dominion Government can force the Imperial Government[2] to yield may therefore be dismissed into the oblivion whence it emerged only owing to the unfortunate mismanagement of a difficult situation by a weak Colonial Government, an inexperienced Governor, and a Secretary of State unaccustomed to that suavity of manner which is essential in communications addressed to territories possessing responsible government, and lacking the moral courage to face a difficulty caused by an error of his own making.

§ 2. *The Governor's Duties under Imperial Acts*

A considerable number of duties are imposed on Governors under Imperial Acts. Thus he is the authority for many matters under the *Fugitive Offenders Act*, 1881, and the *Extradition Act*, 1870 (s. 17), and that of 1873 (s. 3). To him again the *Merchant Shipping Act*, 1894, entrusts various functions, as in ss. 84, 90, 205, and 366, and he is also mentioned in the earlier naturalization legislation, but the powers in question are now given to the

[1] Compare also the dispute in 1917 discussed by Sir R. Borden, *Canadian Constitutional Studies*, pp. 121 f.

[2] In the analogous case of a Provincial Government in Canada, no such ludicrous doctrine has ever been mooted, though, e. g. in 1926, the desire of the Government of Nova Scotia to swamp the Legislative Council was peremptorily negatived by the Dominion Government; *Canadian Annual Review*, 1925–6, p. 408.

Governments by the Act of 1914. Owing to the withdrawal of Imperial forces from the Dominions, the powers ascribed to him in the *Army Act* (ss. 54 (7), 94, 130, 135, 189) are normally not of much importance, though it was otherwise in war-time, but he is, under the *Colonial Courts of Admiralty Act*, 1890, s. 10, Vice-Admiral in the absence of other appointment, and is empowered (s. 9) to fill vacancies in the establishment of a Vice-Admiralty Court, if any, pending the decision of the Admiralty. Important powers under the *Pacific Islanders Protection Acts*, 1872 and 1875, are assigned to him, and his assent is in theory necessary under the *Territorial Waters Jurisdiction Act*, 1878, for the prosecution of any alien in respect of an offence committed on the open sea within the territorial waters of a Colony, and there are other cases.

In these matters the Governor can legally act on his own authority, and Mr. Higinbotham as a purist held that it was his duty so to do, though he was driven by this doctrine to suggest that it would be proper to allow some of his duties under the *Merchant Shipping Act* to be performed by him on ministerial advice under a local Act. This view, however, really contradicts his own admission that there ought to be good feeling between different Governments in the Empire, so that one would aid another.[1] A Governor needs help to do official acts effectively, and it is most proper that he should have aid of this kind. The Government of Canada[2] early enunciated the doctrine that, as the act was to be performed in the Dominion, the Governor-General should ask ministerial advice, and the same doctrine was laid down by the Governor of New Zealand, when an officious firm, anxious to obtain a licence under the *Pacific Islanders Protection Acts*, insisted that he ought to act on his own authority, and when he replied that he neither could nor would act save with the advice of his Ministers.[3] In 1908, on the same principle, the Governor of Victoria declined on ministerial advice to issue a licence under

[1] So the Bankruptcy Act, 1914, s. 122, lays down for the whole Empire the obligation of the Courts therein to be auxiliary to one another, and still binds the Irish Free State.

[2] *Parl. Pap.*, H. C. 194, 1890, p. 8. Contrast an old case of action without advice in *Hansard*, ser. 3, cclxxvi. 1902, 1946.

[3] New Zealand *Parl. Pap.*, 1891, A. 1, p. 7.

these Acts. Advantage too has naturally been taken of ministerial assistance in carrying out miscellaneous minor duties such as the lease of small islands in the Pacific.[1] It may, of course, be admitted that on occasion these powers might have to be exercised in independence of the wishes of ministers, but cases of this sort could not be frequent.

In some cases, however, powers are given to a Governor quite distinct from those he has in that capacity, in order that he may exercise them without being under ministerial control, in such a manner as to promote harmony between the interests of the Dominion and the other matters for which he is made responsible. The classical example of this is the case of the Governor of the Cape of Good Hope, who regularly until the annexation of the Transvaal and the Orange Free State held a commission as High Commissioner for South Africa, in which capacity he was given authority to deal with protected territories, and relations with the civilized territories not under the British Crown, especially the Transvaal and the Orange Free State. He had also to deal with the small Crown Colonies which existed in the vicinity of the Cape, until one by one time for annexation approached; thus British Kaffraria was annexed in 1865 under Act No. 3; Griqualand West lost its distinct status under Act No. 39 of 1877, and British Bechuanaland[2] under Act No. 41 of 1895; on the other hand, Basutoland, annexed in 1868 and attached to the Cape by Act No. 12 of 1871, was roused to rebellion by a foolish attempt at disarmament, and greatly to the benefit of the natives was disannexed in 1884 under Act No. 34 of 1883, and restored to the care of the High Commissioner. Control over the operations of the British South Africa Company from 1889 onwards was vested in the High Commissioner, who was represented by a Resident Commissioner in Rhodesia. The task of combining the functions of two offices was far from easy, and, as a result of Sir Bartle Frere's difficulties with the Cape Government and the troubles in the Transvaal, an office as High Commissioner for South-east Africa was held by Sir G. Wolseley from 1879–81, while the Governor of Natal was later made a Special Commissioner for Zululand

[1] Norfolk Island was thus really under colonial government before it was formally placed under the Governor of New South Wales as such.

[2] *Parl. Pap.*, C. 7932. It became a Crown Colony in 1885.

until its unfortunate attachment to the Colony in 1897.[1] A suggestion was made by the Rev. J. Mackenzie [2] that the High Commissionership should be detached from the Governorship, but this proposal would have involved the direct undertaking of responsibility for advance in South Africa by the Imperial Government, which shrank from any responsibility, preferring to leave to Mr. Rhodes and his associates the burden of the foundation of Rhodesia.

When the Boer States were annexed, Lord Milner was given as Governor of the new Colonies the position of High Commissioner, and it was in this capacity that he concluded an accord with Mozambique, which for years dominated the relations of the Rand and that territory as a recruiting centre and commercial relations between the two territories. On the grant of responsible government to the Orange River Colony in 1907 the High Commissionership [3] became associated with the Governorship of the Transvaal, but it was as Governor in 1909 that Lord Selborne modified in essentials the agreement made by Lord Milner as High Commissioner. Naturally, the style and responsibilities passed on Union to the Governor-General of the Union, who in this capacity controls the protectorates of Bechuanaland [4] and Swaziland, formerly a protectorate of the Transvaal Republic,[5] and the Colony of Basutoland.[6] His control over Southern Rhodesia terminated on the grant of responsible government on 1 October 1923, while, on the other hand, from 1 April 1924 Northern Rhodesia fell under the direct care of the Imperial Government exercised through a Governor, the British South Africa Company yielding control.[7]

[1] *Parl. Pap.*, C. 8782.

[2] *Parl. Pap.*, C. 5488 (1888); W. D. Mackenzie, *John Mackenzie*; B. Williams, *Cecil Rhodes*, pp. 130 ff.

[3] See *Parl. Pap.*, H.C. 130, 1905.

[4] Created in 1885, organized in 1891 under Order in Council, 9 May, and still governed under Order in Council. Cf. *Rex* v. *Crewe, Ex parte Sekgome*, [1910] 2 K. B. 576.

[5] It was transferred to the control of the High Commissioner by Order in Council of 1 Dec. 1906. See *Sobhuza II* v. *Miller and the Swaziland Corporation, Ltd.*, [1926] A. C. 518; 42 T. L. R. 446 for the legal status of the territory.

[6] This territory is preserved as a native reserve, and native institutions, including the Pitso, or Assembly, are carefully fostered. See the annual Colonial Reports.

[7] See Order in Council, 20 Feb. 1924.

§ 3. *The Imperial Conference of 1926*

With a rather abrupt breach of tradition the Imperial Conference of 1926,[1] impelled by the Irish Free State and in some degree Canada, not merely concluded that, as head of the Dominion administration, the Governor-General should comply with the rules applicable to the King in the United Kingdom, but that he should cease to be regarded as in any sense a representative of the Imperial Government. This conclusion was followed up in discussing communications on foreign affairs, by asserting that under the new rule the Governor-General was not qualified to represent the views of the Imperial Government, which thus lost any spokesman in the Dominion. The logical conclusion, of course, is that communications from the Imperial Government, and Dominion communications, should pass through other hands, e. g. be sent direct by the Minister of External Affairs or the Prime Minister to the Dominion or Foreign Secretary of State, or the Imperial Prime Minister, and, if disputes arise, the Governor-General will have no hand in them. Difficult questions arise, and it is fortunate that the Conference did not dogmatize as to whether the new system should be imposed at once, leaving the matter one for settlement in further discussion, so that it is not necessary that the new system should be applied anywhere where it is not really wanted. It must be pointed out that in regard to the reservation of Bills the Governor-General cannot be deprived of his Imperial function without legislation, in part Imperial, in part Dominion. Moreover, it is clear that the time is not ripe for appointing to each Dominion a diplomatic representative of the British Government, and that in practice the use of the Governor-General as an intermediary might well continue, save e.g. in Canada and the Irish Free State. In the latter, it must be remembered, he is essentially the authority through whom reservation of Bills is carried out, for no disallowance is provided for in the Irish Constitution. On 25 November 1926 Mr. Baldwin expressly asserted that no change was contemplated in the position of the Governors-General as to reservation of Bills, thus negating the theory that South Africa was now free to secede by simple Act, automatically assented to.

[1] See Part VIII, chap. iii, § 8; and Part V, chap. v, § 9. The Governor-General for the Union cannot, as long as he is also High Commissioner, cease to be in effect an Imperial representative.

VII

THE CABINET SYSTEM OF THE DOMINIONS

§ 1. *The Cabinets of the Dominions*

THERE is nothing in the Dominions precisely corresponding to the British Cabinet and Privy Council. The latter body, which is regularly referred to in legislative measures, while the former has a very slight formal existence, is composed not merely of the Cabinet ministers of the time being, but of ex-Cabinet ministers, of ministers not of Cabinet rank, and ex-ministers, ambassadors, prominent politicians, and a few others who have been rewarded for conspicuous services of odd kinds by Privy Councillorships. The Cabinet again contains a selection of the ministers at the head of departments, leaving a certain number outside, as well as a large body of Secretaries, Under-Secretaries, Financial Secretaries, &c., who are also ministers, though inferior in status. In the Dominions, on the other hand, there is a tendency for the Cabinet to correspond closely with the Executive Council, and in any case there is no parallel for the British practice which authorizes any matters to be done in Council by a quorum of three, who need not be politicians at all, and who never discuss or investigate in any way the business put before them on the authority of ministers, the regularity of the procedure being assured by the responsibility of the Lord President of the Council.

In New South Wales, South Australia, Queensland, and Western Australia, the Canadian Provinces, Newfoundland, New Zealand, Malta, Southern Rhodesia, and formerly in the Transvaal, Orange River Colony, and Natal, the Cabinet is synonymous with the Executive Council, though there may, of course, be informally an inner Cabinet, as has been known in the United Kingdom. In the Irish Free State,[1] on the other hand, there is a distinction between the Executive Council and departmental ministers, who are not collectively responsible, and do not fall with a Ministry. In Canada, the Commonwealth,

[1] Constitution, ss. 52–6. It was announced in Nov. 1926 that the ministers would all be brought into the Cabinet by a constitutional change.

the Union, Victoria, and Tasmania, and formerly the Cape, the Executive Council—styled Privy Council in Canada only, a style created as a sign of honour in the Act of 1867—includes ministers and ex-ministers, distinguished as members under and members not under summons.[1] In Canada there is a slight approximation to the British model, in that distinguished men have occasionally been honoured by membership without ever being ministers; thus an ancient Senator was so distinguished in 1925, and the Prime Minister of the Commonwealth received this attention in 1916 when *en route* to England, there to be made a Privy Councillor. Moreover, the Solicitor-General of Canada is made a Privy Councillor, though not of the Cabinet. The Privy Council of Northern Ireland[2] retains a comprehensiveness similar to that of the United Kingdom. But the nominal inclusion of ex-ministers is merely an honorary matter, and when in 1908, in the case of the fate of a prisoner Hudson in Tasmania, it was proposed that the whole Council should be summoned to discuss it, the idea was not persisted in,[3] though it is curious that the Governor of Victoria had contemplated at the start of responsible government that the enlarged Executive Council, which he desired to have maintained, might on emergency be of assistance.

As has been seen, the connexion in law between the Parliaments and the Executive Councils is small. The Councils themselves, like the Privy Council, are mainly creations of the prerogative, and do not appear in the Constitution Acts; this is so in the Australian States, Newfoundland, New Zealand, Malta, Southern Rhodesia, as formerly in the four South African Colonies. In Canada it was thought desirable—though probably unnecessary[4]—on federation to create the Privy Council, and to confer Executive Councils on Ontario and Quebec; similarly such Councils were accorded by their Constitution statutes to the new Provinces of Manitoba, Saskatchewan, and Alberta, while those of the Maritime Provinces and British Columbia were created by the prerogative, and, though regulated by Provincial Acts, are not created by them. Executive Councils

[1] The distinction is formally recognized in the royal instructions to Victoria only.

[2] 13 Geo. V, c. 2, Sched. I, s. 2. [3] Hobart *Mercury*, 20, 21 Oct. 1908.

[4] Clark, *Australian Constitutional Law*, pp. 190 ff.

were similarly created by statute for the Commonwealth, the Union, the Irish Free State, and Northern Ireland.

Canada does not provide any legal connexion between Executive Councillors and membership of Parliament, nor do the provinces or Newfoundland, nor in Australia, New South Wales, Queensland, and Tasmania. South Australia, however, provides [1] that certain persons shall *ex officio* be members of the Council and must not hold office for more than three months without seats in Parliament; Victoria requires that four members of the Council must, and eight may be, in Parliament, not more than two being in the Legislative Council,[2] while Western Australia [3] insists on one Executive Councillor being in the Upper House. New Zealand [4] requires paid ministers to be Executive Councillors, but does not compel Executive Councillors to be members of Parliament. The Commonwealth [5] and the Union,[6] however, require ministers to be Executive Councillors, and to have or find seats in Parliament in three months. The Executive Councillors of the Irish Free State must be members of the Chamber of Deputies, but the other ministers need not be. Ministers in Northern Ireland must be Privy Councillors and obtain seats within six months. In Malta and Southern Rhodesia ministers must obtain seats within four months, but their connexion with the Executive Council is, as formerly in the Transvaal and the Orange River Colony, only indicated indirectly in the letters patent constituting the Executive Council, which authorize the Governor to appoint them to it.

Apart from legal requirements, it is prevailingly the rule in the Dominions as in England, that ministers must be in Parliament, though, as there, a minister if regarded as specially valuable may be allowed to function for some time, waiting until a seat can be found for him. The practice, of course, can be abused, as when in British Columbia in 1900 the Ministry of Mr. Martin, which never had a Parliamentary majority, held office without securing election or re-election to the Legislature, and this was one of the grounds for the dismissal of the peccant

[1] See *Constitution Act*, 1855–6, s. 32.
[2] Act No. 1864, s. 9.
[3] 53 & 54 Vict. c. 26, Sched. s. 6; 63 Vict. No. 19, s. 43.
[4] Act No. 31 of 1920, s. 13.
[5] Const. s. 64.
[6] 9 Edw. VII, c. 9, s. 14.

Lieutenant-Governor.[1] In 1908 in Western Australia a minister who was defeated in the general election, but against whose opponent's return a petition was being brought, remained in office until the case was terminated, and his action was energetically defended by the Premier ;[2] a year before Mr. Airey in Queensland had been unable for a considerable period to find a seat, and in 1908 Mr. Kent, Minister of Justice in Newfoundland, was in that position, while Mr. Templeman in British Columbia, after defeat at the election of 1908, had to wait until 1909 to find a place. Nor are other instances lacking, but the room for the procedure is limited ; a Government can seldom afford not to have a minister in Parliament, and even so useful a minister as Mr. P. M. Glynn in the Commonwealth had to be dispensed with on failure to obtain a seat at the general election of 1919. It must be remembered that the small size of Dominion Parliaments mitigates against the possibility of finding seats at by-elections, and the absence of the power to give honours to members who are obliging enough to vacate seats to allow of the election of defeated ministers, hinders such instances of self-sacrifice. It is significant that such matters are more easily arranged in the case of Canada, where the 245 members of the House of Commons afford a wider sphere of possibility, and where a member may be induced to stand for re-election, though reluctant, on the chance that he may be able to cede the seat to a defeated member of the Government. In cases where nominee Upper Houses exist, there has been the possibility of appointing to an Upper House a member willing to be helpful in this way to his party.

The British practice of re-election on acceptance of office—now abandoned by a Conservative Government on flimsy grounds —was introduced in its full form into Canada,[3] where it has remained normal in the Dominion and the Provinces, the principle, however, being that on resignation of a Ministry and its reformation, whether owing to the retirement of the Prime

[1] Canada *Sess. Pap.*, 1900, No. 174, p. 17, where cases in Ontario in 1898 are cited.

[2] *Parl. Deb.*, 1908, p. 59.

[3] A deplorable evasion of the rule in Canada in July 1926, when persons administered departments in Mr. Meighen's Government without being admitted to office, was censured by the House of Commons on 2 July. It reflects equal discredit on the Prime Minister and Lord Byng.

Minister or his death, the Ministers need not be re-elected, unless indeed a new Ministry has actually been formed and installed formally in office in the interim. This is convenient in cases where there may be a short period when efforts are being made to secure a fresh Ministry, after the Government has definitely ceased to exist as such, and the statutes definitely assign a month as the period. In South Africa the rule was never adopted, and so does not appear in the Union Constitution. South Australia rejected it from the first, as did the Commonwealth, and it has gradually vanished from the other States,[1] while New Zealand, Malta, Southern Rhodesia, and the Irish Free State ignore it. The acceptance of another post or of two portfolios does not, of course, vacate a seat. The short duration of Dominion Parliaments in Australia and New Zealand is one of the causes of the acceptance of re-election as otiose, and, where it is in vogue, its inconvenience has often been noted, but the advantages of allowing thus an expression of the will of the people have been held to outweigh other considerations.

§ 2. *The Prime Minister and the Cabinet*

The rule in the Dominions, as in the United Kingdom, is that the unity of the Cabinet depends on the personality of the Prime Minister, and it follows, therefore, that on his resignation the whole body of ministers are held to have resigned, and merely to be remaining in office, until routine business is disposed of and new Ministers take their places. Occasionally, there have been misunderstandings of the position as even in the United Kingdom; thus in 1847 in Canada it seems to have been thought that the resignation of a Prime Minister was merely personal to himself, and that the Ministry remained as such in being; this was no longer the view in 1856 and 1865.[2] In 1878,[3] again, Sir Bartle Frere wished to treat his Prime Minister's resignation as merely personal, but entirely failed to have this view accepted. In 1910, Sir G. Strickland, when offered by Sir Newton Moore the resignation of himself and his Ministry, accepted the former only. But this is clearly an inconvenient

[1] In Queensland it disappeared by 48 Vict. No. 29, perhaps accidentally; Bernays, *Queensland Politics*, p. 291.

[2] Pope, *Sir John Macdonald*, i. 50, 157, 285.

[3] Molteno, *Sir John Molteno*, ii. 342.

practice, because it places the new Prime Minister in an invidious position. He then comes into office with a Ministry in being, in lieu of one which merely awaits the appointment of successors to leave office formally. He thus has to request those whose services he cannot use to resign, in lieu merely of refraining from asking them to remain in office, and, while the difference in fact is minimal, that of form is very substantial. The principle that a Prime Minister shall determine his own Cabinet clearly assumes that none exists when he is appointed. The rule, accordingly, is quite normal in the Dominions; thus in 1876 the Atkinson Ministry in New Zealand resigned in order to be reconstituted; on Mr. Ballance's death in 1893 the Ministry all resigned and a new one was reconstituted; on Mr. Seddon's death in 1906 a Ministry was formed *ad interim* under Mr. W. Hall-Jones on 21 June and succeeded on 6 August by a permanent combination under Sir J. Ward. The precedent was followed on the death of Mr. Massey in 1925, when an interim Ministry was formed under Sir F. Bell and then finally reconstructed under Mr. Coates. The use of the Prime Minister's power is seen interestingly in the history of the Commonwealth; Mr. Hughes by resignation destroyed the Labour administration, and formed his own Labour Ministry of 17 November 1916, and similarly he dismissed his Labour administration, by resignation, and was able to appoint a fresh Ministry, the National Ministry, of 17 February 1917. Again he dissolved that Ministry by resignation on 8 January 1918 [1] and reformed it on 10 January 1918. His decision to resign on 1 February 1923 dissolved his Ministry, and made way for the Bruce-Page coalition and Mr. Bruce's Ministry of 9 February 1923. Canadian practice in the federation has been regularly in this sense, and the same rule applies to the Provinces, and has been followed in Malta. Of course, the exact date when Ministers do give up their offices formally is usually a matter of arrangement with the Governor. It must be remembered that a resignation of an office under the Crown is not complete until it is accepted by the Crown, and accordingly, after the effective resignation, a few days usually elapse until arrangements are completed for successors to be appointed, so that there shall be no real interregnum in the offices of State.

[1] So in 1912 General Botha resigned to allow of reconstruction of his Ministry without General Hertzog, who would not resign.

But this is not absolutely essential ; a Ministry may disappear *de iure* before any other is actually installed. On the death of its chief, Ministers remain, of course, legally Ministers and empowered to act, but their tenure is merely that of persons waiting for an invitation to take office in a new Cabinet, or intimation of the appointment of others in their place. Regard to these obvious facts would probably have obviated most of the misunderstanding which has prevailed on the subject. The Free State Constitution effectively expresses the position ; the Executive Council is to retire from office when it ceases to command the support of the Chamber of Deputies, but (s. 53) they shall continue to carry on their duties until their successors shall have been appointed.

The discretion of a Prime Minister as to his choice of colleagues is, of course, subject in the Dominions to the same principles which govern it in the United Kingdom. His choice is strictly limited by considerations of placating the different sections of his followers, and in the federations and the Union by the necessity of remembering the claims to office of the several parts of the country, a fact which often makes for weak Ministries. He has the same option between giving office to an advanced supporter and fighting his influence in the Cabinet or being faced by his criticism from his place in the Assembly. Special skill in regard to some department of the administration is always a factor of high importance. But in the case of the Labour Ministries of Australia the position is different. The choice of Ministers there rests with the Parliamentary caucus, consisting of all members of the Labour party, who are under stringent obligations of fidelity to the party platform, and the Prime Minister has no option but to accept the colleagues assigned to him. This was not the case in the first Commonwealth Ministry of Mr. Watson, but Mr. Fisher had in 1908 and 1910 to submit to the rule and it has since been invariable ; it was a signal sign of the breaking away of Mr. Hughes from his own party that in his Ministry of 17 November 1916 he selected his own colleagues.

The practice has further extended to the selection of the Prime Minister himself by the caucus. At first sight it seems as if this were an invasion of the rights of the Governor to make his own choice, but the matter can be and has been managed

constitutionally. The caucus, when the general election shows itself in their favour, agrees on the Premier, and, if the Governor should ask any other Labour member to form a Ministry, he would merely express his regret and advise the selection in lieu of the man chosen by the caucus. The usage of choosing colleagues for a Prime Minister by vote has not yet definitely spread to other kinds of Ministries, though signs of it are apparent, and of course in cases of Coalition Ministries it is often the way, as when Mr. Page and Mr. Bruce coalesced in 1923, for one or both of the parties to stand firm either on the number or personality of its representatives in the Cabinet or on both. It should be noted as a mark of the sense of constitutional propriety of Mr. Wilford, as leader of the Liberal Opposition in New Zealand during the period after Mr. Massey's death, when he desired that a union of the two anti-Labour parties should be brought about, that he was willing that the Prime Minister should select his colleagues and should have a free hand, he himself retiring from political leadership for this purpose. When coalitions [1] become desirable, as was specially the case during the war, when they were formed in New Zealand and Canada as well as in Australia and Newfoundland, it is usual for the Ministers to place themselves in the hands of the Prime Minister, thus permitting him full freedom of action in the reconstruction of the Ministry so as to meet the conditions imposed by the other party which is to share in the coalition.

In the case of the Irish Free State,[2] constitutional usage as usual is hardened into law. The President of the Council is to be nominated for appointment by the Chamber of Deputies; he is to select one of the Chamber as Vice-President, and all the Ministers are nominated by him with the assent of the Chamber. The Ministers not members of the Executive Council are not even nominated by him, but by the Chamber itself on the recommendation—which may be rejected—of a Committee representative of the Chamber. But in the event of Parliament appointing functional or vocational Councils these Ministers may be recommended, if Parliament so decides, by these Councils. They hold office subject to removal by the Chamber after investigation by a representative Committee, until the appointments of successors in a new Parliament. This is all that is left

[1] Keith, *War Government of the Dominions*, pp. 196–243. [2] ss. 53–6.

of a much more ambitious scheme of having permanent Ministers irremovable by Parliament as an experiment in government, and the adoption of the Executive Council system relegated the non-Council Ministers to minor importance.

The cohesion of Ministries in the Dominions is perhaps rather less than in the United Kingdom, but in view of Mr. Asquith's somewhat feeble control and the precedents of disunion in Mr. Lloyd George's coalition Ministry, it is perhaps unwise to stress the difference. Certainly Canada has had Ministers who were strong enough to dominate their Cabinets ; Sir John Macdonald was followed by Sir Wilfrid Laurier, and in minor degree Sir R. Borden dominated his colleagues.[1] Mr. Mackenzie King [2] and Mr. Meighen [3] under more adverse circumstances were less able to achieve equal pre-eminence. General Botha was remarkable for his attraction for his colleagues, but had to rid himself in 1912 of General Hertzog as definitely a hostile influence ; on his death General Smuts succeeded to his position, but lacked the personal popularity and reputation for simple honesty of the predecessor, though his strategic skill was admitted. Mr. Deakin was unquestionably feeble as a leader, and during his illness in 1907 his Treasurer and Minister for Trade quarrelled openly, and the former resigned because he could not work with the latter, a fact which elicited surprise at the time, on the score that it was not really essential for a Ministry to agree.[4] Moreover, his successor as Treasurer promptly proceeded to repudiate his predecessor's arrangements for a financial settlement with the State Governments, although it is clear that on any reasonable theory of Cabinet solidarity the Cabinet should have accepted the former proposals and there should have been no question of altering the basis of settlement. It is not surprising that in 1908 amazement was expressed in Victoria that the State Premier laid down the rule that his colleagues were to discuss their projects with him first of all,

[1] Sir O. Mowat ruled Ontario for twenty-four years. Mr. McBride in British Columbia, Mr. Fielding in Nova Scotia, Mr. Roblin in Manitoba, are other cases of long tenure of office.

[2] Sir L. Gouin and Mr. Fielding until their resignation were of great weight.

[3] Strong efforts were made in 1924–5 to induce Mr. Meighen to resign his party leadership. But no one of his party was as competent.

[4] A Cabinet crisis arose in Nov. 1926 in New South Wales because the Premier decided on a budget without Cabinet approval.

and obtain his consent before they gave them out as the intentions of the Ministry; the Premier's action was, of course, justified by the difficulty in which his administration were placed by having either to carry out rash promises or to repudiate the authority of a colleague. But the Premier seems to have been little better himself as an observer of the rule of solidarity, for in the same year the newspaper which was deemed to be his organ delivered a series of attacks on one of his colleagues, apparently intended to drive him from the Government. In 1910 the Minister for Mines in the same State informed an admiring public that he had fought the Cabinet over the question of the sale to the public of coal from the State mines, and had won the day. In Newfoundland the long predominance of Sir R. Bond came to an end because Sir E. Morris insisted on taking to himself the credit for increasing the pay of the men working on the roads, although properly, of course, the decision should have been regarded as a Cabinet one, for which the credit must rest primarily with the Premier. Sir Wilfrid Laurier had to rid himself of Mr. I. Tarde in 1902, as he insisted on expressing his views on fiscal policy, which were opposed to those of his leader; Sir R. Borden in 1912 found that Mr. Monk demanded a referendum on naval policy which he refused, with the result of his colleague's resignation. More stern measures were necessary in 1916, when Sir Sam Hughes resisted vehemently the appointment of a Minister to control the Canadian forces overseas, a matter which he desired to retain in his own hands as responsible generally for defence; a new Ministry was created by the Government, and Sir Sam Hughes, whose indiscretions had counterbalanced his eager energy, was asked to resign office; in 1917 Sir R. Borden in his policy of compulsory service first found Mr. Patenaude resigning in June on the score that he was opposed to his proposals of military service, while in August Mr. Robert Rogers left him because he was not militant enough. Mr. Hughes's forcible policy and his autocratic leanings rendered him predominant in his Ministries, but also engendered friction, which finally brought about his downfall in 1923 at the hands of those whom he had alienated, while his colleagues, by being overshadowed, lost prestige in the eyes of the public, and were the most severe sufferers at the general election. He had rid himself in 1918 of Mr. Jensen, one of his

own ministers, whose attitude turned out to be far from sympathetic with his leader's aims; a more serious loss was the resignation of Mr. Watt on 9 June 1920, when, having proceeded to England on an important financial mission, he found that he was intended merely to act as a means of communication of Mr. Hughes's views to the Imperial Government, a function which might equally well have been served by telegraphic messages.[1] Mr. Hughes, however, probably resented the fact that, when he was in England before the Peace Conference, he found his Ministry most dubious as to the wisdom of the proposal for the separate representation of the Dominion at the Conference, the Cabinet coming very near to dissenting from the principles of their chief. It would indeed have been interesting if they had carried the matter to the extent of resignation in the absence of their leader, a course which has precedents in Australia, where Sir John Downer's colleagues resigned *en masse* when he was absent for the Colonial Conference in London, and in 1911 when Mr. McGowen's colleagues adopted a similar course in the absence of their chief for the Coronation celebrations. Naturally enough in New Zealand the coalition between Mr. Massey and Sir J. Ward was resented by the latter, who, as soon as the termination of the war permitted it, dissociated himself from his leader, expressing freely the feelings which he had restrained when actually in co-operation in the Ministry. In 1921 the not rare disputes in Provincial Cabinets in Canada reached a curious extreme in Saskatchewan, in which the Premier had to remove a colleague, Mr. Langley, who was accused of interfering with a judicial investigation of matters affecting a policeman, and who violated his oath of secrecy as to Cabinet business.[2] In the case of the Irish Free State the Constitution leaves studiously vague the question of the expulsion from the Executive Council of a dissident member. But

[1] Keith, *War Government of the Dominions*, p. 217. For the case of Mr. Tarte see Skelton, *Sir Wilfrid Laurier*, ii. 166 ff. Laurier's own treatment of Mr. A. G. Blair, who resigned in 1903, was lacking in due regard (ibid., ii. 184 ff.), and he also gave legitimate ground of complaint to Clifford Sifton (ii. 230 ff.), who resigned on the issue of the school question in the new Provinces of 1905, a question still painfully alive in 1925–6.

[2] *Canadian Annual Review*, 1921, pp. 781 ff. The utter disintegration of the Norris Ministry in Manitoba in 1922 was shown by its members disagreeing vehemently in public; ibid., p. 767.

it insists on the collective responsibility of the Cabinet, and experience shows that a dissident will follow the normal procedure and resign ; [1] whether he could be removed if he refused —as is the ultimate sanction for resignation in the Dominions— it is by no means easy to say, but very possibly this might be inferred from the general rule that the powers of the Governor-General are analogous to those of the Governor-General of Canada in the absence of any provision contradicting this doctrine.

§ 3. *The Composition of the Dominion Cabinets*

The composition of the Cabinets of the Dominions is regulated much as in the United Kingdom by the principle that a Ministry should contain all the most important departmental heads, and at the same time room should be found for ministers who are not overburdened with official duties. In the United Kingdom this is possible through the existence of such posts as Lord President of the Council, Lord Privy Seal, and Chancellor of the Duchy of Lancaster, though in addition the appointment of ministers without portfolio was resorted to in war-time. In the Dominions such ministers are quite normal ; [2] they can be used as Whips, to relieve ministers if ill or absent on tours which may take them far from the capital in the case of a great Dominion, or generally as helpers. It must be remembered that Parliamentary Under-Secretaries or Secretaries, ministers but not of Cabinet rank, are not normal in the Dominions, though experiments were made in the war, and in 1887 Sir John Macdonald [3] announced a plan which took effect in 1892 for the appointment of two non-Cabinet ministers, Controllers of Customs and Inland Revenue, to work under the Minister of Trade. But in 1895 [4] the ministers were brought into the Cabinet, and

[1] As in the case of General Mulcahy in 1924. The Parliamentary Secretaries appointed by the Executive Council can be removed by it ; see s. 7 of Act No. 16 of 1924.

[2] See e. g. New South Wales Act No. 32 of 1902 ; *Parl. Deb.*, 1910, Sess. 2, p. 409. For interchange of ministerial duties (as among English Secretaries of State) see e. g. South Australia Act No. 1000, 1910.

[3] Canada, *Commons Deb.*, 1887, ii. 862 f. Cf. Sir R. Cartwright, *Senate Deb.*, 1911, p. 252.

[4] *Commons Deb.*, 1896, i. 1065 ff. ; 1897, ii. 4122–30 ; 60 & 61 Vict. c. 16 ; 62 & 63 Vict. cc. 23, 24.

Sir Wilfrid Laurier in 1897 had an Act passed giving them the usual status of ministers. But the decision in 1887 to make the Solicitor-General a member of the Privy Council and the Ministry, but not of the Cabinet, has been observed. Occasionally exceptional treatment has been meted out to the Attorney-General, who in New Zealand until 1920 might or might not be in the Executive Council and might or might not be a member of Parliament.[1] But, though Attorneys-General have sometimes been non-political officers, as in New South Wales in 1875–8, or have been members of the Ministry but not in the Executive Council, as in Victoria in 1875, or been excused obtaining seats in Parliament, as in the Cape in 1892, the rule is normally that the Attorney-General plays a great figure in the Ministry, the office being one which a Premier may hold. This is due *inter alia* to the fact that the duty of Crown prosecutions is not incumbent normally on that officer, who in lieu takes charge of all the legal questions affecting the Government, advises its departments, and affords the Cabinet as a whole the great advantage of a trained intellect ready to deal with a varied assortment of problems.[2] The office is sometimes either associated with that of Minister of Justice or the title Minister of Justice is used in lieu. It can be held without legal qualifications, though this is rare, and, if it is so held, a Governor would not be obliged to regard a certificate from the Minister of Justice as of much legal weight; no exception was in point of fact taken by the Labour Ministry[3] of Tasmania in 1914 to the Governor's demand that, if the office were not in the hands of a trained lawyer—a difficult condition with Labour Ministries in Australia, where a good lawyer is neither likely to be a strong Labour supporter nor to care to take a mere Ministry—he should be at liberty to obtain advice from such a lawyer. As a result of the dissociation of the minister from active prosecution of criminals, it is to him that the exercise of the prerogative of mercy is in effect entrusted, the Governor normally acting on his advice as to remissions of sentences.[4]

In the Dominion Government the principle of representation of each part of Canada has been recognized as valid, and regularly

[1] See 50 & 51 Vict. c. 14; Act No. 22 of 1908; contrast No. 31 of 1920.
[2] Keith, *J. C. L.* viii. 136 f. [3] *Parl. Pap.*, Cd. 7506.
[4] See Keith, *J. C. L.* viii. 136. For Western Australia see Act No. 24 of 1922.

applied ; thus the first Ministry of thirteen members in 1867 comprised five from Ontario, four from Quebec, one representing the English-speaking population, and two each from Nova Scotia and New Brunswick. The problem is now more difficult, for the increase in the number of provinces renders it less easy to satisfy claims ; what is essential is that Ontario, Quebec, the Maritime Provinces, and the West should all be made to feel that they are not being passed over. The first Dominion Ministry contained no member without portfolio, but in that of 1873 two members were so appointed ; in 1878 the Speaker of the Senate was made a member of the Privy Council without portfolio. Various changes in distribution of duties and portfolios were made ; in 1909 the new office of Under-Secretary of State for External Affairs came into being, while it was decided to create a Ministry of Labour, as a sign of the growing importance of labour questions, and in 1910 the Ministry of Marine and Fisheries was divided into two departments under deputy heads, one for Marine and Fisheries and the other for the incipient Canadian Navy. The war emphasized the importance of the Navy, which ultimately received a minister, while a department of health, colonization and immigration came into being. A certain simplification may be noted in the Ministry of Mr. Mackenzie King of 1921 ; it consisted of the Prime Minister and Minister of External Affairs ; and Ministers of Finance, Justice, Railways, Militia Defence and Naval Affairs ; Marine and Fisheries, Trade and Commerce, Postmaster-General, Ministers of Labour, Customs and Excise, Agriculture, the Interior and Mines, Public Works, the Solicitor-General, and three ministers without portfolio. Of these the Minister of Public Works and one Minister without portfolio were Senators.[1] In 1926 there were two ministers without portfolio, one being a Senator, and Ministers of Public Health and Soldiers' Civil Re-establishment and of Immigration, in all nineteen.

It is unnecessary to trace the change of ministerial arrangements in the Provinces. In Ontario the Ministry of 1923 was composed of Premier and Minister of Education, Attorney-

[1] By c. 69 of 1920 the first Minister is given 15,000 dollars a year, other Ministers 10,000, and the same amount is accorded to the Leader of the Opposition. The ignoring of the Senate is the deliberate intention of Mr. Mackenzie King.

General, Minister of Public Works and Highways, Provincial Treasurer, Minister of Mines, Minister of Public Health and Labour, Minister of Agriculture, Provincial Secretary, Minister of Lands and Forests, ministers without portfolio, to the number of four. A Legislative Secretary for Northern Ontario was added in 1924 (c. 6) with 6,000 dollars salary, as usual also in Quebec.[1] Quebec has an Attorney-General, Ministers of Agriculture, Colonization Mines and Fisheries, Lands and Forests, Public Works and Labour, Provincial Secretary, Provincial Treasurer, and ministers without portfolio. The Ministry of Nova Scotia is restricted by law to nine members; that of 16 July 1925 was made up of Premier and Provincial Secretary and Treasurer, Minister of Public Works and Mines, Attorney-General, Minister of Natural Resources and Provincial Development, Minister of Highways, and four ministers without portfolio. The number in New Brunswick is likewise fixed at nine as a maximum, and under c. 4 of 1913 may include, as in 1925, Attorney-General as Premier, Provincial Secretary-Treasurer, Minister of Public Works, Minister of Lands and Mines, and Minister of Agriculture (replacing the Provincial Secretary, Surveyor-General, Commissioners of Public Works and Agriculture), Minister of Health, and the President of the Council. The Manitoba Government of Mr. Bracken of 1922 was made up of Prime Minister and Minister of Education, Attorney-General, Minister of Public Works, Provincial Treasurer and Minister of Telephones, Minister of Agriculture and Immigration, and the Provincial Secretary and Minister of Public Health. British Columbia[2] allows of eight ministers, of whom one must be unpaid; it has normally portfolios of Finance, Mines, Lands, Works which may be combined as in 1924 with Railways, Provincial Secretary, Attorney-General, and President of the Council. In Prince Edward Island the Ministry of 1923 comprised Premier and Attorney-General, Provincial Secretary-Treasurer and Commissioner of Agriculture, Commissioner of Public Works, and six ministers without portfolio. In Saskatchewan and Alberta there is a tendency to multiply the duties of ministers; there are the usual Attorneys-General,

[1] By 1925, c. 9, salaries of 12,000 dollars to the Premier, 8,000 to others, are provided in Ontario.

[2] By 1921, c. 12, the Premier receives 9,000, others 7,500 dollars.

Provincial Secretaries, Treasurers, Ministers of Public Works, Education, and of Agriculture, while Saskatchewan has a Minister of Municipal Affairs and a portfolio of Highways and Labour. Alberta in 1925 had a Premier and Attorney-General, Provincial Treasurer and Minister of Municipalities, Minister of Agriculture and Public Health and Provincial Secretary, Minister of Labour and Public Works, Minister of Railways and Telephones, Minister of Education, and a lady without portfolio.

In Newfoundland, as in certain of the Provinces of Canada, there is a fondness for making up the Cabinet by the use of honorary ministers. Thus the Ministry of Mr. Monroe of 1924 was composed of the Prime Minister and Minister of Education, Colonial Secretary, Ministers of Justice, Finance and Customs, and of Posts, and five ministers without portfolio, making up the Executive Council, with outside it the Ministers of Agriculture, Marine and Fisheries, and Public Works.[1]

In the Commonwealth the existence of the Government came into effect on 1 January 1901, when the Governor-General, who had obtained a Ministry under Mr. Barton, was enabled with the advice of the Executive Council to declare that there should be established the Ministries of External Affairs, Attorney-General, Home Affairs, Treasury, Trade and Commerce, Defence, and the Postmaster-General. Customs and Excise were transferred under the Constitution to the Commonwealth on 1 January, and by proclamations of 14 and 25 February the Departments of Posts and Defence were taken over from 1 March. The Ministry was completed by adding two honorary ministers, one of whom was Vice-President of the Executive Council, and conducted the business of the Government in the Senate. The Prime Minister himself took the office of External Affairs, which, however, was more appropriately re-named Home and Territories in November 1916, while the Ministry of Home Affairs was given then its more suitable style of Works and Railways. Acts of 1915 and 1917 increased the number of ministers from seven to nine, adding to the payment provided, making it up to £15,300 in lieu of £12,000, to which £800 each yearly was added by the *Parliamentary Allowances Act*, 1920. The Department of the Navy, originally included in Defence, existed

[1] The modest salaries are given by 1918, c. 5.

from 1915–21, that of Repatriation from 1917–23, replaced in 1925 by Markets and Migration, that of Health existed from March 1921, but in 1923 it was held along with that of Trade and Customs, while the Ministry of External Affairs was revived in December 1921, and held by Mr. Hughes and Mr. Bruce as Prime Ministers, reviving in name the practice of Mr. Barton and Mr. Deakin, who, however, in his last Ministry of 1909–10 held no portfolio. In his earlier Ministries Mr. Hughes preferred to be Attorney-General, while Mr. Watson and Mr. Fisher took the Treasury and Mr. Cook the portfolio of Home Affairs. Honorary ministers are regular ; one minister has to be in the Senate, and an effort is made to secure all the States one member of the Cabinet even if it be only an honorary minister, and not to have two full ministers from one State, though obviously these ends are not always attainable.

The New South Wales Ministry of Mr. Lang in 1926 was composed of the Premier and Colonial Treasurer, Colonial Secretary, Minister for Lands and Forests, Minister for Mines, Labour, and Industry, Minister for Agriculture, Minister for Education, Attorney-General, Minister of Justice and Assistant Treasurer, Minister of Health, Minister for Works and Railways, Minister of Local Government (separated from Health in 1926), an honorary minister, and the Vice-President of the Executive Council, the last two being members of the Legislative Council.[1] The Victorian [2] Ministry of 13 November 1925 contained the Premier and Minister for Water Supply, Treasurer and Minister for Education and Minister for Labour, Chief Secretary and Minister for Health, Minister for Lands and Immigration, Minister for Agriculture and Markets, Attorney-General and Solicitor-General and Minister for Railways, Minister for Forests, Minister for Public Works and Mines, and four honorary ministers. Two honorary ministers, and two others—the maximum—were in the Legislative Council. The Queensland

[1] These worthies in 1925 increased their salaries to £2,445 Premier, £2,095 Attorney-General, Vice-President £1,375, others £1,945, the rates prevalent until 1922, when Sir G. Fuller's Government reduced them to £2,000, £1,600, £900, and £1,500. The Labour Governments spend lavishly on themselves and their supporters, securing thus party loyalty at the expense of the public.

[2] By Act No. 3118 (1921) £10,000 is provided as salaries, a much more reasonable sum, but no Labour Ministry has ever controlled the Parliament. Queensland fixed £1,250 as ministerial salary, £300 extra for the Premier.

Ministry of 1925 was made up of Premier as Chief Secretary and Treasurer, Minister for Lands, Minister of Mines, Attorney-General, Minister of Railways, Minister for Agriculture and Stock, Home Secretary, Minister for Public Works, Minister for Public Instruction, and from 1926 a tenth salaried Minister for Labour and Industry. There was, of course, only one House of Parliament. The Gunn Ministry in South Australia [1] of 16 April 1924 comprised Premier, Treasurer, Minister of Irrigation and Minister of Repatriation, Chief Secretary and Minister for Railways, Attorney-General, Minister of Housing and Assistant Minister of Repatriation, Commissioner of Crown Lands and Minister of Agriculture, Commissioner of Public Works, Minister of Education and Minister of Industry, and Minister of Mines, Minister of Marine, Minister of Immigration and Minister of Local Government, making up the full six permitted by an Act of 1908; of these the Chief Secretary was in the Legislative Council, which had two members in the preceding Ministry. Mr. Collier's Ministry of just one day's later date in Western Australia contained the Premier, Treasurer [2] and Minister for Forests, Minister for Lands, Immigration and Industries, Minister for Mines and Agriculture, Minister for Railways, Justice and Police, Minister for Public Works and Water Supply, Labour, and State Trading Concerns, Chief Secretary, Minister for Education, Health, and the North-west, and three ministers without portfolio; of these one and the Chief Secretary were in the Legislative Council, which must contain one minister. The Tasmanian Cabinet of 1925 contained the Premier, Treasurer, and Minister of Railways, Attorney-General and Minister for Education, Chief Secretary and Minister for Mines, Minister for Lands, Works, Agriculture, and Forests, and two honorary ministers, of whom one was in the Legislative Council. In that State, as in Victoria, the ex-ministers are still nominally members of the Executive Council, though not under summons, and in the

[1] Act No. 1492 provides £7,750 salaries, i. e. £1,500 to the Premier, £1,250 to the others.

[2] Names given in 1925 in lieu of Colonial Treasurer by *Ministers' Titles Act*, 1925; the Colonial Secretary became Chief Secretary; the change was defended by the alteration of the Secretary of State's style. The substitution of a Minister of Justice for an Attorney-General is due to Act No. 24 of 1922.

Commonwealth and the States alike the President of the Executive Council is the Governor-General or Governor.

In the case of New Zealand the number of Ministries was increased as the result of the war.[1] Mr. Coates's Ministry of 1925 was composed of the Prime Minister and Minister of Public Works, Railways, and Native Affairs, Attorney-General and Minister of External Affairs, Minister of Finance, Agriculture, and Immigration and Stamp Duties, Minister of Education and Justice and Postmaster-General, Minister of Customs, and Industries and Commerce, Minister of Labour, Mines, and Marine, Minister of Lands, Minister of Defence and Commissioner of State Forests, Minister of Internal Affairs, Minister of Health and Minister for the Cook Islands. The last was a Maori, and the Attorney-General was in the Legislative Council. The rule since 1876 has been for but one minister to sit there, to its great indignation. The Governor-General is as usual President of the Executive Council.

In the Union on its establishment on 31 May 1910 ten Ministries were created, and an honorary minister was added; four were given to the Cape, three, including the Premiership and the Treasury, to the Transvaal, and two each to Natal and the Orange Free State, all as a result of earlier arrangements; Sir F. Moore of Natal failing to secure election was made a Senator in consolation. General Hertzog's Ministry of 24 June 1924 was composed of the Prime Minister and Minister of Native Affairs, Minister of Justice, Minister of the Interior and Minister of Education and Minister of Public Health, Minister of Defence and Minister of Labour, Minister of Finance, Minister of Mines and Industries, Minister of Railways and Harbours, Minister of Lands, Minister of Agriculture, Minister of Posts and Telegraphs and Minister of Public Works. The Ministry represented a coalition, two Ministries being allocated to Labour, the number being increased to three in 1925, when an eleventh paid minister was created.

In Southern Rhodesia[2] the first Ministry was composed of the

[1] See the Civil List Act No. 31 of 1920, providing salaries for the Prime Minister (£2,000), and for ten members of the Executive Council, holding one or more of twenty-one specified posts (£1,300), as well as for one (£1,100) or two (£500) Maori or half-caste members of the Council. Act No. 45 of 1921 provides a 10 per cent. cut.

[2] Letters Patent, s. 37.

Premier and Minister of Native Affairs, Colonial Secretary, Treasurer, Attorney-General and Minister of Defence, Minister of Mines and Public Works, and Minister of Agriculture and Lands. The Maltese Ministry of 1925 comprised the Head of the Ministry and Minister for the Treasury, Minister for Justice, Minister for Industry and Commerce, Minister for Public Health, Minister for Public Instruction, and Minister for Public Works.

In the case of the Irish Free State [1] the Ministry of Mr. Cosgrave in 1926 comprised the President of the Executive Council, Vice-President of the Executive Council and Minister for Justice, Minister for Finance, Minister for External Affairs, Minister for Industry and Commerce, Minister for Education, and Minister for Defence. In Northern Ireland the Government of Sir James Craig was made up of the Prime Minister, Minister of Finance, Minister of Home Affairs, Minister of Education, Minister of Labour, Minister of Agriculture and Minister of Commerce, and Attorney-General. The Free State provides also for five non-Cabinet ministers as a maximum, and seven Parliamentary Secretaries, appointed by the Council, while each non-Cabinet minister may have such a Secretary if resolved by the Chamber. Ministerial salaries are £2,500 for the President, £1,700 for others, £1,200 for Secretaries, but not more than fifteen ministers and secretaries can be paid. In 1926 was announced the decision to amend the Constitution to bring the non-Cabinet ministers within the Executive Council, and thus secure the unity of the Government.

§ 4. *Dominion Ministries and Political Parties*

Canada as regards Dominion politics has shown a remarkable tendency to political stability. The first Ministry, that of Sir J. Macdonald, rested on a coalescence of interest which had come into being in 1858 in the old Province of Canada, and which endured, with a break in 1862–4, until confederation, and

[1] See *Ministers and Secretaries Act*, 1924, No. 16. There are eleven departments: President, Finance, Justice, Local Government and Public Health, Education, Lands and Agriculture, Industry and Commerce, Fisheries, Posts and Telegraphs, Defence, External Affairs; the Attorney-General may or may not be a minister. The President decides which Ministries shall be held by members of Council.

was ruined only by the folly of the Pacific Railway scandals. The Liberal administration of Mr. Mackenzie then placed in power lasted from 1873–8, to be succeeded by Sir John Macdonald's predominance until his death in 1891; the Ministry, however, first under Mr. J. Abbott, then under Sir John Thompson, then under Sir M. Bowell, and, when his incompetence was realized, vainly reconstructed under the veteran Sir C. Tupper, fell in 1896, largely because it could not solve the difficulty of the Manitoba school question. The Liberal administration of Sir Wilfrid Laurier seemed unshakable until its decision in 1911 to try to secure reciprocity with the United States, when fear of the political attraction hoped for by the President induced the overthrow of the Government. Sir R. Borden's tenure of office was strengthened by the war, but in 1917 he formed a Coalition Ministry founded on accepting the co-operation of such Liberals as put the issue of reinforcing adequately the troops in the field before party fidelity to the principle of no compulsory service, which Sir Wilfrid Laurier persistently denounced. The close of the war marked the end of the artificial unity produced by war needs; Sir R. Borden's failure of health placed the Government in the less experienced and able hands of Mr. Meighen, and the general election of the close of 1921 resulted in the appearance of Mr. Mackenzie King as Prime Minister, with, however, as the second largest party, a Progressive party based on the belief that the interests of the farmers needed special protection which was not being accorded by the traditional Liberal party. The movement was seen also in provincial politics, and seemed certain to sweep both the Western Provinces and even Ontario. But its promise failed to materialize; the provincial movement after attaining great strength weakened, and fissures appeared in the Progressive party itself, a group forming an advanced wing and co-operating with the tiny representation of Labour. The general election of 1925 proved that the Progressives as a political factor had ceased to be of account; the Conservatives attained 117 seats, becoming the strongest party,[1] but the Liberals had 100 seats, despite the defeat of the Prime Minister himself and eight ministers, and on the test vote at the begin-

[1] *Canadian Annual Review*, 1925–6, pp. 35 ff. Ontario returned only 12 Liberals and 2 Progressives as against 23 and 22 at dissolution.

ning of the session, despite the absence of the Prime Minister, the Government was upheld by three votes, and the formal movement of a no-confidence motion by Mr. Meighen was rebuffed by ten.[1] The Conservative party rather seriously compromised itself by seeking to win Progressive support by promises as to maintenance of tariff rates which ran counter to the assurances on the strength of which they had won Conservative votes in Ontario. The situation, however, of the Government was not less anomalous, for it depended on two distinct factions, the vote of conservative Quebec, which was far from being in favour of lower tariffs, but was desperately anxious to avoid any contamination with Imperialism, and disliked Mr. Meighen because of his connexion with the compulsory service policy of 1917–18, and the votes of the Western Farmers, who resented their exploitation by the manufacturers of the east, and were strong in favour of an increase of the British Preference or even Free Trade. The stronghold of the Conservatives, on the other hand, was Ontario, which on the whole was the most eager of the Provinces to aid Britain in the war, counting over 200,000 enlistments out of 466,000, but in which the demand for protection was overwhelming. The Conservative leader was unable to risk visiting Quebec during the contest, and desire to placate it led to his making proposals, much regretted in Ontario, including the idea that no Canadian troops should ever be sent overseas without the sanction of the Dominion Parliament after a general election on the issue, an attitude stultifying any theory of effective Canadian participation in international affairs. In June 1926 Customs scandals and the issue of religious education in Alberta led to the fall of the Government in peculiar circumstances.

In the Provinces stability in Ministries resulted only from the adoption, doubtless illogically, of Dominion party lines as the basis of distinction. It is clear, however, that without such broad principles it is impossible to have effective Governments, and local affairs seldom are such as to allow of clear distinctions on which to base organizations. Moreover, there was the obvious convenience of using the local organizations for federal

[1] An unsuccessful effort was made by Mr. Lapointe to move a vote of confidence immediately after the formal opening of the Commons, but it failed for lack of due notice.

purposes also for provincial issues. It is curious that there has been a tendency for the Provinces to have Governments of opposite political colour to the Dominion, and Sir J. Macdonald had no objection to this state of affairs, which *prima facie* might seem objectionable. In Ontario the Liberals held office from 1871 to 1908 under Sir Oliver Mowat, who fought manfully for provincial rights, and Colonel Ross; the advent of Sir James Whitney to power took place when Liberalism in the Dominion was still strong and healthy. But war saw the growth of the Farmers' movement, and the general election of 1919 gave the Conservatives only 25 seats, to 29 of the Liberals and 45 of the United Farmers' party; a claim by the Liberal leader to be given a chance of arranging a Government was rejected,[1] and the United Farmers ruled Ontario precariously until 1923, when, on rumours of serious financial accusations—proved true in the case of the Treasurer—and of attempts to arrange a coalition with the Liberals,[2] the Government was ruinously defeated at the general election, with the result that the future of the party [3] in politics is obscure. It was recognized by Mr. Drury, when he took office, that a mere sectional policy was inadequate, but the adoption of a wider outlook helped to destroy the effective cohesion of the supporters of the party. In Quebec Liberalism of the French type, intensely Catholic and conservative, but dominated by anti-Imperialism and anti-militarism, has persisted from the outset, save for the short period when Mr. Angers' dismissal of Mr. Mercier in 1891 gave a brief Conservative interlude. What has depressed Government here has been the absence of a really effective Opposition, and the Conservative revival of 1923, when the Liberals had only 64 seats to 20 Conservative and one Labour, was not unwelcome to Mr. Taschereau's Government. The revival of Conservatism was seen also in the 1925 federal election, when Mr. Patenaude left the provincial sphere in order to seek to create a Quebec party which, if not accepting Mr. Meighen as leader, would still co-operate

[1] *Canadian Annual Review*, 1919, pp. 647 ff.

[2] Ibid., 1924–5, pp. 289–92; 1925–6, pp. 342 ff.

[3] The new Premier recognized as head of the Opposition the Liberal leader alone, but the Speaker admitted the claim of the leader of the United Farmers and Labour group of 19 members to official salary as an Opposition leader under the Act of 1920; *Canadian Annual Review*, 1924–5, pp. 269 ff.

with him in a policy of high tariffs; a reduction of Liberal majorities was the chief result of this effort in which Mr. Patenaude was defeated personally, and only in English-speaking areas were Conservatives elected. Nova Scotia was for long devotedly Liberal; but the election of 1911, when the new federal movement for reciprocity with America was agitating the country, proved ominous; *débacle* was delayed until 1925, when, after 43 years' rule, Liberalism could obtain but three seats out of 43. It is not surprising that New Brunswick, which from 1883 to 1908 was Liberal but went Conservative in that year, and since had been wavering between the two parties, should have followed suit, giving 37 Conservatives to 11 Liberals. Manitoba, after enjoying a long period of stabilization under Mr. Roblin's Conservative rule, and enjoying a period of Liberalism under Mr. Norris, yielded in 1922, at the election brought about by the steady loss by the Government of support in a much divided House, a majority of 30 for the United Farmers' candidates with but 7 Liberals against 21 at the 1920 election, 6 Conservatives, 6 Labour-Socialists, and 8 Independents; the agreement of the Farmers' party led to the appointment of Mr. Bracken as Premier. Saskatchewan has been faithful to the Liberal tradition, and Mr. Dunning won a brilliant victory in 1925, proving that, as the federal election established, the West was gradually realizing that there was little advantage in running a distinct Progressive party in lieu of influencing the Liberal party from within, and Mr. Dunning was asked to joint he Liberal party in the event of the Federal Government being sustained, recruits being often thus secured from provincial politics. Alberta, however, yielded to the farmers' movement, and in 1921 and 1926 returned a Farmers' Government to power,[1] while in the federal election of 1925 that party still showed its vitality. British Columbia, after a long period of heated party strife, based merely on personalities, settled down to steady government under Sir Richard McBride, but on his retirement to become Agent-General in

[1] Mr. Brownlee in the 1926 election denounced the two-party system as dividing the country into hostile factions and introducing federal party politics into local issues. His party secured 38 seats in 1921, 43 in 1926. The racial and social conditions of Alberta differ substantially from those of Saskatchewan.

1916, his Conservative régime fell in 1916, and, though the Liberals suffered severely at the election of 1924, Mr. Oliver was still able by the aid of the new Provincial party of three members, and the Labour party of equal numbers, to make head against the reinforced Conservatives, whose leader, Mr. Bowser, was defeated in the election and took the opportunity to retire into private life, having succeeded in bringing back the party to reasonable strength and improved prospects. The Provincial party is an attempt to frame a party on local issues; its comparative smallness, like that of the Labour parties throughout Canada, is a signal proof of the power of the older organizations to preserve their strength. The tiny Province of Prince Edward Island became Liberal in 1891, and persisted long in this outlook, but the election of 1908 indicated a tendency towards Conservatism, and the general election of 1923 saw the complete overthrow of the Bell administration, which had possessed 24 of the 30 seats of the Legislature, in favour of the Conservatives who won 25; women voted in the election for the first time. Manitoba, so far, has been the chief scene, beside the Federation, of attempts to work with three or more parties, and the confusion and inconvenience of the plan have been marked, doubtless helping towards the obvious tendency of the present time to the reversion to the old historical party groupings.

In Newfoundland there has never been any very clear ground of delimitation between parties, and contests have seldom been fought on principle; religious influences, the quarrel between Catholics and Protestants, have occasionally emerged. But from 1900–9 Sir R. Bond governed by reason of his personal command of his colleagues and the people of the Island, and Sir E. Morris, who ousted his leader in 1909 after a dead heat at the general election, also held office for a considerable period; in 1917 he coalesced with Mr. Lloyd, and in the same year left the Colony and political life; the period since has been marred by instability, but the Warren Ministry of 1923 was strongly supported in the Legislature.

In the Commonwealth there have been frequent changes of Ministry, and political stability has been rare. Sir E. Barton's first Ministry of the Federation had many difficulties to face; the old party of Free Trade under Mr. Reid still existed in fair

strength, and, on the other hand, Labour was a distinct menace. Sir E. Barton gladly took refuge in the High Court on its establishment in 1903,[1] especially as his participation in the Colonial Conference of 1902 was held to have endangered the ideal of Australian independence in matters of defence. Mr. Deakin, who succeeded him, was defeated by a coalition of Mr. Reid with Labour to reject his Conciliation and Arbitration Bill on the score that it did not apply to State railway servants. The Labour Government of Mr. Watson was given short shift, 27 April to 17 August 1904, being ejected by a new coalition of Mr. Reid and a section of Mr. Deakin's followers under Mr. McLean, but Mr. Deakin in revenge aided Labour to defeat it on 4 July 1905, when it was rejected on the opening of Parliament without being given a chance to develop its policy; it must be admitted that on this occasion Mr. Deakin's action was reprehensible. His own Ministry fell before the defection of Labour on 12 November 1908, but the apparent reluctance of Labour to aid the Empire in naval defence brought about its fall on 2 June 1909, Mr. Reid being appointed High Commissioner, and thus the way being left clear for a coalition with his chief Lieutenant, Mr. Cook, on the basis of an anti-Labour policy. But the general election showed distinct repugnance to the rather unnatural coalition, and on 29 April Mr. Fisher came into power; in 1913, however, the Ministry fell in the general election by one vote, and Mr. Cook had a troubled spell of office until by advising a double dissolution he gave Labour full power in either House; Mr. Fisher's retirement to the High Commissionership in 1915 left Mr. Hughes to dominate the situation, first as leader of a normal Labour Government, then from 14 November 1916 as head of his own Labour following; then from 17 February 1917 in charge of a National Coalition Government; which, as reconstructed on 10 January 1918, he led until his rejection by the Country party in 1923 as leader, and his resignation on 9 February, to be succeeded by Mr. Bruce co-operating [2] with Dr. Page, leader of the Country party, who was upheld in power at the general election of 1925. The

[1] Cf. Murdoch, *Deakin*, pp. 211 ff.

[2] Ministries were divided as 6 to 5, and it was agreed that if a proposal in Cabinet were carried by such a vote, it should be regarded as lost, a very curious arrangement.

salient feature of the situation has been the decline of Labour in the Commonwealth as a result of Mr. Hughes's desertion of it during the war, and the tendency of Labour to become contaminated by Communist agitation and the influence of the organization known as the Independent Workers of the World, which both in Canada and Australia showed its disloyalty and required repressive measures to lessen its danger. The party, in addition to Socialistic or Communistic views, is definitely anti-imperial and anti-militarist, and its downfall in 1925 was largely brought about by the cleverness with which the Prime Minister seized on the moment when its support of the strike of British seamen in the ports of the Commonwealth had inflicted the maximum of suffering and loss on the exporters. The other phenomenon is the rise of a third party, in the shape of the Country party, to replace the defunct section which followed Mr. Deakin, and later Mr. Cook, until he left to take over the High Commissionership; this body is dominated by the doubtless just feeling that the interests of the farmers and the country districts in general are apt to be obscured by the more clamant voices of the towns.

In the Australian Colonies, now States, the record has on the whole been one of changes based largely on personal grounds, there being comparatively little divergence on principle. But in New South Wales the issue of Free Trade produced definite parties, and, while the average minister was ephemeral, Mr. Reid managed to hold office for 1894–9 despite the complexity introduced by the issue of Federation which menaced Free Trade. In Victoria the claims of the Legislative Council to preserve landed interests on two occasions produced bitter strife, the first resulting in the recall of the Governor in 1866, and the second in his receiving a distinct censure; in 1894–9 Sir G. Turner managed to keep himself in power, and Sir T. Bent repeated the feat in 1904–8, while Mr. J. G. Jenkins contrived to govern South Australia from 1901–5, and Sir John Forrest controlled Western Australia from the beginning of responsible government until he resigned on 13 February 1901 to enter the first Commonwealth Ministry. In the period since 1890, when the great strike in the shipping industry convulsed Australia and convinced the workers that they must organize politically in order to fight the employers, strongly entrenched as they

were in the Legislatures of the Colonies, there has been a steady rise of the Labour party, which has been met from time to time by the ranks of the anti-Labourists closing in agreement to resist the common danger. The steady trend of events is clearly towards Labour becoming a party striving on not unequal terms against its opponents, who are hampered by reason of the tendency, which lately has become more marked, of the country members to set themselves up as an independent unit, with the inevitable result of splitting of votes and loss of seats by a minority vote; where proportional voting prevents this, the same result comes about through the two anti-Labour factions carrying their animosities to the extent of giving their second preferences not to the other section but to Labour. The war rather helped the opponents of Labour in the States by generating patriotic feeling and detaching certain Labour supporters from their allegiance, just as Mr. Hughes and his immediate following gravitated from Labour on patriotic grounds. Naturally, with the return of peace the sectional interests of Labour have prevailed, to which must be added the consideration that, in the case of Queensland at least, Labour has been fortunate in the ability of its Premier, Mr. Theodore, whose prolonged tenure of office, despite the feeling excited by his confiscatory legislation in 1920 as to land, and the abolition in 1921 of the Legislative Council, lasted until 1925, when he withdrew to the arena of federal politics, only to fail to obtain a seat at the election of that year. His successor showed extreme weakness in facing the demands of the State railway employees, and later left politics for the office of Chief Justice. In New South Wales Labour is less securely entrenched, and nothing but disunion between the Nationalists and the Country party caused the bare victory of Labour in 1925 by four votes, followed in 1926 by its determined attack on the Upper House. Victoria is least accessible to Labour; the first spell of office accorded it was only in December 1913 for a few days, as a manœuvre of Mr. Watt to bring his recalcitrant followers to heel, but in 1924 the growth of the Country party movement resulted in a short, but not ineffective, period of Labour Government with clear indications that the Labour movement will at no distant date become a most serious factor in State politics. South Australia, after Mr. Jenkins's retirement in 1905 to the Agent-Generalship, has

often—again since 1924—been in Labour hands, the ensuing Ministry of Mr. Price impressing favourably the electorate with the moderation and good sense of Labour, and, since in 1901 Sir John Forrest left State for federal politics, Western Australia has been often the scene of Labour successes ; the two States on the result of the General Elections of 1924 both obtained Labour Ministries ; it may be noted that the fact that both have powerful Upper Houses tends to restrict Labour legislation to moderate limits, and, while in one way hampering Labour proposals, probably assists Labour in obtaining majorities in the Lower House, as it is felt by the moderate electorate that there is no serious risk in allowing Labour to govern from time to time. Tasmania has always been cursed by feeble administration, inevitable in a tiny House of 30 members, and sometimes accentuated by proportional representation, though it is probable that in any case there would never be substantial majorities ; the strength of Labour there was shown by its victories in the elections of 1922 [1] and 1925. Of older Ministries those of Sir E. Braddon (1894–9) and of Sir E. Lewis showed greatest longevity, but the drift of power to Labour is quite unmistakable.

In New Zealand Ministries have also been unstable and short of life. A conflict of interest between Liberalism and Conservatism was definitely inaugurated by the versatile Sir George Grey, who had settled in the Colony which he once governed, and whose period of office from 1877–9 was singularly stormy. Sir R. Stout, however, carried on from 1884–7, when Sir H. Atkinson made head against Liberalism until the beginning of 1891 when Mr. Ballance brought Liberalism into real power, and, though his death in 1893 deprived his party of prudent leadership, the fiery energy of Mr. R. Seddon helped on Liberalism to a rapid development, which was not very seriously interrupted by his death in 1906, though his amiable successor, Sir J. Ward, had none of the creative power of his predecessor, and was induced by his one serious defect of character, vanity, to accept in 1911 a baronetcy, which cost him his popularity and gave him no majority in Parliament. His retirement and the brief Ministry of Mr. Mackenzie formed the prelude to the long-con-

[1] It attained power in 1923 though in a minority by reason of divisions in the non-Labour ranks, and in 1925 it won 16 out of 30 seats.

tinued tenure of power of Mr. Massey, who, however, as the result of the 1915 elections and in order to carry on effectively the war, agreed to form with Sir J. Ward a national Ministry on 12 August 1915. The leading part, however, of the Ministry fell to Mr. Massey, and Sir J. Ward, not unnaturally, broke off the alliance after peace was ensured, Mr. Massey becoming again head of a non-coalition Ministry on 25 August 1919. His success, however, in the general election was not repeated in 1922, when, despite a considerable turnover of votes in his favour, his 48 supporters dwindled to 38, while the Liberals, now led by Mr. Wilford, had 25 and Labour 17, but the situation was rendered easier by the fact that three Liberals were under pledge not to vote against him in the case of a no-confidence motion. The comparative paralysis of Parliament resulting from this balancing of parties reacted unfavourably on the health of the Prime Minister, whose death in 1925 resulted in efforts at the formation of a single governmental party to oppose Labour, Mr. Wilford deciding to retire to further this end, while the Conservatives chose Mr. Coates to lead them, after a short formal Ministry of Sir Francis Bell, himself forbidden by age and membership of the Upper House to be a candidate for the Premiership. Mr. Coates, however, declined to form a coalition before the general election; his motives, which were obscure, as it was difficult to find any real point of difference between the policies of the two parties, were probably largely personal, based on reluctance to get rid of a Ministry which had shown its regard for him by his election as Premier by the party's deliberate vote, while the results of the election might smooth the way for coalition by vacating seats; moreover, it was clearly difficult to arrange the vexed question of the selection of candidates in the constituencies. The result of the election of 1925 was a surprising personal victory for Mr. Coates;[1] it is clear now that the Liberal party has little prospect of revival as such, and that matters are tending steadily towards a straight fight with Labour, which, it seems, Mr. Coates would have preferred to avoid.

In South Africa there was no possibility of finding real parties with distinct policies in Natal, and Ministries before

[1] Reform party 54, Labour (now official Opposition) 13, Nationalist (Liberal) 10, Independent Nationalists 2, Liberal (Sir J. Ward) 1.

Union were very unstable; in the Transvaal and the Orange River Colony, on the other hand, one powerful Government dominated from the grant of responsible government in 1906 and 1907 to Union. In the Cape there were racial currents to be considered; after Mr. Molteno's dismissal on the question of the native war by Sir B. Frere, Mr. Gordon Sprigg carried on until 1881; he held office again from 1886–90, when the Rhodes Ministry,[1] resting on the support of the Afrikander Bond and aiming at a union of Dutch and English, obtained power, only to surrender it in 1896 as the outcome of Mr. Rhodes's implication in the ridiculous raid on the Transvaal of 1895. Sir G. Sprigg then recovered office, to lose it to Mr. Schreiner in 1898, but the latter resigned in 1900, when in the stress of the war he found his supporters unwilling to accept his proposals for dealing with persons guilty of treason. Sir G. Sprigg then carried on through the period of the virtual suspension of the Legislature until he fell in 1904 before a Progressive Ministry under Dr. Jameson, which was defeated in 1908 in an election forced on it by the refusal of the Opposition in the Upper House to allow the passing of supply. Mr. Merriman, who took office, carried on until merger in the Union. In that territory it had been hoped that the first Ministry might be really one representative of South Africa, not of one party, but this proved impossible, and General Botha's Ministry definitely represented moderate Dutch views. But General Botha showed his determination to act on the basis of reconciliation by disowning General Hertzog's efforts to enforce bilingualism at the expense of the British element of the population in 1912, and the Ministry in 1914–15 conducted with much energy war on German South-West Africa, and repressed a deplorable rebellion among the Dutch population, misled by German promises and hoping to regain independence. The death of General Botha inflicted a severe blow on the Ministry, but the lack of confidence felt in General Smuts by a considerable section of the Boer population was counteracted for a time by the merger of the Unionist party with the South African governmental party on the basis of their desire to secure the

[1] B. Williams, *Cecil Rhodes*, pp. 183 ff. Sivewright's misconduct as to contracts led to a reformed Government in 1893, after negotiations for de Villiers to assume the Premiership, in which Rhodes played an ambiguous and rather disingenuous part; Walker, *Lord de Villiers*, pp. 222 ff.

constitution against the aims at secession of the Nationalists. Against this coalition, which strengthened the Ministry considerably, the Nationalists now sought to find allies in the Labour party, which, though British in inception and leadership, was becoming more and more representative of the Dutch, as the older British mining workers disappeared from the country, and the mines became filled with landless Boers. Finally an accord was reached on the basis of a definite pledge given on 21 April 1923 by General Hertzog [1] to the Labour leader, Colonel Creswell, that in the next Parliament 'should a Nationalist Government come into power, no Nationalist member of Parliament will use his vote to upset the existing constitutional relationship of South Africa to the British Crown'. The result of this agreement was seen in June 1924 when the growing weakness of the Government from internal defections and unsatisfactory by-elections resulted in General Smuts facing the electors. The Nationalists won 63 seats, the South African party 53, Labour 18, and one went to an Independent; before the election [2] the figures had been 47, 72, 13, and 2. The new administration was therefore a coalition, though this had hardly been planned, two Labour ministers taking their seats in the Cabinet and another being added in 1925, when a further Ministry was called into being. The spectacle of this composite body, including a left wing of Socialists with a right wing of the most conservative Dutchmen, distressed the Dutch of the Union, and in 1925-6 efforts were made to secure a reunion of the Dutch in the Union. The chief obstacle to the achievement of this result was the unwillingness of the South African party to accept a reunion which meant ejecting the British element of the party and adopting a racial outlook, which was rendered unavoidable by the insistence not indeed of General Hertzog, but of his right-hand man, leader of the Nationalists of the Transvaal, Mr. Tielman Roos, that secession was an essential element of the Nationalist position.

Of the Colonies granted responsible government, Southern Rhodesia was fortunate that her first election returned no fewer

[1] *Round Table*, xiii. 866 ff. For his hatred in 1912 of Imperialism see *House of Ass. Deb.*, 1913, pp. 1545 ff.

[2] A new seat had been added under the Constitution by reason of increase of population.

than 25 members of the responsible government party—which re-named itself the Rhodesian party. Malta, on the other hand, has had a troubled career, the first Premier exciting ill feeling and resigning in 1923 as a result of a policy aiming at ultimate union with Italy. The development of sectional parties proceeded apace, until in 1926 coalitions were effected, bringing two more or less definitely opposed parties into being, the one tending decidedly to emphasize connexion in culture and interests with Italy, the other partly actuated by loyalty to the British connexion and united by their support of Sir G. Strickland, who combined the position of member of the British House of Commons with a place in the Maltese Legislature, and partly representing Labour or even Socialistic views, the reverse of pleasing to the Fascist spirit.

In Northern Ireland the formal organization of the Government showed naturally an overwhelming majority for the Ministry of Sir James Craig, though the decision of Mr. Devlin and his followers not to take their seats was disappointing, as it deprived the administration of the necessary stimulus of effective criticism. The Ministry, however, erred seriously in its educational legislation, and was compelled by the effective protests of the Protestant organizations to retrace its steps in order to prevent the main purpose of its Act being frustrated by the refusal of those responsible for them to place the voluntary schools under Governmental control. A dissolution was asked for and given in order simply to test the feeling of the people on the issue of the boundary, the Northern Government having quite logically and legitimately declined to accept any obligation to recognize the boundary clause of the Treaty. The result, while it did not give as clear a majority for the Government as it had hoped, was decisive, and Mr. Devlin's consent to take his seat indicated that the period of abstention was over. The final settlement of the boundary by the new Treaty of 1925 [1] by settling definitely the relations of the two Irelands deprived the Nationalists of the North of any justification in refusing to help in the process of legislation.

In the Free State the provisional Government which formally came into being as the result of the Treaty in 1922, being nominated by Mr. Griffith after his election as President by two votes

[1] See 15 & 16 Geo. V, c. 77.

over Mr. de Valera, faced the electors in June, when 58 supporters of the Government were returned, with 17 Labour members, 7 Farmers' candidates, and 10 others, as against 36 Republicans. The Government was also upheld in the September elections of 1923, when it won 63 seats as against 44 of the Republicans, 16 Independents, and 15 apiece of Labour and the Farmers' party. The refusal of the Republicans to take their seats greatly simplified the position for the Government, but at the same time deprived it of the essential advantage of an effective Opposition. Inevitably in these circumstances there arose from within disruptive movements, especially when it was necessary to reduce the Army, and it appeared that it was honeycombed by factions, to one of which the Minister of Defence belonged. His resignation was brought about, but a dissident group under Mr. J. MacGrath resigned office, nine seats thus being vacated. The election on 11 March 1924 proved a remarkable victory for the Government, as the Republicans, who had seemed likely to profit by the appeal to the electorates, could only by means of proportional voting win the second seat in the two constituencies returning two members each to the Chamber. The members of the National group did not, with one exception, seek re-election, and the one who did, Mr. Milroy, was defeated. In 1925, however, the new Treaty[1] with its surrender of any hope of coercing Northern Ireland by means of an adverse boundary decision brought about the creation of a fresh party with its mind set definitely on constitutional means of bringing about a republic in Ireland, as opposed to the Republicans with their refusal to take their seats owing to the obligation to take the oath of allegiance. This tendency to the development of independent groups is thus strikingly parallel to the experience of Northern Ireland, where the election of 6 April 1925 gave 4 Independent Unionists and 3 Labour members as well as one Tenants' candidate, 10 Nationalists, and 2 Republicans.

The instability[2] which is seen in many Dominion Governments is due to many causes, the absence of serious lines of party demarcation, weakness of party organization, and the small size of the Parliaments, which renders the illness or disagreement

[1] Accepted by 71 to 20 in the Dail on 17 Dec. 1925, Act No. 40 of 1925.

[2] Walrond, *Letters and Journals of Lord Elgin*, pp. 39 ff.

of even one member with the policy of his party a matter of serious concern ; moreover, this fact often gives the individual member undue power to deflect the conduct of the Ministry by making his continued support dependent on the adoption of a definite line of policy by the Ministry. His action, of course, may be fully justified, as when he resigns his seat and fights the constituency in order to secure support for his views. It is less excusable when he makes his power the means of bringing unfair pressure on the Ministry to subserve private ends, or more often, the interest of his constituents as opposed to those of the territory at large.

Party organization proceeds generally in the mode familiar in the United Kingdom as regards the Liberal and Conservative parties. Constituencies have local organizations, and the whole territory—in Federations and the Union each unit—have central organizations, which do their best to formulate and mould policy, but this ultimately must rest largely with the dominant figures in the party and especially with the party leader in the Lower House. But in the main the lack of funds—for there are no honours [1] easily available to purchase donations and other favours are precarious and may lead to difficulties if revealed—hampers organization, which remains comparatively undeveloped. There are, however, often bodies with no absolutely definite political connexions which concentrate on some objection and seek to influence politics directly in their favour; the Farmers' organizations, which ultimately came out definitely as distinct political units in the West of Canada and less successfully in the East, were generated from bodies which had no intention of doing more than influence the existing political parties. A somewhat similar origin can be traced in the Country parties of Australia. The organizations have, however, a comparatively weak hold over their members, though this statement is only generally true and in individual cases may be falsified. The attempt of Mr. Drury in Ontario to cultivate a wider outlook than a mere farmer's view resulted in his loss of power, largely because his supporters felt that he was forgetting his one aim ; Mr. Dunning, on the other hand, in Saskatchewan succeeded

[1] Sir R. Borden seems to have come nearer than any other Premier to the use of honours for political ends, but Canada repudiated this degrading practice in 1918 and 1919, despite his efforts.

in placating the farmers without yielding to their narrow ambitions. The Country parties in Australia have on the whole shown themselves decidedly parochial and narrow in outlook. The same accusation can fairly be directed against the Farmers' party in the Irish Free State, which is also considerably touched by the spirit of Republicanism.

In the case of Labour there is seen in the Commonwealth the emergence of a very definite and elaborate organization of State Labour parties with a Commonwealth Labour party. The aim is that the whole Labour movement, so far as it concentrates on political action, should work on a definite plan, planks for State and Federal elections being fixed by representative Conferences, and in each State there being an annual State Conference representing the Labour leagues and unions affiliated to the Australian Labour party. This annual Conference for each State is empowered to elect an Executive which, pending the next Conference, carries on business, scrutinizes nominations of persons as Labour candidates for Parliament, decides on disputes as to affiliations of leagues and unions, and generally conducts the business of the party for State purposes, as a federal Conference and Executive do for federal purposes. The arrangement is not without difficulty, as there has always been in effect the practice of each Labour party in a Parliament, State or Federal, forming itself into a group in which all matters of any moment are decided beforehand by a majority vote, which is binding on all members of the party when notified of it.[1] The result is, of course, great effectiveness in Parliament, as Labour members, having no other business, are expected to be punctual in attendance, assiduous in business, and above all absolutely loyal in their voting; at one time resignations in blank were required in some cases from members, and in any case a member is bound by agreement to resign if he cannot fulfil his obligations of honour under the conditions of his endorsement by the Party. The Party caucus elects the ministers if there is to be a Ministry and decides who is to accept the invitation to form a Government. But the autonomy of the parliamentary caucus is menaced by the claim that the party

[1] In Nov. 1926 New South Wales presented the unedifying spectacle of the Premier and a rival engaged in a desperate struggle in caucus, the Premier threatening resignation if he were not sustained in his views.

plank, as adopted by the annual Conferences and as laid down before any general election, must be regarded as binding on the members of the party in Parliament and that the Executive of the party shall be the controlling power to decide the policy of the parliamentary party. The extent to which this is made effective is very dubious ;[1] in New South Wales the Labour leader, Mr. Dooley, in 1922–3 fought a successful battle with the Executive of the State party and asserted his position by an appeal to the Federal Labour party, which used its influence to secure that the State Executive did not gerrymander the appointments to the annual Conference; that body reinstated Mr. Dooley, whom the Executive had dismissed from the party but whom his colleagues in the Parliament had insisted on keeping at their head. In the case of Queensland there is more evidence of effective control of the parliamentary party by the State party, though, it must be remembered, the two are normally in general agreement and the decision is merely regarding tactics of which the parliamentary party, with justice, regards itself as the better judge. The serious matter from the point of view of parliamentary government lies in the fact that decisions in Parliament are not, as they are supposed to be, the outcome of discussion between two parties each merely bound to general points of view and capable of compromise; the Labour members really take their views from a party outside, and they cannot agree to those concessions which are in use between such parties as the Liberals and the Conservatives. Criticisms are made frequently on the 'tied' condition of Australian Labourists, and there is no doubt that the practice indicates—perhaps with justice—a serious degree of distrust by the Labour electors of their representatives. The practice, moreover, terminates entirely the old doctrine which in the United Kingdom is sometimes more than merely formal, the belief that a politician returned to Parliament is not a mere local delegate but represents the whole country, or in a lesser form represents not merely his party but also all the electors and people in his constituency. The Labour member represents merely Labour, and not even local Labour but Labour in its State or Federal aspect as the case may be. Nor is the difficulty confined to Australia ; the same problem presents itself regarding the relation of the Labour

[1] *Round Table*, xii. 409 ; xv. 851 ff.

organization in the Union of South Africa with the political party in Parliament under Col. Creswell ; the party without is naturally crude in outlook and unable to appreciate the niceties of a position [1] in which care is necessary to preserve the delicate balance of a very complex organization in a coalition. It is naturally the wish of the extremists to capture control of the party in Parliament, which inevitably would drive a hopeless breach between Nationalists and Labour.

It must be admitted, on the other hand, that Labour has retorted, often with much show of reason, that its opponents adopt very similar methods to its own as a means of compelling the obedience of the members of the party, and that pledges of a very definite kind are often formally or informally exacted from non-Labour candidates, while Labour is more frank in admitting that it expects every candidate approved for support to enter into an agreement as to the obligations due to the party adopting him. There is, however, a real difference in the fact that the ordinary party has no very effective means of visiting its wrath on a delinquent, who may be financially independent of it, while the Labour man is normally in no such position.

It follows from the small size of the Dominion Parliaments that it is not possible, as a normal rule, to adopt the practice by which a defeat of any sort must either be reversed effectively or the Government must resign. The British practice permits of slight reverses being accepted, but it does not allow of the procedure, which is by no means rare in Australian Parliaments, and not unknown elsewhere, under which a minister may declare that a certain point is essential, and yet the Government is defeated on it and accepts the result. Indeed, Tariff Bills frequently see vehement demands on members calmly ignored, it being understood that the Government is merely trying to frighten its adherents. Similarly parties in informal coalition do not mind deserting the Government now and then in order to remind it of its dependence on its allies ; thus the Progressives in Canada, after giving Mr. King's Government a majority of 125 to 115 on the formal vote of censure at the opening of the session of 1926, proceeded to remind the Ministry of its

[1] In Nov. 1926 the party outside was deeply exercised at the unwise action of Parliamentarians in deciding to support the scheme of a new flag minus any trace of the Union Jack.

dependent position by allowing its majority on a motion for the adjournment to fall to one, the Opposition fighting the proposal on the score that, while a new Ministry might reasonably ask for six weeks in which to put its affairs in order, it was unreasonable for a continuing Ministry to ask for so long a respite. Governments will even fight on a majority of a single vote or no real majority at all; the Commonwealth was governed in 1913–14 by a Ministry in a hopeless minority in the Upper House and with a majority of one in the Lower. Sir George Grey, as Lord Normanby [1] remarked in 1878, probably never had a majority in the Lower House at all, while Mr. Joly [2] in Quebec in 1878–9 carried on amid defeats by occasionally one vote, occasionally the Speaker's casting vote. The British Columbia Ministry of 1899–1900 [3] went on despite defeats until the Lieutenant-Governor unceremoniously bundled it out; in 1903 [4] the Government of the day was quite pleased to carry on, though supported only on a critical vote by the Speaker's casting vote. Speakers indeed have very frequently to exercise the privilege of deciding an issue which, of course, they do on strictly party lines. Even a Labour Ministry, like that of Mr. Fisher in 1910, will ignore, if it likes, a defeat, although such an event when it has a clear majority indicates some degree of disloyalty among its own members. Ministries, of course, sometimes connive at votes against Government proposals which they are under pledge to bring forward, but which for one reason or another they do not wish to have passed into law. They then can throw the blame on the Assembly; instances of this seem not rare in the Canadian Provinces. On the other hand, Governments may insist on forcing measures on their supporters, however reluctant, as did Sir J. Ward in 1909 when he insisted on the Lower House passing the vote for a special fee to Mr. Pember Reeves, late High Commissioner, in respect of his services as financial adviser in London, which the House had rejected; the result, however, was Mr. Reeves' withdrawal of his services. Much inevitably depends on the personality of the Prime Minister and the efficiency of the Whips for the effective bringing of the majority up to voting, save in the case of Labour

[1] New Zealand *Parl. Pap.*, 1878, A. 1, p. 3.
[2] *Parl. Pap.*, C. 2445. [3] Canada *Sess. Pap.*, 1900, No. 174.
[4] *Canadian Annual Review*, 1903, p. 213; cf. 1901, pp. 333 f.; 1902, p. 74.

parties, where voting in the sense determined in advance of the discussions is obligatory. Some Premiers have shown themselves sensitive to defeats. Mr. Molteno nearly resigned over one in 1874,[1] Mr. Sprigg actually resigned in 1881 and 1890,[2] and Mr. Scanlan in 1884; so did Mr. Daglish in Western Australia in 1905[3] because of feuds in the ranks of his followers. Resignation in such cases may be chiefly a clever manœuvre; thus in 1909 Sir E. Lewis, being vexed by the intrigues of Mr. Ewing, resigned office, advising the Governor to send for Mr. Earle, on whose failure to form an effective administration he was invited to resume office, satisfied with repressing Mr. Ewing's ambitions; Mr. Watt in Victoria in December 1913[4] repeated the same manœuvre, while Mr. Hughes's resignation in November 1916[5] was a clever device to get rid of his old associates and be commissioned to form a new Government.

Whether weakness is caused from internal difficulties, or from the growth of the power of the Opposition, whether owing to these difficulties or, as often, the coming together of different opposing sections, or as the outcome of by-election defeats or other sign of the loss of popular favour, the Ministry may, of course, advise a dissolution in lieu of resignation. Whether a Ministry ought to resign or advise a dissolution is a matter on which no principles can be laid down with assurance; each case presents normally special features which must all be weighed before a decision is arrived at. It must, however, be recognized that in the Dominions practice shows that it is a distinct advantage to be the party which dissolves and under whose auspices an election is held; thus, when the Assembly of Newfoundland had been dissolved under Sir R. Bond's auspices, equal numbers were returned; the dissolution under Sir E. Morris's auspices gave him a clear majority. Mere resignation indubitably, as in the case of Mr. Balfour's retirement in 1905, implies weakness and want of any definite plan or possibility of co-operation; this was the ground of Mr. Daglish's resignation in Western Australia in 1905. General Smuts in 1924, when he found that his majority was being undermined and by-elections were going

[1] Wilmot, *South Africa*, i. 244 f.
[2] Wilmot, i. 142; iii. 18.
[3] *Parl. Deb.*, xxvii. 803.
[4] Keith, *Imperial Unity and the Dominions*, p. 94.
[5] Keith, *War Government of the Dominions*, p. 210.

against him, advised a dissolution, and the Lieutenant-Governor of Manitoba in 1922 induced his Premier, who wished, in similar circumstances to those of Mr. Daglish, to resign, to face a dissolution as giving the country a better chance of a rapid acquisition of a strong Government. Mr. Drury himself in Ontario in 1923 [1] asked for and received a dissolution. Sir W. Laurier in 1911, when faced with bitter obstruction in the Commons on his Reciprocity Scheme, asked for a dissolution, as did Sir R. Borden in 1917 [2] when he arranged his coalition and desired authority for the passing into effective operation of his proposals for military service. Sir John Macdonald's famous election of 1891 was deliberately arranged to seize a favourable opportunity to consolidate his authority, and Mr. Holman in New South Wales, after obtaining a year's extension of the duration of Parliament through the aid of the Colonial Office, promptly dissolved in 1917 [3] when he thought that the moment was propitious, as it had not in his view been in the immediately preceding month. Similarly Mr. Bruce in the Commonwealth hastened the election of 1925 in order to take advantage of the irritation justly felt at the injury caused by the shipping strike, in which the Labour party was necessarily deeply involved and discredited. On the other hand, a Ministry will not dissolve, though taunted by the Opposition with clinging to power, if it thinks the course inexpedient; thus the Government of the Irish Free State carefully ignored all requests to fight out the issue of a Republic or not on a direct vote.

No principle can be laid down as to when a Parliament ought to be dissolved to allow the people to express their feelings. *A priori* it would seem right that any great change, which had not been deemed a pressing matter at the last election, should thus be made a matter of the arbitrament of the people, but it is impossible to claim that much attention has been paid to this principle. The Parliaments of Canada, Nova Scotia, and New Brunswick agreed to confederation with inadequate regard to the feelings of the people of the last two Provinces; the Cape, Transvaal, and the Orange River Colony did not think any reference to the electors necessary in respect of union, though Natal insisted on taking a referendum. The suppression

[1] *Canadian Annual Review*, 1923, pp. 519 ff., 570 ff.

[2] Keith, *War Government of the Dominions*, pp. 76 f. [3] Ibid., p. 272.

of the Legislative Council of Queensland was carried out without a dissolution, though the people of the State when consulted at a referendum had decided by the enormous majority of 63,000 against its destruction. The decision to destroy that of New South Wales was equally arrived at, though the issue had been merely one of many at an election decided on other matters. Not less strong are the cases of the extension of the duration of Parliaments [1] during the war, contrary to the fundamental principle which deprecates overthrowing thus the constitutional hold of the people on its representatives. Newfoundland and New Zealand thus both enacted compulsory service without first ascertaining the will of the people, and, when this was rendered impossible in Canada by the fact that the extension required an Imperial Act, steps were taken to pass an Act for compulsory service before going to the people, Sir Wilfrid Laurier's proposal for a referendum being voted down on 5 July 1917 by 111 votes to 62. Moreover, to strengthen the party in the coming election [2] two Franchise Acts, the *Military Voters Act* and the *War Times Election Act* were passed, which enfranchised something like half a million female voters, all connected with men on active service, and disqualified naturalized British subjects of enemy birth, conscientious objectors, and persons exempted from combatant service, thus creating, as Sir W. Laurier put it, a special electorate in view of a pending election. Much more venial cases of offence against sound principle are those in which Parliaments present their members with additions to their salaries, as once did the Commonwealth Parliament and as the New South Wales Parliament did in 1925, to the great dissatisfaction of many even of its own adherents, which saw no good reason for increasing the remuneration of much overpaid legislators. It must, however, be remembered that the Imperial Parliament is far from immaculate in this regard; the Irish agreement of 1921 was accepted by a Parliament whose leader had often expressed himself as determined on principles which his settlement promptly and effectively repudiated, and, though Mr. Baldwin's dissolution in 1923 to test the feelings of the country on Protection was a good example of fairness, the actual practice of the Parliament of 1925–6 as regards safeguarding of industries was challenged in some quarters as

[1] Ibid., pp. 271–3.

[2] Skelton, *Sir Wilfrid Laurier*, ii. 528 ff.

hardly in keeping with the express promises in the election address of the Prime Minister in 1924. On the other hand, Sir J. Craig's insistence on dissolving in 1925 in order to test opinion on the Boundary issue was in many quarters regarded as unnecessary, and inspired rather by the desire to demonstrate against the Free State than by any more statesmanlike aim. In any case, there is no doubt that it is only fair, whatever precedents may be adduced on the other side, to afford the people an opportunity carefully to consider any issue of first-class magnitude unless, of course, it has already been definitely before them at a general election, not merely included in a miscellaneous collection of subsidiary points on which no real stress has been laid.

The Free State constitution contains a remarkable limitation[1] of the right to dissolve: an Executive Council may not advise a dissolution if it no longer commands the support of the Chamber. Indubitably this raises serious difficulties, for in Dominion practice—which apart from express enactment applies—it is just when an Executive is feeling the lack of support as a rule that it desires to dissolve. Presumably all that is meant is that a dissolution cannot be advised when the Chamber has voted no confidence in the Council; in that case it must resign, leaving the Chamber to decide the future Government.

It is, of course, the Lower House that determines the fate of a Ministry, and on whose favour a Ministry depends for its creation. The reasons are in part historical, the practice being borrowed from the United Kingdom usage, in part inevitable. The nominee Upper Houses could never claim to control a Ministry in opposition to the Lower House; the Upper Houses have no originating financial powers, and this is enough to debar them from claiming power over Ministries, while even in amending Financial Bills they are not quite on an equality with the Lower House. Moreover, they are normally less democratic in composition. This, indeed, is not true of the Commonwealth Senate, which is as democratic as the Lower House, and which, as essentially in theory a house of States, might have claimed a stronger power over the Executive. But this would probably have been unworkable, and in fact the Senate does not divide on rigorously party lines; the Labour men as a rule vote to-

[1] Constitution, s. 53.

gether, but deviations from party votes are found even among them where their States are deeply concerned—loyalty to the State Labour party interfering with loyalty to the Commonwealth party, and still more often among non-Labour members. A striking proof of the comparative weakness of the Senate as regards the Ministry is seen in the fact that in 1913–14 the Cook Administration could carry on with but one vote in the Lower House and in a tiny minority in the Upper. Curiously enough, the Upper House of the Cape was strong enough in 1907 to compel Dr. Jameson to face an election by refusing him supply, and in 1898 [1] it compelled the Government of the day to pass a Redistribution Bill on pain of finding its legislation hung up. The Union Senate has not inherited any of this vigour,[2] which was not exhibited by the nominee Upper Chambers of the other three colonies which came into the Union.

The nature of the Commonwealth Upper House suggested to Sir S. Griffith, Sir R. Baker, and others the view that the Ministry ought to be elective[3] and to hold office for a fixed term, and this device of elective ministers holding office irrespective of the views of Parliament has been advocated by the *Sydney Bulletin* and more or less definitely accepted as a plank in Labour party platforms, though it is very far from certain whether Labour as a whole really is enamoured of the plan. The argument urged for it is that it is shockingly detrimental to executive work and even to legislation that men should be only for a short time in office, and then hold precariously by a tenure irrespective often of their departmental problems. On this theory a minister would be able to think out a definite scheme and present it to Parliament altogether independently of other proposals, and, if it were approved, proceed to carry it out. It is no doubt disheartening to see useful ministers doing good work removed from office by matters unconnected with their departments, and replaced by others who have to begin afresh, while the necessity of being on the defence of one's party's policy as a whole keeps ministers far too constantly in the

[1] Wilmot, *South Africa*, iii. 347.

[2] Its honourable but vain effort to hold up the Colour Bar Bill of the Union Government in 1925–6 should be recorded.

[3] Quick and Garran, *Constitution of Commonwealth*, pp. 708 f.; Walker, *Australasian Democracy*, pp. 26, 277.

Legislature to the detriment of their departmental duties. This may be admitted, and the brevity of Dominion Governments adds to the disadvantages of a situation sufficiently regretted in the United Kingdom. But it has never been shown how in practice such a scheme would be worked; parliamentary government, when once used, has an inconvenient way of rendering other systems impossible of acceptance by men of Northern race as opposed to the more servile inhabitants of Southern Europe, and it may be doubted if the permanent minister would be able to secure legislative support sufficient to carry any great reform. Such reforms are usually only possible because they are taken up as party matters and pressed energetically by many to whom they have no real appeal and who apart from party might oppose them with even more energy than they expend in supporting them as matters stand. At any rate, all the discussions of the topic in Australia and its investigation by a New Zealand Committee in 1891 have not led to the adduction of any convincing plan.

It is attempted in the Irish Free State constitution to adopt this principle in respect of additional ministers to be elected by the Chamber of Deputies after nomination by a representative Committee, and to hold office for the duration of the Parliament, unless removed by the Chamber after investigation by a Committee. But there is nothing to show that this experiment is likely to be of any importance. At any rate it is not really parallel to what had been suggested for the Dominions, since it is inapplicable to the Executive Council itself.

If a Ministry is defeated at a general election, there is no fixed rule whether or not it should resign before meeting Parliament. The older usage was, as in the United Kingdom, to meet Parliament and resign on a definite vote of the House of Commons, but Mr. Disraeli's resignation in 1868 and that of Mr. Gladstone in 1874, after the result of the elections was clear, set a precedent which has often been followed in the Dominions. It was adopted by Mr. McCulloch in Victoria in 1877, by Mr. Mackenzie in Canada in 1878, by Mr. Atkinson in New Zealand in 1884 and again in 1891, and by Sir R. Stout in 1887. On the other hand, in 1896[1] Sir C. Tupper did not resign until he was

[1] Canada *Sess. Pap.*, 1896, Sess. 2, No. 7.

driven to do so by the intervention of the Governor-General,[1] though it must be noted that the final returns were not in before he resigned, although his defeat was quite clear. His example was followed in Ontario in 1905[2] and in New Brunswick in 1908,[3] while the Government of South Australia in 1910 met Parliament, urging that the majority against it was at best two, and that, if one of these could be induced to accept the Speakership, it might manage to secure support enough to carry on. But in 1909, when parties were equal, the Premier of Newfoundland resigned just before Parliament met, in order apparently to prevent the choosing of a Speaker, owing to the refusal of his party to accept even the nominee of his successor. In that year Sir T. Bent in Victoria, in 1910 Mr. Wade in New South Wales, and Mr. Deakin in the Commonwealth yielded to the result of the polls at once. Similarly Sir W. Laurier in 1911 and Mr. Meighen in 1921 and 1926 accepted the verdict of the polls as decisive.

Where defeat is clear, there is no doubt much to be said for the early resignation of ministers, after the necessary delay in clearing off routine matters, and the instalment in office of the new Government, so that it may proceed to prepare measures for submission to the Legislature.[4] If this is not done, it is necessary to adjourn the Legislature, after passing a vote of no confidence in the Ministry, and valuable parliamentary time is wasted. But, if there is doubt, it is clear that the decision must normally be in favour of waiting to see the outcome. In the interim, of course, it is proper that nothing but routine business should be done, and that the meeting of Parliament should not be delayed, but, if possible, it should be called together at an early date to decide the issue. Precedents since 1911 bear out this view as then formulated by the writer. In 1911[5] the general elections of New Zealand showed dubious results; the Government's future depended in fact on the way in which four Labour members would vote. It was thought by the Opposition that, if the Government of Sir J. Ward would not resign, at least the Governor should press them to meet Parliament, but he did not do so; on 15 February 1912, however, the

[1] Ibid. [2] *Canadian Annual Review*, 1905, p. 489. [3] Ibid., 1908, p. 402.

[4] So in Canada in 1921, and 1926, when Mr. Mackenzie King was encouraged to go at once to London for the Imperial Conference in November.

[5] Keith, *Imperial Unity and the Dominions*, p. 117.

Government met Parliament, and was upheld by the Speaker's casting vote, whereupon Sir J. Ward resigned as being unwilling to govern with a nominal majority. The House adjourned thereafter to allow Mr. Mackenzie to form a Ministry, which did not meet the House again until July, when it was promptly defeated by eight votes, in part as a result of the delay. In 1925–6 Mr. Mackenzie King properly declined to resign, because the vote placed his party in the position of second only in point of number, as the Progressives held the scales and were likely in the long run to vote for him ; the position was complicated in his case by his loss of his own seat as well as the *débacle* among his ministers, but his views were clearly sound, especially as he confined himself to routine business and had Parliament summoned as early as possible, for he was upheld, though by small majorities, on the votes at the opening of the House of Commons.

On resignation of office it was at one time not the British practice for advice to be tendered to the Crown, unless it were asked for, and on Mr. Gladstone's final departure from office he was not even asked to suggest a name,[1] and the Queen's selection undoubtedly was not the wisest that could have been made, for Lord Rosebery lacked concentration and real political insight. In the Dominions it is rather freely tendered, probably almost as a rule, though it is not disputed that there is no obligation to take the advice given ; this was asserted early in the history of responsible government by Sir E. Head in Canada,[2] who acknowledged on 22 March 1856 the advice offered to him, but remarked that he was not obliged to act on it, and in 1908 the Speaker of the Commonwealth House of Representatives [3] expressly ruled that the choice of a Prime Minister was constitutionally a personal act of the Governor-General and not subject to the rule of ministerial responsibility. It is in fact plainly absurd to say that a retiring minister can advise as to his successor and demand that his advice should be taken. The importance of the advice, however, differs greatly in different cases ; a Premier who retires while in full power on grounds of health, or to enter federal politics, commands a very different degree of weight from a minister beaten by his opponents. Skilful use may be made of advice ; thus, as has been noted,

[1] Morley, *Life of Gladstone*, iii. 513. [2] Pope, *Sir John Macdonald*, i. 336.
[3] *Parl. Deb.*, 1908, p. 2796.

Sir E. Lewis in 1909 and Mr. Watt in 1913 advised the sending for Labour leaders as Premiers in order to discomfit the rivals of their own parties. Mr. Hughes, again, in his resignations in 1916–18, advised the Governor-General to send for himself and to reconstruct his Ministry.[1]

There are no binding rules to guide a Governor in his choice ; the one obvious principle is simply to find the minister who is most likely to be able to carry on the Government. The procedure in Newfoundland in May 1918 [2] was very curious. Sir W. Lloyd had become Premier in January on the retirement of Sir E. Morris in the hope of ending feuds in the coalition Ministry of 17 July 1917. But on 20 May Sir M. Cashin, who commanded the support of the majority of the governmental party, resigned, and moved in the Assembly a vote of no confidence in the Government. Sir W. Lloyd rose to explain the circumstances in which the resignation of Sir M. Cashin had taken place, but was reminded by the Speaker that in the absence of a seconder there was no motion to speak to ; he sat down, but after a pause, as no one rose, he formally seconded the motion, which passed without demur, the leader of the Opposition expressing his concurrence in it. The Governor decided to send for Sir M. Cashin rather than the leader of the Opposition, because he had moved the vote on which the Government fell, but he was badly beaten in the general election succeeding. The Lieutenant-Governor of Ontario in 1919 [3] declined to accept the argument of the leader of the Liberal party that as head of the larger of the two established parties he should be preferred to the leader of the new Farmers' party, despite the fact that it had 45 members to 29 Liberals, and exercised his clear right of choice by taking the latter. In 1920 the Governor of New South Wales similarly had to make a choice of his own in view of the closeness of the two parties.

The Irish Free State, on the other hand, asserts its right to determine the head of the Executive Council who is to be appointed on its selection, and, while the Labour parties in Australia cannot decide which leader shall be sent for, they do decide which member of the Labour party, if any, shall become Premier.

Ministers, of course, are personally responsible for illegal

[1] Keith, *War Government of the Dominions*, pp. 210, 213.

[2] Ibid., pp. 241–3. [3] *Canadian Annual Review*, 1919, pp. 660 f.

actions, though for mere mismanagement of public affairs they can be punished, if at all, only by impeachment, which is, it may be taken for granted, obsolete, and certainly has never been attempted in any Dominion. Cases of illegalities are not at all rare; minor instances are the constant ignoring of the law as to the sanctioning of expenditure, and acts done under martial law by directions of ministers usually are badly in need of indemnification. Sir H. Parkes distinguished himself by illegal efforts to prevent Chinese landing in Australia,[1] and Mr. Deakin[2] planned, it seems, but did not carry out the seizure of the New Hebrides in 1888. The Premier of New South Wales ordered and brought about the forcible removal of wire netting from the control of the Customs of the Commonwealth,[3] claiming that it was not liable to duty as intended for governmental use, a claim repelled by the Courts; it was, however, agreed that ordinary criminal proceedings would here have been out of place. The ministers in the Cape during the Boer war consented to and carried out many illegalities, including the non-summoning of Parliament, for which they were indemnified in due course.[4] Much more reprehensible deeds were committed against the Maoris by the unsatisfactory ministers of early New Zealand days.[5] But at least these evil deeds were not for private gain, while malversation in office has been rather too frequent to be pleasant; Mr. Crick in New South Wales has been often paralleled in Canada, the worst cases, perhaps, being the Manitoba scandals of 1915 and those of Ontario in 1923, but severe strictures were passed by a Commission in 1920 on the Crown lands administration of Mr. Ferguson in Ontario; his party resented the attack, and made him their leader, and at the election of 1923 he achieved the Premiership.

§ 5. *The Conduct of Business with the Governor*

The procedure regarding the conduct of business between the Governor and his ministers differs from Dominion to Dominion. The Commonwealth, by custom, and the States, New Zealand,[6]

[1] *Parl. Pap.*, C. 5448, pp. 23, 46, 47. For the illegal extradition of Lamirande see Canada *Sess. Pap.*, 1867-8, No. 50. [2] With Mr. Gillies.

[3] Turner, *Australian Commonwealth*, pp. 180–2.

[4] *Parl. Pap.*, Cd. 1162. [5] Rusden, *New Zealand*, iii. 159 f., 454 f.

[6] The *Interpretation Act*, 1908, s. 22, deals with the case of the Governor's absence; cf. Forsyth, *Cases and Opinions on Constitutional Law*, p. 81.

Newfoundland, Malta, Southern Rhodesia, under the royal instructions, observe the rule, which is followed in the United Kingdom and in Northern Ireland, that there is a clear distinction between meetings of the Cabinet to discuss business and the transaction of formal business, decided upon in advance, in Council. The Cabinet is summoned in the name of the Premier, and is essentially, as formerly in the United Kingdom, rather an informal body of whose proceedings formal records are not regularly kept. On the other hand, the Governor presides in the Executive Council, and the only discussion of business which can take place is when the Governor demurs to something or wishes explanations. In the United Kingdom the fact that there is complete ministerial responsibility results in meetings of the King in Council being purely formal, and the Councillors summoned need not be ministers, though one normally is. In the Dominions also discussion is very rare, for it is the business of the ministers not to bring any really important matter up for formal action in Council, unless and until the Governor has been apprised in advance of what is intended. None the less, if the Governor should desire to question any item, this is essentially his opportunity so to do, and the matter would normally be deferred for explanations to be given, the other business being proceeded with. On occasions, of course, the Governor may endeavour, or be requested, to take active counsel with ministers; Sir Bartle Frere was anxious to do so in the Cape in 1877–8, but Mr. Molteno thwarted most of his efforts;[1] on the other hand, the Governor in Natal in 1906[2] sat in conclave with ministers, as did the Governor of Newfoundland at the beginning of the war of 1914, and Sir G. Strickland used to afford great aid to his ministers in Tasmania. It is the duty of the Governor to preside whenever possible; in the famous case in New South Wales, when the order was given to seize wire netting in Commonwealth control, the Lieutenant-Governor was presiding in the Governor's illness.

In Canada, on the other hand, as in the Irish Free State, the Governor-General is not President of the Privy Council, and the same rule applies to the Provinces. The Governor-General and the Lieutenant-Governors, accordingly, do not preside in

[1] Molteno, *Sir John Molteno*, ii. 190 f., 353, 390, n. 1.

[2] *Parl. Pap.*, Cd. 2905, p. 3.

Council,[1] and the mode of business takes the form of the passing of recommendations in Council which are presented for signature to the Governor, when, of course, he can take exception to them, or refer them back for explanations, which normally, as Mr. Blake explained, are given spontaneously in advance. Thus in the case of such an incident as the dismissal of General Dundonald in 1904 for insubordination, from the control of the Militia, the Governor-General was informed in advance and thus enabled to sign the Order in Council in due course. Similarly Lord Aberdeen[2] in 1896 was empowered to withhold signature from other recommendations for appointments and contracts brought before him, as also did the Lieutenant-Governor of New Brunswick in 1908 when his ministers asked for various appointments to be made after their defeat in the elections,[3] and the Lieutenant-Governor of British Columbia in 1925 declined to sanction further unauthorized expenditure on the University buildings, while in 1926 the Dominion Government forbade the Lieutenant-Governor of Nova Scotia to sign an Order adding members to the Upper House.

The Cabinet is not obliged to reveal its deliberations to the Governor, nor need his Premier take him into the secrets of his political manœuvres and intentions; this was laid down by Lord Carnarvon[4] in a dispatch of 20 November 1864 to Sir G. Bowen, and to some extent the complaints made by Mr. Luc Letellier against the Boucherville Ministry and of Sir B. Frere against Mr. Molteno may have been based on a misunderstanding of the position in this regard. No doubt a wise Premier may be glad to have an experienced Governor's opinion, but unluckily some measure of restraint is bred in their intercourse by the discretion of the Governor as to a dissolution, which is apt to make the Premier chary of confiding his difficulties, lest the Governor use his knowledge against him, even unconsciously, if he ever had to seek a dissolution. But the case is quite different where any official action is going to be, or is being taken,

[1] Canada *Sess. Pap.*, 1877, No. 13, p. 8. Contrast the older usage, Walrond, *Letters and Journals of Lord Elgin*, p. 116. Cf. Buchan, *Lord Minto*, p. 136.

[2] Canada *Sess. Pap.*, 1896, Sess. 2, No. 7.

[3] *Canadian Annual Review*, 1908, p. 402.

[4] Queensland *Ass. Votes*, 1867, p. 64.

and the gravamen of Mr. Letellier's[1] as of Sir B. Frere's[2] charges dealt with such actions. The Governor is perfectly entitled in these matters to the fullest information, and it should be accorded readily and spontaneously. The Governor of course will, as he must normally, rely on the statements of fact and of law which are laid before him by his ministers,[3] but he has been told that he is not bound to accept them, and he can hardly do so if there are serious grounds for suspicion. It may be granted that it is often very difficult for a Governor to go behind the statements made to him, as was shown in the case of Sir T. Carmichael's deception by Sir T. Bent, where the Governor of Victoria was assured of non-existent facts.[4] If he questions a statement he may find his Government resigning as a tactful manœuvre to win sympathy for themselves, especially if they can make out a good case.

But it is impossible to ignore the Governor in the sense of regarding his approval as a formality, and action taken in anticipation of his sanction—as, for instance, the release of criminals whom he has not yet pardoned, though it is proposed to advise him so to do—is a gross discourtesy which might be used by a Lieutenant-Governor who was tired of his ministers to get rid of them. It is true that the action of a Governor is normally that proposed by his ministers; this is so well established that it will be assumed as a principle of law by the Courts,[5] and it has been laid down on several occasions by the Privy Council as in *Attorney-General for New South Wales* v. *Williams*,[6] and *Theodore* v. *Duncan*.[7] But it is not to be deduced that the Governor does not count. In the reference on the Irish Boundary tribunal[8] the Privy Council held that, where a power was given to a Government, it ought to be exercised on the advice of the Ministry intimated in constitutional form through the Governor, and it awarded damages in a Canadian case[9] in which it was found that a petition had not been presented

[1] *Parl. Pap.*, C. 2445. [2] Ibid., C. 2079.

[3] Lord Crewe, House of Lords, 25 July 1910; *Parl. Pap.*, C. 2173, p. 81.

[4] Ibid., 1909, Sess. 2, No. 1; cf. ibid., C. 3382, p. 139.

[5] *Fulton* v. *Norton*, [1908] A. C. 451. For the duty of consultation see New South Wales *Ass. Journals*, 1859–60, i. 1131; *Parl. Pap.*, C. 3382, p. 268.

[6] [1915] A. C. 573. [7] [1919] A. C. 696. [8] *Parl. Pap.*, Cmd. 2214.

[9] *Fulton* v. *Norton*, [1908] A. C. 451. Cf. Rusden, *New Zealand*, iii. 440.

to a Lieutenant-Governor on the specious plea that the decision in any case would have been that of the Ministry to refuse its prayer, and in another it was declared that no amount of agreement on the part of the Cabinet could remedy the fact that no Order in Council had been signed by the Lieutenant-Governor.[1] If the Ministry wish to avoid reference to the Governor it is necessary, as in the Irish Free State, to confer powers on the Executive Council as such, and this is only effective where, as there, the Governor-General is not head of the Council.

The Ministry is responsible, on the other hand, for the Governor's actions, and is expected to defend him from attack. Thus the Speaker of the Commons in 1896 insisted on reminding Sir C. Tupper that he must attack the new Ministry and not Lord Aberdeen for his action in driving him from office, a precedent repeated in 1926 as regards attacks on Lord Byng, and the Speaker in the Cape objected to Mr. Molteno attacking Sir B. Frere in lieu of Mr. Sprigg. To some extent it is an artificial doctrine, even when restricted to the narrow sphere of local affairs and to action by the Governor simply on his own responsibility as head of the Government. But it has, in any case, no application to the Governor when acting on Imperial instructions in opposition to ministerial views. In that case, as Lord Carnarvon [2] laid down in the case of the prerogative of mercy, and as Mr. Ballance accepted as proper in his dispute with Lord Glasgow in New Zealand in 1892,[3] the position of ministers is that they are responsible only for the advice which they give ; if they cannot make it prevail because of the intervention of Imperial instructions, then they are entitled to remain in office, since they have the confidence of the people, and to seek to secure the withdrawal of the Imperial instructions. In that case the policy of appeal was victorious. On the other hand, Mr. Kidston in 1907 held that at such a juncture it was more considerate to the Governor to resign rather than leave him in the uncomfortable position of awaiting a decision against him from the Secretary of State, but his view was clearly wrong, and in 1914, where the dispute was purely on a local issue and there was not even the excuse of Imperial instructions, the Government of Tasmania remained in office until the Governor

[1] *Mackay* v. *A.-G. for British Columbia*, [1922] 1 A. C. 459.
[2] *Parl. Pap.*, C. 1248, p. 7. [3] Ibid., H. C. 198, 1893-4.

was overruled. In practice, of course, the Governor is blamed by the Opposition and denounced energetically whenever he acts in a way disliked by them, however much he may be moved by ministerial advice. Thus the leader of the Opposition in New South Wales in 1925–6 denounced the Governor as heartily as he did the Premier over the swamping of the Legislative Council, and in 1920 the Lieutenant-Governor of Queensland was decidedly more of the villain of the piece in the eyes of the opponents of the swamping of the Legislative Council of Queensland in order to secure the passing of confiscatory land legislation.

The Governor, since his ministers are responsible for his utterances, ought to avoid making observations which counter their policy, and is thus apt to be reduced to making apologia for the Government or more often to eulogizing the cattle, crops, educational system, health schemes, artistic interests, *et hoc genus omne*, of his Government. In some cases he can actively promote their views, as when Lord Dufferin appealed to Canadian national spirit to secure the completion of the Pacific Railway during the difficult times when British Columbia was bitterly reproaching the East with bad faith ; Lord Grey thus favoured the Hudson Bay project in the days when it was popular, and during the war all the Governors had congenial work in exciting patriotic pride in Dominion achievements and in helping schemes for the benefit of the wounded and the care of the relatives of the men under arms. It is permissible, of course, in valedictory speeches to mingle some truth with flattery, as did Lord Northcote, though it may be doubted if he enhanced his popularity by his action, and a genuine devotion to sport is allowed to express itself with due regard for susceptibilities. But Ministries are quick to resent any appearance of criticism, and Oppositions to detect evidence of personal identification. Sir John Macdonald was critical in 1877 of the Governor-General's support of ministers,[1] and Lord Dudley's support [2] of his ministers' naval policy was deemed by Opposition speakers to verge on that partisanship which would unfit

[1] Canada *Commons Deb.*, 1877, p. 373.

[2] Cf. Hobart *Mercury*, 27 Apr. 1909. Sir G. Clarke (Lord Sydenham) and Admiral Bedford, by remarks on defence, excited censure as going out of the State sphere.

him for co-operating with Ministries of opposing political views. There were times when Lord Grey made both Governmental and Opposition supporters dubious of his reticence, but Sir Wilfrid Laurier had far too much sense to carry the matter beyond hints in conversation which no doubt had their effect, and, despite difference of character, the two men got on very well. Lieutenant-Governors have not always been so happy. In Australia sensitiveness is rather too obvious; incautious remarks by a Governor who was imbued in the English system of denominational schools raised a turmoil in South Australia, which only the skill and adroitness of Mr. Jenkins availed to allay, and Sir H. Galway created a distinct disturbance by the innocent observation that the north of Australia was not likely to be settled by white labour. Worst of all, however, was the attack made on party grounds by Mr. Reid [1] on Lord Hopetoun in the Commonwealth on 30 January 1902 because of a speech on 27 January, when he stated, in order to reassure the public, that he and his Ministers had carefully considered the position, and had decided that further troops need not be sent to South Africa. He was merely, it is clear, seeking to indicate that as an Imperial officer he quite concurred with Ministers, but even they defended him lukewarmly, and he doubtless was influenced by this in his decision to resign office. Wholly reprehensible was the attack made by Mr. Verran in December 1910 [2] on the Governor of South Australia, whose offence, as was revealed by the Premier's onslaught, was that he had induced the Cabinet to realize that they could not permit anarchy to prevail in Adelaide in order to please a section of their political supporters. A serious attack was made on 16 November 1926 by Mr. T. Johnson, Labour leader, on the Governor-General for a criticism of Labour policy at the Dublin Chamber of Commerce Dinner. The President repudiated responsibility, suggesting bad reporting, and the Speaker deprecated personal attack; Mr. Healy negatived a rumour of resignation.

On the other hand, the Governor has a clear right to ask that in the speech he delivers at the opening of Parliament he shall not be expected to make use of needlessly offensive language,

[1] *Parl. Deb.*, 1901–2, pp. 4976 ff. Mr. Bourassa fiercely attacked Lord Minto in 1903; *Canadian Annual Review*, 1903, p. 249.

[2] Adelaide *Register*, 29 Dec. 1910.

either as to local matters or as to relations with the Imperial Government, and there are instances on record in which expressions have been successfully objected to. In 1875 [1] the Governor of the Cape succeeded in securing modification of the Government's onslaught on the Imperial Government's suggestions of federation for South Africa, while in 1897 [2] Sir H. Murray in Newfoundland took the stronger course of omitting certain remarks from the speech which was prepared for him to read, for which the press abused him strongly. In 1908, however, matters had improved; the reference to the Imperial Government's overriding of Newfoundland legislation by Order in Council [3] was moderate, and the remarks in Queensland regarding the Governor's action in dissolving Parliament were not such as to injure his susceptibilities. British precedent in the struggle of 1910 and 1911 is distinctly in favour of *fortiter in re, suaviter in modo.*[4]

§ 6. *The High Commissioners and Agents-General*

An important part of the constitutional system of the Dominions is their representation in London. It had far from humble beginnings; the Colonies generally used to have representatives for commercial purposes who furthered their ends, and who might be persons of importance, such as Members of Parliament—once an office of repute. But there was more difficulty in achieving the desired end in the case of Australia, since originally the Government was wholly in the hands of the Imperial Government, as contrasted with the position in the West Indies and Canada. The first Colonial Agent for Australia,

[1] Molteno, *Sir John Molteno*, ii. 4. [2] *Evening Herald*, 13 May 1897.

[3] *Parl. Pap.*, Cd. 3765.

[4] The action of the New South Wales Government in 1926 in opening Parliament by Commission, despite the presence of the Governor, was a deplorable piece of bad manners intended as a revenge for his action in refusing to swamp the Upper House, and was not approved by a strong minority of the Labour caucus. But it was followed by a decision to demand his recall. The Ministry was full of internal dissension, and the Premier on 22 Nov. only escaped by 44 to 42 a vote of censure because his chief rival, Mr. Loughlin, did not desire the dissolution which the Premier threatened to procure if defeated! But the Premier's policy of a newspaper tax thus became indefensible, and a dissolution was shown to be the only correct policy. Contrast the courtesy of Mr. Mackenzie King to Lord Byng after his victory in 1926.

appointed in 1824, dealt solely with non-political issues, and it was not until 1844 that Mr. Francis Scott was appointed,[1] as a Member of Parliament, to press the claims of the people of New South Wales on the British people. His legal position was only conferred in 1849 by the Colonial Agent's Act. Soon, with the grant of responsible government, the duties of the Agents became definitely commercial, and it was a distinct revival of an older status when Sir Julius Vogel, in a rather amusingly serious dispatch of 12 February 1879,[2] pressed his Government to improve his style and status by making him a Resident Minister; he complained that he was regarded as no more than a General Agent for commercial business and sales of produce, and he asked for ambassadorial status and privileges with a recognized precedence; but his Government paid no attention to his complaints. In the same year, however, the Canadian Government asked for the rank of Minister Resident for Sir A. Galt as Canadian representative, and, though the Imperial Government declined to arrange anything about precedence and shied at the mention of ambassadors, it was conceded that he might use the high-sounding style of High Commissioner.[3] The same precedent was followed by the Commonwealth,[4] though the first occupant of the office arrived only in 1910, and New Zealand had conferred the style on its Agent-General in 1905. The Union of South Africa followed suit in 1911[5] on its creation, and Newfoundland, which had never had an Agent-General, finally created the office of High Commissioner.[6] The style of Agent-General remained in use in the Australian States, but Southern Rhodesia likewise, on receiving responsible government, established a High Commissioner.[7] Sir G. Reid's arrival marked a definite demand for higher status, which received recognition by order of the King, without the grant of actual precedence, in cases of such ceremonials as the royal funeral in 1910, and the Coronation in 1911. But the question of formal precedence, exemption from customs duties, income-

[1] Sweetman, *Austr. Const. Development*, pp. 205 ff.
[2] *Parl. Pap.*, 1879, Sess. 2, D. 3.
[3] *Parl. Pap.*, C. 2594.
[4] Act No. 22 of 1909.
[5] Act No. 3 of 1911. Mr. W. P. Schreiner held the office 1914–19.
[6] Act 1921, c. 6.
[7] Act No. 7 of 1925. Malta has no such representation.

tax, and so forth, was formally discussed in 1923 at the Imperial Conference, with the result that the latter exemptions were readily conceded,[1] and on 29 July 1924 it was announced that the King had been pleased to assign the High Commissioners for Canada, the Commonwealth, New Zealand, Union of South Africa, the Irish Free State, Newfoundland, and India, precedence immediately after Secretaries of State when no British or Dominion Cabinet Ministers were present and after such Ministers in other cases.[2]

The Provinces of Canada are represented by Agents-General, but these are not directly accredited to the Imperial Government, in accordance with the invariable rule that relations between Canada and the Imperial Government are conducted through the Dominion Government and the High Commissioner. The presence of important politicians such as Sir R. McBride and Sir J. Whitney in these offices has resulted in a clear gain in public repute and status.

The High Commissioners and Agents-General are all paid officials, serving under statutory appointments for defined periods, and they are not members of the Dominion Governments, though they may be members in an honorary capacity of those Dominion Executive Councils which are not confined to Ministers. Thus the High Commissioners of Canada, including Mr. Larkin, who was never a Minister, have been members of the Canadian Privy Council: all the Commonwealth High Commissioners have been members of the Executive Council, and so normally in the case of Victoria and Tasmania. The tenure of their office has been considered incompatible with a seat in the House of Commons, though, of course, Lord Strathcona sat occasionally in the Lords. Sir J. Vogel's desire to enter Parliament led to the termination of his employment, and Sir G. Reid begged for release in order to accept the invitation given him to enter the House of Commons in 1915.

The functions of the High Commissioners are primarily financial and commercial, and under present circumstances they are much engaged in general superintendence of schemes of

[1] *Parl. Pap.*, Cmd. 1987, p. 17.

[2] But diplomatic immunity from suit even in respect of official reports does not exist; see *Isaacs and Sons* v. *Cook*, [1925] 2 K. B. 391; Keith, *J. C. L.* vii. 201 f.

emigration in view of the arrangements entered into by the Imperial and Dominion Governments under the *Empire Settlement Act*, 1921. As London is the great market for Dominion loans, they are necessarily in close touch with financiers, and heavy demands are made on their hospitality by Dominion visitors. In the case of the Commonwealth, efforts have been made to secure some degree of effective co-operation by a division of labour in respect of emigration to Australia, while for the time being the States other than New South Wales have agreed that borrowing overseas should be arranged not independently as hitherto but on principles approved by an Australian Loan Council representative of the Commonwealth and the States.[1]

Political activity in respect of the interests of their Governments has never been excluded from the functions of the Agents-General and still less from those of the High Commissioners. Sir J. Vogel pressed that they should freely be made the channel of communications between the Imperial and Local Governments, suggesting that friction between Ministers and Governor might thus be avoided. The suggestion was interesting, tending as it did to eliminate the functions of the Governor as a link between the Governments, but it was not acceptable to the British Government. Still, the Agents-General used to press matters on the Colonial Office, sometimes acting in concert; thus they asked the Colonial Secretary to secure the royal assent to the Victorian Divorce Bill of 1889,[2] and made various joint representations regarding Australian interests in the Pacific as opposed to French penetration, the status of New Caledonia, the New Hebrides, the proposed annexation of Papua, &c., while they supported the desire of their Government to be consulted before new Governors were appointed. They met with not rare snubs; the Agent-General for Queensland was informed that the Secretary of State preferred to deal direct with the Government as to the objections to the appointment of Sir H. Blake as Governor, while, when the Agent-General of New Zealand supported his Government's views as to the dispute in 1892 regarding the Upper House, he

[1] Cf. Mr. Bruce's speech on Australian loans, *The Times*, 17 Nov. 1926.

[2] *Parl. Pap.*, C. 6006 (1890). Cf. as to Governors, C. 5828 (1889); as to Papua (21 July 1883), Bernays, *Queensland Politics*, p. 93.

was told the Imperial Government's decision a day after it was sent to the Governor.[1]

A definite proposal to increase the functions of the High Commissioners as channels of communications was made by Sir J. Ward at the Imperial Conference of 1911, when he would have made them the regular channel of communication, though the Governors-General were to be kept informed of all communications. The proposal then was received without enthusiasm, though it was recognized that the use of the High Commissioner was often convenient and legitimate, so long as the Governor's position was not undermined.[2] No radical change was formally made by any of the subsequent Conferences, but inevitably the war made the position of the High Commissioners more and more valuable as a means of exchanging views. It had already been arranged in 1911 that the High Commissioner or other Dominion representative might be invited to meetings of the Committee of Imperial Defence when questions affecting the Dominion were likely to arise, and when the project for Imperial War Cabinets matured, it was contemplated that in the absence of a Dominion Minister to attend a Cabinet the High Commissioner might be permitted to act in lieu.[3] Hence has grown up the custom of summoning meetings of High Commissioners in order to discuss with them points of minor importance as to external and Imperial affairs with a view to their informing, and ascertaining the views of, their Governments.

As the functions of the High Commissioners have thus assumed a distinctly diplomatic tinge, the issue has often been raised since the proposal was first formally made by the Imperial Government in 1912, whether the High Commissioner should not be confined to his important non-political duties, which ought obviously to be carried out by a man of ripe experience and of prolonged tenure, and in lieu a member of the Dominion Government be sent as Minister Resident to enter into full and free relations with the Imperial Government, having direct access to the Prime Minister, Foreign Secretary, and other Ministers. Such access is already conceded, perhaps reluctantly, to the High Commissioners, but the proposal made in 1912

[1] *Parl. Pap.*, H. C. 198, 1893–4. [2] *Parl. Pap.*, Cd. 5513, p. 9.

[3] Keith, *War Government of the Dominions*, pp. 31 f. The project was revived at the Imperial Conference of 1926; Part VIII, chap. iii, § 8.

meant something a good deal more intimate. The issue was discussed several times in New Zealand, but on all occasions with very negative results; the Dominion Government made it clear that it desired to be represented by a High Commissioner who was able to discuss all matters freely with the Imperial Government, but who did not convey opinions of his own, and it was evidently feared that a Minister Resident who was one of the Dominion Cabinet would be likely to go beyond his sphere, and to express opinions of his own which might compromise the position of his Government. The Canadian Government indicated no desire to alter the status of its representative in London;[1] there was less hostility to the idea in the Commonwealth; Mr. Bruce, indeed, adopted the plan in 1925 of having a liaison officer attached to the Imperial Defence Committee to afford him confidential information on foreign relations, creating a special section of his office at Melbourne to deal with the vast mass of information on foreign affairs poured in by the Imperial Government, and a similar local branch was established by Mr. Coates at the close of the year. Canada had by 1909 made effective arrangements of this kind, now extended. Pressure on the Government of the Union to accept the proposal for a Resident Minister evoked no response.

Such a Minister, it is clear, would not be so well adapted to deal with finance and commerce as the High Commissioners, as now chosen, for he would have to be changed with each Government, and would be too much engaged in studying foreign policy to be able to become a real master of other subjects. Nor can it be denied that he would be more apt than a High Commissioner to express views which might compromise his Government, while, unless he was very careful to keep in touch with Ministers at home, he would cease in London to be fully aware of changing feeling in the Dominions; it is plain

[1] Sir R. Borden, 17 Aug. 1925 (3 *Can. Bar Review*, 518 ff.), suggested that High Commissioners should be associated with the Foreign Office, and be made Privy Councillors so as to attend Cabinet meetings; they would with Ministers attend the League Assembly, and join with them in discussing foreign affairs with other Dominion representatives and the Imperial Government before Assembly meetings. The decisions of the Imperial Conference of 1926 on the status of Governors-General (Part VIII, chap. iii, § 8) *may* increase the use of their services; but if British diplomats are sent to the Dominions, the opposite effect might result.

indeed that the representatives of the Dominions in London in September 1922 were not fully apprised of the war-weariness of the Dominions, which made Mr. Lloyd George's appeal for aid against Turkey fall so flat. It seems, therefore, that the solution of giving better aid to the High Commissioner for his other duties and leaving him further time for ambassadorial work, is by no means a bad solution of the present situation. There is obviously much to be gained by length of tenure; Lord Strathcona for Canada, Mr. Schreiner for South Africa, and Sir James Allan for New Zealand illustrate the advantage of having the same ministerial representative constantly in London.

VIII

THE CIVIL SERVICE

AS in the United Kingdom, the vast bulk of the actual work of the Government must be carried out by a Civil Service which is relatively permanent, as compared with the Ministry dependent on the will of the electorate and Parliament. In certain respects there are distinct contrasts between the Imperial and the Dominion systems. The Ministers in the Dominions, especially of course in the states and the provinces, are expected to do much more detail work than in the United Kingdom, hence the part played by the Civil Service is often smaller, and, the status being inferior and salaries lower than in the United Kingdom, the quality of the Civil Service is on the whole of less merit. Further, the British principle of allowing the service to be regulated by custom, under the royal prerogative, with Acts merely for such matters as pensions, is not accepted in the Dominions, where the whole system is now normally elaborately regulated by statute and rules under statute. Thus in the United Kingdom the civil servant holds office at the pleasure of the Crown, but in reality by custom he holds during good behaviour, and his removal is so reluctantly carried out that it is admittedly necessary, if there is to be a great extension of governmental activity in commercial or industrial spheres, that less rigid principles should be applied, and power given to remove officials simply because they are not effective without being necessarily negligent. In the Dominions the officer is protected from dismissal by elaborate procedure,[1] and it has been ruled in the Commonwealth that, if an officer is dis-

[1] See *Shenton* v. *Smith*, [1895] A. C. 229; *Dunn* v. *Reg.*, [1896] 1 Q. B. 116; *Hales* v. *R.*, [1918] W. N. 286; *Malcolm* v. *Comm. of Railways*, [1904] T. S. 947, cf. [1907] T. S. 557; [1910] T. S. 1077; *Skelton* v. *Govt. of Newfoundland*, 1897 *Newf. Dec.* 243, for the rule of tenure at pleasure; for legal protection, New South Wales *Civil Service Act*, 1884; *Gould* v. *Stuart*, [1896] A. C. 575; *Young* v. *Adams*, [1898] A. C. 469; *Young* v. *Waller*, ibid. 661; Queensland *Public Service Act*, 1896, ss. 40–2; *Stockwell* v. *Ryder*, 4 C. L. R. 469; for New Zealand, *Reynolds* v. *A.-G.*, 29 N. Z. L. R. 24. Cf. *Williams* v. *Giddy*, [1911] A. C. 381: *Williams* v. *Curator of Intestate Estates*, [1909] A. C. 353.

missed without observation of the rule that he must first be suspended, the dismissal will give rise to an action for damages, though it is conceded that the amount of damages will be affected by the fact that had the procedure been correctly followed, he could have been got rid of.[1] Curiously enough, the instructions in the case of New Zealand, the Australian States, Malta, and Southern Rhodesia all solemnly lay down that officers, save as provided by law, are to hold office only during pleasure, but law normally intervenes (it is of course possible in some cases, even in the States, to find excepted posts; thus it was held that a policeman in Queensland [2] was still liable to summary removal, just as the power of such removal is sometimes retained for military and other defence officials even when statutory provision exists. Promotions, again, which are decided in the United Kingdom in the main by departmental heads, are normally made in the Dominions the concern of an independent Board which can overrule the wishes of the Minister. A motive for this care may be seen in the power of civil servants in a small population where they may wield undue political influence. The spectacle, especially since the war, of the subservience of public departments to Civil Service demands and the blackmail levied from time to time by civil servants on the State explain adequately Dominion precautions.

The creation of a satisfactory system in the United Kingdom was a matter of time, and with the United States with its spoils system so close at hand, it is not surprising that in Canada the sense of the importance of a permanent service divorced from politics was slowly evolved. Nova Scotia [3] was an unrepentant sinner in this respect, and it was not until 1857 that Canada passed an Act contemplating permanent under-secretaries, deputy heads, and grades. In 1862 [4] Prince Edward Island was adjured to adopt a system of permanent tenure, though to no great purpose. In 1882 the Dominion adopted a system on which a scathing report was presented in 1908.[5] Selections were made from qualified candidates by political influence; the same influence dominated promotions, capable men having

[1] *Williamson* v. *The Commonwealth*, 5 C. L. R. 174.
[2] *Ryder* v. *Foley*, 4 C. L. R. 422. [3] *Parl. Pap.*, H. C. 621, 1848, p. 29.
[4] New Brunswick *Ass. Journals*, 1862, p. 192.
[5] *Canadian Annual Review*, 1908, pp. 56 ff., 91–3.

no chance against protégés of Ministers; these nominees defied discipline; departments were overstaffed, 220 officers at headquarters being needed to supervise a permanent force of 3,000 men which trained annually 40,000 militia; the Marine Department was riddled with dishonesty; salaries were too low, pensions lacking. Mr. Borden's campaign in opposition for purity in the administration helped to secure the agreed passing of an Act in 1908 establishing a Board under the style of the Civil Service Commission holding office subject to removal on a joint address from both Houses of Parliament. To this body was given the right to make appointments by examination in lieu of the old system of nomination from qualified persons, to issue certificates for increases of pay, promotions, and improvement of status. The Act was made applicable only to the inside service, that is, the service at Ottawa, though power was given to apply it by Order in Council to the outside service. The latter step was taken by Act in 1918,[1] and a great system of re-classification was undertaken and determined on in 1919[2] under the advice of American experts. This system has been criticized on the score that it assumes that advancement in the service should be through the lower to the higher grades, in lieu of distinguishing at once between appointments to be filled from University candidates and those requiring a lower educational standard; moreover, it is dubious if the re-introduction of promotion examinations, rendered optional in 1908, is a wise step. The rigidity of the new system led to proposals in 1921 to except from the control of the Commission manual workers, rural postmen, and professional and technical officers. It must be admitted that nothing was done to solve the problem of dismissal; the experts advised that servants should freely be removed when advisable, but they supply no means to facilitate this end, the power of the Governor in Council being useless. It is curious that despite the creation of the Commission Sir R. Borden on 16 May 1918 declared that the Government remained responsible to Parliament in respect of Civil Service appointments, despite the obvious fact that the Government in the Dominion is debarred from exercising patronage in every case which is not exempted in one form or other from the Acts. There remains, of course, a certain room for patronage, as in the past, through

[1] 8 & 9 Geo. V, c. 12. [2] 10 Geo. V, c. 10.

appointment of Ministers' private secretaries to permanent appointments, but these are under the present legislation very few.

The question of political influence was greatly simplified by the Acts of 1908 and 1918. In Canada, before and after federation, the rule was that public servants should only be removed on a change of Government for official misconduct, but political partisanship was such misconduct, and it was practically inevitable that it should be found by an incoming Ministry that the servants of its predecessor, owing their places and prospects to political influence, should have worked for them in the election and rendered themselves liable to removal. This happened in the Federation in 1873, 1878, 1896, and quite as markedly in 1911, but the Act of 1908 had put the inside service as a whole beyond the reach of the principle, and it escaped; the new Act of 1918 should largely effect this result for the outside service, and its efficacy was seen in the fact that in 1922 very few removals from office were due to this cause. The legislation on the subject is emphatic; the civil servant may in any federal or provincial election cast his vote, but he may not engage in partisan work, or contribute, receive, or deal in any way with, any money for any party funds, on pain of dismissal from the service in case of violation.

Pensions on a contributory basis were established for Canada in 1870, but the system was revoked for new entrants in 1898, when in lieu it was provided that five per cent. be deducted from salaries and funded at four per cent. interest payable six-monthly; this is handed over on retirement, while an Act of 1893 provided for insurance of civil servants; an improved system was a desideratum and is supplied by the Act (c. 69) of 1924, which is based on a five per cent. deduction from salaries.

The provinces have followed slowly in the footsteps of the Dominion with some effort to improve superannuation conditions.[1] In Newfoundland the spoils system has flourished, but

[1] e. g. Ontario by c. 3 of 1920 and c. 7 of 1924 has a system of equal contributions, retirement at 65–70, pension not over 2,000 dollars, half payable to wife on death. British Columbia (1917, c. 9) curbs abuse of patronage by putting appointments under a Civil Service Commission; Manitoba (1920, c. 13) has a Civil Service Commissioner; British Columbia by c. 60 of 1921 has a superannuation system on a contributory basis. A very painful impression was created in Canada in 1926 by the enforced resignation of two Civil Service

Mr. Monroe as Premier expressed his desire not to dismiss officials who would refrain from active political work. In the absence of the creation of an effective Board on the Canadian model it is difficult to see how anything satisfactory can eventuate.

The principles governing the Civil Service as whole are obviously inapplicable to the management of railways. In Canada the control used to be wholly political, being vested in a Railway Committee of the Privy Council, until 1903 when by an Act, since freely amended, especially in 1919, a Board of Railway Commissioners was created with very wide powers as to rates and generally the conduct and management of railways under federal jurisdiction.[1] The Commissioners hold office for ten years subject to the possibility of reappointment, which is normal, if the Commissioner is able to complete a full term without reaching the retiring age of 75; they can be removed only on an address from the two Houses. Two, the Chief Commissioner and the Assistant Chief, must have legal qualifications, and can override their colleagues on law; railway and business experience are expected in the others. An appeal lies from them to the Governor in Council or on law to the Supreme Court. Their functions involve the employment of many servants who are not subject to the ordinary Civil Service rules, and, when three of them were dismissed for intervention in provincial elections in 1921, they were ultimately reinstated on the recommendation of a Board of Arbitration.[2]

In the Commonwealth, with better models than those of Canada to follow, by Act No. 5 of 1902 the service was organized on a strictly non-political basis.[3] The control was given to a Public Service Commissioner who could be removed only on addresses from both Houses of Parliament. In 1922, by Act No. 21, a Board of three, with a short, but renewable tenure of office, was substituted. The service was classified as adminis-

Commissioners who were reported to have accepted gifts of liquor from an Inspector of Customs; *Canadian Annual Review*, 1925–6, p. 80.

[1] R. M. Dawson, *The Principle of Official Independence*, pp. 111 ff.

[2] Ibid., p. 94, n. 1.

[3] Married women are not normally eligible for employment. Temporary employment is regulated by Part IV of the Act of 1922 relating to the Provisional as opposed to the Commonwealth Service.

trative, clerical, professional, and general, or, under the Act of 1922, in four divisions, and the principles are appointment by examination where possible, and promotion by merit and seniority, not by the latter alone save in case of equal merit. Persons from outside can be brought in if there are no suitable service candidates, but promotions and appointments of outsiders require a ministerial recommendation, a report by the Commissioners approving the proposal, and a decision by the Governor-General in Council, who, however, can only require the Commissioners to submit a fresh name, and cannot overrule them. Moreover, Parliament must be informed of the ground of acceptance of the Commissioners' view. The civil servant has a definite legal claim for his salary, though in the Defence Department there is no contract, and only sums due can be sued for if dismissed. Officers of the first two divisions can be dealt with by the head of their departments or an Appeal Board. In other cases a formal inquiry is provided for by a Board; fines, or curtailment of leave, or reduction in status, or dismissal may be imposed on the report of the Board of Commissioners by the Governor-General in Council. The chief defects in the system were the lack of a proper pension system, a plan of compulsory insurance being a poor substitute (but a contributory pension scheme has been created by Acts of 1922–4), and a failure to provide a suitable career for entrants of high academic attainments, necessitating seeking outside for men of special qualifications. There are, of course, possibilities of political influence; posts can be created outside the normal rules, pressure brought to bear on the Commissioners, or temporary appointments kept in being for long periods to evade compliance with the regulations, and special powers vested in the Governor-General in Council, intended to meet abnormal cases, are misapplied occasionally. Public opinion, however, is fairly vigilant, and civil servants can usually invoke Opposition protests against any action detrimental to their interests.

In the States, the principle of public service control by Commissions has been generally adopted, with much the same features as in the case of the Commonwealth. At an early date the railway problem proved that management politically was deplorable in results of waste and inefficiency, and in 1884 Victoria set up a commission to end this difficulty, the example

being followed by South Australia in 1887, by New South Wales and Queensland in the following year, and by Western Australia, after a great strike leading to the retirement of the the general manager, in 1902. A problem which has presented difficulties has been the number of Commissioners ; three was at first preferred, but in Queensland this yielded to one, in 1906 (now Act No. 73 of 1924) in New South Wales one was given control over the others, and South Australia placed three experts under a Commissioner, the Minister to decide disputes. Victoria tried one, but after a great strike in 1903 reverted to three, at the same time [1] depriving both railwaymen and civil servants of the ordinary franchise and giving them in lieu the right to elect two members to the Assembly and one to the Council, a plan dropped in 1906.[2] Political activity by civil servants is not, on the whole, generally disapproved in the Commonwealth ; Labour Ministries favour it, and in New South Wales and Queensland it was expressly declared in 1910 to be legitimate and proper, while the former state by Act No. 45 of 1916 allowed civil servants to stand for Parliament, resigning if elected, and the Labour Government of South Australia approved political propaganda. The same view appears to have been adopted by the Labour Ministries of Tasmania and Western Australia, while Victoria has remained more conservative in outlook. The idea of disfranchisement which has been mooted in the Commonwealth as in Canada—where indeed Quebec and Nova Scotia once disqualified federal servants—has little that is attractive in a country where manhood and womanhood suffrage prevails, for it would be impossible to disfranchise relatives, and, as matters now stand, no Disfranchising Act even if passed would ever remain untouched by a Labour Ministry. There is the usual absence of really satisfactory [3] arrangements for superannuation.[4]

[1] Act No. 1864, ss. 25-9.

[2] Act No. 2075. The limits set on political action by s. 4 of that Act are removed by No. 2866 (1916). *Cf. J.P.E.* viii. 116.

[3] See, however, New South Wales Act No. 28 of 1916 ; South Australia No. 1360 (1919) ; *Police Pensions Act*, 1916 (No. 1262).

[4] For State Acts see Tasmania, 1921, No. 41, 1922, No. 25 ; South Australia No. 1259 (1916), 1385 (1919) ; Queensland 1919, No. 28 (Public Service Commissioner, Board of Inquiry, Board of Appeal) ; Victoria *Public Service Act*, 1915, for salaries No. 3059 (1920). The strike in 1920 in Western Australia elicited

In New Zealand under the *Public Service Act*, 1912, the control of the public service is vested in a Commissioner with two assistants, appointed for seven years, responsible to Parliament alone, and removable only by it for misconduct or incompetence. This body has the usual control of appointment and promotion, but it does not deal with railway servants or the police or defence forces, which as usual are treated exceptionally, and by an Act of 1918 the Postal and Telegraph Service falls under the Commissioner only as regards appointments. The Governor-General in Council may also take offices out of the Commissioner's control. There are superannuation funds for the public service, including police, railway servants, and teachers. The railway service is controlled by a ministerial department under a classification scheme, and Appeal Boards, subject to ministerial veto, one for each island, consisting of a magistrate and two elected members from the service, deal with appeals on the score of withholding of increments, promotion, loss of status, or fines exceeding £2. Political action seems to be conceded freely.

In the Union of South Africa the *Public Service and Pensions Act*, 1912, as amended by Act No. 39 of 1914 and now consolidated as No. 27 of 1923, provides for the control of the services under the Public Service Commission of three members who hold office for five years, but this body has wide powers as to appointments, promotions, inquiries into cases of misconduct, grading of the service; and its consent[1] is necessary for alterations of salary, new appointments, payment of gratuities, and other allowances; it administers the leave and subsistence allowance regulations. The service is classed as administrative; clerical; professional and technical; and general; excluding officers of the police, defence, and prison services. The railways, ports, and harbours fall under the control of a Minister who is advised by a Board of three Commissioners, appointed for five years, but eligible for reappointment; subject to regulations made by him, the business is managed by a general manager, and the management is under the constitution to be based on

No. 14 of 1921, penalizing strikes but giving an Appeal Board as usual; No. 38 as to railways. Queensland in 1924 allowed arbitration to be applied to its civil servants, and South Australia did so by Act No. 1648.

[1] The Commission can be overridden by the Governor-General in Council, but in that case the Commission can report to Parliament.

business principles, due regard being had to agricultural and industrial development within the Union, and promotion, by means of cheap transport, of the settlement of an agricultural and industrial population in the inland portions of all provinces. The rates to be charged are not to exceed those necessary to meet the working costs, betterment, maintenance, and depreciation, as well as interest on capital not provided out of railway and harbour funds. The expenditure is charged on the revenue, but is authorized by Parliament; there is discretion to increase for unforeseen expenditure the amounts provided by £300,000 if essential, the excess being reported to Parliament. In 1925 the attention of the Government was called by the auditor to the fact that by using unskilled white labour at high rates of pay the Government was violating the section of the constitution demanding administration on business principles.

The general principle of the Dominion Acts does not exclude the employment of women in any situations for which they are qualified, and in fact they are largely employed in the usual clerical posts which appeal to them, and to a much smaller degree in high offices such as inspectorships. Teachers are normally not direct employees of the Central Governments. The principle generally recognized as to the employment of married women is formally enacted in the Commonwealth Act of 1922, which permits the employment of any married woman only when she has exceptional qualifications, and provides for retirement on marriage. It is in fact obvious that in a country like Australia a woman cannot possibly have time for public duties of the Civil Service type and the keeping of a house.

In the case of Malta and Southern Rhodesia the Civil Service remains in principle on the same permanent and pensionable footing as in the pre-responsible government period, and in Northern Ireland the British rules of tenure and pension are applicable.

In the Irish Free State the Civil Service is regulated by Acts No. 35 of 1923, and No. 5 of 1925, which made permanent the provisions of the earlier Act. Provision is made for the appointment by the Executive Council of a Board of Civil Service Commissioners, three in number, holding office at the pleasure of the Council. The Board is required to inquire into the qualifications of every person proposed to be appointed to

permanent employment. No person can be appointed without a certificate of qualification as regards knowledge and ability. All appointments are made by competitive examination subject to the exceptions set out in s. 6, which were the subject of much criticism during their enactment. Under this section if the Minister of Finance and the Minister in charge of any department are of opinion that the qualifications for any office in that department are professional or peculiar and have been acquired in other pursuits by a person whom it is proposed to appoint, or if they think that it is in the public interest that the Board's regulations as to age or examination should be dispensed with, the Board may grant a certificate of qualification to the person so recommended. The Board are to hold examinations also for army and police and, if required, for local bodies. The general control of classification, remuneration, and conditions of service rest with the Minister of Finance.

PART III

THE PARLIAMENTS OF THE DOMINIONS

I

THE POWERS OF THE PARLIAMENTS

§ 1. *The Plenary Authority of the Parliaments*

IN the Dominions generally the power of the Parliaments rests on Imperial Acts; the exceptions are Newfoundland, Malta, and Rhodesia, in which legislative power is accorded under letters patent. The distinction is of no importance as regards extent of authority. Now in the Indian case of *Reg.* v. *Burah* [1] there was established generally for all Legislatures the principle that the power conferred is not subject to the rule *delegatus non delegare potest*. The question at issue was whether an Act of the Indian Legislature, which authorized the Lieutenant-Governor of Bengal to apply it to certain areas by notice, was vitiated by this delegation of power, on the score that the Indian Legislature itself was a delegate of the Imperial Legislature and had no power to hand on its power. The Privy Council disposed of the suggestion; it was not a question of delegation but conditional legislation, such as had never been questioned when it was merely a case of fixing a date for the commencement of an Act, and could not be called into doubt because the Lieutenant-Governor not merely had to fix a date, but also to assign an area. The same doctrine was applied to the Provincial Legislatures of Canada in *Hodge* v. *The Queen*,[2] where it was held that within the limits prescribed in s. 92 of the *British North America Act* the Legislatures had authority as plenary and as ample as the Imperial Parliament in the plenitude of its power possessed and could bestow. Ontario, therefore, could confer on a Board of Commissioners authority to make by-laws and municipal regulations for the government of taverns. These two cases were relied on in *Powell* v. *The Apollo Candle Co.*,[3] where it was laid down, overruling the Supreme Court of New South Wales, that the Colonial Parliament was entitled to delegate to the Executive the fixing and levying of duties. In

[1] (1878) 3 App. Cas. 889.
[2] (1884) 9 App. Cas. 117.
[3] (1885) 10 App. Cas. 282.

Dobie v. *The Temporalities Board* [1] it was laid down that within their sphere of legislation the provinces were supreme, and that there was no limit to their power save that of difficulty of enforcement.

By modern usage [2] the power of the Legislature is to legislate for the 'peace, order, and good government' of the territory, and there can be no doubt that this phraseology agrees in effect with the older [3] 'peace, welfare, and good government,' or the Victorian power to make laws in all cases. The means to these ends are entirely for the judgement of the Legislature which enacts; the test is subjective, not objective, and no Court can substitute its views of what should be enacted for those of the Legislature. This is laid down in *Riel* v. *Reg.*,[4] where it was pleaded for the murderer Riel that the Canadian Act 43 Vict. c. 25 regulating justice in the North-West Territories was *ultra vires*, since it could not be assumed that the Imperial Parliament intended to confer on the Dominion power to legislate as to treason, so as to alter the privileges conferred on the accused by English law, and that the Act was not in fact for the peace, order, and good government of the Dominion. This doctrine was completely negatived, and it was pointed out that the Indian Legislature had under like authority departed widely from fundamental British rules of the administration of criminal justice.

It is, however, yet unsettled [5] how far this power of creating subordinate legislative bodies exists; granted that it is a wide power, is there any limit? Could, say, the Commonwealth delegate its power of legislating as to divorce to some group of

[1] (1882) 7 App. Cas. 136. Cf. *Lafferty* v. *Lincoln*, 38 S. C. R. 620. But according to *North Cypress* v. *C. P. R. Co.*, 35 S. C. R. 550, the Legislature of the North-West Territories in Canada was a mere delegate of the Dominion Parliament. See also Harrison Moore, *J. C. L.* iv. 11 ff.; *Roche* v. *Kronheimer* (1921), 29 C. L. R. 329; *Welsbach Light Co. of Australasia* v. *The Commonwealth* (1916), 22 C. L. R. 268.

[2] 30 Vict. c. 3, ss. 91–5; Australian Const. s. 51; Western Australia, 53 & 54 Vict. c. 26, sched. s. 2; New Zealand, 15 & 16 Vict. c. 72, s. 53; Union, 9 Edw. VII, c. 9, s. 59; Malta; Southern Rhodesia; Northern Ireland, 10 & 11 Geo. V, c. 67, s. 4.

[3] New South Wales No. 32 of 1902, ss. 5–9; Queensland, 31 Vict. No. 38, s. 2; South Australia and Tasmania, 13 & 14 Vict. c. 59, s. 14.

[4] (1885) 10 App. Cas. 675. See Dominion Act 43 Vict. c. 25.

[5] Clark, *Australian Constitutional Law*, pp. 41–51.

individuals, or to a society of reformers of the morals of the Dominion? It is more easy to pose than to answer the problem, for there is no ground obvious on which such a power could be denied to the Imperial Parliament, and the other Parliaments within their spheres have been asserted to have as plenary authority as the Imperial Legislature itself. The matter has been discussed in the Commonwealth in *Baxter* v. *Ah Way*,[1] where it was contended that the Commonwealth could not delegate to the Executive under the *Customs Act*, 1901, the power to prohibit by proclamation the importation of goods, the power being vested only in the Parliament. As similar enactments had been made freely by the Colonies before federation, it was sought to distinguish these cases by the argument that the Colonies having full power of constitutional change, even without express intention to change their constitutions, the delegations could be supported on that ground which was not open to the Commonwealth. The Court held, however, that there was no ground for excluding the principle of *Reg.* v. *Burah*, and Isaacs J. on the strength of *Cooper* v. *Commissioner of Income Tax*[2] demurred to the suggestion that a State constitution could be altered informally and by implication.

More difficult is the case of creating the process of initiative and referendum, which has been much discussed in Canada, owing to the interest of the provinces[3] in this form of legislation, which is known to them from its use in the United States. Manitoba by 6 Geo. V, c. 59 authorized a number of voters not less in number than 8 per cent. of the votes recorded at the last general election to demand the passing of a Bill, even dealing with supply—on this point ignoring the restriction imposed on the Legislature itself under the *British North America Act*, s. 90, requiring the recommendation of the Lieutenant-Governor. The Legislature could then enact the Bill at the session at which it was presented, or the Bill would fall to be presented to the people for voting at the next general election, or if desired by the promoters, at a special referendum; if passed then by a majority of votes, it was to become law ' subject however to the

[1] (1908) 8 C. L. R. 626.

[2] 4 C. L. R. 1304. But cf. *McCawley* v. *R.*, [1920] A. C. 691.

[3] Keith, *Imperial Unity and the Dominions*, pp. 124–6. Various proposals to amend the Manitoba Act have failed to pass the Legislature.

same powers of veto and disallowance as are provided in the *British North America Act* or as exist in law with respect to any Act of the Legislative Assembly, as though such law were an Act of the said Assembly '. The further provision was made that a number of voters not less than five per cent. of the votes cast at the last election could petition for the repeal of an Act ; in this case the same procedure would follow, with the difference that, if repeal were carried at the referendum, the Act would automatically stand repealed without any intervention by the Lieutenant-Governor. The validity of the measure was referred in the convenient Canadian way by the Lieutenant-Governor in Council to the Court of King's Bench, and it was discussed fully on appeal in the Court of Appeal, which held it *ultra vires*. The Privy Council [1] affirmed this view, but not on broad grounds, though it hinted that the provinces had no residuary powers of legislation ; it held that the power of altering the Constitution possessed by the provinces did not extend to the Lieutenant-Governor, who under the measure was compelled to submit a Bill to a body of voters distinct from the Legislature of which he was the constitutional head, but also prevented him from preventing it becoming law. The last argument is clearly wrong ; the saving words cited above clearly referred in ' veto ' to the withholding of assent by the Lieutenant-Governor, not, as stated by the Council, to the disallowance by the Governor-General, which is not correctly styled veto, and is expressly provided for in the term ' disallowance '. But the further criticism by the Council is clearly valid ; in the case of a repeal the Lieutenant-Governor's veto, i.e. refusal of assent, the popular meaning of the term, was not to apply at all, nor was disallowance by the Governor-General admitted. A more favourable view of the validity of the initiative seems suggested by the Privy Council's view in *Rex* v. *Nat Bell Liquors Ltd.*,[2] which incidentally dealt with the validity of the *Direct Legislation Act*, 4 Geo. V, c. 3, of Alberta. That measure provided for an initia-

[1] *In re Initiative and Referendum Act*, [1919] A. C. 935 ; 32 D. L. R. 248.

[2] [1922] 2 A. C. 128. See Keith, *J. C. L.* ii. 112–15 ; iv. 240–1. The British Columbia Act, 1921, c. 21, allows 25 per cent. of the electors to initiate a law ; the Legislature may pass or propose an alternative ; it is then voted on, and if approved must be enacted subject to royal assent. The referendum is applicable only to laws declared subject to it. Initiative does not apply to Appropriation Bills.

tive if desired by not less than 20 per cent. of the number of votes at the last general election ; it provided that the initiative applied to no Act dealing with supply nor to any which was not declared by the Attorney-General to be within the limits of provincial power. If the Bill presented by the petitioners were not passed by the Legislature, then it could be submitted to a referendum, and if approved by a majority, would then be enacted unchanged by the Legislature at its next session. A lesser number of the voters—10 per cent.—could demand a referendum on measures passed, which, if disapproved by electors, would fall to be repealed at the next session of the Legislature. It had followed but with modifications a Saskatchewan Act, which, however, by being made dependent on a popular vote, had failed to receive the necessary majority to become operative. The Privy Council indicated that the Act of Alberta, if challenged directly, would probably be held valid, on the score that it merely accorded the people a more effective way of telling its representatives what legislation it wished to have passed : legislators were sent with a mandate to enact ; why not go further and supply them with a ready-made Bill, duly approved, which had merely to be passed ? This reasoning seems to ignore the fact that the Legislature exists for purposes of discussion and amendment ; that the procedure of initiative prevents the adoption of even the most essential and acceptable alterations ; and that it has never been held that a legislator goes to Parliament merely to record the wishes of the major part of his supporters on any given issue ; his function is to take counsel with others and act as seems best after such counsel. But the objection is much reduced by an Act of 1923 (c. 7) which authorizes the Legislature to put several questions to the people when any proposed law is presented to it. The voting is then preferential, and the question which is successful alone calls for action by the Legislature. This is to restore to it a real function.

Needless to say, no question can arise as to the use of the referendum, in the narrower sense indicated in the Alberta Act, to deal with the repeal of an Act which has come into operation. It is merely a variant of the insertion in the Act of a clause providing for its facultative adoption, saving the trouble of taking a vote on that point. Still more obviously legal are

Acts providing for referenda on issues submitted to the people for decision, usually in the form of questions, or provisions to settle deadlocks by referenda. A regular system of plebiscite is provided for in Alberta by Act 1921, c. 35. It is noteworthy that the use of referenda has greatly increased in frequency of recent years; moreover, much more decisive results have been attained. In 1892 and subsequent years referenda on the manufacture, sale, and importation of intoxicants took place in Manitoba, Ontario, and other provinces, and one in Canada under 61 Vict. c. 51,[1] but far more was effected during the war period and the succeeding years, when for a time all Canada save Quebec was in favour of prohibition,[2] a position later lost owing in part to the enormous profits of smuggling across the border into the United States, in part to dislike of restriction, and in part to the influence of Quebec, added to the trouble of enforcement and the difficulties arising from the conflicting powers of the federation and provinces and the varying decisions of the local Courts. Religious education evoked a decision in South Australia in 1896 in favour of the *status quo*; one in Queensland under Act No. 11 of 1908 decided in favour of undenominational teaching with facilities for denominational access, and the popular verdict was reluctantly but loyally carried out by Mr. Kidston by Act No. 5 of 1910. A large number of liquor referenda have been held in the States of the Commonwealth with negative results, while in New Zealand, where local option has a stronghold, success in a prohibition referendum was almost achieved in 1919, but has since receded further away, owing to effective organization by liquor interests, and to some extent the increased liking for liquor generated by the New Zealand soldiers who served overseas in the Great War, and whose votes defeated the local majority for prohibition in 1919. For the purpose of determining on a decrease of Members of Parliament

[1] The majority for prohibition was too small to allow of action, to which Laurier in harmony with Quebec feeling was opposed.

[2] In 1919 the Dominion legislated to authorize prohibition of importation in any province by referendum; this was duly acted on, but British Columbia in 1921 adopted sale under Government control, Alberta and Manitoba voted for this in 1923, Saskatchewan in 1924, and Ontario almost adopted it in 1924, modifying thereafter its régime. For the demerits of British Columbia see *Canadian Annual Review*, 1921, pp. 852 ff. For earlier Dominion legislation see cc. 14 and 19 of 1916, also auxiliary to the provinces by regulating importation.

New South Wales held a referendum under Act No. 13 of 1903, while in 1911 a referendum in South Australia defeated a proposed increase in members' salaries. A constitutional referendum to settle divergences of view between the two Houses was enacted in Queensland by Act No. 16 of 1908, but, when its employment in 1917 on the issue of the abolition of the Upper Houses proved unfavourable, steps were taken to secure that end by swamping, disregarding the Act, and in New South Wales the proposal of using the referendum was indignantly repudiated in 1910 and later. Referenda are required under constitutional provisions only in the Commonwealth and more widely in the Irish Free State. A proposal in Queensland to establish the initiative and referendum was pressed for a time vainly on the Council, but has not been yet enacted, though that body has been abolished and there seems decided need of a check on the Assembly.

The Legislatures are in no sense delegates of the people, and thus they can legally effect actions which have never been approved by the people in any sense. Thus the Commonwealth Parliament in 1907 increased its members' pay from £400 to £600 without warning the electorate, despite the indignation of some purists; it has repeated the performance in 1920, giving salaries of £1,000, while Canada similarly gave 4,000 dollars then. South Australia in 1910 let the people decide in the negative by referendum; Western Australia and Tasmania took no risks and provided salaries from 1 January 1911. The example was contagious, and in 1925 New South Wales, which had already added £200 without mandate in 1912 (No. 31), imposed £875 salaries for services which no kindness could appraise at half that value. This, however, is a minor issue compared to the exercise of the power of prolonging without mandate the life of the Legislature, placing the will of the Parliament above the people's chance of repudiation of their members. Ontario took a modest couple of months more in 1901 as a matter of convenience, though voices were raised in protest.[1] The necessity of unanimity to obtain an Imperial Act, requisite under the constitution, defeated the proposal to extend the duration of

[1] *Canadian Annual Review*, 1901, p. 429. For the general principle of wide powers see Mr. Churchill, House of Commons, 22 Feb. 1911; Lord Morley, House of Lords, 28 March, 4 July 1911.

the Parliament of Canada in 1917; in 1916 there had been agreement for an extension for a year which, therefore, was conceded by the Imperial Parliament,[1] which had just, for the first time since the Septennial Act of 1716, extended its own existence, and could not reasonably, even if it had desired, decline the same advantage to Canada. In the Commonwealth a constitutional change could have been effected in the usual way, but, of course, the procedure by referendum would have been too lengthy—the Senate would have resisted—and accordingly it was proposed to pass resolutions to persuade the Imperial Parliament to act, and this failed by the opposition of the Senate, so that a dissolution in 1917 was required. On the other hand, both in New Zealand in 1915 and 1918 (c. 15), and Newfoundland, a couple of extensions were taken without much objection in either case; that in Newfoundland in 1918 (c. 1) was expressly preluded by a coalition, and that in 1919 (c. 2) was only for a few months; and New Zealand formed a coalition as early as 1915, leaving no serious opposition to the power. The extension, on the other hand, of the Legislature of New South Wales in 1916 was mainly dictated by party interests, and was sanctioned by the Colonial Office, despite the just hesitation of the Governor, in order to help Mr. Hughes's schemes for recruiting, in which he had the aid of the State Premier.[2] It may be hoped that these war precedents will not be drawn upon as examples in future; nothing would be more deplorable than the sight of an Imperial Government aiding a majority in a Legislature to emancipate it from the need of facing its own electors when the proposal is plainly and manifestly objected to by a strong minority, as was the Labour party in the country, when Mr. Holman's action was furthered by the Colonial Secretary. It may indeed be doubted whether even in war-time the manœuvre of 1916 was worth while; the distrust of Australian Labour for the Imperial Government has in it one serious basis of justification.

On the other hand it is difficult to lay down any rules as to what measures may be passed by a Legislature without transgressing its obligations to the electorate. In the case of the federation of Canada only New Brunswick held a general elec-

[1] 6 & 7 Geo. V, c. 19.

[2] Keith, *War Government of the Dominions*, p. 272.

tion on the issue, and the House was completely out of harmony with the people by the time federation was achieved, while the people of Nova Scotia deeply resented the action of its Parliament,[1] and vague ideas of separation from the federation still recur there, though happily there is no risk of a repetition of the dismal history of the unjust union forced on Ireland. In Australia, on the other hand, the people were given the fullest opportunity by referenda to decide as to federation and, though in the case of South Africa only Natal held a referendum, there was elsewhere no doubt of popular approval.

In some cases it is probable that the Dominion Legislatures are merely delegates, as when the *Army Act*, 1881, ss. 156 (8) and 169 authorizes Colonial Legislatures to adapt fines provided in the Imperial Act; perhaps also this is the case in regard to Acts such as the *Extradition Act*, 1870, the *Coinage* (*Colonial Offences*) *Act*, 1853, the *Mail Ships Act*, 1891, &c., where the operation of an Imperial Act may be suspended in favour of local legislation, or such legislation given force as if part of the Imperial Act. If so its powers could not be further delegated.

§ 2. *The Limitations on the Powers of the Parliaments*

The authority of Dominion Parliaments is, of course, like that of every Parliament, subject to the limitation in fact of its power to enforce; but in law it is restricted by the following considerations: (1) those resting on the fact that these Parliaments are the Legislatures of dependencies, not of fully sovereign states; (2) those resting on the territorial limitation of Dominion legislation; (3) those arising from repugnancy to Imperial legislation; and (4) those affecting constitutional change, which ultimately fall largely under head (1) or (3).

The first of these heads unquestionably raises problems of no small difficulty, on which views are divergent. The older tendency was to regard many Acts as beyond the powers of Colonial Legislatures. In Upper Canada Robinson C. J. held in *Tully* v. *The Principal Officers of Her Majesty's Ordnance*[2] that the Colonial Legislature could not affect a right of the Ordnance,

[1] Cf. Sir W. Laurier's brilliant denunciation of Sir C. Tupper's action; Skelton, *Sir Wilfrid Laurier*, i. 472 f.

[2] (1847) 5 U. C. Q. B. 6; Lefroy, *Leg. Power in Canada*, pp. 333, 758; 30 S. C. R., at pp. 47, 48.

which as a department was simply not in Canada, though officers of it might be. The case may be upheld on the theory that an action will not lie against the Imperial Crown save by waiver of its immunity by granting a *fiat* to a petition of right; permission of the Court was requisite in the Cape for proceedings against an Imperial officer.[1] But the matter has been carried further. Boothby J.[2] in South Australia denied the power of the Legislature to create a constitution providing for a Legislative Council immune from dissolution, to require that Ministers should find seats in Parliament, in derogation of the Crown's free choice of advisers; or to allow an appeal from the Supreme Court to the Governor in Council. Can a Parliament declare enemy aliens friends within the territory, or order that the Governor shall use his power of pardon under a plebiscite or alter his relations to the Legislature? Sir H. Jenkyns[3] pronounced this last power as wholly beyond the authority of any Colonial Legislature. Or again, we have the doctrine based on Chitty's[4] distinction of *majora* and *minora regalia*; the former include sovereignty, perfection, and perpetuity, which are inherent in and constitute the Crown's political capacity; they inhere throughout the Empire, while the minor prerogatives extend only so far as they accord with local law. The former, it is suggested, are immune from change by any Dominion Legislature, the latter can be so regulated.

There is, it may at once be said, no real authority for any difference in kinds of prerogative; it seems perfectly clear that the distinction of Chitty and his predecessors, which rests on the differentiation between attributes of sovereignty and those of the King as feudal lord, is not applicable to the overseas territories; the prerogative had coalesced into a single element when it was taken overseas, and it must be assumed to apply wholly, unless it is barred by law to which the Crown has assented. Thus the priority of the Crown in bankruptcy has been held to have been carried into Canada generally, and Australia, but not into Quebec[5] because, while not expressly taken away,

[1] *Cape Town Council* v. *Hoskyn*, 14 C. T. R. 586; *Palmer* v. *Hutchinson*, 6 App. Cas. 619; *Fraser* v. *Sivewright*, 3 S. C. 55.

[2] *Parl. Pap.*, August 1862.

[3] *British Rule and Jurisdiction beyond the Seas*, pp. 69 f.

[4] On the Prerogative, p. 25.

[5] *Exchange Board of Canada* v. *Reg.* (1886), 11 App. Cas. 157, as against

it is impliedly so, the Quebec law giving priority definitely where the debtor is an officer under obligation to account to the Crown; similarly it is gone in Mauritius,[1] where under the terms of capitulation and permission of the Crown, French law is in force. It is not necessary, as sometimes asserted, that a prerogative should be expressly barred; the House of Lords has laid down,[2] and the Judicial Committee has adopted as correct, the view that once any matter which includes something that might fall within the prerogative is dealt with in an Act of Parliament, to which His Majesty has necessarily assented, all within the ambit of the matter so dealt with can only be dealt with in future as the Act of Parliament directs, and cannot be dealt with by an exercise of the prerogative outside the provisions of the Act. The view of Strong C. J. of Canada that the pardoning power[3] could be affected only by an Imperial Act cannot seriously be upheld; it is regulated in fact in the provinces by local Acts whose validity is not now doubted, and the cases on which he relied, *Cushing* v. *Dupuy*,[4] and *In re Louis Marois*,[5] merely assert that the prerogative is not taken away by a law unless it clearly shows its intention to take it away; in *Cuvillier* v. *Aylwin*[6] the principle is accepted that the prerogative can be altered by a law aimed to that end. Nor can it be said that the office of Governor or Lieutenant-Governor is beyond regulation, though the Canadian Constitution leaves it unalterable by either a Dominion or a Provincial Act. It is impossible to say that it could not be made elective as was once the case in some instances in North America; Tasmania proposed to make the Governor removable by two-thirds majority votes; this was not approved, but it would doubtless have been good law. Doubts were expressed in South Australia, when the constitution was being enacted in 1855, whether it was legal to make certain officers ex-officio members of the Executive Council, and to compel them within three months to

The Queen v. *Bank of Nova Scotia*, 11 S. C. R. 1; *N. S. Wales Taxation Commrs.* v. *Palmer*, [1907] A. C. 179; *A.-G. of N. S. Wales* v. *Curator of Intestate Estates*, ibid., 519.

[1] *Colonial Govt.* v. *Laborde*, 1902 *Mauritius Dec.* 20.

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

[3] *A.-G. of Canada* v. *A.-G. of Ontario*, 23 S. C. R. 458, 468, 469.

[4] (1880) 5 App. Cas. 409.

[5] (1862) 15 Moo. P. C. 189.

[6] (1832) 2 Knapp, 72.

obtain seats in Parliament, and to require that warrants for expenditure and for appointments or dismissals must be signed by the Governor and countersigned by the Chief Secretary. But the legal advisers of both the local and Imperial Governments held the terms legitimate as matters which might in the United Kingdom be regulated by statute law, though this was not done.[1] Legislation to regulate the Executive Council has been deprecated as inconvenient but never as illegal, and, though the South Australian Parliament in 1906[2] declined to define the powers of a Deputy Governor, it waived its objection in 1910, an example followed elsewhere.

The true limitation on the authority of Parliament is that it cannot by its own action alter vitally the status of the territory for which it legislates. It is created for a definite purpose; within the terms of that purpose it can effect its aims by what means it thinks fit, but it cannot frustrate that purpose or convert to wholly different ends its powers. In the Cape during the discussion of responsible government a movement arose for the division of the territory into provinces and a federation of South Africa. The Attorney-General[3] advised that the Colonial Legislature could by Act provide both for provinces and for entry into a federation. The Governor questioned this; an Imperial Act had been held essential in Canada; the power to create provinces in New Zealand, which was held to be given by an Imperial Act, had been deemed so dubious that the creation had been validated by another Act.[4] The Imperial law officers agreed that the Legislature could only create provinces in the mere sense of local Government areas, that it could not divest itself of its essential functions, and that it could not so legislate as to arrange for federation. Conformably to this view not only was the Commonwealth federated by Imperial Act, but the Colonies of the Union were unified in this manner; in the former case such action might have been deemed essential because their constitutions rested on Imperial Acts; in the second case this excuse could not be adduced.[5] The parallel

[1] *Parl. Pap.*, 24 July 1856, pp. 68, 86.

[2] *Council Deb.*, 1906, p. 191; *Ass. Deb.*, 1906, p. 141.

[3] *Parl. Pap.*, C. 508, pp. 10–13.

[4] 15 & 16 Vict. c. 72; 24 & 25 Vict. c. 30; 25 & 26 Vict. c. 48; 31 & 32 Vict. c. 92.

[5] *The Government of South Africa*, i. 452–4.

of the union of England and Scotland or of the United Kingdom and Ireland is worthless, for these were cases of fully sovereign Legislatures abdicating their functions. A Legislature cannot extinguish itself of its own volition ; the surrender of the constitution of Jamaica in 1866 was validated by the Act 29 & 30 Vict. c. 12 ; those of St. Vincent and Grenada by 39 & 40 Vict. c. 47 ; the federation of the Leeward Islands was similarly accomplished by Imperial Act. On the other hand, a Legislature may reduce itself even to a single person as has done the Virgin Islands since 1902, or change to a nominee from an elective body as in the case of Antigua, Dominica, Montserrat, St. Kitts, and Nevis, but that is not extinction.

Further, it is impossible for any Dominion to sever its connexion with the Empire by a simple Act providing for secession, as has been claimed to be possible in the Union of South Africa. It is not merely that, as General Smuts [1] holds, the King could not constitutionally assent to such an Act, but the Act would be *ultra vires* the Parliament. The sole legislative authority possessed by the Dominion Parliament is derived from the *South Africa Act*, 1909, which was passed in order to unite the British Colonies in South Africa ' under one Government in a legislative union under the Crown of the United Kingdom of Great Britain and Ireland ', and it is plainly absurd to claim for such a Parliament the power to destroy connexion with the Crown. The Canadian Parliament owes its existence under an Act passed to unite the provinces ' under the Crown of the United Kingdom '. The *Commonwealth of Australia Constitution Act*, 1900, was passed on the basis of 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 *Government of India Act*, 1919, rests expressly on the connexion of India with the Empire. The Irish Free State Constitution is based on a treaty which is binding on the Free State, and it requires the acceptance by every Free State legislator of an oath of allegiance. It would require a new treaty to absolve the Free State from her connexion with the United Kingdom. If secession comes, it may be provided for by local Act ; it must receive legal validity by Imperial Act,

[1] Keith, *War Government of the Dominions*, pp. 166 ff. For the Imperial Conference discussion of 1926 see Part VIII, chap. iii, § 8.

doubtless sanctioning a treaty of separation. The legal position is clear, while under Article 10 of the League of Nations Covenant the whole of the British Dominions may be held to be bound together in a territorial guarantee of the Empire.

Again, the Dominion Parliament cannot override the principles of international law affecting a Dominion as a dependency. It cannot enact a declaration of neutrality ; [1] if it obtained the sanction of the Crown it might enact a code imposing on all within it observance of all the duties of a neutral ; it might provide that its armed forces and British subjects within its limits should not be employed against the enemy ; it might relieve persons who became alien enemies by international law from all civil disabilities, render contracts with them enforceable, secure them freedom of person and property, and so forth. But it would remain true that it would rest with the enemy Power to treat the Dominion as at war, and other Powers would properly and naturally treat the Dominion as part of a belligerent state. Moreover, it must be added that British subjects from that Dominion who visited England might find themselves in danger of being tried for treason, for the Imperial Acts extend to adhering to or giving comfort to the enemies of the Crown, whether within the realm or without,[2] and no Dominion Act would bar the operation of the Imperial legislation. Nor again could a Dominion Parliament enact that a treaty made by the Crown should not apply in respect of that Dominion ; such an enactment might render it difficult to enforce the treaty, but it would have no effect at all on the international validity of the treaty ; it would not even amount to a repudiation giving ground for a declaration of war, because the demand for redress could only be made to the sovereign power save in so far as action is now possible under the League of Nations Covenant.

In some cases limitations on the power of legislation are incorrectly ascribed to the status of dependency. It is not on this account that Canada has in vain petitioned for the extinction by Imperial Act of the peerages unwisely granted to Canadians. She could legislate so as to forbid the employment

[1] Cf. Sir W. Laurier, *Parl. Pap.*, Cd. 5745, pp. 116 f. Neutrality is not contemplated for a Dominion under the Locarno Pact, only freedom from obligation to take active steps to enforce the Pact.

[2] *R.* v. *Lynch*, [1903] 1 K. B. 444 ; *R.* v. *Casement*, [1917] 1 K. B. 97.

of the title on her territory, but she cannot, it is clear, prevent the Crown granting a title which is valid even if Canada forbids its employment there, e.g. requiring the holder to pass as Mr. Jones and extinguishing his precedence, any more than she could prevent the Pope creating a Premier a Papal Knight or anything else. Such cases really fall under the head of territorial limitation.

§ 3. *The Special Limitations in Malta and Ireland*

(a) *Malta.* Though Malta has been accorded responsible government, yet it is in respect only to a definite area of questions. The grant of legislative power by s. 41 of the letters patent provides that the power to make laws shall not extend to matters touching the public safety and defence of the Empire, and the general interests of British subjects not residing in Malta. These reserved matters include the control of the Imperial Forces; the defence of the island and the compulsory acquisition of lands for defence; the control and regulation of aerial navigation and the acquisition of property for that purpose; defence surveys; cables, telegraphs, telephones, and other means of communication subsidiary to defence; lands, buildings, docks, and waters used for defence purposes; the places and other buildings reserved for Imperial purposes; external trade, save so far as regulated by the power of taxation; importation of goods and taxation of goods for the Defence Forces; coinage and currency; immigration; naturalization and aliens; postal and telegraphic censorship; the issue of passports and visas; the appropriation of revenues arising in respect of reserved matters; and treaties and relations with foreign states save so far as legislation may be necessary to give effect within the island to treaties binding on the Crown. In order not unduly to limit local legislation, laws dealing generally with drainage, water supply, lighting, electrical communications, roads, transport, or internal communications, may be passed, even if Imperial property or interests are incidentally affected, but must be reserved. Laws dealing with navigation, harbours, shipping, quarantine, shipyards, or territorial waters, if not affecting reserved matters, may be passed, but must be reserved. Further to enforce the rules, the Governor is authorized to forbid the introduction or proceeding with a Bill, clause,

or amendment affecting a reserved matter, subject to an appeal to the Secretary of State by the President or Speaker of either House. Moreover, if any law is passed which appears to affect any reserved matter, the Governor must refer it back, and, if it is not amended to meet his wishes, he shall submit to the Secretary of State, if desired by the Legislature, the question whether it does affect any reserved matter. Nor, until he is satisfied, or the Secretary of State has decided that the law does not affect any reserved matter, can he decide as to assent, reservation, or refusal of assent. The power of legislation as to reserved matters rests with the Governor himself, or with the Crown by Order in Council. This, however, is supplemented by the power taken in the letters patent to alter by Order in Council the provisions of s. 41 of the letters patent, so that, if necessary, the Governor might be enabled to legislate as to matters which require enactments to give effect to treaties binding on the island, the most obvious omission from the list of reserved subjects. In point of fact, as a rule the Imperial Parliament legislates to cover such cases, and authorizes making of Orders in Council applying the Act to all but the Dominions proper. The constitution makes one assertion of constitutional principle ; all persons are to have liberty of conscience and the free exercise of their respective modes of religious worship, and no person shall be subjected to any disability or excluded from holding any office by reason of his religious persuasion. This provision and those regulating the use of language in the Legislature, in administration, and in education (ss. 40 and 57) cannot be altered by the Legislature and are therefore fundamental laws.

(b) *Northern Ireland.* Northern Ireland differs, of course, essentially from Malta, inasmuch as the Imperial Parliament still exercises regular legislative authority over it in certain respects, whereas it legislates only occasionally for Malta. But in view of the legislative authority of the Crown in Council for Malta, the parallelism between the territories is really closer than on first appearance. The powers of the Parliament of Northern Ireland are similarly limited by the exclusion[1] of any matters not exclusively relating to Northern Ireland and in special of the Crown, the succession, the regency, the property

[1] 10 & 11 Geo. V, c. 67, s. 4. For a case of *ultra vires* see *Hunter* v. *McKinley*, [1923] 2 I. R. 165 (12 & 13 Geo. V, c. 8, s. 1 (3) invalid).

of the Crown, and the Governor, save in respect of his executive power as regards Northern Ireland services; peace and war, matters arising from war or neutrality; the Navy, Army, Air Force, and the Defence of the Realm; treaty and other relations with foreign states or other parts of the Empire; extradition and rendition of fugitive offenders; dignities or titles of honour; treason, treason-felony; alienage, naturalization of aliens as such, domicile; foreign trade (except as affected by taxation or legislation to prevent contagious disease or inquiries to further trade); bounties on export; quarantine; navigation and merchant shipping (except as regards inland waters, the regulation of harbours, and local health regulations); submarine cables; wireless telegraphy; aerial navigation; lighthouses, buoys, or beacons; coinage, legal tender, negotiable instruments (save as affected by taxation); changes in standards of weights and measures; trade marks, designs, merchandise marks, patents, copyright; and matters reserved by the Act. These include in effect now postal service; Post Office Savings Bank and Trustee Savings Banks, and designs for stamps, and Irish land purchase until handed over by Act. To the proposed Council of Ireland were assigned by the Act of 1920 powers as to railways, fisheries, diseases of animals, and private Bills in matters affecting all Ireland; these were in 1925 [1] handed over to Northern Ireland, having been conceded in 1922 to the Irish Free State. S. 5 of the Act of 1920 [2] further enforces a principle of right of the highest importance; no law must be made so as 'either directly or indirectly to establish or endow any religion, or prohibit or restrict the free exercise thereof, or give a preference, privilege, or advantage, or impose any disability or disadvantage, on account of religious belief or religious or ecclesiastical status, or make any religious belief or religious ceremony a condition of the validity of any marriage, or affect prejudicially the right of any child to attend a school receiving public money, without attending the religious instruction at that school, or alter the constitution of any religious body, except where the alteration is approved on behalf of the religious body by the governing body thereof, or divert from any religious denomination the fabric of cathedral churches, or, except for the purpose

[1] 15 & 16 Geo. V, c. 77.

[2] See also the treaty of 1921, art. 16, confirmed by 13 Geo. V, c. 1; 12 Geo. V, c. 4.

of roads, railways, lighting, water, or drainage works, or other works of public utility, upon payment of compensation, any other property, or take any property without compensation '. Further 'any existing enactment by which any penalty, disadvantage, or disability is imposed on account of religious belief or on a member of any religious order as such shall, as from the appointed day, cease to have effect in Ireland '.

(c) *The Irish Free State.* The constitution of the Free State is made subject to the treaty of 5 December 1921 with the United Kingdom, which has the effect of law both in the United Kingdom and the Free State,[1] and any provisions of the constitution or of any amendment or of any law made under it, which is repugnant to the treaty, is void and inoperative, and an obligation is imposed on the Parliament and Executive Council of the Irish Free State to pass such legislation, and do such other things as may be necessary to implement the treaty. To tell the truth, this leaves much in the constitution of dubious validity,[2] for article 2 expressly lays it down that 'subject to the provisions hereinafter set out the position of the Irish Free State in relation to the Imperial Parliament and Government and otherwise shall be that of the Dominion of Canada ; and the law, practice, and constitutional usage governing the relationship of the Crown or the representative of the Crown and of the Imperial Parliament to the Dominion of Canada shall govern their relationship to the Irish Free State '. If this is to be strictly construed, then—in view of the fact that nothing in the treaty touches the matter—the whole power of the Parliament of Ireland to alter its constitution is contrary to the treaty ; contrary also are the provisions as to the virtual election of the Executive Council, and the refusal to allow the dissolution of the Parliament by the representative of the Crown on the advice of a defeated Ministry ; the right of disallowance by the Crown of any Free State Act subsists despite the silence of the constitution ; the restriction of the right of appeal contemplated under s. 66 is equally invalid.[3]

[1] Imperial Act, 13 Geo. V, c. 1 ; Irish Free State Act No. 1 of 1922.

[2] Keith, *J. C. L.* v. 120 ff. These difficulties are consistently evaded by writers even like Prof. Swift MacNeill, who must have realized them.

[3] On the principle of *Nadan* v. *The King*, [1926] A. C. 482 ; 42 T. L. R. 356 an appeal in criminal cases lies to the Privy Council.

The constitution lays down certain general propositions in the nature of declarations of fundamental rights on the continental model. By article 6 the liberty of the person is inviolable, and no person shall be deprived of his liberty, except in accordance with law.[1] *Habeas corpus* lies in any case of detention, 'provided, however, that 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'. The dwelling of each citizen is inviolable and shall not be forcibly entered except in accordance with law. Freedom of conscience and the free practice and profession of religion are, subject to public order and morality, guaranteed to each 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. The right of free expression of opinion as well as the right to assemble peaceably and without arms, and to form associations or unions, is guaranteed for purposes not opposed to public morality. Laws regulating the manner in which the right of forming associations and the right of free assembly may be exercised shall contain no political, religious, or class distinction. All citizens of the Irish Free State have the right to free elementary education. The lands and waters, mines, and minerals belonging to the State are declared inalienable, subject to being leased or granted under licence by authority of Parliament, but on no condition for a longer period than 99 years, no lease or licence to be renewable by its terms.

Under article 70 no one shall be tried save in due course of law, and extraordinary Courts shall not be established, save only

[1] This may, of course, be very drastic, as in the Act for the Preservation of Public Safety passed to meet the attacks on police in Nov. 1926.

such military tribunals as may be authorized by law for dealing with military offenders against military law. The jurisdiction of military tribunals shall not be extended to, 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 from one area to another for the purpose of creating such jurisdiction. No person shall be tried on a criminal charge without a jury, save for minor offences by Summary Courts, and for military offences by Military Courts. In time of peace members of the Forces of the State may only be tried by Courts Martial for offences expressly referred for trial to such Courts by law.

By the treaty, coastal defence is reserved to the Imperial Forces, subject to discussion between the Irish and Imperial Governments in December 1926 to arrange the participation of the State in her coast defence. This does not hamper the maintenance of revenue and fishery vessels. The military establishment of the State must not exceed the proportion to the Imperial establishment of the population of the State to that of Great Britain. The clause is badly worded, as the terms clearly prevent the inclusion of the population of Northern Ireland in the total for Great Britain.[1]

[1] The limitation was ignored in the critical period 1922–5, but has since been regarded as the outcome of the need for economy and the cessation of guerrilla warfare.

II

THE TERRITORIAL LIMITATION ON DOMINION LEGISLATION

§ 1. *The Nature of the Limitation*

THE powers of Dominion Legislatures are not usually limited territorially by express words; they are authorized to legislate for the peace, order (or welfare), and good government of the territory, and it is the exception to find in Queensland [1] the use of the term 'within', and as regards the provinces of Canada [2] the words 'in each province'. It might have been argued that the power to legislate should be deemed to extend to anything calculated to achieve the purposes desired, whether strictly territorial in operation or not, but this doctrine had obvious inconveniences, and as early as August 1854 [3] the Queen's Advocate advised that foreigners could only be forbidden to engage in fishing for seals or whales within three marine miles from the Falkland Islands, this being the normal extent of territorial waters under international law. In February 1855 the law officers went much further, for they definitely held that the legislation of British Guiana must be deemed to be operative only within the territory and territorial waters as thus defined of the Colony and possibly beyond those limits to persons domiciled in the Colony. So also it has been held essential to pass Imperial Acts providing for the extradition of criminals, the removal of Colonial prisoners from one place to another, the rendition of fugitive offenders, all matters which involved custody on the high seas deemed beyond Colonial power.[4] Even the hearing of appeals from British Honduras in Jamaica was

[1] 31 Vict. No. 38, s. 2; for Victoria see 18 & 19 Vict. c. 55, sched. s. 1.

[2] 30 Vict. c. 3, s. 92.

[3] Forsyth, *Cases and Opinions on Constitutional Law*, pp. 24 ff., 217 ff.

[4] ***Fugitive Offenders Act***, 1881 (44 & 45 Vict. c. 69); ***Colonial Prisoners Removal Acts***, 1869 and 1884 (32 Vict. c. 10; 47 & 48 Vict. c. 31); ***Extradition Acts***, 1870 and 1873 (33 & 34 Vict. c. 62; 36 & 37 Vict. c. 60).

deemed to need an Imperial Act as well as the constitution of a West Indian Court of Appeal.[1]

Apart from these opinions and Parliamentary usage, we have other evidence of the view held. In the case of the Canadian prisoners [2] banished by Lord Durham, with the legislative authority of an ordinance passed by him under an Imperial Act, to Bermuda, there to be detained, the law officers had no doubt that the detention in Bermuda must be illegal, and the action was duly indemnified by Act. It is true that in *Leonard Watson's* [3] case his transportation through England *en route* to Van Diemen's Land for imprisonment there under a statute of Upper Canada was held valid, but, even if we assume that the real point was clearly before the Court, the decision could be based on the combined effect of the Quebec Act in introducing English law and the Imperial Act of 1824 referring to transportation between Colonies.[4] Sir J. Macdonald in 1873 insisted that Ontario could not arrange to deport undesirables; this needed a Dominion Act for deportation to another province, for removal elsewhere an Imperial Act.[5] In *Ray* v. *McMakin* [6] the Victorian Court refused to recognize the power of New South Wales to authorize detention beyond the limits of the Colony. Lord Carnarvon [7] expressed the same doctrine, and in *Brisbane Oyster Fishery Co.* v. *Emerson* [8] the Chief Justice of New South Wales recognized the limitation, alluding to the fact that it had prevented local legislation—without Imperial confirmation—establishing Colonial navies. New Zealand jurisprudence took the same view *In re Gleich*,[9] denying the power to deport or authorize detention outside the Colony. Even Higinbotham C.J. in *Reg.* v. *Call, ex parte Murphy*,[10] admitted that it was quite arguable that the Victorian legislature had no extra-territorial authority, though he evaded the obvious conclusion by holding that Victorian Acts must be obeyed in Victorian Courts, a clearly indefensible view.

[1] 44 & 45 Vict. c. 36; 52 & 53 Vict. c. 33; 6 Will. IV, c. 17; 9 & 10 Geo. V, c. 47. [2] Forsyth, op. cit., pp. 465 ff. [3] 9 A. & E. 731; cf. 1 P. & D. 516.
[4] Lefroy, *Legislative Power in Canada*, pp. 323 ff.
[5] *Prov. Leg.*, 1867-95, p. 103.
[6] 1 V. L. R. 274; cf. *Hazelton* v. *Potter*, 5 C. L. R. 445, 471.
[7] *Hansard*, ser. 3, ccxxiii. 1074. [8] Knox (N. S. W.), 80.
[9] 1 O. B. & F. S. C. 79; *Parl. Pap.*, 1880, A. 6.
[10] 7 V. L. R. 113, 123; cf. *Reg.* v. *Pearson*, 6 V. L. R. 333.

The further question arose how far a Dominion Legislature could penalize acts done beyond territorial limits. The Imperial Act 24 & 25 Vict. c. 100, s. 57 very properly punishes bigamy committed by a British subject wherever the offence is committed.[1] A Canadian law adapting the principle to Canada made it punishable for a Canadian resident, being a British subject, to commit the offence anywhere, provided he had left Canada in order to do so. This was held *intra vires* in *Reg.* v. *Brierly*.[2] But in 1891 the Privy Council decided *Macleod* v. *Attorney-General for New South Wales*,[3] in which, under s. 54 of the *Criminal Law Amendment Act*, 1883, of New South Wales, it was held in the Court below that it was an offence punishable in the Colony to have married there a woman in 1872 and to marry in her lifetime another woman in Missouri. The enactment provided that 'whosoever being married marries another person during the life of the former husband or wife, whereso-ever such second marriage takes place, shall be liable to penal servitude for seven years'; it was held by the Council that the wide interpretation contended for was inadmissible, and the Act must be intended to remove difficulties as to venue; in the wider sense it would be *ultra vires* the Colonial Legislature; crime was territorial; *extra territorium ius dicenti impune non paretur*; outside the British dominions 'except over her own subjects Her Majesty and the Imperial Legislature have[4] no power whatever'. This view might conceivably have led to an interpretation of the Act to refer to British subjects, and, as it did not do so, it must be deemed that the Council was deliberately alluding in these terms to the special position of the Imperial Parliament as possessing a sovereign right to legislate for British subjects all over the world. On the strength of this judgement the Ontario Court of Queen's Bench declined in *Reg.* v. *Plowman*[5] to follow *Reg.* v. *Brierly*. The whole issue was elaborately discussed by the Supreme Court in Canada *In re Criminal Code, Bigamy Sections*.[6] The code of 1892 by ss.

[1] *Trial of Earl Russell*, [1901] A. C. 446.

[2] (1887) 14 O. R. 525; cf. *Reg.* v. *Giles*, 15 C. L. J. 178; *R.* v. *McQuiggan*, 2 L. C. R. 340; Smith, 1 *Can. Bar Rev.* 338 ff. [3] [1891] A. C. 455.

[4] Many nations hold otherwise; see *B. Y. B. I. L.* 1925, pp. 44–60.

[5] (1894) 25 O. R. 656; cf. Riddell, C. L. T. xl. 491–502.

[6] 27 S. C. R. 461; *R.* v. *Brinkley*, 12 Can. Cr. Cas. 454.

275, 276 punished bigamy committed anywhere by a British subject who left Canada for that purpose. The Chief Justice denied the validity of the enactment, citing his judgement in *Peek* v. *Shields* [1] denying that Canada could penalize an act of insolvency committed in England. Girouard J. insisted that Canadian authority was plenary save if there were repugnancy to Imperial legislation. The other judges held only that the Act was valid if applied to a Canadian resident, arguing that *Macleod's* case depended on the wideness of the terms used, and would have been valid if restricted to British subjects resident in New South Wales. It is much more probable that the Act can be upheld as penalizing leaving Canada with intent to do a certain act ; the leaving and intent are territorial, and therefore the *locus* of the action is immaterial.

The difference between direct prohibition of extraterritorial acts and effective indirect prevention was shown in the Newfoundland case *Rhodes* v. *Fairweather*.[2] A Scottish sealer, which cleared from St. John's and returned there for manufacture and shipment of the seals it caught, took seals on the high seas at a time forbidden by an Act of 1879. Carter C.J. ruled that, even if registered in Newfoundland, the taking could not be penalized directly, Little J. agreed, but Pinsent J. thought the use of a Newfoundland port might bring the case within the law. What is clear is that the Act 50 Vict. c. 26, forbidding the bringing in of skins caught in prohibited times, would have been adequate to penalize the sealer, if it had been enacted before the seals in question were caught. A similar device was used by the Imperial Parliament in 1909,[3] preventing landing in England of fish caught by foreign trawlers in the Moray Firth, in order to evade the disputed issue of the firth as *mare clausum* as held by the Scottish Courts, though dubiously from the point of view of international law. Similarly in 1911 the powers given by enactments of the Federal Council of Australasia in 1888 and 1889 regarding the pearl fisheries of Queensland and Western Australia were found to be efficacious to compel observance of the rules even on the high seas by foreign vessels, since they had to make use of the shore.

In a second Newfoundland case, *The Queen* v. *Delepine*,[4] it

[1] 8 S. C. R. 579.
[2] 1897 *Newf. Dec.* 321.
[3] 9 Edw. VII, c. 8.
[4] 1897 *Newf. Dec.* 378.

was ruled, following the Privy Council judgement in *Anglo-American Telegraph Co.* v. *The Direct United States Co.*,[1] that territorial waters follow a line drawn three miles from an imaginary line joining the headlands of bays, and that Conception Bay was part of Newfoundland territory. In the case of *The Frederick Gerring*,[2] which caused much friction with the United States, the Canadian Court held that the vessel was captured within the three-mile limit, so that no real point as to jurisdiction could arise. In the case of *The Ship 'North'* v. *The King*[3] the Supreme Court of Canada held that it was legitimate for a Canadian Government ship to pursue and capture outside territorial waters a ship which had just been breaking Canadian regulations in these waters. The decision was clearly right; the Canadian action was internationally valid under the doctrine of 'hot pursuit', but apart from that the maxim of *male captus bene detentus* would have applied: the offence was clearly committed in Canadian waters. In *The Ship 'D. C. Whitney'* v. *St. Clair Navigation Co.*[4] the real matters in issue turned on the extent of Canadian admiralty jurisdiction under statute, not on territorial limitation in the proper sense, but the Court decided the case by the view that the arrestment was invalid as it took place in a channel open by treaty to free passage, and the ship had never entered a Canadian port and so rendered herself liable to the arrest. Subject to special Acts, the admiralty jurisdiction of the United Kingdom is by statute generally exercised in Dominion Courts.

It is interesting to note that the Natal Treason Court, resting its action on Roman Dutch law, and not on Imperial statutes, held itself justified in punishing treason committed outside Natal.[5]

On the other hand, there has often been misunderstanding of

[1] (1877) 2 App. Cas. 394, accepted in the Hague Arbitration of 1910, Cd. 5396, p. 23.

[2] (1897) 27 S. C. R. 271. [3] 37 S. C. R. 385.

[4] (1907) 38 S. C. R. 303. The British Admiralty jurisdiction of course covers the case (*The Diana*, Lush. 539; *The Courier*, Lush. 541; *The Jassy*, 95 L. T. 363; 24 Vict. c. 10; 15 & 16 Geo. V, c. 49, s. 22). But the point was that the vessel was never legitimately arrested. Chaleurs Bay is territorial waters of Canada (*Mowat* v. *McFee*, 5 S. C. R. 66), and so is Hudson Bay by statute. Cf. *The Fagernes* (1926), 42 T. L. R. 621; Keith, *J. C. L.* viii. 291.

[5] *R.* v. *Bester*, 21 N. L. R. 238.

the limitation, as when *Low* v. *Routledge* [1] is cited as authorizing the doctrine that an alien's rights outside Canada cannot be affected by Canadian legislation. The case merely shows that rights acquired in a Colony under an Imperial Act cannot be taken away by legislation repugnant to that Act. Nor, as *Ashbury* v. *Ellis* [2] establishes, is it illegitimate for a Dominion to subject to its jurisdiction persons neither themselves nor by agents resident in a territory in respect of contracts to be performed there in whole or in part. Such authority is clearly necessary for the peace, order, and good government of a Dominion, but, of course, the effect of its judgements is entirely a matter to be governed by private international law, as supplemented in the case of England by the terms of the *Administration of Justice Act*, 1920.[3] If a Dominion Act provided that matters affecting persons and things in England, e.g. the rent of houses let to Dominion citizens, could be determined in Dominion Courts, the legislation would doubtless have no effect in the view of other Courts, but it might be so worded that the Courts could not decline to consider and pass on such matters. On the other hand, an Act fixing house rents would be deemed utterly invalid as attempting to legislate extraterritorially.

§ 2. *The Recent Interpretation of the Doctrine*

Judicial opinion has not on the whole departed from the older ruling. The case of *Earl Russell* [4] is a convincing proof of the difference between Dominion and Imperial legislation as to bigamy; the Lords there held without doubt that Earl Russell, despite a colourable divorce, was guilty of bigamy when he married a lady in America when his marriage was still subsisting. On the other hand, the High Court of the Commonwealth has on various occasions repeated the doctrine that, apart from the special provisions of s. 5 of the *Commonwealth Constitution Act*, or any other Act, the Commonwealth has only territorial jurisdiction as in *McKelvey* v. *Meagher*,[5] *Merchant Service Guild of Australasia* v. *Archibald Currie & Co.*,[6] *Merchant Service*

[1] (1866) L. R. 1 Ch. 42. [2] [1893] A. C. 339.

[3] See Keith, *J. C. L.* iv. 310–12; 10 & 11 Geo. V, c. 81, ss. 9–14; Dicey and Keith, *Conflict of Laws* (ed. 4), pp. 466 ff.

[4] [1901] A. C. 446. [5] (1906) 4 C. L. R. 265. [6] (1908) 5 C. L. R. 737.

Guild v. *Commonwealth Steamship Owners' Association*,[1] *Delaney* v. *Great Western Milling Co., Ltd.*,[2] *Australian Steamships Ltd.* v. *Malcolm*,[3] and other cases. Similarly, Isaacs J.[4] has well said: 'But the jurisdiction of the State Parliament does not extend to any person, whatever his nationality, outside the State territory, though, of course, it may affect any property within it, wherever the owner may be.'

No derogation from this principle can be found if the cases at first sight disagreeing with it are examined, and the High Court has recognized this. The most important is *Peninsular and Oriental Steam Navigation Co.* v. *Kingston*,[5] which dealt with the power of the Commonwealth Parliament to enact that seals placed on ship's stores in the Commonwealth must not be broken, and to rule that, if a ship entered a port with the seals broken, the master would be guilty of an offence against the *Customs Act*. The case for the Company was in effect that, as the seals were not broken in territorial waters, the power of the Commonwealth never applied, but the Privy Council very naturally insisted that the offence was entry with broken seals, and dismissed the appeal from the conviction below, pointing out that a foreign ship would be liable in the same in the United Kingdom under s. 135 of the *Customs Consolidation Act*, 1876, though the Imperial Parliament did not possess or claim the right to legislate for foreign ships in non-territorial waters. The reasoning here justifies a similar decision in *ex parte Oesselmann*.[6] It has also been held in *McKelvey* v. *Meagher* that a Colonial Legislature may impose a penalty on a man who within four months before insolvency quits the territory taking with him a sum exceeding £20 which should have been available for his creditors, though it was contended that a man could not quit a territory and be within it so as to be subject to its jurisdiction. Further, the question of the right of Canada to deport aliens was decided in her favour in *Attorney-General for Canada* v. *Cain*[7] by the Privy Council after it had been negatived in the Court below on

[1] (1913) 16 C. L. R. 664.
[2] (1916) 22 C. L. R. 150.
[3] (1915) 19 C. L. R. 298.
[4] *Morgan* v. *White*, 15 C. L. R. 1, 13.
[5] [1903] A. C. 471; 27 V. L. R. 418.
[6] (1902) 2 (N. S. W.) St. R. 438. See also *D'Emden* v. *Pedder*, 1 C. L. R. 91, 118; *Hughes* v. *Munro*, 9 C. L. R. 289, 294, 297.
[7] [1906] A. C. 542; cf. *In re Adam*, 1 Moo. P. C. 460, 472–6; *Li Hong Mi* v. *A.-G. for Hong Kong*, [1920] A. C. 735.

the theory of territorial restriction. The basis of the judgement of the Council was that there existed in the Crown an unquestioned right under international law to refuse admission to an alien and to deport him; this right might be delegated—the choice of term is not happy[1]—to a Colonial Government by letters patent, Imperial or local Act, and when so delegated, it could be exercised, though it meant placing restraint on the deportee beyond the Colonial limits, a doctrine asserted in the old Mauritius case *In re Adam*. The decision was very naturally followed by the High Court of Australia in *Robtelmes* v. *Brenan*[2] in the case of the deportation from Queensland of the Kanakas expelled thence. A difficulty suggests itself in this case which has not yet been solved by actual decisions; in *Reg.* v. *Lesley*[3] it was held that it was illegal to hold captive on board a British ship Chilean revolutionaries deported by the Government on the score that though the putting on board might be legal by the law of Chile the holding on board outside territorial waters was not. A civil action for damages might thus lie against the captain deporting the deportees, but it is most improbable that it would succeed, having regard to the judgement of the Privy Council establishing the legality of deportation, at any rate if the ship were made liable, as it is in Canada, to deport persons placed on board by the immigration department. The captain could fairly say that he had no alternative.

We have seen that the law officers in 1855 hinted that Colonial laws might apply outside the Colony to persons therein domiciled, an attempt to adapt to Colonial conditions the rule of law that the Imperial Parliament can bind British subjects wherever they may be. This doctrine failed to find acceptance until it was revived definitely by the decision of the New Zealand Supreme Court *In re Award of Wellington Cooks' and Stewards' Union*,[4] where it was held that the terms of an industrial award affecting conditions of working and pay were binding on a New Zealand registered ship even when in Australian or Fijian ports, though not binding on a vessel registered elsewhere. The Chief Justice insisted that under the general power of s. 53 of the Constitution Act, New Zealand laws would bind New Zealanders anywhere; there must be power to punish

[1] Cf. Keith, *Journ. Soc. Comp. Leg.*, xi. 237.
[2] (1906) 4 C. L. R. 395.
[3] (1860) 1 Bell C. C. 220; 29 L. J. M. C. 97.
[4] 26 N. Z. L. R. 394.

New Zealanders who fought a duel on a foreign ship four miles from land, and, as another judge observed, prisoners on vessels going from one Colonial prison to another must be deemed to be in valid custody. He held that *In re Gleich* [1] must be held to be overruled by *Attorney-General for Canada* v. *Cain*,[2] and *Macleod's* [3] case he distinguished on the ground that Macleod was not treated as a citizen of New South Wales. He pointed out that, as naturalization under a Colonial Act created only a local status, a British subject of this kind would be free from extraterritorial control under any Imperial Acts and therefore ought to be deemed to fall under local Acts. Moreover, a ship might be deemed part of the territory of the Colony as for some purposes in international law. The arguments are unconvincing: the case of prisoners is covered by the *Fugitive Offenders Act*, 1881, s. 25, which the Court overlooked; the law governing merchant ships generally is English law, and offences committed on a British ship, wherever registered, can be punished by Colonial courts under the jurisdiction accorded by s. 686 of the *Merchant Shipping Act*, 1894. Other cases are covered by the *Admiralty Offences (Colonial) Act*, 1849, which confers on local Courts the wide powers of British Admiralty jurisdiction. New Zealanders duelling on a foreign ship might be tried in England under the *Offences against the Person Act*, 1861. It is true that a Colonial naturalized person is exempt from certain prohibitions in Imperial Acts, but in view of the provision of means of Imperial naturalization this difficulty is evanescent. But the value of the New Zealand decision, which the writer criticized [4] at the time, has been removed by the decision in *R.* v. *Lander* [5] of the same Court. The question there was whether a New Zealander could be punished under the *Crimes Act*, 1908, which followed the British model for bigamy in England; the Chief Justice, of course, ruled that he could, but the Court was persuaded as a whole by the arguments against, and declined to allow a conviction.

The result of this decision was seen in the determination of the Government of New Zealand not to attempt to legislate for Western Samoa, allotted to the King in his government of the

[1] 1 O. B. & F. S. C. 79. [2] [1906] A. C. 592. [3] [1891] A. C. 455.
[4] Keith, *Journ. Soc. Comp. Leg.*, ix. 208 ff.; xi. 294–9.
[5] [1919] N. Z. L. R. 305.

Dominion of New Zealand under mandate by the principal allied and associated powers in 1919. An Imperial Order in Council of 11 March, 1920, made under the *Foreign Jurisdiction Act*, 1890, was accordingly procured authorizing legislation by the Dominion for Western Samoa.[1] A very different view was taken of the position of a mandated territory by the Government of the Union of South Africa, which decided that the power of the Union to legislate for the peace, order, and good government of the Union must be deemed to apply to legislation for matters outside the Union definitely bearing on these matters. The Speaker, when the issue was raised on 8 September, 1919, in the Lower House by a Nationalist member, ruled that legislation was in order. He adduced various considerations in favour of his ruling; Germany had expressly renounced her sovereign rights, which had duly been transferred under international law to the King in the Union; there were parallels in Cape legislation for Kaffraria [2] and other adjacent territories; if the Union did not legislate, dangers would arise due to the neglect to put in effect the mandate, and the Union Parliament was morally under the duty, as it had the right, to legislate for peace, order, and good government. The parallels from Kaffraria, &c., were not exactly in point: legislation, then, was effected by authority of the Crown under Act of Parliament, and the Annexation Acts, by which territories were incorporated in the Cape, were even then suspected of dubious validity, and were validated by the *Colonial Boundaries Act*, 1895, which removed any invalidity attaching.[3] But it was quite fair to argue that, in virtue of the new status acquired by the Union as member of the League of Nations and mandatory power, she could legislate without any Imperial Act to authorize her action. This leaves untouched the general question of the extent of authority under the *South Africa Act*, 1909, which cannot be argued to be wider than in New Zealand.

The right, however, of extraterritorial legislation to some

[1] Keith, *War Government of the Dominions*, pp. 262 ff.

[2] A separate Colony in 1847 and annexed in 1865 (No. 3 of 1865). This annexation was expressly authorized by Imperial Act, 28 Vict. c. 5, and therefore was not in point.

[3] 40 & 41 Vict. c. 47, s. 58; Cape No. 38 of 1877 (Trans Kei); No. 39 (Griqualand West); No. 35 of 1884 (Walfisch Bay); No. 3 of 1885 (Tembuland); No. 37 of 1886 (Xesibe); No. 45 of 1887 (Rode).

extent must be regarded as inherent in the Parliaments, though it cannot be said that this extent is capable of exact definition. In the case of the Commonwealth, apart from the special power in s. 5 of the Constitution Act, the Constitution itself confers power to legislate for fisheries in Australian waters beyond territorial limits, for lighthouses, lightships, beacons, and buoys; for the relations of the Commonwealth with the islands of the Pacific; for external affairs; for immigration and emigration, and the influx of criminals; extraterritorial action, which can fairly be brought under any of these heads, would doubtless be upheld as valid if really necessary, and it would extend to British subjects, and also, so far as international law admits, to foreigners if so expressed. All the Dominions have power to regulate military and naval defence—to which must now be added air defence—and it cannot really be imagined that these powers would be restricted definitely within territorial limits. It must, however, be remembered that the Imperial *Army Act*, 1881, s. 177, allows definitely of the application of Colonial laws to Colonial forces beyond the limits of the Colonies, and difficulties as to naval matters are removed by the Imperial *Naval Discipline* (*Dominion Naval Forces*) *Act*, 1911. But apart from these there would be authority no doubt in the Dominions. Thus in *Semple* v. *O'Donovan* [1] the Supreme Court of New Zealand held that, apart from Imperial legislation, under the Constitution, there existed ample power to pass the Act for compulsory service outside the Dominion; it would be absurd to hold that a Colony must wait to be attacked before it sent its troops across its borders, or that it had not power to control its forces on an expedition to attack Samoa. The arguments may not be altogether free from possible objection, but the principle is clearly sound enough. In *Sickerdick* v. *Ashton* [2] the High Court in Australia held that the sending of an expeditionary force was quite legitimate, though the point was merely incidental, the charge being one of printing in Australia a pamphlet prejudicing recruiting for oversea service. Nor was there any better success in the efforts made to find the Canadian Compulsory Service Act invalid.[3] An echo of the same idea may

[1] [1917] N. Z. L. R. 273.

[2] (1916) 25 C. L. R. 506.

[3] See *Grey's* case, *Can. Law Times*, xxxviii. 671; Keith, *War Government of the Dominions*, p. 84.

be seen in General Beyers's excuse for his participation in the rising in the Union ; he alleged that the determination to go to war against South West Africa was illegitimate, because only the Parliament was consulted, not the people, the functions of the Parliament being confined to internal matters, ignoring the fact that the Union from the first had legislated to provide for service outside, as well as within, the Union.[1]

Apart from special cases of authorization, it is provided in the Commonwealth Constitution Act, s. 5, that the laws of the Commonwealth shall be in force on all British ships, the Queen's ships of war excepted, whose first port of clearance and whose port of destination are in the Commonwealth. The meaning of this section is not really now open to serious doubt. The *Merchant Shipping Act*, 1894, s. 735, gives a power to Colonial legislatures to regulate shipping registered within their territories, and it is very probable that the decision of the New Zealand Court in *In re Award of Wellington Cooks' and Stewards' Union* [2] could have been justified on the strength of that section. The Commonwealth power is wider ; it applies not merely to ships registered in the Commonwealth, but to other British ships which perform similar functions, and it applies to all the legislation of the Commonwealth, not merely to matters falling under the head of merchant shipping legislation. Moreover, it applies to the ships any common law that may be held to exist in the Commonwealth. In *Merchant Service Guild of Australasia* v. *Archibald Currie & Co.*,[3] the High Court declined to apply the section to ships which started from Calcutta, called at Commonwealth ports, and returned to Calcutta, insisting that the Act contemplated round voyages, commencing and ending in the Commonwealth. In *Merchant Service Guild* v. *Commonwealth Steamship Owners' Association*,[4] on the other hand, it was ruled, with evident correctness, that if the ship did begin its work in and end it in the Commonwealth, the conditions imposed by the Court of Conciliation and Arbitration would apply even to acts done outside territorial limits. In *Clarke* v. *Union Steamship Co. of New Zealand* [5] the decision was that, where a ship not registered in the Commonwealth was engaged in voyages from Sydney to San Francisco and back, she could not

[1] See *Defence Act*, 1912. [2] 26 N. Z. L. R. 394.
[3] (1908) 5 C. L. R. 737. [4] (1913) 16 C. L. R. 664. [5] 18 C. L. R. 143.

be held to be governed by Commonwealth law on the high seas after leaving San Francisco *en route* to her home port. This decision, it will be seen, shows every determination not to strain the Act. In the former case the true rule as to jurisdiction was well laid down by Gavan Duffy and Rich JJ. that 'the true rule with respect to subordinate Legislatures is that they will not be held to possess any extraterritorial jurisdiction unless it is conferred on them expressly or by necessary implication'.

There is no doubt that the authority of the Dominions to legislate applies to all matters taking place within the three-mile limit, and that they can make criminal, for instance, fishing in territorial waters by foreigners in foreign ships. It is true that in the *Franconia* [1] case it was finally held that the common law did not permit of the punishment of a foreigner who committed manslaughter in territorial waters by means of a foreign ship, and that it was held necessary to pass the *Territorial Waters Jurisdiction Act*, 1878, to confer jurisdiction on British Courts, the prosecution of a foreigner being made subject to the assent of a Governor in a Colony. But the Act has never been seriously treated in the Dominions as a source of authority; this is clearly justified, for s. 5 expressly disclaims any derogation of any jurisdiction possessed over foreigners by the law of nations or existing by law. The Colonial Courts are not bound by the judgement in the case of *The Franconia*, and there seems no ground whatever for questioning the right of the Dominion Parliaments to bind foreigners in Dominion waters, or asserting that this power appertains alone to the Imperial Parliament, on the score that the waters are not parts of the Dominion territory. The simple and doubtless correct mode of considering the facts is to realize that by international law a State can enact laws binding on all persons within her territorial waters, and that on the analogy of the case of *Cain* [2] full authority to exercise this power is passed on to a Dominion Parliament and Government by a Constitution Act empowering legislation for peace, order, and good government. To such a contention no serious answer seems possible, and discussion of the existence of any property right in the territorial waters appears otiose.[3]

[1] *R.* v. *Keyn* (1876), 2 Ex. D. 63. [2] [1906] A. C. 542.

[3] See *A.-G. for British Columbia* v. *A.-G. for Canada*, [1914] A. C. 153, 172;

There has also been much discussion of the issue of the power of taxation. Exception was justly taken by the High Commissioner of Canada and the Australian Agents-General to the original terms of the Imperial *Finance Act*, 1894, which appeared to impose a charge on lands in the Dominions.[1] The power to impose a charge was not denied, but the constitutionality of the proposal was severely censured. In the result the terms of the Act made it clear that there was no charge imposed on land out of the United Kingdom. In the case of the Dominions it is clear that in law, as well as constitutionally, legislation cannot charge lands outside the territory. But the question which arises is whether a Colonial Legislature can legally impose duties on the whole personal estate of a person who dies domiciled therein, although the property is locally situated elsewhere. It has never been held in any Colonial case that this procedure is improper, but the provinces of Canada have been distinctly narrowly limited by the decision of the Privy Council in *Woodruff* v. *Attorney-General for Ontario*[2] in which it was laid down that the Legislature of Ontario could not levy duties on the estate of a testator in respect of bonds deposited in New York and a bank balance there. On the other hand, it is clear that a province can tax any property situate locally in the province on its transmission by death of any person wherever he dies or is domiciled on death. The difficulty, of course, then arises as to where property is situated, and this is not free from obscurity, especially in the case of debts. As regards shares, the decision of the Privy Council in *Brassard* v. *Smith*[3] definitely lays down

A.-G. for Canada v. *A.-G. for Quebec* (1921), 37 T. L. R. 140, 145, where the international aspect is pointed out. Contrast Salmond, *L. Q. R.* xxxiv. 235–52; Thompson, *C. L. T.* xl. 470–90; but see *The Fagernes* (1926), 42 T. L. R. 621; Keith, *J. C. L.* viii. 290 f.

[1] *Parl. Pap.*, C. 7433, 7451. Cf. later Cd. 3523, pp. 183 ff.; 3524, pp. 161 ff.

[2] [1908] A. C. 508. Cf. *R.* v. *Lovitt*, [1912] A. C. 212; *Cotton* v. *R.*, [1914] A. C. 176, 193; *Alleyne* v. *Barth*, [1922] 1 A. C. 215.

[3] [1925] A. C. 371. On the *situs* of assets, debts, &c., *Beaver* v. *Master in Equity of Supreme Court of Victoria*, [1895] A. C. 251; *Harding* v. *Commrs. of Stamps for Queensland*, [1898] A. C. 769; *Stamp Duties Commr.* v. *Salting*, [1907] A. C. 449 and App. 28 in Dicey and Keith, *Conflict of Laws* (ed. 4). As to taxing Acts and their interpretation, see *Hughes* v. *Munro*, 9 C. L. R. 289; *In re Tyson*, (1910) 10 Q. L. J. 34. They are not normally enforceable in England; *Spiller* v. *Turner*, [1897] 1 Ch. 911; *Municipal Council of Sydney* v. *Bull*, [1909] 1 K. B. 7.

that the place where a share is registered is decisive of its locus; thus Quebec could not tax shares, registered at Halifax, of the Royal Bank of Canada, whose head office is at Quebec, the shares not being transferable there. A further carrying of the principle resulted in the decision in the case of the *Alberta and Great Waterways Railway Co.*,[1] that a provincial Act of Alberta, confiscating certain funds in the Royal Bank of Canada at Edmonton, was invalid because the effect of confiscation would have been to deprive certain lenders of money of the right to recover funds from the Bank of Montreal, which was not situate in the province. The decision is a remarkable one, and its full bearings have yet to be elucidated. It must be added that the grounds on which these cases are distinguished from Colonial cases are not self-evident.

The Canadian claims of the extension of her northern limits to all territory lying between meridians 60 and 142, asserted in the *North-West Territories Amendment Act*, 1925,[2] which provides for the issue of licences and permits to explorers and scientists, do not rest on any power of extraterritorial legislation but on the authority given by the Crown to the Governor-General to annex all territory within these limits. The expedition to take possession of Wrangel Island was not provided with the necessary power to annex, and the British and Canadian Governments in due course renounced any title to the island whose connexion with the Russian territory was indeed obvious.

In the case of the Irish Free State the result of the new status in reducing the ambit of authority is interestingly illustrated by a comparison of the case *R.* v. *Wicklow County Court Judge*[3] and *R.* v. *Cork Circuit Court Judge*.[4] The former was decided before the creation[5] of the new Circuit Courts superseding the old County Court jurisdiction continued under the constitution to the Irish Courts, the latter after the change. It was held that in the former case a dependant of an Irish seaman could

[1] [1913] A. C. 283. See Keith, *Imperial Unity and the Dominions*, pp. 134–6. The case is distinguished in *Workmen's Compensation Board* v. *C.P.R. Co.*, [1920] A. C. 184, 191: a claim for compensation in respect of a death occurring outside a province is valid, as a provincial subject of legislation.

[2] Cf. *Commons Deb.*, June 1, 10, 1925.

[3] [1924] 2 I. R. 139.

[4] [1925] 2 I. R. 165.

[5] Under Act No. 10 of 1924.

proceed with an arbitration to obtain compensation under the *Workmen's Compensation Act*, 1906, in respect of an accident occurring in Jamaica, as a result of the existence of the wide jurisdiction conferred by the Imperial Act; in the latter it was ruled that the Circuit Court in Cork possessed no jurisdiction, *Macleod's* case being adduced for the doctrine of the territoriality of legislation. This accords with the abandonment by the Free State of any attempt to enforce fishery regulations outside its waters pending Imperial legislation to extend its powers.

Further light has been thrown on the position even of the Dominions as one of some difficulty by the decision in *Pass* v. *British Tobacco Co. (Australia) Ltd.*[1] The Commonwealth of Australia by the *Income Tax Assessment Act*, 1915–21, taxes the income earned in Australia by companies operating there, and requires the company to pay tax on what it distributes to its shareholders not resident in Australia, authorizing it to deduct the amount paid. In that case, however, it was ruled that the Commonwealth Parliament could not authorize the deduction in question. In the first place, it could not under the Constitution validly tax any person not domiciled or resident in the Commonwealth; secondly, while it might tax the company which carried on business there, it could not deal with the contractual rights of the shareholder against the company, since the company was registered in England and its shares domiciled there, so that the debt was situate in England, and thus beyond the reach of the Commonwealth Parliament. The reasoning, it may be noted, is equally applicable to the case of a foreign country, so that no special ground of objection exists in the case of the Dominions.[2]

§ 3. *The Removal of the Territorial Limitation*

As was pointed out by the writer in 1915[3] no real Imperial advantage attaches to this restriction on Dominion legislation, and this view has gradually been accepted in the Dominions,

[1] (1926) 42 T. L. R. 771. Cf. *Spiller* v. *Turner*, [1897] 1 Ch. 911.

[2] Cf. Dicey and Keith, *Conflict of Laws* (4th ed.), pp. 622, 639.

[3] *Imperial Unity and the Dominions*, pp. 127–38; *J. C. L.* ii. 328 f.; iv. 234.

especially since Canada found that there was doubt as to her power to regulate her own airships. The issue was also raised by the Irish Free State, which desired to enact and enforce fishery regulations effective beyond territorial waters even on British fishermen, though she withheld action at the desire of the British Government. Accordingly, in June 1920, the Canadian Parliament addressed the Crown begging for an amendment of the British North America Act to provide that 'any enactment of the Parliament of Canada otherwise within the legislative authority of the Parliament shall operate and be deemed to have operated extraterritorially according to its intention in the like manner and to the same extent as if enacted by the Parliament of the United Kingdom'. It is a somewhat acid comment on the genuineness of the equality of status of the Dominion within the Empire that this request was simply treated as a matter for discussion, and that it was declined in the form proposed—which was in fact far from satisfactory. Eventually on 18 July, 1924, agreement was reached in a new address asking that 'an enactment *intra vires* of the Parliament of Canada, if expressed to operate extraterritorially, shall have, and is deemed to have had, that operation if and in so far as it is a law for or ancillary to the peace, order, and good government of Canada'. The equality of status is not exactly shown by the fact that the request remained unanswered by legislation in 1924 or 1925. The provision is very badly expressed, and open to very serious difficulty. Is it intended to permit a Dominion to create offences, e. g. agreements to smuggle prohibited goods into Canada by persons in England which would be punishable under the Dominion statute in English courts? If this is not intended—and it is not advisable—still it remains that Englishmen doing deeds permitted by English law may be punished in Canada, if found there; perhaps also they may be held to be liable to extradition. Moreover, the same powers must be given to all Dominions, which makes the matter much more serious, as disputes regarding Free State legislation might easily occur. It is plain that it would have been much wiser to restrict extraterritorial power over Canadian citizens as defined for immigration and other purposes,[1] Canadian registered ships

[1] See the Acts of 1910 (c. 27) and 1921 (c. 4). So as regards Irish citizens. For Canadian views see Sir R. Borden, *Can. Const. Studies*, p. 129; Sifton,

and airships, with perhaps authority in respect of smuggling offences committed by any British subjects [1] within a reasonable distance of Canadian waters.

Canadian Annual Review, 1922, p. 975. The matter was referred for consideration by the Imperial Conference of 1926 (Part VIII, chap. iii, § 8) to an expert committee.

[1] Or others, if the principle of punishing acts committed outside but having effects within the territory is accepted; see *B. Y. B. I. L.* 1925, pp. 53 ff.; *R.* v. *Oliphant*, [1905] 2 K. B. 57; *R.* v. *Nillins*, 53 L. J. M. C. 157.

III

REPUGNANCY OF DOMINION LEGISLATION

IT was early laid down that no law enacted by a Colonial Legislature should be repugnant to the law of England, and this provision may yet be seen in the constitution of New Zealand,[1] while it governs those of South Australia and Tasmania [2] apart from the general rules of the *Colonial Laws Validity Act*, 1865. Difficulties as to the force of the rule were at first not very serious; the full effect of the doubts possible was seen when Mr. B. Boothby was made Chief Justice of South Australia and applied a critical judgement to the legislation of that Colony. The two Houses of Parliament at last passed addresses for his removal, and the whole question thus came before the Colonial Secretary.[3] Mr. Boothby held that the Constitution Act of 1855–6 was invalid in parts; a Legislative Council that could not be dissolved by the Crown, the rule that the Attorney-General must be a minister and in Parliament, and the omission of re-election on ministerial appointment offended against English law. The *Real Property Act* refused a suitor the jury granted by *Magna Carta*, and should have been reserved under the royal instructions, though the Governor pointed out that the instructions were merely directory and that violation did not affect assent; the Electoral and Customs Acts were invalid because they had not been reserved. The law officers of the Crown were asked to advise and gave a most valuable series of opinions. They held that it was the clear duty of the Court to examine the validity of any Act of the Parliament, and that it was immaterial whether it had been held valid by the Imperial Government. It must pronounce invalid any Act which was inconsistent with enactments of the Imperial Parliament applicable to all the Colonies or to South Australia in special. The Court must also hold invalid an Act which it held contrary to fundamental principles of British law, as by denying the

[1] 15 & 16 Vict. c. 72, s. 53.

[2] 13 & 14 Vict. c. 59, s. 14. Cf. *Bank of Australasia* v. *Nias*, 16 Q. B. 717.

[3] *Parl. Pap.*, Aug. 1862. Cf. Forsyth, *Cases and Opinions on Constitutional Law*, p. 23.

sovereignty of the Crown, by allowing slavery or polygamy, by prohibiting Christianity, by authorizing the infliction of punishment without trial, or the uncontrolled destruction of aborigines. On the other hand an Act should not be held invalid because it altered matters not fundamental; e. g. the number of a jury, the requirement of a jury, unanimity therein, the law of primogeniture or of evidence or of transfer of real property. No definition distinguishing between fundamental principles and matters not so regarded could be given, beyond the view that the former were such principles as in their nature were equally applicable to all Her Majesty's Christian subjects in every part of Her Dominions, but it was very unlikely that the Legislature would pass, the Governor assent to, and the Crown allow to remain in operation, any Act contrary to such principles, and Courts should not be astute to hold Acts invalid as repugnant to such principles. The royal instructions were to be deemed directory only to the Governor, whose assent, therefore, must be held valid even if he disobeyed or misinterpreted them. The *Constitution Act* was not invalid on any of the grounds criticized by the Chief Justice, and the law officers held that he ought to follow the English practice and to conform his views to any ruling of the whole Supreme Court on any issue. Unfortunately they also held, no doubt rightly, that the *Electoral Act*, No. 10 of 1856, under which the two Houses of Parliament had been constituted ought to have been reserved, and that all that was done by the two Houses was therefore invalid; an Imperial Act, 25 & 26 Vict. c. 11, therefore was rushed through to undo the harm. But another Electoral Act of 1861 was held invalid because the necessary two-thirds majorities under s. 34 of the Constitution had not been secured, and the judges doubted if the Legislature had any power to change its constitution.[1] The passing of 26 & 27 Vict. c. 84 [2] to remove difficulties was frustrated in operation by further doubts as to its extent; the Chief Justice ruled also that by passing the *Electoral Act* of 1856, which repealed Ordinance No. 1 of 1851, the existing Council had incidentally destroyed itself, and so invalidated the Constitution Act and so on. The law officers disagreed with some, but accepted others of the points raised, and, as an outcome,

[1] Blackmore, *Constitution of South Australia*, p. 60.

[2] South Australia *Parl. Pap.*, 1863, Nos. 23, 129, 130.

was passed the *Colonial Laws Validity Act*, 1865, defining definitely the cases of repugnancy.[1] It[2] applied to all parts of the Dominions of the Crown other than the Channel Islands, the Isle of Man, and India, defined Colonial Legislature as applying to the authority, other than the Imperial Parliament or the Crown in Council, empowered to make laws for the Colony, and a representative legislature as any 'Colonial Legislature which shall comprise a legislative body of which one half are elected by inhabitants of the Colony', and provided that its enactments should apply to Colonial laws whether enacted by a Colonial Legislature or the Crown in Council. The Act removes repugnancy to principles of English law as vague and unsatisfactory. It restricts it to actual repugnancy to an Imperial Act or orders or regulations made under the authority of such an Act, or having the force of such an Act in the Colony, and provides that the Colonial law shall be read subject to such Act, order, or regulation, and shall to the extent of its repugnancy be and remain absolutely void and inoperative (s. 2). Further, it enacts (s. 4), as laid down by the law officers,[3] that disobedience to instruction shall not invalidate a Governor's assent, unless the instructions are actually embodied in—not merely referred to—the letters patent or instrument authorizing the Governor to assent to laws. Further, it is declared (s. 5) that every Colonial Legislature is to be deemed to have had and to have power to establish, abolish, and reconstitute Courts of Justice and to make provision for their administration of justice, while representative legislatures are to be deemed to have had, and to have, the power of alteration of the colonial constitutions subject to certain conditions. Due provision is made (s. 6) for the acceptance of a certificate by the clerk or other officer of the Legislature as proving the authenticity of an Act or reserved Bill and the notification of the Crown's disallowance or assent to a reserved Bill by proclamation in any newspaper—now usually the official gazette. Finally, the South Australian Bills or Acts impugned were validated by a general clause.

[1] It adopted the principle applied to Canada by 3 & 4 Vict. c. 35, s. 4.

[2] 28 & 29 Vict. c. 63. Cf. *In re Zaghlul Pasha* (1923), 67 S. J. 382. For a vain attempt to minimize the Act see *Eastern Rand Exploration Co.* v. *Nel*, [1903] T. S. 42; *Globe Advertising Co.* v. *Johannesburg Town Council*, [1903] T. S. 335.

[3] Cf. *R.* v. *J. Kerr* (1838), 2 N. B. Rep. 367, 558.

There has, it may be noted, been some misunderstanding as to what Imperial Acts apply to a colony in such a sense as to render invalid Colonial Legislation repugnant to them. It had been thought that Imperial Acts introduced as part of the general law of the Colony, when its law is declared e. g. in Australia by the Act of 1828,[1] have this character, but this is clearly wrong. The Act of 1828 gave the Colony a body of law which could be varied—as the Act clearly indicates—as regards all those Acts which are not Imperial Acts extending deliberately either to all the Colonies or to the particular Colony.[2] None the less the Commonwealth Act No. 11 of 1909 contains a section providing that two old Imperial Acts introduced by the Act of 1828 shall not apply to marine insurances governed by the Commonwealth Act, though it must be clear that if the Imperial Acts did apply *proprio vigore* the Commonwealth Act could not repeal them, while as they had no validity, save as introduced by the Act of 1828, express repeal was needless.

Despite the Act of 1865 the claim was made for Canada by Sir J. Thompson,[3] if not by Draper C.J. and apparently also by Strong C.J., that the *British North America Act*, 1867 gives the Dominion Parliament power to repeal any Imperial Act applicable to Canada enacted before the coming into effect of that Act. In *Reg.* v. *Taylor* [4] Draper C.J. held that the use of the term 'exclusive' as applicable to the legislation of the Dominion in s. 91 of the *British North America Act* was intended as a deliberate renunciation of any legislative power by the Imperial Parliament for Canada, which, of course, must mean that Canada could repeal all Acts before the renunciation, for otherwise they could not be repealed at all. The same view was expressed in *Holmes* v. *Temple*,[5] but the opinion of a judge of an inferior court is valueless, while *The Royal*,[6] which holds that a section of the Imperial *Merchant Shipping Act*, 1854 had

[1] 9 Geo. IV, c. 83. Cf. *A.-G. for N. S. Wales* v. *Love*, [1898] A. C. 679.

[2] Cf. *Vincent* v. *Ah Yeng*, 7 W. A. L. R. 145; *In re Reg.* v. *Marais*, [1902] A. C. 51. The matter is clearly understood in Victoria; see Act No. 3270 (1922), ss. 5, 7; *J. C. L.* vi, pt. ii, pp. 87–9, where the introduced Acts and the true Imperial Acts are distinguished, and the latter are not repealed.

[3] *Parl. Pap.* C. 7783, pp. 5, 6.

[4] (1875) 36 U. C. Q. B. 183; Lefroy, *Leg. Power in Canada*, p. 211.

[5] (1882) 8 Q. L. R. 351.

[6] (1883) 9 Q. L. R. 148. Contrast *The Farewell* (1881), 7 Q. L. R. 380.

been repealed by s. 56 of the Dominion *Seamen's Act* of 1873, was valid by reason of the express power given to legislate as to registered ships by s. 547 of the Act impugned. There is abundant later repudiation of these views; in *Tai Sing* v. *Maquire* [1] Gray J. pointed out that Draper C.J. had overlooked the fact that 'exclusive' is used to define not the relation of the Dominion Parliament to that of the United Kingdom, but its powers as compared with those of the provinces. Similarly Dorion C.J. in *Ex parte Worms* met the argument that Canada had been given power to legislate regarding the treaty obligations of the Dominion and that accordingly the *Extradition Act*, 1870 must be read as not applicable to Canada, by saying that there was no real inconsistency between the grant of powers and the Imperial Act, but that if there were the later Act must prevail.[2] As regards the similar claim that provincial legislation was to be deemed exclusive of British legislation it was laid down in *Reg.* v. *College of Physicians and Surgeons of Ontario* [3] that the Imperial *Medical Act*, 1868 applies to Canada and gave a right to a British medical practitioner to practise and be registered in Ontario as against the claim that, as the exclusive right of legislation was given in such matters to the provinces, Ontario had the right to insist on an examination in every case as a preliminary to legislation. The later Act of 1886 [4] recognized the validity of the constitutional as opposed to the legal objection, and provided merely for a system of reciprocity under which practitioners in both countries may be allowed to be registered in the other.

None the less, in the famous controversy on copyright [5] in Canada the Dominion Government pressed the proposition that Canada could repeal Imperial Acts passed before federation, though it admitted that an Imperial Act passed thereafter applying to Canada, as did the *Copyright Act*, 1886 under an Order of Council of 1887, was binding on Canada and could not be repealed. The Imperial Government never admitted this

[1] (1878) 1 B. C. (Irving) 101, 107.

[2] (1876) 22 L. C. J. 109, 111.

[3] (1879) 44 U. C. Q. B. 564.

[4] 49 & 50 Vict. c. 48. See also *Metherell* v. *Medical Council of British Columbia* (1892), 2 B. C. (Cassidy) 186, 189.

[5] *Parl. Pap.*, C. 7783. Cf. Sir J. Thompson on the *Jesuits' Estates Act*, 1888 (51 & 52 Vict. c. 13); *Commons Deb.*, 1889, pp. 958 ff.

view. It was held by Sir R. Palmer and Mr. Herschell on 7 November 1871 [1] that the exclusive power as to copyright was exclusive against the provinces, and merely dealt with the distribution of power, not enlarging it, and this opinion was reiterated by Sir R. Baggallay and Sir J. Holker on 22 May 1874 [2] and 7 June 1875, while the Canadian Act as to copyright of 1875 was expressly validated by the Imperial Act 38 & 39 Vict. c. 53. Despite these opinions Sir John Thompson in 1889 contended that the law officers were wrong. He cited *Hodge* v. *The Queen* [3] and *Powell* v. *Apollo Candle Co.*[4] as proving that the powers of the Parliament were not restricted but as full as those of the Imperial Parliament, ignoring the fact that such an interpretation made the *Colonial Laws Validity Act*, 1865 meaningless. Probably to turn this objection he contended that the repugnancy mentioned in that Act might be held properly to refer merely to statutes enacted after a territory came into being; otherwise, he asserted, Canada would be hopelessly hampered in legislation by a multiplicity of statutes binding her, an assertion not supported by a single concrete instance, and doubtless incorrect, Canada having in reality a clear field. An alternative view was that the Act of 1867 was intended to repeal as regards Canada the Act of 1865. He further relied on *Harris* v. *Davies* [5] in which the Privy Council held that the New South Wales Parliament could repeal an Imperial Act, 21 Jac. I, c. 16, s. 68, and impliedly did so by a local Act, 11 Vict. No. 13, s. 1, which placed an action for spoken slander on the same footing in respect of costs as an action for libel. But the authority to repeal the Imperial Act was given by s. 24 of 9 Geo. IV, c. 83, which introduced the Act with other parts of English law, for it authorized modification of the law thus brought into the Colony. Nor was his citation of *Riel* v. *The Queen* [6] any more valuable; Riel was tried by a Magistrate and a Justice of the Peace and a jury of six for treason under the Canadian statute 43 Vict. c. 25, s. 76, made under the authority of the Imperial Act 34 & 35 Vict. c. 28

[1] *Parl. Pap.*, H. C. 339, 1872, p. 74.
[2] *Parl. Pap.*, H. C. 144, 1875, pp. 12 ff.
[3] (1884) 9 App. Cas. 117.
[4] (1885) 10 App. Cas. 282.
[5] (1885) 10 App. Cas. 279. Cf. Clark, *Australian Constitutional Law*, p. 301.
[6] (1885) 10 App. Cas. 675.

authorizing the Dominion to legislate for any territory not being a province of the Dominion. He claimed that the trial ignored the rights possessed under the Imperial law of treason and that the Canadian statute was *ultra vires*, but this was not admitted by the Privy Council, which upheld the validity of the Dominion Act. The reason for its validity in supersession of earlier Imperial legislation is simple ; the *Rupert's Land Act*, 1868 (31 & 32 Vict. c. 105) expressly authorized the Parliament of Canada to legislate in respect of the old territory of the Hudson Bay Company, and provided that pending such legislation the old laws would be in force, implying as clearly as was possible the Dominion right of repeal.

As a matter of fact it was held before federation by two judges of the Appeal Court of Upper Canada in *Smiles* v. *Belford* [1] that the Imperial Act of 1842 regarding copyright was in force in the province, and in *Low* v. *Routledge* [2] Lord Chelmsford incidentally laid down the same doctrine as unquestioned. Yet it is interesting to note that in *Imperial Book Co.* v. *Black* [3] it was admitted by the Supreme Court of Canada that the Act of 1842 was in force therein, but the right was reserved to consider whether the Dominion Parliament might not have the power if it choose to exercise it, to repeal that Act as having been passed before federation. It is plain that the answer must have been in the negative, had the question ever been raised ; the Privy Council [4] refused leave to bring an appeal from the decision, showing that it held no doubt as to the application of the Act of 1842 to the Dominion, and the Imperial *Copyright Act*, 1911 removed the difficulty by recognizing clearly the constitutional claims of Canada, to be given freedom to legislate by special enactment.

The issue was raised again faintly when the Commonwealth of Australia Constitution was being debated in London between the delegates from Australia and the Colonial Secretary. The suggestion was thrown out that the *Colonial Laws Validity Act* should no longer be deemed applicable to such territories as the Commonwealth of Australia, but the Imperial Government declined entirely to accept the situation, and special care was

[1] 1 O. A. R. 436.
[2] (1866) L. R. 1 Ch. 42.
[3] 35 S. C. R. 488 ; 10 O. A. R. 488 ; 8 O. L. R. 9.
[4] (1905) 21 T. L. R. 540.

taken in wording the Constitution Act to secure that there was no possibility of denying that the Commonwealth was a colony in the sense of the Act. In 1908[1] a very limited claim was adduced, namely that the power given by the Constitution to legislate for merchant shipping must be deemed to be wider than that accorded by ss. 735 and 736 of the *Merchant Shipping Act*, 1894, and that accordingly the legislation of the Commonwealth would not require to conform to the terms of that Act. The contention as put forward by the Commonwealth Government on 15 June 1908 was not accepted by the Imperial Government in its reply of 18 September,[2] and it is clear that it was invalid. The precedent of Canada told absolutely against the suggestion. The Dominion constitution dated from 1867, but in 1873 when Canadian legislation regarding ships and the coasting trade was passed the two Acts Nos. 128 and 129 were expressly enacted not under any supposed power to ignore Imperial Acts but the first under the power given by the Imperial Act of 1854, and the second under the Imperial Act of 1869, showing that Canada recognized that an Act expressed to the Colonies bound her, whether enacted before or after the Federation Act. The Commonwealth High Court[3] made no attempt to deny the application of the Act, though it has not had much occasion to apply it, save, of course, as in Canada in the whole body of cases on the constitution which arise out of the supremacy of the Imperial Act establishing the constitution over any legislation under it. In *Chia Gee* v. *Martin*[4] it very naturally derided the attempt to apply *Magna Carta* for the purpose of questioning the validity of the *Immigration Restriction Act*, 1901, s. 3. It treated more seriously, but equally rejected,[5] the contention that the *Land Tax Assessment Act*, 1910–14, was invalid in imposing by s. 29 taxation on leasehold estates in Crown lands on the score that Imperial Acts conferred on the various States powers of legislation regarding the waste lands of the Crown. It was ruled that there was no

[1] *Parl. Pap.*, Cd. 3023, p. 61 ; Cd. 4355, p. 20.

[2] *Parl. Pap.*, Cd. 4355, p. 20. Cf. Gen. Botha, Cd. 5745, p. 423, in favour of wider power. But see 36 C. L. R. 130, 164, *per* Starke J.

[3] Quick and Garran, *Const. of the Commonwealth*, pp. 351 ff.

[4] (1906) 3 C. L. R. 644.

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

real contradiction between the two powers. An attempt was made by Higgins J. to define repugnant:

I am strongly inclined to think that no Colonial Act can be repugnant to an Act of Parliament of Great Britain unless it involve, either directly or ultimately, a contradictory proposition—probably contradictory duties or contradictory rights. If the federal Parliament, in pursuance of its power to acquire land, were to vest land in A, and the State Parliament were to say that it vests in B, there would be no repugnancy within the *Colonial Laws Validity Act*; for the repugnancy would be between the federal law and the State law.... But if it is the British Parliament that vests the land in B, there is a repugnancy: and the British Act prevails.

This is clearly sound, subject, however, to the obvious remark that, if there is a real clash of the Commonwealth and the State powers, then it results in the enactment by one or the other of a law which is in excess of its constitutional power under the Constitution, and this repugnant to the Act, or it arises from the legitimate use of either of its power, in which case the Commonwealth Act prevails under the Constitution, and there is no repugnancy at all.

In any case it is always a matter for construction to ascertain whether a colony is affected by an Imperial Act or not, and it will not in the absence of clear indications or necessary intendment be assumed that the Imperial Parliament desires to legislate for the Dominions. Thus, while it was held that the terms of the *Bankruptcy Act*, 1883 [1] as to land in the ownership of a bankrupt passing to his trustee applied to a colony, it has equally been ruled in *New Zealand Loan and Mercantile Agency Co.* v. *Morrison* [2] that the *Joint Stock Companies Arrangement Act*, 1870 did not apply to the Colonies so that an arrangement did not bind creditors there. Nor is it repugant to the *Merchant Shipping Act*, 1894 for Canada to levy duties on foreign vessels imported to be there registered.[3] In *Mayor, &c., of Canterbury* v. *Wyburn* [4] the inapplicability of the *Mortmain Act*, 1891 to a Colonial will of a domiciled Colonial was asserted. In *Graves & Co., Ltd.* v. *Gorrie* [5] it was held that the *Fine Arts Copyright*

[1] *Callender Sykes & Co.* v. *Col. Sec. of Lagos*, [1891] A. C. 460.
[2] [1898] A. C. 349.
[3] *Algoma Central Railway Co.* v. *The King*, [1903] A. C. 478.
[4] [1895] A. C. 89.
[5] [1903] A. C. 496.

Act, 1862 did not apply to a colony. The extent of the application of Imperial laws on matters ecclesiastical was much canvassed in the Natal cases of *Bishop of Natal* v. *Wills*,[1] and *Bishop of Natal* v. *Green*.[2] *Magna Carta* was adduced also in *Phillips* v. *Eyre*[3] to establish the invalidity of the Jamaican Indemnity Act in favour of Eyre, but as usual vainly. The effect of the *Colonial Laws Validity Act* in removing grounds of attack on Colonial legislation other than repugnancy to an Act is seen in the case of the detention in Gibraltar under a local ordinance of the Egyptian patriot Zaghlul Pasha, for the Privy Council declined to grant leave to appeal from the decision of the local Court upholding the validity of his detention, though it was contended that the Crown could not authorize detention without trial for an offence, if any, committed outside Gibraltar by one never a British subject.[4] Similarly in *R.* v. *Crewe, Ex parte Sekgome*[5] it was held that an Order in Council under the *Foreign Jurisdiction Act* had the force of authorizing local legislation for the deportation and detention of a chief, although in *Sprigg* v. *Sigcau*[6] it had been ruled that the local Act No. 5 of 1894 had not been effectively worded to exercise a similar power in respect to a Pondoland chief with which the Cape Government desired to deal similarly.[7]

The *Colonial Laws Validity Act* applies of course not merely to colonies in the technical sense of the *Interpretation Act*, but to all subordinate legislatures, including the provinces of Canada[8] and the Union of South Africa.

The question of the removal of the limitation has been raised again as a result of the decision[9] of the High Court of the Com-

[1] 1867 N. L. R. 60. [2] 1868 N. L. R. 138. [3] L. R. 6 Q. B. 1.

[4] Keith, *J. C. L.* v. 276 f.; 67 S. J. 382.

[5] [1910] 2 K. B. 576. [6] [1897] A. C. 238.

[7] For the unfettered power of a Colonial Legislature created by the prerogation to authorize deportation of aliens and British subjects, see *Li Hong Mi* v. *A.-G. for Hong Kong*, [1920] A. C. 735.

[8] *Union S. Jacques de Montréal* v. *Bélisle*, 6 P. C. 31. An attempt to upset the application of a *Workmen's Compensation Act* (R. S. B. C. 1916, c. 77) of British Columbia giving compensation to the dependants of a drowned seaman engaged in the province, but drowned outside, as repugnant to the Imperial *Merchant Shipping Act*, 1894, s. 503, or the Canada *Shipping Act* (R. S. 1906, c. 113, s. 215), failed in *Workmen's Compensation Board* v. *C. P. R. Co.*, [1920] A. C. 184.

[9] 36 C. L. R. 130; cf. 37 C. L. R. 393, 418 ff.

monwealth on 16 June 1925 in the case of the *Union Steamship Co.* v. *The Commonwealth* in which it was held that the *Colonial Laws Validity Act* applied to the Commonwealth and that the provisions of a Commonwealth Act relating to the engagement and discharge of seamen were invalid as opposed to the *Merchant Shipping Acts*, 1894–1906. The Leader of the Opposition called attention in Parliament to the decision and protested that the law of 1865 had been resurrected to restrict Commonwealth autonomy, being apparently ignorant that the *Colonial Laws Validity Act* has always been operative. Mr. Bruce's reply indicated on his part also comparative ignorance of law, as he insisted that it has been understood that the investigations of the Commission which dealt with the Act had secured the removal of all dubity regarding the validity of the Commonwealth legislation. But he felt assured that any Imperial legislation improperly limiting Commonwealth powers of enactment would be readily removed by the Imperial Government. The real issue of course is to what extent shipping legislation should be enacted by any Dominion, which may better be considered later. The abandonment of the supremacy of Imperial over Dominion legislation would, of course, mean a final recognition of true equality among the portions of the empire, which is not conceded even in the Act approving the Irish Free State Constitution,[1] by which the supremacy of Imperial legislation is once more expressed.[2] Even the Imperial Conference of 1926[3] could go no further than refer the issue to an expert committee for report,[3] seeing that secession in the Irish Free State and the Union at present is prevented by the supremacy of Dominion legislation.

[1] 13 Geo. V, c. 1, s. 4. It is deliberately left obscure how far the Free State can alter Acts of the Imperial Parliament passed before the date of that Act, 5 Dec. 1922. No doubt it has a very wide power, but in view of s. 4 not wider than that of Canada. For the power of the Parliament of Northern Ireland see 10 & 11 Geo. V, c. 67, ss. 6 and 61.

[2] The supremacy of Imperial legislation is interestingly illustrated by Admiralty jurisdiction in matters of collisions, and in the application of limitation of liability under the *Merchant Shipping Act*, 1894. See *Bow, McLachlan & Co.* v. *Ship 'Camosun'*, [1909] A. C. 597; *C. P. R. Co.* v. *Storstad Steamship*, [1920] A. C. 397; Keith, *J. C. L.* ix. 123–5.

[3] See Part VIII, chap. iii, § 8.

IV

THE ALTERATION OF THE CONSTITUTION

§ 1. *The Constituent Authority of Dominion Parliaments*

THE right of alteration of the constitution without express grant of power to that effect was questioned by Mr. Boothby,[1] and the *Colonial Laws Validity Act* therefore expressly provides in s. 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, Orders in Council, or colonial law for the time being in force in the said colony.

The power, it will be seen, is restricted to representative legislatures, as is natural; in other cases power must be derived from express authorization; thus in the case of the Cape the non-representative Council was formerly authorized by letters patent of 23 May 1850 to frame a constitution, and the ordinance thus framed was finally adopted by Order in Council of 11 March 1853. In some cases, however, as in those of the West Indian Colonies such as British Honduras, the power of constitutional alteration is possessed by a non-representative legislature by reason of inheritance of the authority of a representative legislature.

The fundamental difference between an Imperial Act altering the Imperial constitution and a Dominion Act is shown in the proviso; an Imperial Act cannot bind any succeeding Parliament; an enactment that a two-thirds majority would be necessary for the repeal of, say, a housing Act would be valueless; any subsequent Act passed without a majority of the kind would bind the Courts, and the earlier Act would be extinguished by reason of its divergence from the later and more authentic Act. It is not so with the Dominions; any rule laid down by any of the means specified is binding, and any Act

[1] Blackmore, *Const. of South Australia*, pp. 64–8.

passed without due regard to the conditions specified is *ultra vires*. Hence Dominion constitutions, even if no other restriction exists, are nevertheless potentially rigid. But the exact effect of the law is not clear, and some divergence of view has been shown regarding it. In *Cooper* v. *Commissioners of Income Tax for the State of Queensland* [1] the Chief Justice of the State contended that the levying income-tax on his official salary under the *Income Tax Consolidated Acts*, 1902–4 and the *Income Tax Declaratory Act*, 1905 violated the terms of s. 17 of the *Constitution Act*, 1867, which provided that the salaries allotted to judges were to be paid during their term of office.[2] The claim was not a happy one, seeing that the Imperial Acts of 1700 and 1760 regarding English judicial salaries had never been held to be infringed by general income-tax legislation, and the High Court disallowed the claim, but it expressed in no uncertain manner the view that repeal of a constitution Act by implication was not possible; a constitution Act must be amended formally, and indeed the Court seemed to go so far as to hold that the only mode of dealing with such a case was for a formal alteration to be made in the constitution and something else inserted thereafter by a separate and independent Act. If this was their meaning, it is clearly incorrect, and it was so held by the Privy Council in *McCawley* v. *The King* [3] overruling the High Court. The issue there was the validity of s. 5 of the *Industrial Arbitration Act*, 1916, of Queensland, which empowered the appointment, notwithstanding anything in other Acts limiting the number of judges of the Supreme Court, of the President of the Industrial Court to be a member of the Supreme Court, but the tenure of office given to the President was only seven years, whereas the constitution contemplated life appointments of judges. It was contended that the amendment in this way of the constitution was too informal, but it is difficult to see how it could well have been more express. The result, therefore, is simply that, as laid down in the first edition [4] of this work, a constitutional change must be expressed, it can-

[1] (1907) 4 C. L. R. 1304. Cf. for New Zealand *Parl. Pap.*, Feb. 1866, p. 36.

[2] Thus, when all salaries were reduced by New Zealand Act No. 45 of 1921, those of judges were spared.

[3] [1920] A. C. 691; 26 C. L. R. 9; 28 C. L. R. 106.

[4] pp. 426 f.; *J. C. L.* ii. 330 f.

not rest on mere inference; if there is nothing which clearly alters the constitution, the later Act will be read subject to it; if it clearly—in words or necessary intendment—alters the constitution, then the alteration is valid, subject of course to the special disabilities on alteration which now may be enumerated. The error of the High Court was in exaggerating the formality of change needed.

§ 2. *The Restrictions on Alteration in Australia*

The requirements as to reservation, and in some cases laying before Parliament of the Bills of the Australian Colonial Parliaments respecting constitutional changes, were hopelessly complex until 1907. They depended on the complex effect of Acts of 1842, 1844, 1850, 1855, and 1862:[1] and as we have seen they were not effectively observed as regards the *Electoral Act* of 1856 in South Australia, nor indeed later; batches of Acts had to be validated in 1893 and 1901, and a general validation was accorded in the Act of 1907.[2] The Act of that year laid down that reservation is requisite in the case of (1) any Bill altering the constitution of the legislature or of either House; (2) any Bill affecting the salary of the Governor; (3) any Bill which under any Act of the legislature passed after the Act of 1907 is required to be reserved or for which reservation is required in the Bill itself. But in addition Bills may be reserved under the royal instructions to the Governor, while Bills need not be reserved if previous approval from His Majesty has been obtained for assent, or assent is refused, or is accorded to a temporary measure on grounds of urgency. The generality, however, of requirements affecting the reservation of Bills affecting the legislature is restricted by exempting from it measures which create or alter electoral provinces or districts, vary the number of members to be elected for any province or district, increase or diminish the number of members of the legislature, or deal with the qualifications of electors or elective members or regulate elections.

As if the Imperial restrictions were not enough, the Colonies

[1] 5 & 6 Vict. c. 76; 7 & 8 Vict. c. 74; 13 & 14 Vict. c. 59; 18 & 19 Vict. cc. 54, 55; 25 & 26 Vict. c. 11. See pp. 427–30 in ed. 1.

[2] 7 Edw. VII, c. 7.

imposed more ; thus New South Wales [1] demanded two-thirds majorities on second and third readings for alterations in the constitution of the Upper House, and a two-thirds majority in the Assembly for change in it, but, having omitted to safeguard the clauses enacting the rules, they were repealed without the majorities in 1857 ; Queensland only got rid of a like restriction as to the Council in the same way in 1908 by Act No. 2 ; it had rid itself by 34 Vict. No. 28 of the rule that the constitution of the Assembly could only be changed by a two-thirds majority in the Lower and a simple majority in the Upper House.[2] In South Australia absolute majorities are required under the Act of 1855–6, s. 34 on both second and third readings for alterations of the constitution of the legislature, though reservation is now unnecessary under the Imperial Act of 1907 if the measure falls within the exempted classes there laid down. In 1910 a Bill to lower the Council franchise to that for the Lower House failed to obtain the needed majority on the second reading, with the result that the standing orders had to be suspended, and the Bill again passed, only, of course, to be rejected by the Upper House.

Similar requirements as to absolute majorities on the two readings are contained in the Victorian constitution [3] along with the usual provision for reservation, now superseded by the Act of 1907. A delicate point rose in 1903 [4] when a petition was addressed to the Governor asking for the withholding of assent to the Constitution Act just passed on several grounds, including, beside the formal objection that Parliament had not been held in the place appointed by the Governor's proclamation, the more serious one that after the Bill had been passed through the Lower House, it had been considerably changed, as a result of a free conference between the two Houses, before the Upper House passed it into law. The procedure was clearly irregular, but assent was accorded, though the discussion as to its validity was revived in 1909.[5]

Western Australia [6] also insists on absolute majorities on

[1] 18 & 19 Vict. c. 54, s. 36 and s. 15 of the schedule.

[2] 31 Vict. No. 38, ss. 9, 10 ; see Bernays, *Queensland Politics*, pp. 213–16. The Act passed by a bare majority.

[3] 18 & 19 Vict. c. 55, sched. s. 60.

[4] Melbourne *Herald*, 14, 15 May 1903.

[5] *Parl. Deb.*, 1909, pp. 3303 f.

[6] 53 & 54 Vict. c. 26, sched. s. 73.

second and third readings, and it required reservations of Bills affecting the Civil List, aborigines grant, political pensions, but these have disappeared under the Act of 1907. It is significant of the fondness for restrictions as to absolute majorities that the *Redistribution of Seats Act*, No. 6 of 1911 expressly includes provision that it must not be varied save by absolute majorities in either House.

The question has been raised in Tasmania since 1902 when the legislature can be reduced without further Imperial legislation to a single chamber. The matter was clear, and any lingering doubt disappeared with the decision that the abolition of the Queensland Upper House was perfectly legal.[1]

§ 3. *The Alteration of the Constitution of New Zealand*

Nothing was said in the Act of 1852 in New Zealand regarding the power of alteration, but an Act of 1857 [2] expressly conferred on the General Assembly the right of alteration of all save certain specified provisions of the original Act. These include the provisions for the establishment of a General Assembly (s. 32); as to the place and time of its meeting, its prorogation and dissolution (s. 44); the taking of oaths of allegiance by its members or affirmation in lieu (ss. 46, 47); the power of the Assembly to legislate (s. 53); the rules as to the appropriation and issue of public money (s. 54); the rules as to assent to, reservation of, refusal of assent to, and disallowance of measures (ss. 55–9); the prohibition in s. 61 of the levying of duties on stores for Imperial troops, and duties contrary to treaty; certain provisions as to civil and judicial services (ss. 64, 65); the provision in s. 71 for the preservation of the laws of the aborigines, for which under that section provision might in theory still [3] be made by letters patent by the Crown; the provision of s. 73 regarding the acquisition of the land of the aborigines; and the definitions of Governor and New Zealand in s. 80, the

[1] *Taylor* v. *A.-G. for Queensland*, 23 C. L. R. 457. As regards the necessity of majorities, it may be noted that it might be very difficult to establish invalidity by evidence in view of s. 6 of 28 & 29 Vict. c. 63. Cf. *Bickford Smith & Co.* v. *Musgrove*, 17 V. L. R. 296.

[2] 20 & 21 Vict. c. 53. As to the abolition of the provinces in 1876 under the powers of 31 & 32 Vict. c. 92, see *Parl. Pap.*, 1876, A. 2a.

[3] The section is not repealed by the *Statute Law Revision Act*, 1893.

latter including the definition of the boundaries. S. 73 was, however, rendered subject to alteration by the Imperial Act 25 & 26 Vict. c. 48, and was repealed by the *Native Lands Act*, 1873, while the boundaries were re-defined by 26 & 27 Vict. c. 23 ; subsequent annexations of the Kermadec and Cook Islands have been effected by letters patent validated and approved by the *Colonial Boundaries Act*, 1895.

It is disputed [1] whether the powers of alteration given in 1857 are still to be deemed restricted in the way indicated, or whether the *Colonial Laws Validity Act* of 1865 implicitly availed to extend them, so that for example the Parliament could abolish the second chamber, as once was desired by Mr. Seddon, and make itself unicameral. The better opinion seems to be in favour of the wider power. Even so, of course, the provision requiring reservation of Bills altering the Governor's salary or the appropriation for native affairs remains operative until repealed expressly.

§ 4. *The Alteration of the South African Constitutions*

Under the pre-Union constitutions of the South African Colonies the process of alteration was simple ; the Cape constitution demanded no special formalities, though the Governor was by the royal instructions expected to reserve any Bill altering the constitution in essentials, and therefore Bill No. 1 of 1872 to establish responsible government was reserved. In Natal under the letters patent of 15 July 1856, s. 51 constitutional change required reservation, but under Act No. 14 of 1893 any legal necessity for reservation disappeared, the Governor being left to use his discretion. In the case of the Transvaal and the Orange River Colony under the letters patent of 6 December 1906 and 5 July 1907 reservation was required of all Bills, altering the letters patent, providing for indentured labour, or imposing on non-Europeans disabilities to which Europeans were not equally subjected. The freedom of change is reflected in the provisions regarding the alteration of the Union constitution, which will be discussed later.

[1] *British Rule and Jurisdiction beyond the Seas*, pp. 75 f. ; New Zealand *Parl. Deb.*, 1907, cxxxix. 276.

§ 5. *The Alteration of the Constitutions of Newfoundland and the Canadian Provinces*

In Newfoundland there is wide power of change by Imperial Act, the one difficulty arising from the fact that as the result of trouble in the early days of representative government certain powers were given to the Crown which are still valid. Thus the Crown still possesses by Imperial Act [1] power to provide regarding the qualifications of members of the House of Assembly, the qualification by residence of electors, the simultaneous holding of elections, and the recommendation of Money Bills by the Governor. The powers have been exercised by instructions of 4 May 1855 based on instructions of 1 September 1842, and as regards electoral matters the rules so laid down appeared in the Consolidated Statutes of 1892 and later amendments. A delicate question arises as to the power of the legislature to vary the principles thus laid down under the Imperial Act, on the score that the general power of amendment is given by the Act of 1865 and applies to the principles laid down in the instructions. There is, however, no doubt that the Crown can at any time alter the rules under its powers, and such alterations could override any Newfoundland legislation. If, therefore, change were required, the simplest plan would be an address to the Crown to secure that an alteration was made, or the Imperial Acts repealed.

In the old province of Canada the power of change under the Act 3 & 4 Vict. c. 35 was very limited, but by 17 & 18 Vict. c. 118, in deference to strong representations, power was conceded to alter the tenure of office of the Upper House, which was at once made elective, and to change by simple, in lieu of two-thirds, majorities the proportions of members in the two Houses. A later Act (22 & 23 Vict. c. 10) permitted the making elective of the Speakership of the Legislative Council. On federation the provinces were given the widest power of alteration of the constitution, except as regards the position of the Lieutenant-Governor, who is a Dominion officer. This repealed the powers of change by simple Act which the maritime provinces enjoyed under their constitutions and which was conferred on British

[1] 5 & 6 Vict. c. 120 confirmed and made permanent in part by 10 & 11 Vict. c. 44. The local legislation was consolidated in 1916.

Columbia by an Order in Council under 33 & 34 Vict. c. 66 as a preliminary to entry into the federation. As regards Quebec one further limitation is imposed ; the electoral districts specified in a schedule, being English-speaking districts at the time of federation, may not be altered save with the concurrence of a majority of the members for these districts in the second and third readings of the Bill for the alteration ; an address must be presented from the Assembly to the Lieutenant-Governor before he assents to any such measure, and this is referred to in instructions from the Governor-General. In the case of Prince Edward Island, when the old elective second chamber which existed from 1862–93 was abolished by an Act of 1893 and a composite Assembly created, with a third of Council-men elected on a high franchise provided, it was arranged that any change in the number of those thus elected or the qualifications of their constituents would require to be passed by a two-thirds majority of the Assembly. It was doubted by Sir J. Thompson whether the fact of there being such a requirement in a local enactment could be held to counter the absolute power given by s. 92 (1) of the *British North America Act*, 1867, passed after the *Colonial Laws Validity Act*, but this is on the whole the less probable view.[1]

§ 6. *Constitutional Change in Malta and Southern Rhodesia*

Under the letters patent of Malta, s. 41 (6) the Parliament of Malta may repeal or alter any of the provisions of the letters patent, except those contained in that section,[2] namely the enumeration of subjects reserved from the Parliament, and all other provisions relating to reserved matters or Imperial property and interests, and those contained in s. 56 relating to religious toleration ; in ss. 40 and 57 relating to language ; and in s. 63 relating to the reserved Civil List. It may likewise repeal or alter any of the provisions of any Order in Council extending to the island other than provisions affecting any matters mentioned in the section. It is provided, however, that no Bill for the repeal or alteration of any such provisions of the

[1] See Act No. 1 of 1908, s. 158 ; *Provincial Leg.* 1867–95, p. 1228 (as regards the Act of 1893).

[2] These can be altered by the Crown by Order in Council, and the Governor can legislate by Ordinance on reserved matters.

letters patent or any Order in Council shall be valid unless affirmed by not less than two-thirds of the total number of members of each House of the legislature.[1]

In the case of Southern Rhodesia s. 26 (2) of the letters patent provides that a law passed by the legislature may repeal or alter any of the provisions of the letters patent save those contained in the section itself, which accords by s.-section 1 legislative power, and those contained in s. 28 relating to the reservation of Bills; ss. 39–47 relating to native administration, over which special powers are exercised by the Imperial Government; and s. 55 relating to the Governor's salary. The legislature may also repeal or alter any of the provisions of any Order in Council extending to the Colony, other than provisions affecting any matter mentioned above. But no Bill to constitute a Legislative Council shall alter any of the provisions in the letters patent relative to the Legislative Council; these can only be altered by a law passed by both Houses after a Council has been constituted. The exercise of the power of repeal or alteration is in every case subject to passing of the measure by two-thirds of the total membership of each House or, until there is a Council, of the Assembly.

In the case of both constitutions the reservation of Bills to alter the constitution is expressly provided for in the letters patent, so that non-observance of the condition would invalidate the legislation. Further, in both cases the Crown expressly reserves right of amendment. In that of Malta this extends to amend s. 41 and all other provisions relating to reserved matters of Imperial property and interests; also ss. 40 and 57 which deal with the use of language in laws, records, courts, and generally; s. 56 as to religious toleration; and s. 63 as to the reserved Civil List. The power kept is thus remarkably extensive, because under it the area of reserved matters appears to be capable of extension at the expense of the powers of the responsible government and legislature, while the power in respect of religious toleration and language touches two very tender spots.

In the case of Southern Rhodesia a still more remarkable

[1] For the application of the rule to the Trade Union Council Bill in connexion with the representation of Maltese Trade Unionists in the Senate see Dr. Mifsud, *Senate Deb.*, 18 June 1926.

power is reserved, for the Crown claims the right not merely to alter the sections as to reservation of Bills (s. 29); the Governor's salary (s. 55); and native administration (ss. 39–47); but also to alter s. 26 which confers legislative power. The effect of this provision can hardly be denied; it constitutes the possibility of a legal revocation of the constitution in its essential feature by the Crown, and this can hardly have been seriously intended; rather it may have been meant to reserve authority to alter the powers of the legislature as to change of the constitution.

§ 7. *The Constituent Powers of the Irish Free State and Northern Ireland*

The Irish Free State constitution may be amended by the Parliament, subject always to the terms of the treaty of 1921 with the United Kingdom. No such amendment, however, passed by the two Houses after the expiration of eight years from 6 December 1922 shall become law, unless after passing the two Houses or being deemed under the constitution to have passed them both, it is submitted to a referendum and a majority of the voters on the register, or a two-thirds majority of the votes recorded, are cast in favour of the amendment. Any amendment within the period of eight years may be made by ordinary legislation, which of course, like all such legislation,[1] may be referred to a referendum under certain conditions, namely the deferring of its operation for ninety days on the request of a majority of the Senate or two-fifths of the Chamber, and a request for a referendum either from the Senate by a resolution of three-fifths of its members or from one-twentieth of the numbers of registered voters. It must be remembered that in many details the Parliament has already full power, the constitution merely enunciating principles, and leaving the legislature to apply them at its discretion; thus much of the

[1] Subject to the rule (s. 47) that Bills 'declared by both Houses to be necessary for the immediate preservation of the public peace, health, or safety' are exempt from the referendum. See Act No. 29 of 1923, 3 Aug., passed to safeguard Act No. 28 of 1 Aug., from this fate; *R.* (*O'Brien*) v. *Minister of Defence*, [1924] 1 I. R. 32; see 2 I. R. 104. Use of the power of constitutional change has been made (Senate elections, No. 35 of 1925; relation of extern ministers to council, length of existence of Dail, &c., 1926–7).

fundamental principles of the rights of the people can be and have been in practice reduced to negligible proportions by enactments under the authority given.

In Northern Ireland [1] the Parliament has power to repeal Imperial Acts made before it came into existence on matters affecting those questions which are assigned to it by the constitution of 1920. But it cannot alter the Act of 1920 and amending Acts save where expressly permitted to do so. It has authority to change the qualifications and registration of electors, the law relating to elections, and the questioning of elections; and to regulate the constituencies and the distribution of the members among the constituencies, provided, however, that the number of members shall not be changed and due regard shall be had to the population of the constituencies other than a University constituency. It is therefore clear that there is no question here of the application of the *Colonial Laws Validity Act*, 1865.

[1] 10 & 11 Geo. V, c. 67, ss. 6 and 61.

V

THE PRIVILEGES AND PROCEDURE

§ 1. *The Control of Expenditure*

IT is, of course, as in England, the rule that taxation can only be levied under legislative authority,[1] and that the greater part of the expenditure of the year has to be provided for by annual act, raising taxation. As at one time in England,[2] it has been ruled in the Dominions that the temporary collection of customs duties on the faith of a resolution of the Lower House was legal, though in some cases legislative provision to this end has been enacted for the removing of any doubts. But in any other case legal redress can easily be obtained.

In the case of expenditure it has been already pointed out that there is considerable difficulty in keeping within the law, and that payment on warrants of the Governor issued without any legal appropriation having been made are far from rare; thus when the Liberal Government dissolved the Canadian Parliament in 1911 without obtaining supply, it was necessary for their successors to carry on, pending the meeting of the legislature which was accelerated as much as possible, by resort to this device, and Lord Byng's unfortunate dissolution of July 1926 necessitated return to this source. In some measure the situation has been relieved by Acts allowing for certain expenditure at rates already approved to continue during periods definitely limited in which supply may not have been granted; thus Newfoundland has made appropriations up to the end of June next but one after the session in which supply is voted.[3] In Southern Rhodesia the case is simplest of all, for the existence

[1] For England see *Attorney-General* v. *Wilts United Dairies Ltd.* (1922), 91 L. J. K. B. 897; *T. & J. Brocklebank Ltd.* v. *R.* (1924), 40 T. L. R. 237; *Bowles* v. *Bank of England*, [1913] 1 Ch. 57. For the Dominions see *Stevenson* v. *The Queen* (1865), 2 W. W. & A'B. L. 143. Cf. 31 C. L. R. 421, 462.

[2] The matter is now statutory. For the Dominions see *Ex parte Wallace & Co.*, 13 N. S. W. L. R. 1; *Sargood Bros.* v. *The Commonwealth*, 11 C. L. R. 258.

[3] By Act No. 1471 (1921) South Australia gives virtually £200,000 a year to be spent at governmental discretion; for Victoria see the *Public Account Advances Act*, 1923, No. 3341.

of a single House secures that approval of the estimates means certainly approval of the necessary appropriation Act. On the other hand, in territories where the Upper House still exercises some measure of financial power, the habit of expenditure prior to legislative approval is a useful device to give the Lower House a higher position than the Upper by making its assent practically all that the government requires, no very useful purpose being served by objecting to sums already expended. This follows because, as in the United Kingdom, there is no effective mode in which persons guilty of excessive expenditure, as contrasted with speculation, can be dealt with. The Committee which investigated Sir T. Bent's illegal expenditure in Victoria in 1908–9 recognized that when money is spent in this way, and no question of personal corruption arises, political disapproval is the only weapon available.[1] One method, however, of seeking to legalize expenditure, that of Mr. Higinbotham in Victoria in the deadlock between the two Houses, has been disapproved by the courts. He admitted on the part of the government debts as due by the Colonial Government, and then claimed that it was legal to pay them under the Act regulating claims against the Crown, but the courts ruled that it was necessary to have in these cases also appropriations of the necessary sums. The point is of importance ; it shows that the authority given in Acts dealing with such claims to pay the sums out of moneys legally available does not mean that they may be made out of any funds in the hands of the exchequer ; they can only be paid out of sums which Parliament places at the disposal of the exchequer for this purpose.[2] A judgement therefore imposes on the Crown a moral duty to ask for supply to pay the amount awarded, and on Parliament to accede to the demand, but it does not act as an appropriation of public revenue unless this is expressly provided. But it remains true that there seems no form of remedy to prevent the illegal issue of public money by a Treasurer ; the Supreme Court of the Transvaal[3] has held that no action at the suit of a private individual to restrain payments will lie, and the same rule would probably be adopted by other courts.

[1] Victoria *Parl. Pap.*, 1909, Sess. 2, No. 1 ; *Deb.*, pp. 330 ff.

[2] So in England ; a judgement cannot be enforced against the Crown.

[3] *Dalrymple & Others* v. *Colonial Treasurer*, [1910] T. P. 372.

The Government of the day controls expenditure in one vital respect; it is of the essence of the system of finance that no appropriation can be made save on the recommendation of the Governor. This is not a matter of discretion on his part; it is true that Governor Darling was once forbidden to allow a proposed vote for his wife to be submitted, but this instruction was modified a month later, and there is, it is clear, no ground on which the Governor could take exception to any proposal. It falls to him also to sign warrants for the issue of funds, and it is still theoretically his duty to satisfy himself either that there is due sanction for the expenditure or that the Legislature will provide the authority and will approve his having anticipated it. The procedure in the Commonwealth is typical of the usual plan. The Treasurer draws up statements of moneys required, which the Auditor-General examines; if there is legal authority, he signs the instrument prepared, which then is handed to the Governor-General for his signature, whereupon it operates as an authority to the Treasurer to issue cheques or drafts on the Public Account in the Commonwealth bank. If the Auditor-General is not satisfied, he reports the matter to the Governor-General, who then is advised whether there is a case for the issue of a special warrant.

Financial procedure is, on the whole, much as in the United Kingdom, with occasional variations in the direction of greater simplicity and convenience. Thus in the Commonwealth the rule that all appropriations lapse at the close of the year is shorn of some of its terror by the institution of trust funds into which moneys thus voted may be paid, and the High Court[1] has ruled that such payments may be held valid, a device followed despite protest in Queensland when a sum of £50,000 provided for the University, which it had been found impossible to spend, was thus dealt with in order to prevent it lapsing.[2] The Commonwealth *Audit Act* again allows of the varying of the expenditure on items of subdivisions of the estimates, provided that the power is not used to change salaries or wages. Amounts in excess of appropriations on subjects not provided for can be charged to such heads as the Treasurer may direct, but the total appropriations, after apportionment to heads for

[1] *Government of N. S. Wales* v. *Government of the Commonwealth*, 7 C. L. R. 179.
[2] *Parl. Deb.*, 1910, pp. 1463 ff.

which provision is made, and after allowing for repayments, must not exceed the sums provided under 'Advance to Treasurer' in the estimates. The Commonwealth by the *Audit Act* of 1901 set up three funds, the Consolidated Revenue Fund, which is the recipient of the ordinary receipts of the Commonwealth; the Loans Fund, into which loan moneys are paid, and whence sums are issued on the passing of Acts specifying the amounts to be appropriated and the purpose; and the Trust Fund, under which are ranged the specific trust funds, into which are paid any sums appropriated for them by Parliament and any repayments in aid or donations, and from which sums are issued on appropriations by Parliament.

That expenditure and revenue are properly dealt with from the point of view of accounting is ensured, more or less effectively, by the existence of an Auditor-General who is usually given a tenure of office during good behaviour, subject to removal on addresses from Parliament. In the Commonwealth as usual[1] he may not be a member of any Parliament or an Executive Councillor.[2] In that case his department as usual serves two main purposes. In the first place it ensures a regular check on the handling of receipts and expenditure in each department, supervising also the carrying out of financial rules regarding contracts and the maintenance of governmental stores. Secondly, the accounts are scrutinized in the office of the Auditor-General, who receives for that purpose monthly statements of receipts and disbursements from all officers charged with such duty, as well as a daily cash sheet from the Treasurer. As the result of this examination the Treasurer is given a discharge, or is surcharged, and he in turn surcharges the officer responsible and may proceed to take steps to secure refunds; the officer is given a right of appeal to the Governor-General in Council, who may remit the surcharge. There are required quarterly statements for the benefit of the public of the receipts and expenditure of the three great funds, with figures for the corresponding period of the preceding year, and a yearly report

[1] The Acts of Canada and its Provinces, Newfoundland, the States, New Zealand, the Union, Southern Rhodesia, Malta, and the two Irelands contain like provisions.

[2] In 1926 the retiring age of 65 was imposed, but no other change save the increase of the salary to £1,750 made.

giving full figures of the transactions of the last financial year, accompanied by such criticism as the Auditor-General deems desirable. In many cases the British practice of a Public Accounts Committee has been adopted in order to scrutinize in the light of the Auditor-General's report the facts as to revenue and expenditure, but, as in the United Kingdom, this device has extremely little effect in producing any solid result; the reports are buried and abuses go on, unless the Government for its own interest thinks fit to discourage them.[1] In the Union of South Africa the Auditor-General has expressed severe censure on a considerable number of irregularities on the part of the Government, without much result; the most important is doubtless the calling attention in 1925 to the fact that the employment on the railways of a large number of unskilled white workers, in lieu of natives at a third of the cost, was an offence against the law of the constitution that the railways, ports, and harbours are to be run on business principles. It is, however, clear that a direction of this kind in the constitution is not fit for effective enforcement by any legal process. South Africa is also remarkable for its rigid distinction between the ordinary revenue and expenditure of the country and that connected with railways, ports, and harbours, which is not to be used to make up deficits on the normal transactions of the Government. For unforeseen contingencies a total of £300,000 is made available on which the Governor-General may issue warrants; these, like those for ordinary appropriations, are directed to the Treasurer and are honoured by the Controller and Auditor-General granting credit to the Treasury on the Exchequer Account. A place of historic rather than practical importance is occupied by the Civil Lists annexed to most of the Constitution Acts. Historically interesting as one of the great sources of conflict in the days of representative government, when the Executive wished to obtain them in return for the surrender of the hereditary revenues of the Crown, they are now of no real consequence, save in so far as they obviate annual votes for the salary of the Governor,

[1] See e. g. the purely party treatment of the case of J. Lyons, who resigned his office as Minister of Lands, Ontario, in March 1926, as his firm was engaged in business with Government contractors; *Canadian Annual Review*, 1925–6, pp. 333 f., 352 ff.; for illegal expenditure on University buildings in British Columbia in 1925, ibid., p. 511.

and some other officers, including ministers, judges, and members of boards. Thus the Maltese letters patent provide permanently for the salaries of the Governor, Lieutenant-Governor,[1] legal adviser and contingencies, and for the judges; those of Southern Rhodesia for that of the Governor only, while the Consolidated Revenue Fund is duly charged with all the costs of raising the revenue.[2]

§ 2. *The Privileges of the Parliaments*

The legal position of Colonial Legislatures as regards privilege has long been made clear by judgements of the Privy Council. These assert in effect that the privileges of Parliament are essentially peculiar to itself, being the product of long usage, that they are not carried over to any Legislature by its mere performance of similar functions in legislative matters—the Parliament having had more complex origin than mere legislation—and that a Legislature has merely, perhaps in a marked form, the right of any Assembly to secure order in its own proceedings. Thus in *Kielley* v. *Carson* [3] it was denied that the Newfoundland Assembly had any right to order an arrest for a contempt committed out of doors, in *Doyle* v. *Falconer* [4] it was ruled that the Legislature of Dominica, when still representative, could not punish for a contempt committed before it, because it had power to remove an obstacle to business but not to punish the offender. The Supreme Court of Canada in *Landers* v. *Woodworth* [5] decided, dissenting from a long string of cases in Quebec [6] and from the claims of the New Brunswick [7] Legislature up to 1844, that the Assembly of Nova Scotia could not remove a member on the score of contempt when he was not actually obstructing business, but merely refusing to make an apology

[1] This fact has already caused discussion in Malta, as it has been held that a civil Governor should be appointed, thus eliminating any need for a Lieutenant-Governor.

[2] For the Irish Free State see the *Central Fund Acts* of 1923 (No. 7) and 1924 (No. 8). The Comptroller and Auditor-General holds office from the Lower House, has a salary of £1,500, and his functions are in effect those laid down for his United Kingdom prototype by the Acts of 1866 and 1921. For Northern Ireland see the *Exchequer and Audit Act*, 1921, amended by c. 4 of 1923.

[3] 4 Moo. P. C. 63, overruling *Beaumont* v. *Barrett*, 1 Moo. P. C. 59.

[4] 4 Moo. P. C. (N.S.) 203. [5] 2 S. C. R. 158. [6] Cited ibid.

[7] Hannay, *New Brunswick*, i. 182 f.; ii. 96 f.

in terms dictated by the Assembly for an unjust accusation against the Provincial Secretary. So in *Barton* v. *Taylor* [1] the Privy Council held that the New South Wales Assembly might have a power to suspend, but not indefinitely nor for a definite period resting on the irresponsible decision of the Assembly. So in *Fenton* v. *Hampton* [2] the right of the Legislative Council of Tasmania to commit the Controller-General of Convicts there for contempt in refusing to appear before it and answer accusations of ill-treatment of convicts was denied. Yet the actual powers are not insignificant; in *Toohey* v. *Melville* [3] it was held in New South Wales that the Speaker, without resolution of the Assembly, might eject a member guilty of disorderly conduct and wilful obstruction contrary to the standing order adopted from order 176 of the British House of Commons. In *Harnett* v. *Crick* [4] the Privy Council ruled that the Assembly could pass a special standing order under which Mr. Crick was suspended pending judicial investigation of his conduct as Minister of Lands, the decision depending on the special circumstances of the case, a committee having reported on his action but further action thereupon being obstructed by the judicial proceedings. On the other hand, the Supreme Court held in 1911 [5] that the Speaker had no power to order that a member should be brought back to the Chamber to be dealt with on a charge of discourtesy, on the score that his power extended to the preservation of order and not to punishment, a fortunate result.

Where, as is normal, privileges are conferred by the constitution or by Act much wider authority is possible. The simplest case is that of the Commonwealth,[6] where the privileges of Parliament are under the constitution to be such as it assigns to itself, but until altered those of the House of Commons. The Union [7] was given similarly unrestricted powers of legislation, but in exercising its power, it by Act No. 19 of 1911 expressly limited its privileges to the measure of those of the House of Commons from time to time. This is the rule laid

[1] (1886) 11 App. Cas. 197; 6 N. S. W. L. R. 1.
[2] 11 Moo. P. C. 347.
[3] 13 N. S. W. L. R. 132.
[4] [1908] A. C. 470, overruling 7 S. R. (N. S. W.) 126.
[5] See *Resp. Govt.* (ed. 1) iii. 1617 f.; *Willis* v. *Perry*, 13 C. L. R. 592.
[6] Const. s. 49; so Northern Ireland.
[7] 9 Edw. VII, c. 9, s. 57.

down also for Western Australia [1] as formerly in the constitution of Natal, while Victoria [2] and South Australia [3] are not to give themselves privileges exceeding those possessed by the House of Commons at the date when their constitutions took effect. The model of Western Australia was followed in the case of the Transvaal and Orange River Colony, and now in those of Malta, which has legislated by Act No. 24 of 1924, and Southern Rhodesia. No limits or rules of any sort are laid down in the constitutions of Newfoundland, New South Wales,[4] Tasmania,[5] Queensland,[6] or formerly the Cape, but all of these save New South Wales have legislated, and in the case of Queensland the Act has been included in the Constitution Act on its consolidation. The Irish Free State [7] constitution, while laying down privileges and powers, naturally ignores the rules of the House of Commons. It is a speculation of more theoretic than practical interest what would be the value of an Act, say, of Western Australia conferring privileges far exceeding those of the House of Commons. Would such an Act have to be read subject to the limitation in the constitution, or would it, on the principle of *McCawley* v. *The King*,[8] be ruled to operate as an amendment of the constitution? It is at least clear that it is possible in view of that decision to repeal the restriction by a simple Act, which at the same time might give in lieu fresh powers. The restriction, therefore, is decidedly a *brutum fulmen*.

The extent of the powers when they are taken by Act is very wide; the Victorian cases of *Dill* v. *Murphy* [9] and *Speaker of the Legislative Assembly* v. *Glass* [10] establish that a libel is a ground for committal for contempt, and that the Assembly can exercise the high power of committing for contempt without specifying wherein the contempt lay, thus precluding the action of the courts which, as English cases clearly show, if the contempt were expressed and *ex facie* were not really a case of contempt, might well refuse to recognize the validity of the committal.

[1] 53 & 54 Vict. c. 26, sched. s. 36; 54 Vict. No. 4.
[2] 18 & 19 Vict. c. 55, sched. s. 35; 20 Vict. No. 1; Act No. 1075, s. 10.
[3] Act No. 2 of 1855–6, s. 35; No. 14 of 1872; 430 (1888).
[4] 18 & 19 Vict. c. 54, sched. s. 35.
[5] 18 Vict. No. 17, s. 29.
[6] 31 Vict. No. 38, ss. 41–56.
[7] ss. 18–20.
[8] [1920] A. C. 691.
[9] 1 Moo. P. C. (N. S.) 487.
[10] 3 P. C. 560.

Canada is as usual in a special position by reason of her rigid constitution and negligible power of amendment. It was provided in the *British North America Act*, 1867, that Canada could confer on her Houses privileges not exceeding those of the House of Commons as they then existed. In 1868 an Act giving committees of the Senate power to examine witnesses on oath was allowed to stand, though the Act was *ultra vires*, the committees of the Commons then having no such power. In 1873 the matter, however, received investigation in connexion with an Act to give both Houses and their committees power to examine witnesses on oath. It was held that the Act was *ultra vires*, and it was disallowed, but an Imperial Act of 1875 gave Canada power to take privileges equivalent to those of the House of Commons from time to time, and in 1876 the Canadian Act was re-enacted, while the Imperial Act of 1875 itself confirmed the Canadian Act of 1868.[1]

Provincial legislation took an interesting course. Ontario and Quebec Acts of 1868–9 [2] which took the privileges of the Canadian House of Commons were disallowed, both the Dominion and Imperial law officers holding them *ultra vires*. Yet when Quebec in 1870 explicitly claimed by Act 33 Vict. c. 5 much the same powers, the measure was left to operate and was upheld in *Ex parte Dansereau*,[3] though the Court there held, doubtlessly wrongly in view of *Doyle* v. *Falconer*,[4] that a Legislature had an implied power to summon witnesses and punish on refusal to appear and give evidence. A British Columbia Act (35 Vict. c. 4, repealed by 36 Vict. c. 35 but in substance re-enacted by c. 42) was allowed to stand; but in 1874 a Manitoba Act (36 Vict. c. 2) was disallowed. In 1876, however, there was legislation in Ontario (c. 9), Manitoba (c. 12), and Nova Scotia (c. 22), all allowed to stand, though the Minister of Justice evidently doubted their validity. The Supreme Court, however, in *Landers* v. *Woodworth* [5] encouraged legislation, mentioning as proper the laws of Ontario and Quebec, and suggesting that they might even go further. The hint was taken, all the pro-

[1] *Parl. Pap.*, C. 911, pp. 3–9; Canada *Sess. Pap.*, 1876, No. 45; Imperial Act 38 & 39 Vict. c. 38; Canadian Act 39 Vict. c. 7.

[2] 32 & 33 Vict. c. 3; 32 Vict. c. 4; *Sess. Pap.*, 1877, No. 89, pp. 202–11, 221; *Prov. Leg.*, 1867–95, pp. 83, 146 f.

[3] 19 L. C. J. 210. [4] 4 Moo. P. C. (N. S.) 203. [5] 2 S. C. R. 158.

vinces legislated,[1] British Columbia limiting her privileges by those of the House of Commons, and Alberta and Saskatchewan enacted measures in 1909 (c. 2) and 1908 (c. 4). The validity of these Acts is beyond question. It was laid down in *Fielding* v. *Thomas*[2] that Nova Scotian legislation giving the power to summon witnesses and to arrest and imprison on contempt was perfectly valid ; an offender had been arrested by the serjeant-at-arms, but had obtained release on *habeas corpus* proceedings; he claimed damages for assault and false imprisonment ; the Court below found for him, and the Supreme Court being equally divided it was left for the Privy Council to vindicate the authority of the Act. It adduced two grounds, one that the province had all its old powers save as reduced by federation, the other that the power of constitutional alteration under s. 92 (1) was ample to give the desired authority, a ruling which covers the case of Manitoba, Saskatchewan, and Alberta, which never were independent Colonies. It was, of course, pointed out that, as criminal law belongs to the federation under s. 91 (27) of the Constitution, in constituting itself a Court of Record the Legislature did so merely in the sense of doing so in respect of its dealing with contempts. So the Supreme Court held in *Payson* v. *Hubert*[3] that any person committing a disturbance could legally be removed from the stairs of the Nova Scotian Assembly.

The nature of the powers may be illustrated by the latest model, that of Southern Rhodesia. Act No. 4 of 1924 declares that there shall be freedom of speech and debate, and forbids the impeachment of its proceedings outside Parliament. The Legislature is made a Court of Record to inquire into and punish contraventions of the Act. All civil or criminal proceedings in any Court on matters claimed by certificate of the Speaker to fall under privilege shall be stayed and determined forthwith. Members and officers are exempt from jury service, and can be required to serve as witnesses, or appear as defendants only before a Court sitting at the place of the Legislature in cases of civil actions.[4] No member shall be liable to any proceedings

[1] New Brunswick and Prince Edward Island in 1890 (cc. 6 and 4).

[2] [1896] A. C. 600, overruling 26 N. S. 55.

[3] 34 S. C. R. 400, overruling 36 N. S. 211.

[4] Arrest on a *ca. sa.* was held possible in New South Wales even when the

of any kind for anything brought by him in any way before the Legislature. No person shall be liable in any way for any act done under authority of Parliament in its legal powers. The Legislature may punish summarily for contempt by fine or fee, and, if the amount imposed is not forthwith paid, may commit the offender to any jail or the custody of an officer of the Assembly, to be kept there until the fine be paid or until the last day of the session, the Act leaving it vague what will happen if payment is not made by the last day. Moreover, a general power is given to imprison up to the last day of the session, which is additional to the specific power to impose fines. The contempts include refusal to attend the Assembly or produce documents; refusal to answer questions; refusal to obey any rule, order, or resolution of Parliament—a very vague power; offering bribes; assaulting or obstructing or seeking unduly to influence members; resisting an officer in the execution of his duties; challenging members to fight; creating a disturbance near the place of Parliament when in session; tampering with witnesses; presenting false documents; prevarication; publication of any false or scandalous libel; and any contempt declared from time to time by any standing order—again a very wide power. The Speaker is to issue warrants for apprehension and imprisonment of offenders; the contempt is to be stated, no power to state contempt generally, as is possessed in the United Kingdom, being asserted. In case of disturbances during the session of Parliament, the Speaker may order arrest without warrant. All sheriffs and officers are to assist in executing such warrants or orders, and in seeking to apprehend offenders doors may be broken. The attendance of witnesses is to be provided by summons, and witnesses may be examined on oath by Parliament or any committee; Parliament may excuse answers, but false answers expose a witness to prosecution for perjury. On the other hand, a truthful witness will receive a certificate which will protect him from civil and criminal proceedings in respect of matters revealed in his evidence. It is also provided that no member may receive payment for promotion of or opposition to Bills, &c., on penalty of fine up to £1,000 and of the repayment of the bribe. Full

Assembly was sitting; *Norton* v. *Crick*, 15 N. S. W. L. R. 172. This is often expressly negatived, e. g. in Alberta Act 1909, c. 2.

protection is given in respect of the publication of Parliamentary proceedings to those engaged in the work,[1] and any abstract which appears in any other publication is privileged if made *bona fide* and without malice. The Attorney-General by resolution of the Assembly may prosecute for any contravention or offence. Further, it is provided generally that in all matters not mentioned the privileges of the Commons in the United Kingdom as they existed on 1 September 1923 shall apply, with any further privileges not exceeding those then enjoyed by the House of Commons added by later Acts. This attempt to bind future Parliaments is doubtless invalid, but it is clear that under the constitution any clause taking greater powers than those enjoyed by the House of Commons would be invalid, unless the Act which contained it was passed as a constitutional alteration must be passed, i. e. by a two-thirds majority of the Legislature, and then duly reserved. In the case of the Canadian provinces it is suggested that the restriction imposed on the Dominion Parliament of never exceeding the privileges of the British Commons is binding on them also, but this is far from proved. It is probable, however, that the Dominion Government would disallow any Act claiming excessive powers. It may, of course, seem anomalous that minor Legislatures should have wider legislative powers than the greater Legislatures. But the explanation is simply that the grant of legislative power covers so minor a matter as the taking of privileges, and the restriction on certain territories arises from the fact that, unluckily for them, in the Acts conferring their constitutions the matter was dealt with at all.

The Southern Rhodesia model follows that of the Cape in 1883 and the Union in 1911 in claiming the power to fine as normal; the more usual plan is merely the rather inadequate one of imprisonment until the close of the session. But in Quebec in 1922 a striking example of the vindication of the Legislature was forthcoming. Mr. J. H. Roberts, in commenting in *The Axe* of 27 October 1922 on the failure of the police to discover the murderer of Blanche Garneau, reflected on two unnamed members of the Legislature. He was arrested on 31 October on a

[1] Cf. the Commonwealth Act No. 16 of 1908 and *Isaacs & Co.* v. *Cook*, p. 374. In *Gipps* v. *Malone*, 2 N. S. W. L. R. 18, it was held that no action lay for defamation in a question.

warrant issued by the Speaker of the Assembly on a motion by the Premier, and on 4 November brought to the Bar of the House, where he declined to give the names of the members who were connected in his allegations with the crime. An Act was immediately passed and assented to on 29 December 1922 to provide for his imprisonment for a year, his charges being denounced as a violation of the privileges of the Legislature, an odious attack on its honour and dignity, and a calumny unprecedented in Parliamentary annals. The Bill evoked a dramatic scene in the Council on 23 November, when the Speaker left the Chair for the first time in fourteen years to defend the Government; the Act was assented to on 29 December, Mr. Roberts being kept in prison during the interval, while a Royal Commission on 14 November was appointed, and Bernier J. refused *habeas corpus* to Mr. Roberts, commenting on the wickedness of the charge. On 14 January 1923 the Supreme Court dismissed an attempted appeal by Mr. Roberts against his imprisonment, holding that it was taking place under a Quebec statute, and that appeals lay only in criminal matters under the legislation of the Dominion Parliament. There could, indeed, be no real doubt of the validity of the Act—the Premier very properly offered to facilitate an appeal to the Privy Council, and Mr. Roberts eventually was released under Order in Council of 12 April, having submitted a satisfactory explanation of his articles. The Royal Commission exonerated the Government of all suspicion of negligence.[1]

It is not usual to claim the right to commit for a contempt stated indefinitely; Tasmania in her early Act[2] required that the contempt should be expressed in the warrant, to show that it fell under the actions defined in the Act as contempt. In some cases members are freed from arrest or molestation on civil causes during the session and for a period of twenty days before and after, in which case any violation of the privilege is a contempt; the Commonwealth Lower House has ruled that to serve a summons on a member in Parliament House is a contempt, but in New South Wales in the absence of legislation it was held in *Norton* v. *Crick*[3] that an arrest on a *ca. sa.* was

[1] *Canadian Annual Review*, 1922, pp. 712 ff.; 1923, p. 607.

[2] 22 Vict. No. 17. See also 49 Vict. No. 25.

[3] 15 N. S. W. L. R. 172.

possible even during the session of the Assembly. Tasmania and Queensland set the model of authorizing the Houses to direct the Attorney-General to prosecute offenders amenable to the criminal law.

In the case of the Irish Free State the constitution provides by ss. 18–20 that every member of Parliament shall, except in case of treason, felony, or breach of the peace, be privileged from arrest in going to and returning from, and while within the precincts of, either House, and shall not, in respect of any utterance in either House, be amenable to any action or proceeding in any Court other than the House itself. All official reports and publications of Parliament are privileged,[1] and also utterances in either House wherever published. Each House shall make its own rules and standing orders with power to attach penalties for their infringement, and shall have power to ensure freedom of debate, to protect its official documents and the private papers of its members, and to protect itself and its members against any person interfering with, molesting, or attempting to corrupt its members.[2]

A curious issue was raised in Queensland shortly after the grant of a separate existence to the Colony. A judge had a grievance regarding salary, and the Legislative Council, while not refusing to consider the issue, expressed an unfavourable opinion of his conduct. A supporter of Mr. Lutwyche then assailed the Council in the press, whereupon by its request he was prosecuted by the Attorney-General for libel, but, as the trial took place before the judge in question, who charged the jury as to the law applicable, it is not surprising that he was acquitted. The views of the judge elicited a request from the Attorney-General for a legal opinion by the Imperial law officers on certain issues, and they advised that the Legislature could not strictly be deemed to be part of the Government of the Colony, 'the Government denoting the officers of state by whom the Queen's authority is exercised therein, whereas the Legislature there, as in the Mother Country, is separate and

[1] As to the effect in England of local Acts see *Isaacs & Sons* v. *Cook*, [1925] 2 K. B. 391; Dicey and Keith, *Conflict of Laws* (ed. 4), p. 736.

[2] New Zealand took the privileges of Parliament as at 1 Jan. 1865 by her *Parliamentary Privileges Act*, 1865; see now No. 101 of 1908, s. 242. S. 52 of the constitution gave only power to make orders.

distinct from the Sovereign '. But they held that it was clearly possible to libel the Legislature as such independently of its being a part of the Government.[1]

§ 3. *The Form of Acts*

For reasons which are purely historical Acts are usually enacted in the name of the King and the two Houses, normally ' advice and consent ' being expressed, though the Commonwealth omits the words as needless. But in certain cases, as formerly in the Cape, the laws are made by the Governor with the Houses ; this is still done in Newfoundland, ' advice and consent ' being omitted, in New Brunswick, Nova Scotia and Prince Edward Island, in South Australia and Tasmania, the reason being that in the first four cases power was given in this form by the letters patent, in the two latter by local Acts. In New Zealand Acts are made by the General Assembly which includes the Governor. There is absolutely no difference between the legal authority in either case ; the Governor is merely the instrument of the Crown. It is therefore absurd to enact, as did Newfoundland in an Act of 1910, that the operation of the measure was to be suspended until the King's pleasure had been signified, for strictly speaking that is done in the assent ; what was meant, of course, was suspension of operation pending notification that the Act would not be disallowed, which it is normal to notify by proclamation.[2]

The form of assent is variously given ; sometimes by the Governor in person in Parliament, sometimes at the Government offices, or often by commission ; an amusing objection was raised in Canada in 1911 to this being done by a deputy of the Governor-General, but there was clearly nothing in the objection. The intimation of assent to a reserved Bill must be formally announced ; if it is not, the Act is invalid, as Western Australia found as regards its Aborigines Act of 1897, which had to be re-enacted in 1905 (No. 14). The words of assent are

[1] Sir W. Atherton and Sir R. Palmer, 10 Jan. 1862 ; Bernays, *Queensland Politics*, p. 26.

[2] For the correct form see *Const. and Govt. of New Zealand*, p. 193. A direction in an Act that it is to be reserved is a harmless absurdity, New Zealand *Parl. Pap.*, 1902, A. 1, pp. 9, 12 f. ; A. 2, p. 20. But see p. 352.

borrowed from the British model, but assent to Appropriation Bills is given in the English equivalent.

The use of language in Parliament is regulated by law in certain cases. The Act of 1840 uniting the Canadas laid it down (s. 41) that English was to be the official language of all formal instruments and reports of Parliament, copies in French being forbidden to be recorded in the archives. The use of French in debate was not prohibited, and was at once practised, while in 1841 an Act was passed to secure that French translations should be made of Acts, &c. In 1845, however, the matter came to a head, as the Speaker had felt bound to refuse a motion in French, and the House upheld his ruling as a matter of law, but asked for the repeal of the provisions of the Imperial Act; Mr. Gladstone promised this on 3 February 1846 and it was accorded in 1848.[1] S. 133 of the *British North America Act* provides that either English or French may be used in the debates of the Federal and Quebec Legislatures, that their proceedings and Acts shall be recorded in both languages, and that either shall be available in the Federal and Quebec Courts; the result is that the Federal Parliament duplicates everything at great expense without regard to the utility or the necessity of the proceeding, which could under the terms of the law be considerably limited as regards printing of reports. The same rule was enacted in the original constitution granted to Manitoba by the Federal Parliament,[2] but it was repealed by that province in 1890;[3] the Legislature of the North-West Territories had duplication imposed in 1880,[4] but it was agreed in 1890[5] to leave the matter to the Legislature itself, and in 1905[6] no provision was inserted in the Alberta and Saskatchewan constitutions, an amendment to secure the federal rule there being wisely defeated.

In the Cape s. 89 of the Constitution Ordinance insisted on English as the official language in debates and in records; Act No. 1 of 1882 permitted the use of Dutch in debates, and No. 21

[1] 11 & 12 Vict. c. 56, s. 1; Houston, *Const. Doc. of Canada*, pp. 162, 175, 183, 213.

[2] 33 Vict. c. 3, s. 23.

[3] 53 Vict. c. 14; *Prov. Leg.*, 1867–95, pp. 909 ff.

[4] 43 Vict. c. 25.

[5] *House of Commons Journals*, 1890, pp. 106–8; 54 & 55 Vict. c. 22, s. 18; Willison, *Sir Wilfrid Laurier*, ii. 57, n. 1; Skelton, i. 396–400.

[6] *Canadian Annual Review*, 1905, p. 105.

of 1884 allowed Dutch in legal proceedings. A good deal was translated into Dutch for the information of the Dutch-speaking population, but the system was essentially one of practical convenience,[1] and, as time went on, it was the practice to concentrate on printing what was useful, not merely what might be suggested by patrons of equality of the languages. In the letters patent for the Transvaal and Orange River Colony debates might be conducted in either language, votes, proceedings, Bills, and laws printed in both, but the formal records of the Legislatures were to be in English. S. 137 of the *Union of South Africa Act*, on the other hand, lays down a régime of absolute equality in every respect; Dr. Jameson is said to have agreed to the change from Cape practice only when it was made a point of honour by the Dutch members of the Conference as to Union.[2] The enactment, however, was definitely intended by its sponsors to secure for officials of Dutch race an advantage over British officials, as the learning of English for a speaker of Afrikaans is much more useful than the reverse process for a speaker of a great language like English. It may be added that, though the Act seems to contemplate only Dutch, i. e. the refined literary speech of the Netherlands, the demand was made in 1925 that the language to be used as Dutch was the Afrikaans, which, though a rude and barbarous speech compared to Dutch, has the advantage of being a true vernacular, and will avoid the absurdity of printing enormous masses of documents in a form of speech which is by no means easily intelligible to the Boer of the back blocks. It is further reasonable that a British territory should not resort to a language foreign to both sections of its inhabitants, and use for official purposes will no doubt in the long run refine the present rough dialect.[3]

In the case of the Transvaal and the Orange River Colony the authentic copy of any Act was to be the English copy; in the Union the Governor-General has his choice of one or the

[1] Wilmot, *South Africa*, ii. 148. See also Walker, *Lord de Villiers*, pp. 177, 279, 406, 478.

[2] For the demerits of bilingualism cf. *Parl. Pap.*, Cd. 5666, pp. 244 ff. The French of Quebec is a sad business, the Afrikaans a mere patois, and the use of Irish a grave mental burden, oppressive, useless, and foolish.

[3] Act No. 27 of 1923 compels civil servants to become expert in both languages.

other in each case, and he does in fact sometimes sign the Dutch, sometimes the English version. In Canada there is no rule as to which version is valid ; in Quebec, considerations of general harmony with the context,[1] and in the case of a consolidation the language of the original measure, are taken into account in deciding those not very infrequent cases where one or other of the versions may be read in a somewhat different sense from the other.

In Malta the letters patent provide by s. 40 that debates and discussions may be conducted in English, Italian, and Maltese, but are to be recorded in the language used, save in the case of Maltese, when either an English or an Italian rendering is to be used at the discretion of the Speaker, Maltese being the local vernacular, but despised by the upper classes who secured this lowly position for it. Bills and laws are to be printed in both, nothing being said as to which is to be the authentic version. All journals, entries, minutes, and proceedings of the Houses are to be recorded in English or in both, as may from time to time be decided by either House. Generally by s. 57 both English, as the official language of the British Empire, and Italian, as the established language of record of the Courts, shall be official languages. English is the official language of administration, but Italian may be used as a second official language for use along with English versions, when convenient. Neither administration nor legislation may diminish the position of English as an official language or tend to diminish its use in education or the public service. Maltese is to have such facilities as are necessary to satisfy the reasonable needs of those unfamiliar with English or Italian. English and Italian are to be recognized as equal languages of culture in Malta in the University, in secondary schools, and in the higher classes of elementary schools ; where both cannot be taken conveniently simultaneously, regard is to be had in settling priority to the wishes of the parents in the case of schools, and of students in the case of the University, and the utility of the language in respect to future occupation. Maltese may be used in the lower classes of elementary schools as a medium of instruction ; Italian shall be the official language of the Courts with, however, adequate provision for the use of English in the case of all

[1] Cf. 8 Edw. VII, c. 7, s. 13 ; Civil Code, s. 2615.

suitors who do not know sufficient Italian to follow properly the proceedings.[1]

In the Irish Free State s. 4 of the constitution provides that the national language of the Free State is the Irish language, but the English language shall be equally recognized as an official language. Nothing, however, is to prevent special provision being made by Parliament for districts or areas where one language only is in general use. The Governor-General by s. 42 may sign either an Irish or English version.[2]

§ 4. *The Procedure of Parliament*

The Parliaments of the Empire have borrowed fairly accurately the elaborate procedure of the United Kingdom, which was imitated in Canada even in the days when the Legislature met in a tiny town. Objections have been made at times to the elaboration of the ceremonial and the preservation of outworn forms ; thus in 1910 the Opposition in Western Australia deserted the House *en masse* as a protest against the absurdity of the first reading of a Bill in dummy shape, but on the whole it has been recognized that a certain elaboration of ceremonial is a good thing as tending to impress on legislators that their duty is of a serious character, though it may be admitted that the generally small size of the Houses renders a simpler procedure more natural. As it is, there are state openings,[3] messages from the Governor, three readings with committee stages, and most of the English conventions, for the procedure is often largely borrowed wholesale from the standing orders of the House of Commons, which not rarely are incorporated in the local orders as being available when there is any lacuna in their provisions.

In the Lower Houses the Speaker is regularly elected ; in Malta and Rhodesia and even in New Zealand [4] his appointment

[1] See Act No. 9 of 1923 ; English is compulsory throughout a child's course, Italian is also taught from the third standard in elementary schools.

[2] Trouble arose in 1911 on the similar rule in the Union, where it had been foolishly assumed that the Governor-General would sign always the English version ; Walker, *Lord de Villiers*, p. 478.

[3] In 1926 the New South Wales Parliament was opened by commission, a foolish piece of spite against the Governor by the Labour Premier.

[4] *Cons. Stat.* 1908, No. 101, s. 15.

is subject to confirmation by the Governor; in South Australia and Tasmania notification to the Governor is prescribed by law; it elsewhere is customary; and, while the practice has been dropped in the Commonwealth since 1904,[1] in Canada, the provinces, and the Australian States it is still usual to ask the Governor to grant the usual privileges, which are graciously accorded.[2] In the case of the Upper Houses the President or Speaker is normally appointed by the Governor, where the Upper House is nominee, but he is elected in New Zealand, the Governor-General having the right to disallow the election. In elective Upper Houses he is elected; in Victoria he is subject to confirmation by the Governor and so also in Malta; in South Australia and Tasmania his appointment need merely be notified, as usual in the other cases by courtesy.[3] In Southern Rhodesia the Assembly was permitted to choose a Speaker from outside the Legislature, which inaugurated its existence in what had been a dancing hall at Salisbury. The President and the Speaker are paid, and hold office until their successors are appointed, or they resign, or they are removed by the vote of the House or by the Governor where the appointment lies in his hands. The officers of Parliament[4] are exempted from the usual rules of the Civil Service; their tenure is regulated by the House which they serve and usually depends on good conduct in effect if not in theory. In Victoria in 1910, on the refusal of the Governor in Council to approve a recommendation of the President of the Council, the Council adjourned in protest for a week. The English tradition of re-election of the Speaker is not generally accepted in the Dominions, though it is frequently accepted if it suits the convenience of the majority. Thus the re-election of the Speaker of the Dominion Commons was not objected to by the Opposition in 1926, as it gave the Liberals one vote less for the critical division which was to be forced; on the other hand, in 1924 General Hertzog declined to listen to

[1] Both President and Speaker were presented for approval in 1901; in 1904 they were merely presented, and the request for privileges dropped.

[2] Munro, *Const. of Canada*, pp. 48, 114.

[3] Art. 21 of the Irish Free State Constitution provides for the election of the Chairman and Deputy Chairman of either House. In 1927 automatic re-election to the Dáil of its Chairman was agreed to.

[4] Many of them have rendered excellent service, e.g. L. A. Bernays, for 49 years in Queensland; see C. A. Bernays, *Queensland Politics*, p. 22.

the plea that the Speaker of the old House should be elected; he pointed out that, with the small Houses of the Dominions, it was impossible to expect a Speaker to observe in election times the non-party attitude of the British Speaker, and pointed out that the late Speaker had energetically supported his party in the electoral campaign.

The rules as to the Speaker's vote are curious: in Canada, the Commonwealth, and Quebec the President or Speaker of the Upper House has a vote, but if the votes are equal, the matter is resolved, as in the House of Lords, in the negative. In all other cases the presiding officer of either House has only a casting vote, though it is just possible that both President and Speaker in Newfoundland and President in Nova Scotia might exercise both an ordinary and a casting vote without actually violating law. The casting of the vote is not at all rare in the Dominions, where Houses are so small, but the manner of its exercise is not regulated by any principles. In 1877 [1] the Speaker of the South Australian Assembly voted against the Ministry on a vote of no confidence because he held that he should always vote against a Ministry which had not apart from his vote a majority in the House; on the other hand, Lord Normanby explained the Speaker's decision in New Zealand in the same year to vote for Sir G. Grey's Government in similar circumstances as due to his desire to conform his practice to the British usage, which demands that the casting vote should, if possible, not be used in such a way as to prevent further consideration of the matter at issue.[2] In 1907 [3] the President in the Cape, who by law was the Chief Justice, laid it down that he thought it was his business to try to have supply voted, and the Government carried on; in 1910 the President in the Transvaal Council declared he had tried to follow the British precedent, which has, of course, the great advantage that it keeps the Speaker free from being accused of partisanship, though, on the other hand, it is a counsel of perfection which can hardly expect acceptance in a small House. In point of fact Speakers have often worked manfully to keep their party in power; in 1874 [4]

[1] *Ass. Votes*, 1877, p. 236; cf. ibid., 1871, p. 226.
[2] *Parl. Pap.*, 1877, A. 7.
[3] *Council Deb.*, 1907, pp. 357 ff.; Walker, *Lord de Villiers*, p. 413.
[4] Prowse, *Hist. of Newfoundland*, p. 499.

the Speaker's vote alone kept in power Mr. Carter in Newfoundland; in 1897 [1] the Cape Speaker and in 1903 [2] the Speaker in British Columbia alike saved Governments for the time being, and so common is the practice that it may be said at least to be normal.

The conventions as to the election of Speakers are as regards form the same as in the United Kingdom. Thus in the Commonwealth the Clerk at the meeting of 26 July 1909 exercised the right of voting against an adjournment of any discussion as to the election of the Speaker, the parties being about to disagree on the issue of defence, with fatal results to the Ministry. In Tasmania, as regards the election of the President of the Council, and in Canada, as regards that of the Speaker, it is customary to ignore the British practice on the opening of a new Parliament under which a commission is issued prior to the election, and in lieu the election takes place before any communication is received from the Crown.[3]

The Governor is given the power to summon, to prorogue, and to dissolve Parliament. The authority is given in the Constitution Acts, and, though normally repeated in the letters patent, the repetition is unnecessary, nor is it followed in the case of Malta and Southern Rhodesia, where the absurdity of giving it in the two sets of letters patent, creating the Legislature and the Governorship respectively, would be flagrant. It is not referred to in the Instruments issued to Lieutenant-Governors in the Canadian provinces, and yet they exercise, unquestioned,[4] the rights of the Crown. The rule as to summoning is, of course, regulated by the fact that annual Parliaments are invariably required, the rule being that a period of twelve months shall not intervene between the last sitting in one session and the first in the next. Prorogation is generally governed by the same rules as in the United Kingdom, the New Zealand Committee of 1854 which examined the question reporting that prorogation by proclamation, and, when the House was in session, by personal visit or commission, was in order, but in the provinces it is possible to prorogue indefinitely, thus avoiding the tedium of

[1] Wilmot, *South Africa*, iii. 331.

[2] *Canadian Annual Review*, 1903, p. 213.

[3] Tasmania *Parl. Pap.*, 1909, No. 14; Munro, *Const. of Canada*, pp. 47, 112.

[4] Cf. Mr. Blake, Canada *Sess. Pap.*, 1877, No. 13, p. 10.

frequent prorogations. In 1909 it was discussed in New Zealand whether there was any legal means of accelerating the meeting of a Parliament prorogued to a definite date, but it was held that the power did not exist.[1] Both Tasmania and Victoria have the convenient British provision allowing the House to be summoned in case of need for a period not earlier than six days.

The Crown is expected to act on ministerial advice in all these actions.[2] When, in the Cape in the Boer War, Parliament was not summoned, Ministers took the responsibility of not advising action, and an Indemnity Act covered the wrongdoing.[3] In 1891 Mr. Angers was advised that he was entitled to dissolve at once the Lower House without any business being done, and in 1910 there was only a formal meeting of the Legislature of Saskatchewan. The Governor, of course, is entitled if he thinks fit to bring pressure to bear on Ministers, subject to the usual rule of being prepared to yield or find another Ministry. In 1911 in New South Wales he was compelled to grant a prorogation after an adjournment had been refused by the Assembly, because he could find no other Government in New South Wales prepared to carry on without a dissolution which he felt illegitimate. In 1879 Lord Normanby was able, by reason of Sir G. Grey's weakness, to force him to meet Parliament as early as he could in 1879, but the Government of 1882 refused a similar request of Sir A. Gordon. In 1908–9 the Opposition in Newfoundland pressed for an early meeting of the Legislature, but the Governor did not feel called upon to accelerate it much before the usual date. In 1909, however, the Governor of Western Australia was accused of pressing Ministers to have a short session early to obtain supply. In 1912 the Governor of New Zealand was criticized on the ground that he did not press Ministers to face Parliament at an earlier date, but he held that drastic action would merely introduce an irrelevant issue.[4] In 1925–6 the Premier of Canada pushed the meeting of the Parliament as far forward as was compatible with the

[1] Cf. *Const. and Govt. of New Zealand*, pp. 191 f.

[2] By a strain of propriety the Canadian Parliament of 1926 was dissolved by proclamation, though normally it should have been prorogued by the Governor-General in person and later dissolved, and on the advice of a Premier condemned by the House of Commons.

[3] Walker, *Lord de Villiers*, pp. 403 f.

[4] Keith, *Imperial Unity and the Dominions*, p. 117.

propriety of waiting until every member was in a position to take his seat. In the Irish Free State [1] the representative of the Crown is permitted to summon and dissolve the Parliament in the name of the King, but the power is purely formal. The Chamber of Deputies fixes the date of the reassembly of Parliament, and the date of the conclusion of the session of each House, in the case of the Senate with its concurrence. Moreover, the Chamber can be dissolved only on the advice of the Executive Council, and only while the Executive Council possesses the support of the Chamber. On a dissolution the general election must be held within thirty days, and Parliament must meet within a month thereafter. All real power is thus taken from the Governor-General, assuming that these provisions are compatible [2] with the theoretical supremacy of the treaty of 1921 over the constitution, and the adoption in the treaty of the Irish model as that to be followed.

In the Commonwealth,[3] Victoria,[4] South Australia,[5] Tasmania,[6] New Zealand,[7] Malta, and Southern Rhodesia, the Governor has the convenient power of returning any Bill presented for his assent with suggested amendments, and the Houses of the Legislature are authorized to take them into consideration. This serves of course normally as a convenient way of having minor points put right, and the Governor acts on ministerial advice. In Malta the matter is of more importance, because the Governor has the interests of reserved subjects and Imperial matters to consider, and cases have occurred of recommendations not necessarily supported by Ministers which inevitably have no chance of more than formal consideration, though due provision is made in the standing orders for their reception and formal consideration. In the case of any Bill or amendment being proposed which seems to the Governor to affect reserved subjects, he may forbid any proceedings to be taken, subject to the right of the Houses to obtain a decision from the Secretary of State as to whether the matter does affect

[1] ss. 24 & 53.
[2] They obviously are not compatible, but only in a crisis can the issue arise.
[3] Const. s. 58.
[4] 18 & 19 Vict. c. 55, sched. s. 36.
[5] Act No. 2 of 1855–6, s. 28.
[6] 5 & 6 Vict. c. 76; 13 & 14 Vict. c. 59, s. 12.
[7] 15 & 16 Vict. c. 72, s. 56.

a reserved subject. If a Bill is presented for assent he may also ask for amendment if it affects some reserved matter; if the Legislature will not amend, he shall submit to the Secretary, if required by the Ministry, for decision the question whether the law does affect any reserved matter. The power of suggesting amendments is unknown in Canada and Newfoundland, though it was allowed in the South African Colonies.

It is now established law that the existence of any Legislature is not determined by the demise of the Crown, a rule also observed as regards Executive appointments.[1] There is usually statutory authority for this rule; in the case of the Commonwealth in its absence it was decided in 1910 that the rule had no application to statutory bodies as opposed to bodies existing under the common law, in which case in the absence of statute the demise of the Crown might be held to terminate their existence, as in the case of New Brunswick in 1820 and 1830.[2]

The practice of conference between the Houses of Parliament, which in the United Kingdom is reduced to a mere form, and is not of practical importance—cases like the conferences of 1910 and 1914 being of a quite different kind—is in use in the Commonwealth, the Australian States, and New Zealand, but it has not been followed in Canada or Newfoundland. Thus in 1910 in Victoria the Electoral Act, No. 2288, was passed by the Houses as the outcome of a conference of delegates from either, who sat in public and arrived at a settlement. More usually conferences are secret, but they are real discussions, if free, and compromise is sought unless it is found that neither side is in a position to make any sacrifice of principle.

The quorum is settled in legislation and is usually about a third of the total number of members. Committees of ways and means and supply and for other purposes are used in imitation of the English practice, but with variations of detail. Proceedings are normally public, though in emergency secret sessions were held during the war, but such a result as that which can still be arrived at in the United Kingdom, when with no real desire of secrecy all strangers can be removed on the motion of a private member, would not be acceptable in the Dominions.

[1] See *Devine* v. *Holloway*, 14 Moo. P. C. 290; as to office, 1 Will. IV, c. 4; 1 Edw. VII, c. 5; Quick and Garran, *Const. of Commonwealth*, pp. 462–4.

[2] Hannay, *New Brunswick*, i. 445.

In the Irish Free State, private sessions can be held only in special emergency, with the assent of two-thirds of the members present. The proceedings normally are reported with great fullness in Parliamentary Debates, though in the Canadian provinces and in Tasmania this luxury is usually dispensed with, but not invariably, and Southern Rhodesia follows suit. In Malta, on the other hand, speeches are printed in the proceedings of either House.

It has, on the whole, not very often been necessary to resort to the drastic use of the closure: the number of members in most Houses is too limited to encourage endless rhetoric. Canada resisted the temptation to apply the closure even in 1896 when the Conservative Ministry was struggling to obtain supply ere Parliament expired through lapse of time;[1] in 1908[2] the Opposition in the Commons long delayed supply until the Government carried it through the physical exhaustion of the members, and in 1911[3] obstruction was so successful as to drive Sir W. Laurier to a dissolution without supply in order to obtain a mandate from the people. In 1913,[4] however, it was actually necessary to use the closure in order to carry in the Commons the third reading of the Naval Aid Bill, and in 1926 the debate on the address in reply had to be closured on 2 March, the debate having lasted from 11 January. The Speaker on occasion has exerted his reserve authority as was done on a famous occasion by Mr. Brand in the British House of Commons; the Speaker in New Zealand on 2 September 1881, and in the Cape on 24 March 1904 in respect of the Additional Representation Bill, and on 15–16 November 1909, exercised the right of putting a matter to the vote when it seemed impossible otherwise to conclude an interminable and inconclusive debate. But exercises of authority of this sort are not exactly popular,[5] and the Speaker's vagaries in New South Wales in 1911 brought a good deal of discredit both on his office and on a House which has justly a bad reputation for want of manners and

[1] Skelton, *Sir Wilfrid Laurier*, i. 479 f.

[2] *Canadian Annual Review*, 1908, pp. 47, 51, 53 f.

[3] Skelton, op. cit., ii. 369 ff.

[4] Keith, *Imperial Unity and the Dominions*, pp. 322 ff. For Sir W. Laurier's protest see Skelton, ii. 469-12.

[5] Rusden, *New Zealand*, iii. 384 f.; *The State of South Africa*, ii. 675.

dignity. The closure had also to be employed in 1910 in New Zealand.[1]

In a few cases such as those of the Commonwealth, New South Wales and South Australia, and since 1926 Malta, the excellent rule prevails that a Bill which has been carried so far in one session may be taken up again, at the point reached, in the next session. This is, of course, subject to the proviso that no general election or election of the Senate, in the case of the Commonwealth, or Council in that of South Australia, has taken place in the meanwhile, and, if the Bill has already gone though one of the Houses, its sanction is requisite to the measure being taken up by the other.

The adoption of time limits for speeches has never been popular in the Dominions, though it was adopted in Victoria in 1889 for motions for the adjournment of the House to discuss a matter of urgent public importance, when it was provided that the member raising the point could not speak for more than thirty minutes and any other member for fifteen, while two hours was the limit of the discussion. New South Wales and Queensland had by 1908 adopted analogous regulations, while Ontario gave only ten minutes, and Nova Scotia forbade more than an hour and a half of any one speech save by special permission of the Assembly. Queensland in 1910 adopted a somewhat elaborate system, allowing an hour and a half as a maximum to a mover, and thirty minutes to any one else. New Zealand has always been more elaborate, and the Commonwealth and the Union have been compelled to lay down restrictions, though not of a very drastic character, while leave to exceed the limit is not rarely accorded, if a speaker has anything to say.[2] Manitoba in 1924[3] accepted closure proposals.[4]

[1] Sir J. Ward, House of Representatives, 27 Sept. 1910.

[2] Much use was made in 1923 and 1925 of urgency procedure in the Commonwealth, under which drastic limits are fixed for each stage; thus the Bill to create peace officers was rushed through from 28–31 Aug. 1925, and the Bill to authorize deportation of industrial agitators was passed from 25 June to 17 July. This involves, of course, the use of the guillotine in both Houses. Cf. *Parl. Deb.*, 1925, p. 1281.

[3] *Canadian Annual Review*, 1924–5, pp. 393 f. Under the closure motion of 2 March 1926, in the Dominion House of Commons, twenty minutes were allowed to each speaker; ibid., 1925–6, p. 55.

[4] The details are too complex and too liable to change to be worth giving.

An extraordinary innovation was introduced in Queensland in 1922 in order to preserve the then precarious majority of the Government in the Assembly. It was provided that any member who was certified by two medical practitioners to be ill, and who informed the Speaker that he was unable to obtain a pair, might designate a member to vote for him by proxy. The measure was justly denounced by the Leader of the Opposition, and must remain a serious blot on Mr. Theodore's sense of justice and legislative propriety, giving force to the contention that Labour will stick at nothing to achieve its momentary ends. It could not even be said that the Act was absolutely essential, for the chief object of it appears to have been to relieve the necessity of the Speaker and Chairman of Committees having constantly to carry Governmental measures by a casting vote, doubtless an undesirable practice, but one far less offensive than resort to a right which even the House of Lords long ago recognized to be the reverse of democratic. It must, of course, be pleaded in excuse that in any case under the caucus system of Queensland the members of the Labour party vote as machines, and it might be less inconvenient if the votes were simply handed in automatically by the Labour Premier, thus saving much Parliamentary waste of time and cost of printing speeches which are not read.

The practice of permitting Ministers to speak in either House is convenient, and is recognized in the Union, Northern Ireland, and Malta; the Irish Free State expressly gives Ministers—necessarily members of the Dáil for normal purposes—the right to speak in the Senate. But it has not been adopted in the Commonwealth, Canada, or New Zealand.

It is an essential feature of all Parliaments that the members are required to take an oath of allegiance to the Crown as a condition of taking their seats. In the case of the Irish Free State the oath is primarily one of true faith and allegiance to

The old return, *Parl. Pap.*, H. C. 301, 1908, is now antiquated. Queensland has a simple system of day sittings, 10 a.m. on Tuesday, Wednesday, and Thursday, Government business having precedence save from 10 a.m. to 2 p.m. on Thursday. At 5.30 daily automatic adjournment applies; Standing Orders, 29 July 1926. The Victorian Council in 1926 decided to consider limiting speeches in Committee. The Queensland system of allotting a limited number (17) of days to supply and restricting speeches is held a success by Bernays, *Queensland Politics*, p. 177.

the Irish Free State Constitution, but also to the King, 'his heirs and successors by law, in virtue of the common citizenship of Ireland with Great Britain, and her adherence to and membership of the group of nations forming the British Commonwealth of Nations'. The oath notoriously has caused for years a deep division of opinion in Ireland, and deprived her of a strong Opposition, without, as far as can be seen, serving any useful purpose whatever, and the reference to the common citizenship is amusing in view of the fact that Ireland refuses to the average British subject her citizenship. But the practice of clinging to idle superstitions is ineradicable from the human mind, and it is curious that the Irish Republicans have not realized that Mr. Tielman Roos, who is a Minister of the King, regards that position perfectly compatible with working for the defection of the Union of South Africa from the Empire.

The drafting of public Bills is regularly provided for by creating special departments charged with this duty and often also with that of suggesting amendments and consolidations.[1]

Provision is regularly made for the special treatment of private Bills, a term defined by standing orders and covering local measures as well as private Bills in the narrower sense of that term.[2] Such Bills receive special treatment at the hands of a committee which may take evidence for and against the Bill, and provision is made to secure that due notice is given of the proposed Bill, and that those whose rights are affected are notified of the proposals, in order that they may take exception if desired. In the case of the Union of South Africa provision is made by Act No. 20 of 1912 for the use of select committees of the Provincial Councils in respect of private Bill legislation. The principles on which promoters and opposers are dealt with as to costs are in some cases stereotyped by legislation; thus

[1] See e. g. New Zealand Act No. 46 of 1920. Consolidations of the whole body of law are regularly made by Commissioners, as in Victoria in 1915; in Saskatchewan in 1920, in Alberta in 1922, in Canada in 1924 onwards; in British Columbia a new consolidation came into force in 1925.

[2] The Canadian Parliament is troubled with over a hundred Divorce Bills on occasion, the Roman Catholic hierarchy deterring the legislators from the common-sense plan of a Divorce Court for Ontario up to April, 1927, if not Quebec. In the Irish Free State the Lower House has decided to refuse to consider a Divorce Bill. In Northern Ireland there is no divorce law and Parliament alone can grant relief, which it also will not do.

in Southern Rhodesia by Act No. 11 of 1924 the opposing party is entitled, if two-thirds of the committee hold that he has been unreasonably put to expense in opposition, and either find that the preamble of the Bill is not proved, or that a clause should be inserted to safeguard his rights, or a provision omitted or amended, to be awarded costs as taxed by the Taxing Office, or an agreed sum by consent. On the other hand, vexatious opposition may be penalized on a similar majority by being required to pay costs, save that an owner of land or rights in land if he opposed *bona fide* and at his sole risk cannot be condemned in any case to pay costs.[1]

The tone and temper of Parliamentary proceedings in the Dominions are doubtless often inferior to the traditions of the House of Commons, though the generalization is much less true than it was at one time, when Colonial Legislatures still suffered more severely than the House of Commons from the convivial habits of members. There has, as in England, been a steady improvement in this regard, but party passion still runs unduly high, and the personal feuds engendered by local conditions are more bitter and expressed with greater virulence than at Westminster. The Commonwealth House of Representatives must, it may be feared, share with the Legislative Assembly of New South Wales the accusation of sinking lowest in the scale. In 1909 the House degenerated into a bear-garden, and the venerable Speaker on 22 July sank mortally ill amid a scene of strife following on a fourteen hours' sitting.[2]

[1] Private Bills are not subject to normal deadlock procedure, as in the Imperial Parliament.

[2] Turner, *First Decade of the Australian Commonwealth*, p. 230. For the invasion of the Queensland Parliament on 30 July 1918 see Bernays, *Queensland Politics*, p. 188.

VI

THE LOWER HOUSES

§ 1. *The Franchise*

THERE has been a decided tendency in the Dominions to create single-chamber Legislatures in place of the original bicameral system. In Ontario responsible government began under the Federal Act of 1867 with but one chamber, and British Columbia in 1871 entered the federation with one; Manitoba was given two when created in 1870, but rid herself of the second in 1876 (c. 28). New Brunswick, which had a chamber of twenty-three members, abolished it in 1891; Prince Edward Island merged it with the Assembly in a composite body in 1893 (c. 21), the result being led up to by the decision in 1862 to make it elective, and Saskatchewan and Alberta never had second chambers. In Australia the Legislative Council of Queensland was abolished in 1922, and New South Wales almost shared the same fate in 1926. The Dominion of Canada, the Commonwealth, and the Union include second chambers as part of their federal and quasi-federal systems, while Victoria, South Australia, Western Australia, and Tasmania have firmly entrenched elective Upper Houses. Conservative Quebec is little likely to disturb the peace of her nominee upper chamber, but in contrast Nova Scotia announced on 9 February 1926 the determination to terminate—a very hard task—the life of the Upper House as out of harmony with the spirit of the times. In the Union before the amalgamation each Colony had two Houses, but, though it was originally proposed to confer both on Southern Rhodesia, it was finally determined to allow the Colony to manage with one, with power to create another if need be, which hardly seems likely to arise. Two Houses were desired and accorded to Malta, and are enjoyed by Northern Ireland, where the second chamber is really unnecessary,[1] and the Irish Free State, where its powers are jealously limited.

[1] It was created because, under the proposed constitution of 1920, an Upper House was deemed essential to secure Protestant minorities in Southern Ireland, and the two parts had to be treated alike. And, having been created, abolition is out of the question, despite the change in the Irish Free State.

The Upper Houses are styled Senate in the two federations, the Union, Malta, Northern Ireland, and the Irish Free State; elsewhere it is named Legislative Council. The Lower House is normally styled Legislative Assembly, but House of Assembly in South Australia, Tasmania, Newfoundland, Nova Scotia, and the Union of South Africa ; House of Commons in Canada and Northern Ireland ; House of Representatives in the Commonwealth and New Zealand, and Chamber of Deputies (Dáil Eireann) in the Irish Free State. The legislative bodies of the Provinces of Canada are normally as well as legally styled Legislatures, a convenient distinction between them and the Dominion Parliament ; in other cases the term Parliament is used both in legal documents and in popular parlance ; in New Zealand, where General Assembly is the constitutional description, the style of M.P. was given by law to members of the Lower House. South Rhodesia, which was given merely the style of Legislature in the letters patent, as had been done for Malta, promptly proceeded to enact an Act defining the privileges of Parliament.

The rule of the franchise for the Lower House is that it is fixed very low, so as to give something approaching or attaining manhood—and normally also womanhood—suffrage. The main features are as follows :

(*a*) *North America*. Until 1885 the Dominion franchise was in each province that of the province ; in that year the Conservative Government enacted a measure creating, in their own interest according to their opponents, a special Dominion franchise, but the Liberal party repealed this in 1898.[1] There the matter rested until 1917, when in the stress of war conditions two important measures were enacted. The *Military Voters Act*, 1917, gave the franchise to all British subjects connected with Canada, whether resident there or not, male or female, adult or under twenty-one, white or Indian, actively engaged in war work. The *War-Time Elections Act*, 1917, gave the vote to wives, widows, mothers, daughters, of past or present members of the oversea forces, but disfranchised conscientious objectors, those excused active combatant service, and enemy aliens recently naturalized.[2] Finally, by the *Dominion Elections Act*,

[1] 61 Vict. c. 14.

[2] Cf. Keith, *War Government of the Dominions*, pp. 273 ff.

1920,[1] the franchise was given to every person, male or female, not being an Indian ordinarily resident in an Indian reservation, who is (A) a British subject by birth or naturalization; (B) of the full age of twenty-one years; (C) has ordinarily resided in Canada for at least twelve months, and in the electoral district wherein he seeks to vote for at least two months preceding the issue of the writ of election, provided (D) that any Indian who served in the naval, military, or air forces of Canada in the war shall be entitled to the franchise unless otherwise disqualified. Allegiance, however, is not to be deemed to be changed in the case of an alien-born by marriage or the naturalization of a parent, but only by personal naturalization, unless in cases where by operation of law a person is automatically naturalized, but otherwise would be eligible for personal naturalization, or where the person in question is born in the continent of North America. Disqualifications include Judges appointed by the Federal Government; the chief electoral officer; persons disfranchised for a period for corrupt and illegal practices or under the *Disfranchising Act*; prisoners and lunatics. Persons who by the laws of any province are disqualified from voting for a member of the Assembly of the province in respect of race shall not be qualified to vote in the province under the Act, with a saving for persons who served in Canadian forces in the war.

In the Provinces of Canada the franchise was from the first fairly liberal both in the Provinces of Canada, where it depended on the Imperial Act, 31 Geo. III, c. 31, and in the Maritime Provinces, where it depended on the Governor's commissions, by which it was only practicable to set up a freehold or other liberal franchise under the prerogative; thus in New Brunswick males of twenty-one years, and three months' residence, originally were qualified; this was restricted by a property franchise in 1791 in the days of reaction from democracy, but reduced materially in 1889.[2] Sir John Macdonald used to prefer a property franchise, owing to the illiteracy of considerable sections of the people, but with the growth of education this policy has been antiquated. The

[1] c. 46 (now consolidated).

[2] For Election Acts see Quebec, 1912, c. 10; 1924, c. 16; Manitoba, 1920, c. 33; 1922, c. 6; 1924, c. 15; British Columbia, 1920, c. 27; 1921, c. 17; New Brunswick, 1921, c. 4; Alberta, 1924, c. 34; Ontario, 1923, c. 3. In 1925 Prince Edward Island gave the vote to the wives of property-owners.

general rule, therefore, gives manhood suffrage, and to this womanhood suffrage has been added by the experience gained in war-time. The proposal had before then been rather contemptuously rejected by the Legislatures, but in 1915 it was accorded in principle in the western provinces and duly enacted in Manitoba, Alberta (c. 2), and Saskatchewan (c. 37) in 1916. British Columbia was compelled to follow suit (c. 23 of 1917), and Ontario (c. 5) also conceded it in 1917, with the result, as seen above, of the federation giving it widely in the same year, and in the following year taking the sensible step of according it by c. 30 to all women over twenty-one, suggestions of a higher age, thirty, or an educational qualification, being negatived. Nova Scotia accepted the new rule in the same year (c. 2) and New Brunswick in 1919 (c. 63), while Prince Edward Island conceded it in time to allow the women of the island to defeat the Government in the elections of 1923. Quebec remains adamant, holding with Professor Bluntschli that politics is the affair of men, and alleging that it is undesirable that French women should be contaminated by contact with the unsatisfactory tactics of electoral contests, a fact which does not, however, as unkind critics observe, prevent them bringing out every female voter in strength to vote Liberal in the federal elections, for which women have the vote; possibly the higher standard of purity of these elections explains the difference of treatment accorded.[1] Quebec also rejoices in a complex franchise which nearly comes to manhood suffrage, and, if common sense counted in politics, would be made so. Some property or income qualification lingers on in Nova Scotia, while Prince Edward Island[2] makes a distinction between two sets of electors, those who have a property qualification of $325, and others with a very low ownership, or occupation, or tax-paying qualification; the first class have two votes, since fifteen members of the Legislature are elected by them only, while all can vote for the other fifteen members, the distinction being a reflex of the old division between Councillors and Assemblymen when the two Houses were amalgamated in 1893.

As a rule, in the provinces, residence for a year there (or as in British Columbia six months) and for three months—or as in

[1] Up to 1926 one woman had been elected to succeed her husband in British Columbia and become a Minister; in Alberta also one; in Canada only one.

[2] See 1922, c. 4.

that case one month (or two in Alberta)—in an electoral district, is required. There are usually disqualifications in respect of Supreme Court and County Court Judges, persons disfranchised for corrupt practices, lunatics, idiots, prisoners, and paupers. North American Indians are excluded in New Brunswick, Saskatchewan, Alberta, and British Columbia, and, if in receipt within three years before of treaty money from the Crown, in Manitoba; in Ontario, Indians enfranchised under the Dominion legislation may vote, unenfranchised Indians normally not. Chinese were disfranchised in Saskatchewan in 1908 (c. 2), and British Columbia by its Act of 1920 (c. 27) excludes Orientals, including Chinese, Japanese, and British Indians, and deserters as defined in the Act. Manitoba imposed a disability on any person not born a British subject, who had not resided for seven years in Canada, and who was unable to read a selected portion of the Manitoba Act in English, French, German, or any Scandinavian language.

The principle adopted in the *British North America Act* for the number of members in the Federal Parliament is that Quebec shall have sixty-five members and the other provinces shall have a proportionate number, based on the relation of their population to that of Quebec at each decennial census from 1871 onwards. Single-member constituencies are the rule, and the older practice was for the Government of the day to prepare a list of constituencies and force it through the House, being naturally not oblivious of its own interests in its division of the country. Sir W. Laurier preferred, and Mr. Mackenzie King in 1924 followed, the wiser plan of referring the delimitation of constituencies to a committee representative of the parties, with instructions as to the principles to guide their work. These were, that county and municipal organization should serve as a general basis; that the unit of representation in urban constituencies should be larger than in rural constituencies; that, as between units of the same type, there should be as much equality as possible in respect of population; and finally, that compact areas should be chosen as far as possible. The unit for a member all over the provinces was given by the census of 1911 as 30,819; in 1921 it became 36,283. The net result[1] of the

[1] It was alleged that the Conservatives acquiesced in the unfair division of

investigations of the committee was the passing of the *Redistribution Act*, 1924 (c. 63), which gave the following membership: Ontario 82, Quebec 65, Nova Scotia 14, New Brunswick 11, Manitoba 17, British Columbia 14, Prince Edward Island 4, Saskatchewan 21, Alberta 16, and Yukon Territory 1. Prince Edward Island is secured her minimal representation by the Imperial Act of 1915,[1] which provides that no province shall have fewer members of the Commons than Senators, and the Yukon's member is authorized by the power of Canada[2] to legislate for any part of its territory not included in a province; the electorate is very small, the population of 1921 being only 4,157, but representation is justified by the remoteness of the area. The total thus reached 245 members, an increase of 10 over the previous redistribution, the gains falling to Saskatchewan (5), Alberta (4), British Columbia (1), and Manitoba (2), while Nova Scotia lost 2, a sign of the steady transfer of political power towards the West. The constituencies were defined in s. 3 of the Act itself.

The number of members in the provincial Legislatures is modest enough, and has only slowly been increased with the growth of population. Ontario has 112 since 1925, with single-member constituencies; Quebec, which had 81, in 1922 increased the number by adding 5 but amalgamating 2, giving 85 single-member divisions; Nova Scotia has 43 seats, 5 in one constituency, 4 in another, 3 each in two, and 2 each in fourteen; New Brunswick[3] has 48, 6 each in four constituencies, 3 each in three, 2 each in seven, and 1 in one; Manitoba in 1920 increased the number from 48 to 55, giving Winnipeg 10 to allow of proportional representation; British Columbia has 47, 6 in Vancouver, 4 in Victoria, the rest being single-member constituencies; Saskatchewan has 63, 2 each in three constituencies, the rest having 1 apiece; Alberta[4] with 61 gives Edmonton and Calgary 5 each, and Medicine Hat 2, the rest are single

constituencies in return for dropping the alternative vote, which, in view of the competition with the Progressives, would have helped the Liberals greatly.

[1] 5 & 6 Geo. V, c. 45.

[2] 34 & 35 Vict. c. 28, and 49 & 50 Vict. c. 35 cover the power to give representation to new provinces and to territories.

[3] 1912, c. 5. For Ontario Acts of 1925–6 see *Canadian Annual Review*, 1925–6, pp. 339 ff.

[4] By 1913, c. 2, the number was made 56.

membered, and, as noted, Prince Edward Island has two sets of fifteen, each division having a Councillor and an Assemblyman.

In Newfoundland the franchise under the letters patent granting representative government was extremely democratic, and it was only restricted by the Imperial Act of 1842, which temporarily reunited the Houses, by imposing a residential qualification of two years to confine votes to the permanent population. The present franchise is regulated by s. 2 of the *House of Assembly Amendment Act*, 1925, which confers the franchise on every male and female British subject of the full age of twenty-one and twenty-five respectively, of sound understanding, resident in the Colony for two years preceding the day of election, in the district within which he or she is an actual and *bona fide* resident at the time of the preparation of the electoral list, to the exclusion of temporary residents who have permanent homes in other parts of the Colony. The grant of female suffrage was rather reluctantly conceded, after it had become normal in the English-speaking provinces of Canada. The *Redistribution Act*, 1925, created thirty-seven constituencies each with a single member save Harbour Main, St. John's City (East) and (West), which were each given two members, replacing a more complex distribution. Labrador was given no representation, as its boundaries were still in dispute with Canada.

(*b*) *Australia*. The franchise for the Commonwealth is laid down in the *Commonwealth Electoral Act*, 1918–22, as follows:

All persons not under twenty-one, male or female, married or unmarried, natural born or naturalized British subjects, who have lived continuously in Australia for six months must be enrolled, and, under the Amending Act of 1924, must vote once at each Senate or House of Representatives election, unless disqualified. The disqualifications are unsoundness of mind; conviction of treason; and conviction and sentence for any offence punishable in any part of the King's dominions with imprisonment for a year or more; or being an aboriginal native of Australia, Asia, Africa, or the islands of the Pacific (except New Zealand), unless entitled under s. 41 of the Constitution which gives the Commonwealth franchise to any person entitled to vote for the Lower House of a State.[1] By an Act, No. 20 of 1925, the disqualification is removed as regards His Majesty's British Indian subjects.

[1] *Muramats* v. *Commonwealth Electoral Officer* (*Western Australia*) (1923), 32 C. L. R. 500.

The number of members is seventy-five for the States, on a population basis, redistributions being made periodically on the ground of suggestions submitted by commissions appointed for the purpose of preparing schemes; New South Wales has thus 28, Victoria 20, Queensland 10, South Australia 7, Western Australia and Tasmania 5 apiece, while the Northern Territory is represented by a single member without voting power. The quorum is a third.

In New South Wales [1] the franchise is possessed by all persons aged twenty-one, natural born or naturalized British subjects, who have resided for six months in the Commonwealth and three in the State—if naturalized, both periods after naturalization—and one month in district of registration prior to date of application. Disqualifications are unsoundness of mind, receipt of poor relief (until 1926), being in prison, or conviction of certain offences including aggravated wife assault, or having a maintenance order outstanding against him. The number of seats, at one time as high as 141, was reduced in 1902 to 125, and is now 90, formerly 9 constituencies returning five and 15 three members, for which single-member constituencies were replaced in 1926. The quorum is twenty, and female suffrage was accorded in 1902. In 1858 manhood suffrage was granted, in 1893 all plural voting and property qualifications for non-residents disappeared.

In Victoria [2] manhood suffrage was accorded in 1858, plural voting dropped by Act No. 1606 in 1899, and female suffrage was conceded by an Act of 1908. The franchise was simplified in 1910 by Act No. 2288, which gave it to any natural born or naturalized British subject resident in the State for six months and in any district for one month preceding any electoral canvass or application for enrolment. By Act No. 3331, passed in 1923, arrangements were made to assimilate federal and Victorian electorates and electoral rolls, in order to combine the administration in one system. This involved the provision of disqualifications only for conviction for treason, service of imprisonment for any term longer than a year, and unsoundness of mind, in lieu of a rather muddled list under the Act of 1910.

[1] See Acts No. 33 of 1902; No. 1 of 1903 (female suffrage); No. 41 of 1906; No. 18 of 1910; *Parliamentary Elections and Electorates (Amendment) Act*, 1926.

[2] See Act No. 3331 (1923).

There were sixty-five divisions to be redistributed in 1927, each returning one member, and a quorum of twenty.

In Queensland[1] the franchise was extended in 1905 to females, and plural voting was abolished. It is granted on the same conditions as in New South Wales, and disqualifications are unsoundness of mind; attainder for treason or conviction, and sentence or liability to sentence for any offence punishable in any part of the British Dominions with imprisonment; and being an aboriginal native of Australia, Asia, Africa, or the islands of the Pacific. The number of constituencies is seventy-two, each with one member; the quorum sixteen. Compulsory voting was introduced in 1914.

In South Australia manhood suffrage dates from 1856, womanhood by Act No. 613 from 1894, being first conceded in Australia by this territory. The *Electoral Code*, 1908, No. 971, fixed the qualification for the franchise at age 21, being a natural born or naturalized subject, and residence in the State for six months before registration. In 1920 arrangements were made by Act No. 1446 to use the Commonwealth roll for State purposes. The disqualifications are, as usual, unsoundness of mind, attainder for treason and conviction for and sentence for or liability to sentence for any offence punishable in any part of the British Dominions with imprisonment for one year or longer. There are forty-six members, eight districts returning three members each and eleven two apiece; the quorum is fifteen inclusive of the Speaker, who usually is not counted in a quorum. There is no plural voting.

In Western Australia female suffrage was conceded in 1899[2] as an effort to strengthen the party in power. The franchise as simplified by Acts No. 27 of 1907 and No. 44 of 1911 gave the vote to any person of twenty-one years, a natural born or naturalized subject, resident for six months in the State and one month in the district prior to the claim to be enrolled.

[1] Electoral Acts, 1885-1905; 8 Edw. VII, No. 5; female suffrage was given by 5 Edw. VII, No. 1; see now 1915, No. 13; Bernays, *Queensland Politics*, pp. 283 ff. The inmates of charitable institutions may vote since 1915, but for their original districts.

[2] 63 Vict. No. 19, s. 26; Act No. 27 of 1907; No. 44 of 1911; *Parl. Deb.*, 1910–11, pp. 3192 ff. The voting on a property qualification of aborigines or half-castes of African, Australasian, or Asiatic origin disappeared with the qualification in 1907.

Disqualifications are as in South Australia, with the addition of complete dependence on State relief except as a hospital patient, and being an aboriginal native of Australia, Asia, Africa, or the islands of the Pacific, efforts in 1911 to exempt Maoris failing, or half-castes. There are fifty constituencies, each with one member; the quorum is a third.

In Tasmania female suffrage was conceded in 1903. The franchise is given to any persons, aged twenty-one, natural born or naturalized, resident twelve months in the State. The disqualifications by Act No. 16 of 1922 [1] are reduced to being of unsound mind or in prison under any conviction. The number of members is thirty, there being five districts with six members each; the quorum is twelve, including the Speaker.

(*c*) *New Zealand.* In New Zealand manhood suffrage was attained in 1879, women accorded the vote in 1893, plural voting ended in 1889, and all property qualifications removed in 1896. The franchise [2] extends to all persons of twenty-one, natural born or naturalized, who have resided for one year in New Zealand, and for one month before registration, in the district. Half-castes are eligible thus to be enrolled, while Maoris are enrolled separately to vote for Maori representatives, four in number. Disqualifications are unsoundness of mind; conviction for an offence punishable by death or imprisonment for a year or upwards in any part of the British Dominions; or conviction in New Zealand as a public defaulter, or under the *Police Offences Act*, 1908, as an idle and disorderly person or as a rogue and vagabond, unless he has undergone the sentence or received a free pardon. The number of members, originally forty, was raised to seventy-six in 1900, one for each constituency, forty-six in the North Island, thirty in the South; the Maori representation was granted by an Act of 1867, and there are three constituencies in the North, one in the South.

(*d*) *South Africa.* The franchise of the Union is under the constitution, until altered by the Parliament, that of the old

[1] For the older Acts see 64 Vict. No. 5; 3 Edw. VII, No. 13; 7 Edw. VII, No. 7.

[2] *Cons. Stat.* 1908, No. 101, s. 35; No. 33 of 1914, which provides facilities for enrolling seamen, commercial travellers, and members of the theatrical profession, allows voting by persons whose names are struck off in error, and applies to Maoris the rules as to Europeans.

provinces, and the power of change by Parliament is limited by the rule that any alteration which would on ground of race or colour only disqualify any person who under the law of the Cape would be entitled to be registered as a voter, must be passed by the two Houses of Parliament in joint session, and on the third reading with a majority composed of not less than two-thirds of the total members of both Houses, while under the royal instructions the Governor-General would be obliged to reserve the Bill, in accordance with a pledge given when the Act was passed through the Imperial Parliament. The difficulty of legislating prevented action to modify seriously the franchise until 1925 and 1926, when new proposals were brought forward with a view to possible action in 1927.

The Cape franchise was accorded to all persons aged twenty-one, able to write their names, addresses, and occupations, being natural born or naturalized subjects. A voter must also have occupied property worth £75 for twelve months in the district in which he sought registration, or have resided for three months and been in receipt of not less than £50 a year wages. Act No. 14 of 1887 excluded persons whose only claim as property owners rested on occupation under tribal tenure. Lunacy, conviction for murder, treason, and certain other offences disqualified.[1] In Natal[2] the conditions were similar, but lunacy was not a disqualification, and no educational test was imposed; a voter must own immovable property worth £50 or rent such property worth £10 in the constituency, or have resided three years, and have income of at least £8 monthly. Natives were originally admitted as in the Cape without a colour bar, but restrictions were steadily imposed under a narrow jealousy, so that by 1909 the conditions for a native or coloured person to obtain a vote were practically insuperable; he must have resided twelve years, been exempted from native law for seven, be recommended by three European electors, and have received a certificate from the Governor entitling him to registration. Indians were excluded by an Act of 1896, aimed at persons, natives of, or descendants of natives of, countries which had

[1] Acts No. 9 of 1892; No. 19 of 1898; No. 48 of 1899; No. 5 of 1902; No. 6 of 1908. There were in the Cape Assembly 107 members for 46 divisions.

[2] Natal Charter, 15 July, 1856, ss. 11, 12; Law No. 11 of 1865, No. 2 of 1883; Act No. 8 of 1896. The Assembly had 43 members for 17 divisions.

not enjoyed representative elective institutions based on the Parliamentary franchise, unless individually exempted by the Governor in Council. Of these two classes a very few received exemption and the franchise. In the Transvaal[1] and the Orange River Colony[2] the franchise was rigidly confined to white persons, six months' residence being requisite; members of the Imperial forces, persons in receipt of poor relief, or convicted of offences punishable by imprisonment without option of fine, were disqualified, but not lunatics. The prohibition of registration if on full pay from the Imperial Crown was enacted for the whole of the Union in the constitution. This clause had to be relaxed by Act No. 12 of 1918 in order to remove the disability in respect of those South Africans who served in His Majesty's forces in the war. The same Act abolished the possibility of a plural vote in Natal—it had been forbidden in the other provinces, but allowed periods of residence to be made up by residence in other parts of the territory. Female suffrage, though it gradually won support from an increasing number of voters on both sides of politics, was nevertheless delayed or defeated down to 1926. The franchise for the provinces is as for the Union.

The number of members for single-member constituencies is: Cape 51, Transvaal 50,[3] and 17 each for the Orange River Colony and Natal.

In Southern Rhodesia the franchise was conferred by Ordinance No. 14 of 1912 on males of twenty-one, natural born or naturalized British subjects, who for a period of six months had been in occupation of a building, with or without land, of the value of £150 as regards his share of it; or was the registered owner of a reef, alluvial, coal or precious stones claim in the area; or was in *bona fide* receipt of at least £100 a year wages. If land were held under communal tenure, including all land held in a native reserve, it was not to count for the franchise unless the holder actually occupied a building, whether or not situated on such land, which together with land not held on communal tenure

[1] Letters patent, 6 Dec. 1906, ss. 9, 10. There were 69 members, each for one division.

[2] Letters patent, 5 June 1907, ss. 9, 10. There were 38 (after 1908 39) members, each for one division.

[3] At first 36, but raised by growth of population.

was of the value of £150. But to complete the exclusion of natives as a whole it was also provided that the applicant must be able to fill up the form of application in his own handwriting, and, if called upon to do so, to write fifty words in English to dictation. Further disqualifications were unsoundness of mind, and conviction within five years and sentence to hard labour without the option of a fine, or any greater punishment, if no free pardon has been granted. Moreover, an oath of intention to reside permanently in Southern Rhodesia, and of allegiance, was exacted. Ordinance No. 9 of 1919 extended the franchise to women on the same terms as to men, but allowed each married woman, not married under a system of polygamy, to be deemed to possess the occupation or wages qualification of her husband. These rules were continued by the letters patent pending fresh legislation. The number of constituencies fixed by the Governor under the letters patent was fifteen, two for each; the quorum is ten.

(*e*) *Malta*. The letters patent of 14 April 1921 for Malta[1] give the franchise to all male British subjects who are able to read and write; or are in receipt of income from immovable property or other capital, of a clear income of not less than £5; or pay rent to that amount, and have done so for six months. Members of the Imperial forces without Maltese domicile are disqualified, as are persons convicted of certain crimes; or declared incapable to exercise civil rights under Maltese law; or insane; or in receipt within three years of poor relief. There are thirty-two members, who for the first election were elected by eight districts, four members in each. The quorum is sixteen.

(*f*) *Ireland*. In Northern Ireland the *Government of Ireland Act*, 1920, provided for the maintenance of the Imperial franchise as laid down in the *Representation of the People Act*, 1918, which is in effect manhood suffrage with a more restricted suffrage for females not under thirty years of age; a man has, beside a franchise based on a university degree or on six months' residence, one based on occupation of business premises, and may vote twice at a general election; a woman must be qualified as a Local Government voter or as the wife of one, or as having a degree, and also may vote twice. Disqualifications are

[1] See also Act No. 14 of 1924, s. 9, which continues the system of districts and proportional representation by the transferable vote (Sched. VII).

lunacy; conviction for treason or felony unless the sentence has been served or a pardon granted; employment for electoral purposes, or conviction for corrupt practices. Four boroughs were given four members each, six counties in all thirty-two, and the university four, making up fifty-two. But authority was given to the Parliament to alter the franchise.

The Irish Free State Constitution provides a definite set of principles regarding the Legislature. All citizens of the Irish Free State, i. e. persons domiciled in its area when the constitution took effect, being born in Ireland or one of whose parents was born there or resident seven years there, are entitled to the franchise on reaching twenty-one.[1] Parliament consists as regards the Chamber of a number of members determined by law—at present 153 for thirty constituencies of from three to nine members—but limited by the rule that there must not be less than one per 30,000 population or more than one per 20,000, and the number of members in each constituency is to be made as equal as possible to its proportionate population; redistribution every ten years is contemplated, to take effect from the beginning of the next Parliament.

2. *The Members*

The qualification of members of the Lower Houses is normally that of electors, but on public grounds certain electors are debarred from election. The grounds are largely the same for both Lower and Upper Houses.

(*a*) *North America.* In the Dominion no Senator or member of a provincial Legislature can be a member of the House of Commons, though there is nothing to prevent a Legislative Councillor of Quebec being a Senator. Others disqualified are persons convicted of corrupt and illegal practices at elections; Government contractors, with certain exceptions for shareholders in companies (not being contractors for public works), and persons on whom contracts devolve by law, contractors for loans to the Governments, &c.; persons holding employment in the service of the Government, and public officers, with exceptions for Ministers of the Crown; and members of the forces on full pay. In the provinces there are similar rules: members of

[1] See also the *Electoral Act*, No. 12 of 1923; the receipt of poor relief is not a barrier (s. 4). Members of the police force are disqualified (s. 5).

other Legislatures or of the Federal Parliament are excluded; persons convicted of corrupt practices at elections; public servants, Dominion or provincial, though in British Columbia Judges were accorded the franchise against Canadian practice; and Government contractors other than shareholders in companies, not being companies undertaking governmental work contracts. Seats are vacated under similar conditions, and a member may resign either by a declaration of intention in the House, or by notice to the Speaker, or, if there be no Speaker, to two members. Re-election is required on acceptance of ministerial office,[1] but not on change of office, nor on acceptance of a second office, nor on resignation and acceptance of office again within a month, unless a new Government has been formed and the new Ministers have actually occupied the offices.[2]

In Newfoundland under an Act of 1925 (c. 7) a member must have a net annual income of 480 dollars or the possession of property exceeding 2,400 dollars clear of all encumbrances. Moreover, the member must be actually domiciled in the Colony at the time of nomination, and never have been convicted of any infamous crime. Other disqualifications are holding office under the Government or being a contractor for the Government; resignation is required on the occurrence of any disqualification or on bankruptcy. The rule as to re-election was laid down as in Canada with an interval of six months as the period within which re-acceptance of office is possible.

(*b*) *Australia*. In the Commonwealth [3] a member must be an elector or qualified as an elector, or resident for a month in the territory for the seat of Government, three years resident in

[1] The conditions are laid down in the *Revised Statutes* of the Dominion and provinces. Women were first made eligible in Saskatchewan and Alberta; for British Columbia, 1920, c. 17. An Ontario Act of 1926 relieves a Minister appointed within three months of a general election from the necessity of re-election. For the disgraceful evasion of the rule in Canada in July 1926 by the device of appointing Acting Ministers see above, pp. 148 f.

[2] For the discreditable use of the provisions of the old Canadian Act, 20 Vict. c. 22, by J. Macdonald in 1858, see Morison, *British Supremacy*, pp. 318 f. As in 1926 the Governor-General of the day must share blame for the violation of the constitution.

[3] Act No. 27 of 1918; No. 31 of 1919; No. 14 of 1921; No. 14 of 1922; No. 10 of 1924; No. 20 of 1925.

the Commonwealth, and if naturalized at least five years naturalized, under a law of the United Kingdom or the Commonwealth. Senators are disqualified, and persons who are citizens or subjects of any foreign Power; persons attainted of treason or sentenced to, or liable to sentence for, an offence punishable under the law of the Commonwealth or State with imprisonment for one year or longer; undischarged bankrupts; holders of office (not being Ministers of the Crown in the Commonwealth or the States; members of the Imperial forces, and members of the Commonwealth forces not wholly engaged in these services); and pensioners payable at pleasure, and persons with pecuniary interests in contracts with the public service except as members of companies of not less than twenty-five members. It is also forbidden to nominate any person who is or within fourteen days has been a member of a State Parliament; it was sought, in order to obviate this exclusion, to legislate in the states to allow of any person who resigned his seat in order to accept nomination for the Commonwealth Parliament to be re-elected without a contest, but these ingenious devices were defeated by the Commonwealth by Act No. 14 of 1921, which disqualified any person who had resigned from a State Parliament, and had the right, if not elected to the Commonwealth Parliament, to recover his seat by re-election without a poll. The states recognized their discomfiture and repealed their Acts.[1] A seat is vacated by failure to attend for any two successive months without permission, becoming subject to any of the disqualifications or becoming bankrupt, and by taking or agreeing to take a fee for any services to the Commonwealth or rendered in Parliament to any person or state. The High Court has ruled that no such fees can be recovered.

In New South Wales[2] the qualification is that of an elector. Disqualifications include membership of the Legislative Council; Government employment save as a Minister or military or naval officer; and a Government contract, save as member of an incorporated or trading company of not less than twenty members. Disqualifications causing the vacating of a seat are failure to attend for a session without leave; becoming the subject of

[1] South Australia Nos. 1499, 1549; Victoria Nos. 3119, 3188; Western Australia No. 7 of 1921; Tasmania No. 65 of 1917; Queensland No. 31 of 1921.

[2] Act No. 32 of 1902; No. 41 of 1906.

a foreign Power; or bankrupt or a public defaulter; or conviction for felony or infamous crime; becoming a public officer save as a Minister or naval or military officer; and entering into a contract with the Government save as member of a company. Re-election of Ministers disappeared under Act No. 41 of 1906.

In Victoria [1] a member if naturalized must have been so for five years, and residence in Victoria for two years is requisite. Disqualifications include membership of the Commonwealth Parliament or the Legislative Council; Judges holding office during good behaviour; being a minister of religion; or convicted of felony or infamous crime; holding office under the Crown, except as a Minister; or being concerned in any Crown contract save as a member of a company of over twenty persons. A seat is vacated by being elected a member of the Commonwealth Parliament; failing to attend for a session without leave; becoming the subject of a foreign Power; becoming a bankrupt; being convicted of felony or any infamous crime; becoming insane; becoming a public defaulter; participating in a Crown contract; accepting an office of profit under the Crown except as Minister, Speaker, Chairman of Committee, or member of the Railway Committee. By Act No. 3337 of 1923 women were declared eligible. Re-election of Ministers was ended by No. 2578 of 1914.

In Queensland [2] any elector is qualified to be a member. Disqualifications are being a minister of religion; holding an office of profit under the Crown except as Minister or military or naval officer; being an uncertificated insolvent; or holding a contract with the Crown, except as a member of a company of not less than twenty members. Seats are vacated under the same conditions as in New South Wales.

In South Australia [3] an elector or person qualified to be an elector may be a member. Disqualifications are being a member of the Commonwealth Parliament, and holding a contract under the Crown. A seat is vacated by being elected a member of the

[1] 18 & 19 Vict. c. 55; Act No. 1075 as amended; No. 2632.

[2] 31 Vict. No. 21; 60 Vict. No. 3, simplified by No. 29 of 1913; No. 13 of 1915. Re-election disappeared in 1884 (No. 29), women became eligible in 1915.

[3] Act No. 2 of 1855–6; Nos. 731, 790, 959, 1148. For the general enfranchisement of women see No. 1456.

Commonwealth Parliament; failing to attend for one month without leave; becoming a subject of a foreign state; becoming bankrupt, or a public defaulter; being convicted of felony or any infamous crime; becoming insane; accepting an office of profit, except ministerial office; or becoming a contractor.

In Western Australia [1] a naturalized subject must have been naturalized for five years; in any case two years' residence is requisite. Disqualifications are membership of the Commonwealth Parliament or the Legislative Council; being a Judge or Sheriff; a clergyman; an undischarged bankrupt; convicted of treason or felony; and holding a contract for the public service, except as a member of a company of not less than twenty members. A seat is vacated by being elected a member of the Commonwealth Parliament; failure to attend for two months without leave; becoming the subject of a foreign state; becoming insane; or accepting an office of profit other than ministerial office.

In Tasmania [2] a naturalized subject must have been so naturalized for five years, and two years' residence is required. Disqualifications include membership of the Commonwealth Parliament; being a Judge; holding office by appointment under the Crown save ministerial office; insanity; or being in prison under any conviction; or holding a contract for the public service, unless as member of a company of over six persons. A seat is vacated by election to the Commonwealth Parliament; failing to attend for a session without leave; becoming the subject of a foreign Power; becoming insane, or being imprisoned for crime; becoming a bankrupt or public defaulter; accepting office save as Minister; and becoming a contractor with the Crown.

A member in any State may resign by letter addressed to the Speaker; or, if there be none, to the Governor.

(*c*) *New Zealand.* In New Zealand an elector is eligible for membership.[3] Disqualifications include undischarged bankrupts; members of the Legislative Council; civil servants; and contractors. The term civil servant excludes Ministers, the Speaker

[1] 63 Vict. No. 19; 64 Vict. No. 5. Women were made eligible by No. 7 of 1920, one being elected, the first in Australia, in 1921. See also No. 56 of 1923.

[2] 18 Vict No. 17; 64 Vict. No. 5. See also No. 57 of 1921.

[3] *Cons. Stat.* 1908, No. 101, s. 24. Women became eligible by Act No. 16 of 1919.

and Chairman of Committees, military and naval officers other than members of the permanent local forces, members of University governing bodies, and of Royal Commissions. A contract does not cover the case of a member of an incorporated company; it applies only if, under a contract for the public service, the person concerned receives above £50 a year. Persons on whom contracts devolve by operation of law are not affected for a year, and contracts for the sale of land for public purposes, for loans and for advertising, after public tenders have been called for, are not affected. A seat is vacated by failure to attend for a session without leave; becoming the subject of a foreign state; becoming a bankrupt or public defaulter; being convicted of a crime punishable by imprisonment with hard labour for two years or more; becoming a lunatic; contractor; or public servant; or by resignation addressed to the Speaker, or in his absence to the Governor-General.

(*d*) *South Africa*. The qualifications provided in the case of the Colonial Parliaments no longer apply to the Union. Under the *South Africa Act*, 1909,[1] a member must be qualified as an elector; have resided for five years in the Union; and be a British subject of European descent, thus negating the old theoretic right of natives in the Cape to be elected members of the Cape Legislature; for the provincial councils on the other hand any person qualified as an elector may be a member, and thus a native could be elected to the Council of the Cape. By s. 53 no person is eligible for election who has been convicted and sentenced to imprisonment without the option of a fine for twelve months, unless he has been pardoned or the sentence has expired five years before the date of election; or is an unrehabilitated insolvent; or is of unsound mind; or holds office of profit under the Crown (except office as Minister, or a pensioner, or naval or military officer not on full pay). A seat is vacated by the occurrence of any of these disabilities; loss of qualification; or failure to attend for a session without leave. Membership of the two Houses mutually excludes.

In Southern Rhodesia the letters patent[2] left the old rules as to eligibility for election undisturbed until changed, but provided for vacating of seats on absence, save through illness, without leave for a month; having an interest in a Government

[1] 9 Edw. VII, c. 9, ss. 44, 53, 54.

[2] 1 Sept. 1923, s. 22.

contract except as a member of a company of at least twenty-five members; becoming the subject of a foreign state; becoming insolvent; being convicted and sentenced to imprisonment without option of a fine for not less than twelve months; becoming insane; and becoming a holder of office under the Crown except as a Minister or naval or military officer on half-pay. Resignation is to be intimated to the Speaker, no provision being made for a vacancy in the office as in the Union, where the Governor-General is then the recipient, and a resignation requires the leave of the Assembly, if there are pending proceedings regarding the validity of the election or questions affecting the member's conduct in the Assembly.

(*e*) *Malta.* In Malta [1] an elector is normally qualified as a member. Disqualifications include conviction and punishment for crime, unless a free pardon has been granted; being an uncertificated bankrupt; having within three years before the election received charitable relief; being of unsound mind or interdicted for prodigality; and holding offices of profit under the Crown, excluding as usual pensioners and naval, military, or air officers on half-pay, and University Professors holding part-time appointments. Officers connected with framing or revising voters' lists are disqualified from election for the division where such a list is in force. A seat is vacated by absence, save through illness, for two months without leave; by being for a month a party to any Government contract; by becoming the subject of a foreign Power; or becoming subject to any of the disqualifications above. A member of either House, on being elected to the other, vacates his seat. Resignation is permitted, but subject to the same conditions as in Southern Rhodesia. There is nothing to prevent membership of the Imperial House of Commons and the Assembly simultaneously, as in the case of Sir G. Strickland in 1924–7.

(*f*) *Ireland.* In Northern Ireland [2] the rules applicable in the United Kingdom are generally in force; thus an elector is normally qualified; but disqualifications include lunacy; conviction for treason, or felony, or corrupt practices; being a Government contractor; receiving a pension other than a civil list or service pension; or holding office under the Crown,

[1] Letters patent, 14 Apr. 1921, ss. 31, 32.
[2] 10 & 11 Geo. V, c. 67, s. 18.

except ministerial office, for which re-election is not necessary. Peerage is no bar to election, and on the other hand membership of the Senate is such a bar. Bankruptcy is a bar, and emergent bankruptcy vacates a seat in six months, and ministers of religion remained disqualified under the Act of 1920. Resignation is permitted.

In the Irish Free State the constitution [1] provides that any citizen who has attained the age of twenty-one shall be eligible for election unless placed under disability by the constitution or by law. Members of either House may stand, but if elected are to be deemed to have vacated their seats in the other House. Disqualifications [2] are imprisonment; unsoundness of mind; bankruptcy; conviction of corrupt practices; and membership of the defence or police forces, or, unless permitted by the terms of appointment, of the Civil Service. Seats are vacated on resignation or incurring a disqualification. The Judges and the Comptroller and Auditor-General may not become members of Parliament.

§ 3. *The Duration of Parliament*

In Canada the Dominion House of Commons has a maximum duration of five years. Ontario and Quebec were given the same duration, four years, by the *British North America Act*; but, while Ontario has remained faithful, save for an extension of two months in 1901, Quebec adopted five years in 1881.[3] Nova Scotia in 1897 adopted the same period. New Brunswick started with seven years in 1795, reduced it in 1842 to four years, and since 1900 to five years two months. Prince Edward Island still keeps four years, but Manitoba, British Columbia, Saskatchewan, and Alberta [4] prefer the longer period. The Newfoundland House of Assembly lasts for four years.

In the Commonwealth the constitution by s. 28 gives the House of Representatives three years. This period was assumed by South Australia from the first; [5] in New South Wales the original five years disappeared in 1874, in Queensland in 1890; in Victoria three years was adopted by Act No. 89, in Tasmania

[1] Const. ss. 15, 16. [2] *Electoral Act*, No. 12 of 1923, ss. 51, 52.

[3] *Rev. Stat.*, 1909, s. 115.

[4] The period was originally four years in the new provinces, but see Alberta, 1909, c. 2; Saskatchewan, 1908, c. 4; repeated in the *Revised Statutes*; British Columbia, 1913, c. 11. [5] Act No. 2 of 1855–6, s. 3.

by 54 Vict. c. 58; while the original four years of the constitution in Western Australia was reduced to three years by 63 Vict. No. 19, s. 21, and by Act No. 48 of 1919 it was arranged that the Assembly should always terminate on 31 January, thus giving a duration somewhat longer or shorter than three years. In New Zealand the five years of the constitution was reduced to three by an Act of 1879.

The Union of South Africa adopts the period of five years, which was accepted in the old Colonies other than Natal, which had four. Southern Rhodesia [1] has also the period of five years. In Malta [2] the Assembly may last three years only. In Northern Ireland the period is five, and in the Irish Free State four years.[3]

In all cases the rule is that twelve months may not intervene between the last session of one and the first of a new Parliament. The date whence the period runs was at one time canvassed in Canada, where it would have made a considerable difference in the difficult position of the Conservative Government in 1896 if the 'day of the return of the writs' mentioned in the constitution had been interpreted as the actual date of the return of the latest writ; but it was decided to adhere to the view that the day of the return meant the day fixed for the return, which is sometimes specifically mentioned in the Acts; in other cases the first day of the meeting of the Parliament being the period indicated as the starting-point.[4]

§ 4. *Payment of Members*

The rule of payment of members of Parliament is regularly observed, and under stress of recent conditions the payments, often unduly modest, have frequently been made much too high for the value of the services rendered. This tends, of course, to encourage the hack politician whose chief aim is to keep his seat, and it serves in Australia as an important source of strength to the Labour party, which is represented in the

[1] Letters patent, s. 18. [2] Ibid., s. 18.

[3] Six for future Dáils under a constitutional change announced 16 Nov. 1926; Act No. 5 of 1927; this may be diminished by law.

[4] For Ontario see 42 Vict. c. 4, s. 3; Act 1908, c. 5, s. 4. In Quebec, e. g. in 1923, there was no actual legislation passed; the second session (13 Geo. V) ended 29 Dec. 1922, and was followed on 17 Dec. 1923 by a meeting of a new Legislature, which adjourned on 21 Dec. to 8 Jan. 1924.

Parliaments by men who earn a comfortable living from their services and are completely subservient to the caucus.

In Canada the rate of pay was raised to 4,000 dollars in 1920,[1] not without protests against the adoption of the new rate without prior consultation with the electors. Australia, however, began with a modest £400, then in 1907 increased the amount to £600 without consulting the people, and in 1920 brought it similarly up to £1,000.[2] New Zealand[3] increased the modest £300 in the same year to £500, with £350 for the Legislative Council, but in 1922 it retrenched both salaries by ten per cent. The State of New South Wales,[4] content with £300 in 1906, increased the sum first to £500, and to £875 in 1925, leaving, however, its doomed Legislative Councillors unpaid. Victoria, which used to pay nothing to its Councillors and £300 to the Lower House, has increased the latter sum to £500, as now in Queensland, and given £200 to the former;[5] South Australia has brought up its salaries from £200 to £400,[6] Western Australia gives the same sum, and Tasmania £300,[7] in all cases with free passes on the State railways. On the other hand, the Union Parliament received £400, and £120 for provincial Councillors, but extra allowances were voted from 1920 on, the largest amount being £200. The Government of General Hertzog increased the sum in 1926 to £700, less £6 for each day's absence over fifteen days without grounds. The Provincial Legislatures of Canada vary greatly in the amounts, which likewise have steadily increased, British Columbia giving as much as 2,000 dollars.[8] The constitution of the Irish Free State by s. 32 makes payment of members obligatory, thus going beyond ordinary precedent, and allows them to be provided with free railway transport in Ireland, not merely in the Free State. By Acts No. 18 of 1923 and No. 29 of 1925 the pay is £30 a month, tax free. By Act No. 11 of 1924 Malta penalizes legislators who fail to perform their duties on committees.

[1] c. 69.

[2] Act No. 5 of 1907; No. 12 of 1920; contrast No. 12 of 1902.

[3] Act No. 31 of 1920; No. 45 of 1921.

[4] For the early controversy see *A.-G. of N. S. Wales* v. *Rennie*, 16 N. S. W. L. R. 111; [1896] A. C. 376.

[5] Acts Nos. 3118 and 3218.

[6] Act No. 1493 (1921); £200 was fixed in 1887.

[7] Act No. 3 of 1919.

[8] 1921, c. 12; for Manitoba see 1921, c. 39. Ontario in 1925 (c. 8) raised the pay to 2,000 from 1,400 dollars.

It is the normal practice to pay the leader of the Opposition a further salary, varying from £400 in the Commonwealth to £100 in Tasmania ; in the Commonwealth the Opposition leader of the Senate has £200. In Canada the amount allowed is 10,000 dollars, the ministerial salary. The difficulty of three parties was met in Ontario by dividing the sum of 5,000 dollars provided among leaders of parties with not less than fifteen followers.[1]

§ 5. *Electoral Matters*

Procedure in electoral matters, registration, nomination, polling, forfeiture of deposits, and so forth, is largely based on British models, and there is endless variety of difference in details. The issue of writs for a general election lies with the Governor, who must, of course, act with the advice of the Government, since he could not perform the necessary steps involved otherwise ; casual vacancies fall to be dealt with by the President or Speaker.

The rule of voting by ballot is regularly adopted, but conditions in the Dominions with their great distances have furthered the development of systems of absent voting or postal voting. The difficulties of both systems are that they complicate and delay elections, and offer possibilities of improper practices. Allegations of misuse through governmental influence in the Queensland elections of 1907 resulted in the repeal there in 1908 of the postal vote, and the substitution of an absent vote in lieu ; the postal vote, better safeguarded, was substituted again in 1913 (No. 29) and facilitated in 1914 and 1915 (No. 13). There have been repeated tinkerings in the Commonwealth and the States with legislation on the subject. The *Commonwealth Electoral Act*, 1918–22, authorizes any voter to vote either at the prescribed polling place in the subdivision in which he is registered or at any other polling place in the State. It permits a postal vote if an elector will not be in the State ; or will be more than ten miles from the nearest polling station in the State ; or will be travelling so as to be unable to go to a polling booth ; or is hindered by age or infirmity. Application must be made on

[1] 1920, c. 3. This was applied to the leader of the United Farmers in 1924, though the leader of the Conservative Government only recognized the Liberal leader. Queensland gave £200 in 1909, beginning to pay Members in 1889.

a form duly witnessed—on this point much effort to prevent irregularity has been spent—and sent to the Divisional Returning Office by which the necessary papers are issued. The States generally allow postal voting; in Queensland a person not in his district on election day may vote in any part of the State, and he may, if he is to be outside the State, record his vote in advance, and a postal vote is admitted in case of ill health, if the would-be voter can sign his name. Provisions for absent voters are also becoming used in Canada. The Free State [1] permits any elector to be registered as a postal voter, while the system applies to the University seats.

Electoral experiments were only slowly made. In New Zealand in 1908 [2] the system of second ballots was adopted, the rule being that, if no candidate on the first ballot received an absolute majority, a second ballot was to be held seven days later, or in outlying districts fourteen days later. The result of the election was that in twenty-three constituencies there had to be second ballots, with, as a net outcome, eight of those who headed the first ballots being defeated, including the leader of the Opposition. There was a decline of from 78 to 74 per cent. of the voters who actually voted, and about 10 per cent. of those who actually voted in the first ballot did not trouble to go to the second ballot. It was found that, as the rule was that only the two highest candidates were voted on in the second ballot, the result was sometimes that where the lowest candidate was of the same party as one of those left in, his supporters, as a result of the heat engendered by the election, transferred their votes to the candidate of the rival party. The measure did not prove popular with any one, and it was repealed in 1913 by Act No. 36. Since then, energetic efforts on the part of supporters of proportional representation to secure its adoption [3] have been defeated, the late Mr. Massey being a devoted adherent of single constituencies with one vote. It must be remembered that the considerable size of New Zealand constituencies renders electioneering and keeping in touch with constituents difficult,

[1] Act No. 12 of 1923, s. 21.

[2] *New Zealand Official Year Book*, 1909, pp. 392 ff.

[3] The number of seats won often has very little relation to the votes cast. In 1922 the Reform party lost 10 seats as compared with 1919, but had 50,000 votes more (*Round Table*, xiii. 666).

and that the large areas for proportional representation would result in the termination of any real contact with the electors.

New South Wales adopted by Act No. 18 of 1910 the system of the double ballot as a political device to avoid split votes in the contest with Labour; the election of 1910 saw it used only in three cases, where it served its purpose adequately. But the device was unpopular, no one cared for the second contests with their orgy of electioneering and efforts to arrange matters between disappointed voters, and by Act No. 40 of 1918 proportional voting was introduced, with five and three-member constituencies. The result at the first election was not precisely satisfactory: only the willingness of a Liberal to abandon party for the Speakership enabled a Ministry to be formed. The repeal of the Act was therefore pressed from various points of view, and effected in 1926.[1] In 1918 by Act No. 27 the Commonwealth adopted preferential voting for the Lower House, and in 1919 by Act No. 31 extended it to the Upper. The scheme there is simple: in voting for the Lower House with single-member constituencies the voter must mark his preference for each candidate; the votes are counted, any candidate who obtains an absolute majority of first preferences is elected; if no one does, the votes of the lowest candidate are counted to his second preference, and, if the result then gives an absolute majority for any one, he is returned; if not, the votes of the lowest candidate still left in are assigned to the next available preference of each, until some one obtains an absolute majority. In the case of Senate elections at which there are normally three or more places to be filled, the voter must vote for at least twice the number of vacancies plus one, or if there are fewer candidates than that total, for all. The counting of votes is then conducted on the same principle as before, until one is elected by an absolute majority, when his second preferences are ranked as first preferences for purposes of enumeration.

Preferential voting was adopted in 1911 for the Assembly also by Victoria after several attempts had failed, owing to the

[1] In 1925–6 the Labour Government sought to restore simple voting, the Council demanded preferential voting, and finally this was agreed to, single-member constituencies reappearing. The giving of a contingent vote is optional.

opposition of the Upper House, to which it was applied by Act No. 3139. In Queensland, as early as 1892, the voter was given by Act No. 7 the right of indicating a preference if he desired; in single-member constituencies, if no candidate obtained an absolute majority, then all save the two highest were excluded as defeated, and their preferences, if any, given to the two remaining, that one being elected who had the highest total. Where two candidates were to be elected, on the system of elections then in force, then, if there were more than four candidates, the highest four were to be left in, while the preferences of the rest were transferred to them; if then only one had an absolute majority, all save two of the original candidates, these being the next highest to him, fell to be deemed defeated and preferences were ascribed to the two left in, until one was elected. The system, unsatisfactory especially as regards cases of the election of two candidates, nevertheless still is in force, and as only single-member areas now exist, works better; it is optional. It later was adopted in the Electoral Act of 1907 in Western Australia, where also it has worked badly.[1] In Tasmania,[2] on the other hand, proportional representation with five constituencies, each returning six members, was adopted in the election of 1909 on the elaborate system of Mr. Hare as modified by the suggestions of Mr. Justice Clark. Proportional representation had been tried before in 1896, but abandoned in 1901; since its reintroduction it has been adhered to. It is true that it results in ludicrously close results between the two parties in the State, but with a small House and with nearly equal strength of opinion, it seems likely that in any case Governments would be wretchedly weak, especially as there are really no serious lines of division in political outlook, Labour being much less vehement than in the Commonwealth, and united with the Liberal party in resentment of the indifference of the Commonwealth to Tasmanian needs. The system requires that the voter shall mark at least three preferences if there are as many candidates. In the case of New South Wales the standing difficulty of by-

[1] Preferential voting had to be made compulsory by Act No. 44 of 1911, s. 26. Cf. *Parl. Pap.*, Cd. 5352, pp. 155–8; Cd. 5163, pp. 46–50. For Queensland see Act 1915, No. 13, s. 65.

[2] *Electoral Act*, 1907; Cd. 5163, pp. 54–63; Cd. 5352, pp. 188–91; Commonwealth *Parl. Pap.*, 1901–2, No. 46.

elections has been dealt with by the device in 1920[1] of allowing, on the occurrence of a casual vacancy, the next name of a candidate of the same party who was defeated at the general election to be taken as that of the person to fill the seat, and in 1921, to meet the obvious difficulty when no such candidate existed, the power was given to the leader of the party to nominate a person to fill the vacancy. It must, of course, be remembered that in a short-lived Parliament this plan is less absurd than it appears.

Canada, on the whole, has remained deaf to the advocates of proportional representation, despite the grave anomalies which admittedly arise from the present system of voting, which often gives anything but mathematical justice to the electors. Thus in Quebec, in the general federal election of 1900, 57 Liberals were returned with 2,344 votes apiece against 8 Conservatives with 12,907 votes, and it may be added that Quebec constantly shows this amazing anomaly by reason of the single-member and single-voting system; hence naturally the absolute refusal of the French Canadian members of the Federal Parliament to contemplate any change. In the British Columbia provincial elections of 1912 the Conservatives with about 51,000 votes had 31 representatives, the Liberals with 21,000 votes had no representatives, the Socialist and Independent party with 12,000 votes secured two seats. In Nova Scotia in 1925, 270,524 Conservatives won 40, 154,158 Liberals 3 seats, 12,260 Labour none. In the federal election of 1908 as a whole, the Liberal party with 594,000 votes had 135 members, the Conservatives with 552,000 secured 86 seats; in 1911 the Conservative vote was 669,000 with 134 seats, the Liberal vote 625,000, but only 87 seats were won. In the federal election of 1921 the proportional results would have been Liberals 96, Conservatives 73, Progressives 55, Labour 4, Independents 7, but the results were Liberals 117, National Progressives 65, Conservatives 51, Labour 2. Despite, however, much discussion, and the support of the Prime Minister, Mr. Mackenzie King, the principle even of the alternative vote has not succeeded in prevailing. In Manitoba in 1920 (c. 33) the first election of the full proportional system was fought in Canada for ten seats in Winnipeg; there were 10 Liberal, 10 Conservative, 11 Inde-

[1] *Parliamentary Elections (Casual Vacancies) Act*, 1920.

pendent, and 10 Labour candidates, and the result was Labour 4, Liberals 4, and Conservatives 2 seats, the Independents splitting their votes badly. The results were frankly not quite in harmony with the numbers of voters, which were in proportion Labour 42.5, Liberals 30.4, Conservatives 13.7, Independents 13.4. A favourable report on the scheme was also pronounced by a Commission in Ontario. In British Columbia an interesting device was introduced in 1921 (c. 17) permitting the candidates of parties for Vancouver and Victoria, where there are elected six and four members respectively, to have themselves shown on the ballot papers in their party groups, a privilege enjoyed by candidates for the Senate of the Commonwealth under Act No. 14 of 1922. Alberta in 1924 adopted proportional representation, but with three constituencies only of more than one member, and the transferable vote in the others (c. 34).

In the Union of South Africa it was suggested, when framing the constitution, that proportional representation should be adopted,[1] though it had been unknown in the Colonies, where the chief abnormality had been plumping for the Upper House of the Cape. This, however, was rejected, and confined to elections of the Senate and the Provincial Committees of the Provincial Councils for which the system of proportional representation with the single transferable vote has been adopted. The results as regards the provinces have not been satisfactory, producing Executives and Councils which exist by private compromises and bargains between groups. It was imposed on a very reluctant Northern Ireland by the *Government of Ireland Act*, 1920, but the Government of that territory, while it held the first election under its control in 1925 on that system, never liked it, and gave an assurance that year that it would disappear before the next election. It was equally imposed for the first elections in Malta, on the same system of the single transferable vote, by the letters patent of 1921. But Southern Rhodesia was content with simple voting in two-member constituencies, each elector having two votes, but without power to give them to one candidate. In the Irish Free State proportional representation is enjoined by s. 26 of the constitution.

Compulsory enrolment is not by any means regular, but both it and compulsory voting are in force in Queensland since 1914

[1] Walker, *Lord de Villiers*, pp. 438, 451 f., 468, 479.

(No. 29), and the Commonwealth, which provided for the latter in 1924 (No. 10), imposing a penalty of 40 shillings for failure to vote without a sufficient excuse. The measure passed with approval on all sides, there being the belief among the Government party that Labour had an advantage in bringing out all its votes, while Labour equally held that the Australian's love of sport led to his negligence in voting, which would be conquered by a fine which the richer voters could easily regard as nugatory. There is much variation as regards days of nomination and polling, but the general rule requires the early issue of writs after a dissolution or expiry of the Legislature by efflux of time, and short intervals between nomination and polling ; the trend is, of course, to one day for nominations and another day for polling throughout the area. The Free State Constitution is as usual precise ; the polls shall take place on one day to be proclaimed a public holiday (this provision disappeared by Act No. 4 in 1927) not more than thirty days after the dissolution, and the Chamber shall meet within a month thereafter. New Zealand is content with compulsory enrolment by Act No. 61 of 1924, as has been adopted widely in the States in order to facilitate unification of rolls with the Commonwealth.[1]

Redistribution is regulated on various principles. In Canada [2] it is required by the constitution after each decennial census, but the process is not automatic, and it is left to Parliament to decide how it shall redistribute the constituencies, the constitution merely laying down the number of sixty-five as the unit of members for Quebec, readjustment to be made on the basis of population. The power of increase at other times is also given, and has been exercised ; the creation of the new provinces of Saskatchewan and Alberta in 1905 gave rise to vehement protests against gerrymandering, but the redistribution under the

[1] Cf. Victoria Act No. 3331 (1923); South Australia No. 1446 (1920); Tasmania No. 57 of 1921 ; Western Australia No. 59 of 1919.

[2] 30 Vict. c. 3, s. 51 ; Canadian Acts 4 & 5 Edw. VII, cc. 3, 42 ; *In re Representation of Certain Provinces in the House of Commons*, 33 S. C. R. 475 ; *In re Representation of Prince Edward Island in the House of Commons*, ibid., 594 ; [1905] A. C. 37 ; 6 & 7 Edw. VII, c. 41 ; Imperial Act, 5 & 6 Geo. V, c. 45 ; Canadian Act c. 63 of 1924. In the provinces redistribution is likewise left to the will of the Legislatures, there being no provision at all for automatic change. Thus in 1925–6 Ontario was redistributed with 112 members, 9 country divisions regarded as likely to return 'dry' members being readjusted.

census of 1921 was carried out on the advice of a moderately representative committee and raised less ill-feeling. Inequality of size is very marked; thus in Montreal and Toronto about 100,000 voters have but one member, while in certain rural divisions about 15,000 to 20,000 may be able to elect a member.

In the Commonwealth the House of Representatives is under the constitution [1] to be as nearly as possible double the size of the Senate and in fact consists of seventy-five members. The number for each State is found by taking a quota, by dividing the number of the people of the Commonwealth as shown in the latest statistics by twice the number of Senators; the number of members to be chosen in each State is then determined by dividing the population of the State by the quota, and if, on such division, there is a remainder greater than one-half of the quota, one more member falls to be chosen in that State. A redistribution of the constituencies in the State may be made whenever this event occurs; it may also be made when it appears that a quarter of the constituencies have deviated by a fifth more or less from the quota ascertained by dividing the total number of electors by the total number of members, or when directed by the Governor-General in Council. He then appoints three Distribution Commissioners, one being the Chief Electoral Officer, and one the Surveyor-General of the State, whose business it is to prepare a scheme, with due regard to community or diversity of interest; means of communication; physical features; existing boundaries of divisions and subdivisions; and State electoral boundaries; subject to these considerations the quota derived from dividing the number of electors by the number of members decides distribution, a variation of one-fifth either way being permitted. The Commissioners must prepare maps, exhibit them at the local post offices, and notify proposals in the *Gazette*; objections may be made within thirty days. The final decisions of the Commissioners then are laid before Parliament, which must approve by resolutions of both Houses, in which case the new division takes effect after the dissolution of the existing House of Representatives; if either House does not approve, fresh recommendations are invited. Parliament thus retains and exercises freely final control of redistribution.

[1] s. 24; *Commonwealth Electoral Act*, 1918–22, ss. 15–25.

In Queensland, on the other hand, under 1 Geo. V, No. 3, redistribution was provided for on much the same principle as for the Commonwealth, as explained above, the area of proposed districts which did not comprise a town to be taken into account in lieu of existing boundaries. There the Commissioners were to decide finally on the districts, which then were to be proclaimed by the Governor in Council. For the future [1] it was decided that, if any district fell below or above the quota derived from dividing the electorate by seventy-two, the number of the seats, there should be a change of boundaries by a Commission, but the process of deciding on appointing a Commission was left to the discretion of the Governor in Council. Redistribution is also provided for by the New South Wales *Parliamentary Electorates and Elections Act*, 1902, and in the Western Australia Act No. 10 of 1923. In New Zealand [2] the system of redistribution contemplates the appointment of a Commissioner for each of the two islands, and the power given to vary the quota derived in the usual way is placed at a maximum of 550 in a rural and 600 in an urban area, the plan of equal electoral districts being thus fairly well assured.

In the Union of South Africa [3] provision is made by the constitution that a quinquennial census shall be held, beginning with that of 1911; the number of members assigned to the provinces in the original Act falls to be increased whenever in any province the number of male European adults has increased by a number equal to the quota derived from dividing the population under the census of 1904 by the number of members established for the whole Union by the Act of 1909. After each census a redistribution must take place, when effect shall be given if necessary to the increase indicated. The Commission consists of three judges appointed by the Governor-General in Council; they must have regard to community or diversity of interest; means of communication; physical features; existing

[1] There has been, especially in 1923, much assertion of unfair distribution, perhaps not warranted.

[2] *Cons. Stat.*, 1908, No. 101, ss. 16–22. In Victoria redistribution became a pressing issue in 1926, owing to disparities due to change of population. Compulsory voting and Saturday polls were passed.

[3] 9 Edw. VII, c. 9, s. 34. The voting in 1924 gave almost equal numbers to the South African and the combination of the Nationalist and the Labour parties, but the latter had 80 to 52 seats.

electoral boundaries; and density or scarcity of population, and can allow a deviation of fifteen per cent. either way from the quota for each province, arrived at by dividing the number of voters by the number of members allotted to it. A certain right of referring back to the Commission for consideration is given, but the Commission decides by a majority if necessary, and the divisions must then be proclaimed to take effect from the next general election. The rule of the constitution excludes members of the Imperial forces on full pay from enumeration, and, as this would have worked utter injustice under war conditions, it was arranged in 1918 by the *Electoral Divisions Redelimitation Amendment Act*, No. 31, for the purpose of the census of 1918, to count as voters those who were on active service. The law had, under the constitution, to be submitted to the two Houses in joint session summoned by the Governor-General and presided over by the Speaker of the Assembly, 143 votes being cast for it on the third reading, at which by law a two-thirds majority vote of the total members of both Houses was requisite. Another Act (No. 15) deferred to 1918 the census due in 1916, and placed the next census at the normal 1921.

The Irish Free State Constitution recognizes the principle of redistribution after each decennial census but does not impose it automatically, and in the Southern Rhodesia letters patent the quite needless permission is given to the Legislature to redistribute, if the growth of population as shown by the biennial registration of voters renders such a course necessary or desirable. The general rule is to permit Parliament itself to determine from time to time what redistribution shall be effected, with the usual result of complaints of gerrymandering by one party or another. Victoria, South Australia, and Western Australia [1] have adopted this plan, while in Tasmania under proportional representation change is rendered less often necessary with the large constituencies demanded by that system. The provinces of Canada also adhere to this simple plan.

Elaborate provision is made in all the Dominions to punish electoral corruption, on lines generally in accord with those of

[1] See on Act No. 6 of 1911 the *Parl. Deb.*, 1910, pp. 1499 ff.

the Imperial Acts.[1] Postal and absent voting have generated new possibilities of misconduct, which, as the enactment of special legislation in the Commonwealth and Victoria indicates, is often very hard to check. Disputed returns are dealt with normally now by courts of law, as a substitute for the unseemly wrangles of members of the Legislatures, when victory may mean the difference between a Government remaining in power and its complete defeat. This is now the rule in Canada [2] and the provinces and in Newfoundland, and it is also the rule in the Commonwealth of Australia, where the Court of Disputed Returns consists of a single judge of the High Court, unless that Court refers the case to the Supreme Court of a State, in which case also a single judge exercises the jurisdiction. In the case of the Legislative Councils of New South Wales, and formerly Queensland, the Councils were empowered under their constitutions to decide disputes, subject to appeal to the King in Council. New South Wales adopts a tribunal of nine members of the Assembly nominated by the Speaker at the opening of each session. Victoria has committees of seven members for either House, nominated by the President and the Speaker respectively. South Australia aids a Supreme Court Judge by giving him four members elected by the Council or the Assembly. Queensland since Act No. 29 of 1913 and No. 13 of 1915, Western Australia, and Tasmania accept the decision of a single judge of the Supreme Court. In New Zealand two judges of the Supreme Court officiate. The rule in South Africa is reference to the Courts, and this is laid down also for Malta, Northern Ireland, and the Free State.

It is the rule of the Privy Council [3] that appeals from electoral

[1] For the Irish Free State see the *Prevention of Electoral Abuses Act*, No. 38 of 1923.

[2] The Speaker ruled on 6 May 1926 that the Commons could not entertain a petition for vacating a seat on the score of wrong counting of votes, while the matter was before the Courts under R. S. 1906, c. 2, s. 8. Nor can a member in such a case resign; *Canadian Annual Review*, 1925–6, pp. 57 ff.; cf. the famous case of Mr. A. Deakin's election and resignation in 1879; Murdoch, *Deakin*, pp. 61 ff. For judicial bias even in high quarters cf. de Villiers' decisions in *De Waal* v. *Sivewright* (16 Buch. 30) and *Harding* v. *Sauer* (ibid. 90); Walker, p. 326.

[3] *Théberge* v. *Laudry* (1877), 2 App. Cas. 102 as explained in *Cushing* v. *Dupuy* (1880), 5 App. Cas. 409, 419.

courts should not be heard, as being matters in which the Courts are acting in quite a special capacity, and the High Court of the Commonwealth [1] has similarly ruled that it does not propose to entertain appeals from State Courts on these issues.

Efforts have been made somewhat sporadically to check expenditure on elections and to diminish the influence of mere wealth.[2] The best example of what has been achieved is that of the *Commonwealth Electoral Act*, 1918–22, which forbids the expenditure in a Senate election by any candidate of more than £250, in a House election than £100. These sums may be expended only on matters within the following categories: printing, advertising, publishing, issuing, and distributing addresses by the candidate and notices of meetings; stationery, messages, postages, and telegrams; committee rooms; public meetings and halls therefor; and scrutineers. The only other expenses permitted are those for the purchase of rolls, and the personal and travelling expenses of the candidate. Not only must he file a return of expenses, but so must every trade union, organization, association, or other body or person or persons who have expended money to influence any individual or a number of electors, and every newspaper proprietor must similarly return an account of all electoral matters of any kind inserted for payment, these returns being open to the public.

[1] *Holmes* v. *Angwin* (1906), 4 C. L. R. 297; cf. *Parkin* v. *James*, 2 C. L. R. 315, 333. See also *Valin* v. *Langlois*, 5 App. Cas. 115; *Kennedy* v. *Purcell*, 14 S. C. R. 488.

[2] There are various provisions especially in the provincial Acts in Canada; e. g. Ontario Act 1914, c. 6. For special efforts to combat corruption, see e. g. British Columbia Acts 1917, cc. 21, 30.

VII

THE UPPER HOUSES. I

Composition and Legal Powers

IN this chapter we shall consider (1) the composition of the Upper Houses in the Dominions; (2) their powers with regard to (*a*) finance and (*b*) general legislation; and (3) the procedure, if any, for the adjustment of differences between the Houses on these two heads. The constitutional relations which have existed and exist between the Houses will be considered in Chapter VIII.

§ 1. *Canada*

(*a*) *The Dominion.* By the *British North America Act* [1] the Senate of Canada was composed of 72 members, who were appointed in the Queen's name by warrant under the sign-manual, and whose names were inserted in the proclamation of union. Power was, however, given to Canada to increase the size of the Senate in respect of the growth of the Dominion from a mere union of four provinces by Acts of 1871 and 1886,[2] authorizing increase in the case of the creation of new provinces, or in respect of the representation of that part of Canada not under provincial organization. The number 72 was allotted in equal shares to Ontario, Quebec, and the Maritime Provinces, the arrangement, in 1873, when Prince Edward Island came in, being that it had 4 Senators as against 10 each of Nova Scotia and New Brunswick. Manitoba, created in 1870,[3] was promised a maximum of 4, British Columbia, which adhered in 1871, was given a maximum of 3,[4] and Saskatchewan and Alberta [5] a maximum of 6 apiece, if justified by the census of 1911; after the addition of territory to Manitoba in 1912 [6] 2 more Senators were promised. In 1914, however, when the Government desired to increase the Senate, and to remedy the absurd disproportion in favour of the Maritime Provinces, the Opposition

[1] 30 Vict. c. 3, s. 21.
[2] 34 & 35 Vict. c. 28; 49 & 50 Vict. c. 35.
[3] 30 Vict. c. 30 of Canada.
[4] Order in Council, s. 8.
[5] 4 & 5 Edw. VII, cc. 3 and 42.
[6] c. 32; *Parl. Pap.*, Cd. 6863, p. 18.

raised objections until it was agreed that the changes should be inoperative until the next general election. An Imperial Act[1] was then obtained, varying the *British North America Act* by giving a total of 96 Senators in four groups each of 24; Ontario; Quebec; Maritime Provinces; and the western provinces; each with 6 Senators; the number of Senators to be allocated to Newfoundland if she ever adhered to the Union was also raised to six.

The Senators are summoned by the Governor-General in the King's name under the Great Seal of Canada, and hold office for life.[2] A Senator must be thirty years of age, natural born or naturalized by an Act of the United Kingdom or Canada; must be seised for his own use of freehold lands and tenements or lands or tenements held in franc-alleu or roture in the province for which he is appointed, to the clear value of 4,000 dollars above all encumbrances; must own real and personal property of the value of 4,000 dollars above all debts; must be resident in the province; and in the case of Quebec must reside in or hold his landed property qualification in the electoral division for which he is named Senator. A Senator may resign, and his seat becomes vacant if he fails to attend for two consecutive sessions; becomes bankrupt or a public defaulter; is attainted of treason or convicted of felony or any infamous crime; and if he ceases to be qualified by property or residence, other than residence at the seat of Government in connexion with the duties of an office under the Government. The quorum is fifteen, including the Speaker.

2. The only legal definition of powers between the two Houses is that by s. 53 Bills for appropriating any part of the public revenue, or for imposing any tax or impost shall originate in the House of Commons.

3. No provision is made for deadlocks by express reference, but there is included a power to the King on the recommendation of the Governor-General to summon originally three or six, under the legislation of 1915 four or eight members, two from each of the three, now four, divisions of the Senate. In the case of such action being taken, no further Senators can be appointed save on a further such summoning on a similar recommendation, until the number in each division is reduced to the normal 24.

[1] 5 & 6 Geo. V, c. 45; Cd. 7897.

[2] 30 Vict. c. 3, ss. 24, 29–31.

(*b*) *Quebec.* In Quebec [1] the Legislative Council consists of twenty-four members appointed for life by the Lieutenant-Governor under the Great Seal of the Province, one for each of the twenty-four divisions of the province.[1] A Councillor must be qualified as in Canada, save that his property formerly need only be in the district in which the division he represents is situated, and under c. 16 of 1921 need only be in the province, and his seat is vacated under the same conditions. There are excluded also persons holding office under the Crown, other than ministerial, and persons interested in Government contracts, save as shareholders in incorporated companies, other than companies having the execution of public works. As in Canada,[2] Appropriation or Tax Bills must originate in the Lower House, but there is not the slightest provision otherwise to define the relations of the Houses or to prevent deadlocks.

(*c*) *Nova Scotia.* In Nova Scotia, by an historical accident,[3] the Legislative Council was stereotyped at twenty-one members nominated by the Lieutenant-Governor in Council. No member of the Dominion Parliament is eligible, nor holders of certain provincial offices, nor persons declared by a Court incapable of sitting in the Dominions House of Commons by reason of electoral malpractices. A seat is vacated by two sessions' absence without the authority of the Lieutenant-Governor in Council. The only legal provision regarding the powers of the Council was as in Quebec.

In 1925 a definite effort at change was made by a Bill which proposed to reduce the period of office to ten years, with the possibility of reappointment, but with an age limit of seventy for new, of seventy-five for present members, while any public Bill, other than a Money Bill, could be passed over the head of the Council if accepted in three successive sessions by the Lower House, an interval of not less than two years elapsing between the second reading in the first session and the final passing by the House. The measure finally passed the House, the power of reappointment being negatived. The Council returned the Bill with various amendments, including the omission of any age limit for existing members, and the fixing of the limit for new members at seventy-five years, while the provision as to deadlocks was not

[1] 30 Vict. c. 3, ss. 71, 72; *Rev. Stat.*, 1909, ss. 84–6.

[2] 30 Vict. c. 3, ss. 53, 90.

[3] See below, chap. viii.

to apply to any Bill altering the constitution of either House, and the Lower Chamber accepted the Bill as altered, thus strengthening the position of the Council in the estimation of the public.[1]

§ 2. *Newfoundland*

Under the letters patent of 28 March 1876, the Legislative Council consists of members appointed by the King under the sign-manual and signet, or provisionally by the Governor and confirmed by the King; the total number of Councillors resident must not, however, be increased beyond fifteen by such provisional appointments, though the number appointed by the Crown is not subject to limit. Any member can be removed by the Crown by warrant or instructions under the sign-manual and signet, and with the approval of the Privy Council. The quorum is five.

2. By No. 249 of the Rules of the House of Assembly adopted by the 16th Assembly it is provided, that 'all aids and supplies and aids to his Excellency in Legislature are the sole gifts of the Assembly; and all Bills for the granting of any such aids and supplies ought to begin with the Assembly; and it is the undoubted and sole right of the Assembly to direct, limit, and appoint in such Bills the ends, purposes, considerations, conditions, limitations, and qualifications of such grants; which ought not to be changed or altered by the Legislative Council'. But the Assembly waives privilege in respect merely of pecuniary penalties, and forfeitures to secure the observance of Acts, and the imposition of fees for services not payable into the revenue, and in respect of private Bills and tolls authorized therein. This is, of course, an effort to adopt by resolution of the Assembly the position asserted by the House of Commons by resolution prior to the Parliament Act.

3. As in the United Kingdom, it was found necessary to pass legislation to secure harmony between the Houses, and in the *Legislature Act*, 1917, the terms of the *Parliament Act*, 1911, are taken over by Newfoundland. A Money Bill sent up to the Council a month before the close of the session may be presented, unless the Assembly otherwise directs, for the royal assent, and becomes law on receiving this assent; the term Money Bill is defined as in the Parliament Act, and excludes

[1] *Canadian Annual Review*, 1925–6, p. 401.

moneys locally raised. The Speaker is required to certify as to whether any Bill is a Money Bill. Any other Bill may be passed over the head of the Council, if it is passed in three consecutive sessions, not necessarily of the same General Assembly, and sent up to the Council in each case a month before the end of the session, provided that two years elapse between the second reading in the first session and its final passage in the Assembly. The Bill must be certified by the Speaker, and there is, as in the Imperial Act, the same provision allowing of the alteration of the Bill to the extent necessary to meet change of date and to incorporate amendments made by the Council, if the Assembly agrees to do so. Bills passed under the Act are to be styled as made by the 'Governor and House of Assembly in legislative session convened, and in accordance with provisions of the Legislature Act, 1917, and by authority of the same'. Nothing in the Act is to diminish or qualify the existing rights and privileges of the House.

§ 3. *Australia*

(*a*) *The Commonwealth*. Under the constitution [1] the Senate consists of members chosen directly by the people in each State acting as a single electorate. The minimum is six for each original State, and these States must always have equal representation, though the number may be increased. They are elected for six years, half retiring every three years on 30 June, the date having been changed by Act No. 1 of 1907 from 31 December. The quorum is a third. The qualifications for members, the disqualifications, and the causes resulting in the vacating of seats are as in the case of the House of Representatives, and a Senator cannot be elected from any House of a State Parliament. The franchise is also the same for both Houses.

2. Section 53 of the Constitution provides:

Proposed laws appropriating revenue or moneys, or imposing taxation, shall not originate in the Senate. But a proposed law shall not be taken to appropriate revenue or moneys, or to impose taxation, by reason only of its containing provisions for the imposition or appropriation of fines or other pecuniary penalties, or for the demand or payment or appro-

[1] 63 & 64 Vict. c. 12, Const. s. 7.

priation of fees for licences, or fees for services under the proposed law.

The Senate may not amend proposed laws imposing taxation, or proposed laws appropriating revenue or moneys for the ordinary annual services of the Government.

The Senate may not amend any proposed law so as to increase any proposed charge or burden on the people. The Senate may at any stage return to the House of Representatives any proposed Bill which the Senate may not amend, requesting, by message, the omission or amendment of any items or provisions therein ; and the House of Representatives may, if it thinks fit, make any of such omissions or amendments, with or without modifications.

Except as provided in this section, the Senate shall have equal power with the House of Representatives in respect of all proposed laws.

It is further provided by s. 54 that laws appropriating revenue or moneys for the ordinary annual services of the Government shall deal only with such appropriation, and by s. 55 that laws imposing taxation shall deal only with taxation, and that any other provision contained therein shall be of no effect ; further, laws imposing taxation are to deal with one subject only, save those dealing with Customs or Excise, which are to be confined to these two topics.

3. There is no special procedure in the case of deadlocks on finance, but a general provision exists in s. 57 which provides that, if the Lower House passes a Bill, which the Upper House rejects or amends unacceptably, in one session, and if in that or a subsequent session, after an interval of three months, the House again passes the Bill and the Senate rejects it, or asks for unacceptable changes, the Governor-General may dissolve both Houses. After the election, if the House again passes the measure, with or without any amendments made by the Senate, and that body again rejects or amends unsuitably, a joint session may be convened by the Governor-General. At this session the Bill, with any amendments made by either House but disagreed to by the other, shall be considered and voted upon ; any amendments obtaining a majority and voted for by an absolute majority of the total membership of both Houses shall be incorporated in the Bill, and it then finally

voted on; if approved by an absolute majority of the total members it may then be assented to by the Governor-General. It is, however, provided that a penal dissolution cannot be given within nine months of the expiry of the Lower House by efflux of time.

In the case of constitutional changes the rule under s. 128 requires any alteration to be passed by absolute majorities in both Houses, and then referred, not sooner than two nor later than four months after, to the people. But, if the two Houses disagree, and either House passes a Bill twice with an interval of three months whether in the same session or not, then the Governor-General may submit the proposed measure to the people, either with or without any amendments, made subsequent to its introduction and passing on the second occasion in the originating House, to which both Houses have agreed. The referendum in either case is determined by a majority of electors with a majority of States, and a majority of electors is also required in any State for any alteration diminishing its proportionate representation in the Parliament, diminishing the minimum number of its members in the House of Representatives; increasing, diminishing, or otherwise affecting its limits; or affecting in any way the provisions of the constitution with reference to the State.

(*b*) *New South Wales.* Under the constitution of 1855 and Act No. 32 of 1902, the Legislative Council is composed of persons, unlimited in number,[1] summoned by the Governor under the Great Seal of the State. Members must be twenty-one, and, until 1926, male; contractors for Government save as members of a company of at least twenty,[2] and members of the Federal Parliament are disqualified, and not more than one-fifth must be members holding office under the Crown. Tenure is for life, subject to resignation and vacation of a seat by non-attendance for two sessions unless excused by the Crown;[3] becoming a subject of a foreign state; a bankrupt; a member of the

[1] The minimum, 21, of 18 & 19 Vict. c. 54, sched. s. 3, does not appear in the Act of 1902.

[2] Cf. *Miles* v. *McIlwraith* (1883), 8 App. Cas. 120, a decision on a similar point as regards the Queensland Assembly.

[3] Cf. *A.-G. of Queensland* v. *Gibbon* (1887), 12 App. Cas. 442, decided under a similar rule in Queensland.

Federal Parliament; a public contractor or defaulter; and being attainted of treason or convicted of felony or infamous crime. The quorum is a fourth, exclusive of the President.

2. There is no legal restriction on the powers of the Council, save the rule[1] that Bills for appropriation or imposing new taxes must originate in the Assembly.

3. No provision was made by these Acts for deadlocks, beyond the fact that the power to add members was unlimited, and that, therefore, the Council could be destroyed whenever it became recognized that the power could be used to obtain a majority determined to terminate its existence, for which purpose nominations were made by the Labour Government of 1925, but for the moment the device failed.

(*c*) *Victoria*. Under the constitution[2] the Legislative Council consists of thirty-four members elected for seventeen provinces, two for each. Members hold office for six years, one from each two retiring every third year, but, if a dissolution takes place and two are elected, then the one who receives the fewer votes holds office for three years only. The quorum is twelve. A member must be thirty years of age, females being eligible, and, if not natural born, naturalized and resident in the State for ten years before his election; he must also for a year have been seised for his own benefit of a freehold estate of lands and tenements in Victoria, of the annual value of £50, clear of encumbrances other than rates and taxes. The disqualifications are similar to those for the Assembly, and seats are vacated in like conditions with the addition of the sale of the property qualification.

The electorate consists of any man, and, since 1909, woman aged twenty-one, who owns lands or tenements or is mortgagor or mortgagee or the *cestui que trust* of lands or tenements in actual possession; or is in receipt of rents and profits if in one province and rated at £10 a year; or is entitled as lessee or assignee for the balance of an original term of five years of property rated at £15 a year; or occupies property rated at £15 a year. Moreover, a resident of Victoria who is a graduate of any University in the British Dominions; or a barrister or solicitor; or a legally qualified medical practitioner; or a duly appointed

[1] Act No. 32 of 1902, s. 5.

[2] 18 & 19 Vict. c. 55; Acts Nos. 1075, 1723, 1864, 2075, 2632, 3337.

minister of any church or religious denomination ; or possesses a certificate of fitness to teach ; or is an officer, naval or military ; or has matriculated at the University of Melbourne, is also qualified. There is the usual provision for joint owners, lessees, and tenants. If not natural born, a naturalized person must have been naturalized for three years and have resided in Victoria for twelve months prior to 1 January or 1 July preceding. No person may have more than one vote in any one province.

2. The constitution of 1855 declared that any Bill appropriating any part of the revenue and any Bill imposing any duty, rate, tax, rent, return, or impost shall originate in the Assembly, and may be rejected but not altered by the Legislative Council. In 1903 by Act No. 1864, s. 30, it was provided that this enactment should not be deemed to apply to Bills containing provisions for the imposition or appropriation of fines or other pecuniary penalties, or for the demand or payment or appropriation of fees for licences or for services. Further, the Council was empowered at each of the following stages of any Bill which it could not amend : consideration in committee, on report, and on the third reading, once to send to the Assembly suggestions for the omission or amendment of items in such a Bill, provided always that no suggestion should increase any burden or charge on the people.

3. Section 31 of the same Act was devised to settle disputes between the two Houses. If the Assembly passes a Bill and the Council will not accept it as it stands, or passes it with amendments which are unacceptable, the Governor may, not later than nine months before the expiry of the Assembly by efflux of time, dissolve the Assembly, stating that the dissolution is granted by reason of the disagreement over the Bill. On the reassembling of the Assembly, if it passes the Bill, with or without the Council's amendments, and the Council again is recalcitrant, the Governor may dissolve both Houses. The Council is to be deemed to have rejected a Bill if it is not dealt with within three months from the date when it was sent up by the Assembly. Constitutional alterations affecting the Council or Assembly, other than increases or decreases in the number of members chosen for electoral provinces, are excluded from the operation of the section.

(*d*) *Queensland.* The Legislative Council of Queensland,

abolished in 1922, consisted of nominated members summoned as in New South Wales by the Governor, holding office for life. Conditions as to qualification were identical with those of New South Wales, while disqualifications applied as in the case of the Queensland Assembly. The quorum was a third.

2. The Constitution Act, 1867, s. 2, provided that all Bills for appropriating any part of the public revenue, or for imposing any new rate, tax, or impost shall originate in the Legislative Assembly.

3. An Act, No. 16 of 1908, provided for a referendum being held on Bills rejected twice by the Upper House, if passed in two consecutive sessions with an interval of three months.

(*e*) *South Australia*. By an Act of 1913 [1] the number of members of the Legislative Council was fixed at twenty, elected for five districts, four in each. The term is six years, save that those elected to fill casual vacancies hold office only for the term unexpired. Retirement of two members with longest service takes place at each periodic dissolution of the Assembly. A member must be a natural born or naturalized British subject of three years' residence in the state, and thirty years of age ; if naturalized, five years' residence is required. Disqualified are members of the Commonwealth Parliament ; contractors for the Government, with the usual exception as to members of companies of twenty members ; judges of the Courts ; and ministers of religion. Seats are vacated on the same conditions as in the Assembly.

The electorate includes any person aged twenty-one who is a British subject and an inhabitant of the State, and has resided therein for six months prior to registration, if he owns a freehold estate of the clear value of £50 ; or has a leasehold of the clear annual value of £20, duly registered and granted for three years, or containing an option of purchase ; or is a registered lessee of Crown lands on which are improvements to the value of £50 ; or is an inhabitant occupier as owner or tenant of any dwelling-house.

2. The Constitution Act of 1855–6 was content with the simple rule requiring that Bills for appropriations and for taxes must originate in the Assembly. In 1913 the provision was altered, and a complex system substituted. A Money Bill or a money clause in a Bill shall originate only in the House of

[1] See *Parl. Pap.*, Cd. 7507, pp. 39–41.

Assembly, and the Council may not amend any money clause. The Council may, however, return to the Assembly any Bill containing a money clause with a suggestion to omit or to amend such clause or to insert additional money clauses, or may send to the Assembly a Bill containing suggested money clauses, which must be printed in erased type and shall not be deemed to form part of the Bill, requesting by message that the suggestions be given effect to; and in every case the Assembly may comply with the suggestion with or without modifications. But the power of the Council applies to the money clauses contained in an Appropriation Bill only when such clauses contain some provisions appropriating revenue or other public money for some purpose other than a previously authorized purpose, or dealing with some matter other than the appropriation of revenue or other public money. A Bill for appropriating revenue or other public money for any previously authorized purpose shall not contain any provision appropriating revenue or other public money for any purpose other than one previously authorized. No infringement or non-observance of any of these provisions shall be held to affect the validity of any Act assented to by the Governor. A Money Bill includes any measure dealing with appropriation, taxation, or raising loans, and a money clause has a like sense. A previously authorized purpose is one sanctioned by Act, or resolutions of both Houses, or included in the votes of the Committee of Supply on which a previous Appropriation Act has been based. Except as provided as regards Money Bills, the Council shall have equal power with the House of Assembly.

3. Act No. 959 of 1908 provides a method of settling differences between the Houses. If the Assembly passes a Bill, and it fails to pass the Council, and if after a general election the same Bill is again passed, in this case, with absolute majorities on both second and third readings, and the Council fails to accept it, the Governor may, but need not, within six months dissolve both Houses; or in the alternative summon ten additional members, two for each division, to the Council. The Council will then have no further vacancies filled until the number has been reduced to normal.

(*f*) *Western Australia*. The first Legislative Council [1] was a

[1] 53 & 54 Vict. c. 26, sched. s. 42. See also 63 Vict. No. 19; 64 Vict. No. 5;

nominee body of fifteen members, which was to be replaced by an elective Council after six years, or when the Colony reached 60,000, exclusive of aborigines. It now consists of thirty members elected in ten provinces, each returning three members. At the end of two years from the election the senior member retires, and thereafter one senior member retires every two years, seniority depending on date of election; if two are elected at the same time, the one who polls the greater number of votes is senior; if there is no contest, or votes are equal, the precedence is by alphabetical order of surname and Christian name. The quorum, as in Victoria, is a third of the members exclusive of the President.

The electorate includes any natural born or naturalized British subject, twenty-one years of age, who has lived for six months in the state, provided that within the province for which he is registered he has a freehold estate of the value of £50, and has held it for twelve months before making his claim; or is a householder occupying a dwelling-house of the annual value of £17, and has occupied it for twelve months; or has a leasehold of the annual value of £17, held on a lease with at least eighteen months to run; or has a similar leasehold which he has held for eighteen months; or has held for a similar period a lease or licence from the Crown at a rental of £10 a year, to de-pasture, occupy, cultivate, or mine upon land.

A member must be a British subject aged thirty, and, if naturalized, must have been so for five years, and have resided for that period in the state. Disqualifications and conditions of vacating a seat are similar to those for the Assembly.

2. The constitution of 1890 was content with the usual provision for the origination of Appropriation or Taxation Bills in the Assembly. When the Council was made elective by an Act of 1894 [1] the Council was empowered to make suggestions at any stage of such a Bill by message, requesting omissions or amendments, and the Assembly might make the changes desired with or without modification. By the *Constitution Amendment Act*, No. 34 of 1921, a change was made, and the provision applicable to the Commonwealth Parliament, as set out above were applied, with the necessary changes of terminology, to th

Acts No. 27 of 1907; No. 31 of 1911; Battye, *Western Australia*, pp. 38 393 ff., 401 ff.

[1] 63 Vict. No. 19, s. 46 renewed this provision.

relations between the Houses of the Parliament. But it is uncertain what effect this enactment can have in law, in view of the decision as to the power of constitutional alteration in *McCawley* v. *The King*.[1] It has been suggested[2] that the net result will be no more than if the provisions had been enacted by standing orders, and it has been seen that in the case of South Australia the Act of 1913 expressly asserts that the forms prescribed may be violated without affecting the validity of an Act. This, however, may go rather too far; it is provided that Bills imposing taxation shall deal only with the imposition of taxation, and it is declared that any provision therein dealing with any other matter shall have no effect. Unless this provision were expressly repealed by a subsequent Taxing Act, which dealt with other matters, it seems that under the *Colonial Laws Validity Act* this provision would invalidate such additional matter. But it is clear that it can be evaded by a simple express repeal of the clause. Its value, therefore, is really that of a statement of what should be constitutional usage, and the Upper House can be relied upon to see that due effect is given to it.

3. No provision is made for the settlement of differences between the Houses.

(*g*) *Tasmania*. The Legislative Council consists of eighteen members, elected for fifteen constituencies, Hobart having three, Launceston two, and the others one member each. They hold office for six years, reduced in 1885[3] from nine, and three retire in May yearly, save in 1905 and each sixth year following, when four retire. The quorum is nine, including the President. A member must be thirty years of age, qualified to become an elector, who has resided at any one time five years in the state, or for at least two years immediately preceding the election, and, if not natural born, must have been naturalized for five years. Disqualifications and conditions of vacating a seat are similar to those affecting members of the Assembly.

An elector must be twenty-one, natural born or naturalized, resident in the state for twelve months, having freehold estate in the electoral district of £10 a year; or being the occupier of pro-

[1] [1920] A. C. 691. [2] Dr. F. L. Stow, *J. C. L.* v. 105.

[3] 49 Vict. No. 8. See also 8 Edw. VII, No. 12; 18 Vict. No. 17; 64 Vict. No. 5, and for the franchise the *Electoral Act*, 1907.

perty of the value of £30 a year; or being a graduate of any University in the British Dominions, or an Associate of Arts in the State; a legal practitioner on the roll of the Supreme Court; a legally qualified medical practitioner; an officiating minister of religion; an officer or retired officer of His Majesty's forces; or a retired officer of the Volunteer Force of Tasmania. Disqualifications are insanity and imprisonment for crime, as in the case of the Assembly.

Voting is preferential in the Commonwealth, Victoria, Western Australia; and contingent votes must be cast in Tasmania if there are more than two candidates; ordinary voting is used in South Australia.

2. Section 33 of the Constitution Act, 1855, provides that all Bills for appropriating any part of the revenue or for imposing any tax, rate, duty, or impost shall originate in the House of Assembly.

3. There were no legal provisions to provide for solving deadlocks between the two Houses until 1926 (*see* App. A).

§ 4. *New Zealand*

Under the *Legislature Act*, 1908, No. 101 the Legislative Council consists of members unlimited in number, summoned by the Governor-General in the King's name under the Public Seal of the Dominion, holding office in the case of those appointed since 1891 for seven years, previously for life. A member must be a male, natural born or naturalized subject, and disqualifications, as in the case of the House of Representatives, include bankruptcy; conviction for crime unless pardon has been granted or the sentence served; membership of the Lower House; being a contractor with the Government; or a civil servant, with the same exceptions in these cases as in the case of the Lower House. A seat is vacated by resignation accepted by the Governor-General; by absence for a session without the approval of the Governor-General; by bankruptcy or becoming a public defaulter; or being convicted of a crime punishable by death or three years' imprisonment with hard labour; or becoming the subject of a foreign state.

2. Section 54 of the Constitution Act of 1852 provides that no Appropriation Bill can be passed by either House, or assented to, unless the Governor shall first have recommended the House of Representatives to make provision for the specific public

purpose towards which such public money is to be appropriated. This involves necessarily the origination of all such Bills in the Lower House.

3. No provision exists to meet the case of deadlocks, but the number of members is not limited, and, though reappointment is normal, it is not automatic.

In addition to the provisions of the Constitution Act, the standing orders of the House lay down that

> all aids and supplies and aids to His Majesty in Parliament are the sole gift of the House of Representatives; and all Bills for the granting of any such aids and supplies are to begin with the House of Representatives; and it is the undoubted and sole right of the House of Representatives to direct, limit, and appoint in such Bills the ends, purposes, considerations, conditions, limitations, and qualifications of such grants; which may not be changed or altered by the Legislative Council.

The right of the Governor to appoint was made clear by an Imperial Act of 1868, which conferred also the power of electing the Speaker.[1]

By an Act, No. 59 of 1914, which failed to be brought into operation up to 1926, provision was made for the election of the Council, the normal number to be elected to be forty, in four electoral divisions, proportional voting to be used. In the case of Money Bills the procedure of the *Parliament Act*, 1911 was to be followed, and such Bills, duly certified by the Speaker might be passed over the head of the Council, if not accepted in one month. In the case of other Bills, if passed by the Lower House in two consecutive sessions and rejected by the Upper, the Governor-General might convene a joint session, at which the Bill, if passed by an absolute majority of the members of the two Houses, could be presented for the royal assent; if not so passed, the two Houses might be dissolved simultaneously, but not within six months of the expiry of the Lower House by efflux of time. Bills for appropriation or taxation might not originate in the Council, but this prohibition was not to apply to the mere dealing with fines or pecuniary penalties or fees for licences or services. The Council might not amend Bills imposing taxation or appropriating revenue for ordinary annual services,

[1] 31 & 32 Vict. c. 57.

nor amend any Bill so as to increase any charge or burden on the people, but at any stage it might return to the House any Bill which it could not amend, requesting omissions or amendments, which the House might make if it thought fit, with or without modification.[1]

§ 5. *South Africa*

Before Union, the Legislative Council of the Cape[2] was an elective body of twenty-six members, holding office for seven years. Money Bills had to originate in the Lower House, but express power to amend was given by the constitution to the Council, though it was not wont to increase burdens on the people. The Governor had the power to dissolve either the Assembly or both Houses simultaneously, which provided in a certain degree for meeting difficulties. Natal[3] had a nominee Upper Chamber of thirteen members holding office for ten years, and the Council could accept, or reject, but not amend any Money Bill. The Transvaal[4] had likewise a nominee Council, of fifteen members, which might not amend Money Bills; for disagreements there was provision for the Governor convening a joint session, after a Bill had been rejected in two consecutive sessions by the Upper House, or of his dissolving the Lower House, and, in the next session, if the Bill was again rejected, holding a joint session at which the Bill might be passed by an absolute majority of the total members of the two Houses. The Orange River Colony[5] had a nominee Council of eleven, with the same powers and arrangements for disagreements.

The Union[6] constitution was based on the models of the Transvaal and the Orange River Colony as regards powers, while its composition was provisional and tentative. The first Senate was constituted for ten years, of forty members. Eight were nominated by the Governor-General in Council, half mainly on the ground of their thorough acquaintance, by reason of official experience or otherwise, with the reasonable wants and wishes of the coloured races in South Africa; the term

[1] J. Christie, *J. C. L.* vi. 19 ff.

[2] *Constitution Ordinance*, 1852; Act No. 1 of 1872; No. 14 of 1893. For details see ed. 1, i. 543 ff.

[3] Act No. 14 of 1893.

[4] Letters patent, 6 Dec. 1906.

[5] Letters patent, 5 June 1907.

[6] 9 Edw. VII, c. 9, ss. 24–6, 53, 54.

'reasonable' is significant. In each province eight were elected by the two Houses of the Colonial Legislatures sitting together, by proportional voting, each voter having a single transferable vote. As no legislation was passed by the Parliament before the end of the first ten years, the Senate was reconstituted for another ten, eight being nominated as before, and eight in each province elected on the same system by the Provincial Council and the members of the Assembly for the province in joint session. By an Act of 1926 the Senate may be dissolved within 120 days after a general election, whereupon new nominees will hold office until a new Government comes into power, or another dissolution occurs. The quorum is twelve. A Senator must be thirty; be qualified to be registered as a voter for Assembly elections in one of the provinces; have resided in the Union for five years; be a British subject of European descent; and, if elective, be the registered owner of immovable property within the Union of the value of not less than £500 over and above any special mortgages thereon. The disqualifications and the grounds of vacating seats are as in the case of members of the Assembly.

2. Sections 60 and 61 of the South Africa Act, 1909 provide:

60. (1) Bills appropriating revenue or moneys or imposing taxation shall originate only in the House of Assembly. But a Bill shall not be taken to appropriate revenue or moneys or to impose taxation by reason only of its containing provisions for the imposition or appropriation of fines or other pecuniary penalties. (2) The Senate may not amend any Bills so far as they impose taxation or appropriate revenue or moneys for the services of the Government. (3) The Senate may not amend any Bill so as to increase any proposed charges or burdens on the people.

61. Any Bill which appropriates revenue or moneys for the ordinary annual services of the Government shall deal only with such appropriation.

3. Section 63 provides for the case of deadlocks. If the Assembly, in two consecutive sessions, passes any Bill, and it fails to pass the Senate, the Governor-General may convene a joint session at which the Bill shall be voted upon, and may be passed by a majority of the total number of the members of the two Houses present at the joint session; as usual, amendments which have been proposed but rejected in the earlier proceedings

may be accepted by a similar majority before the final vote on the Bill. But if the Senate fails to pass any Appropriation Bill, then the joint session may be held in the same session. The Senate numbers 40, the Assembly was increased in 1924 to 135, giving the preponderance in joint sessions to the Lower House.

In Southern Rhodesia the creation of a Legislative Council was left facultative to the Assembly.

§ 6. *Malta*

The Legislative Council of Malta consists under the letters patent of 14 April 1921 of seventeen members, seven general and ten special, representing, in twos, the clergy, nominated by the Archbishop; the nobility; the graduates; the Chamber of Commerce; and the Trade Union Council,[1] these eight being elected by the bodies they represent. Special members must be thirty-five and qualified to vote for elections of such members; general members must be thirty-five, and be ecclesiastics, or graduates, or members of the Chamber of Commerce, or Trade Union Council, or enjoy an income of £100 from immovable property, or pay £50 rent, or have been legislators, or higher civil servants. Special electors must be twenty-one and included in one of the four categories represented; general electors must be twenty-one and able to read and write, and in possession of an income of £20 from immovable property, or pay rent to that amount; members of the Imperial forces on full pay are only eligible if they have a domicile in Malta. For the first election there were two divisions, one with four and one with three members, elected on the system of proportional representation with the single transferable vote.[2] The tenure of office was six years, subject to dissolution by the Governor, the quorum eight. Disqualifications for membership and rules as to vacation of office were laid down as for the Assembly. Similarly, the rules regarding disqualification of voters are those of the Assembly.

2. The relations between the Houses on Money Bills are

[1] In the absence of a recognized Council it was left to the Governor to regulate the matter by Proclamation of 15 Sept. 1921. As an attempt to define by Act would need two-thirds majorities, it was decided in 1926 to leave the Governor to act, on ministerial advice (Secretary of State's dispatch, 12 March 1926); Senate *Deb.*, 16 June 1926.

[2] Continued by Act No. 14 of 1924, s. 8, and as to voting, Seventh Schedule.

regulated under ss. 60 and 61 of the letters patent. Appropriation and taxation measures must originate in the Assembly. No such Bill may be altered by the Council, but it may return the Bill with amendments which they recommend ; the Assembly must then consider the amendments, but, when it has been returned again to the Council, that body must either accept or reject, without further attempt to recommend change.

3. The machinery for deadlocks, laid down in s. 42 of the letters patent, is that formerly used in the Transvaal and Orange River Colony. If a Bill is twice passed in consecutive sessions by the Assembly, and fails to pass the Council, the Governor may convene a joint session, or he may dissolve the Assembly, and, if desired, also the Council. If after the dissolution the Bill again passes, and is rejected by the Council, a joint session may be convened. At this session the Bill, with any amendments proposed but rejected in the preceding sessions, may be considered, and passed if desired by a vote of two-thirds of the total numbers of the two Houses. The right to dissolve must not be exercised within six months of the expiry of the Assembly by efflux of time.

§ 7. *Ireland*

(*a*) *Northern Ireland.* The Senate of Northern Ireland consists under the *Government of Ireland Act*, 1920, of twenty-six members, the Lord Mayor of Belfast, and the Mayor of Londonderry *ex officio*, and twenty-four members elected by the House of Commons. Members hold office for eight years, but half of the elected members retire every four years, the first to retire being determined by lot. The qualifications, disabilities, and causes of vacation of seats of members are as in the case of the Commons, and the election takes place, whenever four or more Senators are to be chosen, by proportional representation with the single transferable vote, as defined in the Imperial *Representation of the People Act*, 1918.

2. Bills imposing taxation or appropriating revenue can only originate in the Commons, but this does not apply merely to the imposition of fines or pecuniary penalties, or their appropriation, or to the imposition or appropriation of fees for licences or services. The Senate may not amend any Bill so far as it imposes taxation or appropriates revenue or moneys, and may not amend any Bill

so as to increase proposed charges or burdens on the people. Any Bill which appropriates revenue or moneys for the ordinary annual services of the Government shall deal only with that appropriation. These clauses, it must be noted, being embodied in an Imperial Act, and not included in the portions which may be altered by the Parliament of Northern Ireland, are binding, and an Act which was passed contrary to them might be void for repugnance, under the express terms of s. 6 of the Imperial Act.

3. Under s. 17 of the Imperial Act, the procedure for deadlocks is that of the joint session, which may be convened if any public Bill is twice in successive sessions rejected by the Senate; then voting takes place on the Bill and any amendments rejected in the preceding discussions, and the Bill, with or without any of these amendments, may be passed by a majority of the total numbers of the two Houses.

In the case, however, of Appropriation or Taxation Bills, if the Senate rejects a measure, a joint session may be convened in the same session.

(*b*) *Irish Free State*. In the Irish Free State [1] the first Senate was composed of thirty persons nominated by the President of the Executive Council, due regard being had to the representation in the Senate of parties not adequately represented in the Chamber. Of these, fifteen chosen by lot hold office for twelve years, the others for six years. Fifteen, elected by the Chamber on the principle of proportional representation, were to hold office for nine, another fifteen similarly elected for three years, casual vacancies were to be filled by election by the Senate, the person so elected to retire at the end of the three years' period current. In 1925 the first election was held under the permanent system which provides that the electorate shall be the whole state, the electors, qualified as for the Chamber, voting under proportional representation; such elections for fifteen members are to be held every three years, each member thus having twelve years' service. The choice of the electors is confined to a panel consisting of ex-Senators desiring re-election, and three times as many qualified persons, i.e. persons eligible for the Chamber

[1] In addition to the constitution see the *Electoral Act*, No. 12 of 1923, and the *Constitution (Amendment No. 1) Act*, No. 30 of 1925, as to duration of Senatorial office and filling of casual vacancies.

but aged thirty-five, who are to be proposed on the ground that they have done honour to the nation by reason of useful public service, or that, because of special qualifications or attainments, they represent important aspects of the nation's life. These qualified persons are to be nominated, as regards two-thirds, by the Chamber, one-third by the Senate, who are to have regard for the necessity of arranging for the representation of important interests and institutions in the country, but must themselves decide on the grounds and mode of choice of their nominees.

2. The Chamber has exclusive authority in respect to Money Bills as defined in the constitution, which excludes, as usual, local authorities' taxation. The Chairman of the Chamber has *prima facie* power to certify, but, on the motion of two-fifths of either House, made within three days after a Bill is passed, the question whether it is a Money Bill within the constitution may be referred to a Committee of Privileges consisting of three members of either House elected by it, sitting under the chairmanship of the senior judge of the Supreme Court, who shall have a casting vote in case of equality. It is laid down that the legislation necessary to carry out the financial resolutions of the Chamber in each year should be enacted in that year, and the rule that appropriations must be recommended by the Crown is made precise by adding 'on the advice of the Executive Council' (s. 37). But a Money Bill is to be sent to the Senate, which may return it within twenty-one days, with recommendations. The Chamber may deal with these as it thinks best, and thereafter as passed by the Chamber it is deemed to be passed, while it is deemed to be passed if not returned in that period.

3. As regards other legislation the Senate may amend and send back to the Chamber, but at the end of 270 days after the Bill has been sent to the Senate, it is to be deemed, unless the period is extended by agreement of the Houses, to have been passed in the form in which it last passed the Chamber. The Senate may require a conference, but only to discuss, not amend the Bill. On the other hand, a majority of the Senate or two-fifths of the Chamber may, within seven days after the passing of a Bill, require that its operation be suspended for ninety days, and, if within that period a resolution is passed by the Senate, assented to by three-fifths of its members, or a petition is

presented from one-twentieth of the voters, the Bill must be submitted to a referendum. These provisions do not apply to Money Bills or Bills pronounced by both Houses to be necessary for the immediate preservation of the public peace, health, or safety.[1]

§ 8. *The Nominee Houses and Money Bills*

The practice of creating Upper Houses on the basis of nomination, without defining their rights as to Money Bills, necessarily led to disputes. In 1854[2] the Legislative Council of New Zealand set up a claim to be entitled freely to amend Supply Bills, but the Secretary of State, in his reply of 25 March 1855, expressed the opinion that the Council, as nominee, should not exercise a power not accorded to the House of Lords by the Commons. In 1863[3] the law officers of the Crown advised that it was not a breach of privilege on the part of the Council, nor contrary to British practice, to require that certain instruments dealing with native lands must take the form of certificates duly signed by the Governor, and sealed, though such certificates were under law liable to certain fees, and thus in a sense the Council was increasing the burden on the people. They pointed out that the House of Lords could not be barred from holding that transactions in English land must be regulated in some form in respect of which fees were provided, by Acts passed by the Commons, and assented to by the Lords, the imposition of taxation being, therefore, really the work not of the Lords but of the Commons. In 1872[4] an acute case of difference arose: the Lower House having borrowed money for immigration and public works, proposed by the Payments to Provinces Bill, 1871, s. 28, to hand over half of the proceeds to the provinces. The Council thought this a breach of faith with the investors, and claimed the right to strike out the clause. This was denied by the Lower House, and the matter was referred to the Imperial Government for the opinion of the law officers. The Council argued that the Bill imposed no new burden on the people;

[1] See the *Public Safety (Emergency Powers) Act*, No. 29 of 1923, remedying the omission of a declaration as regards the Act to the same effect, No. 28. The similar Act of 1926 was introduced on Tuesday and signed on Friday, 19 November.

[2] *Parl. Pap.*, H. C. 160, 1855, pp. 38 f.

[3] *Const. and Gov. of New Zealand*, pp. 195 ff.

[4] Ibid., pp. 199 ff.

altered no existing burden, and was not a grant of supply; and claimed that it could alter such a Bill without departing from the practice of the Lords, which it was entitled to follow generally; but it also asserted that under the express terms of the *Parliamentary Privileges Act*, 1865, which gave both Houses the privileges of the Commons in the United Kingdom, it had the right to deal with such financial legislation. The law officers naturally asserted that the House of Lords would not attempt to deal in this manner with a Bill of the kind; that the Act of 1865 clearly was not intended to alter the distribution of legislative authority; and that they concurred in the view of the House that

> it is beyond the power of the Legislative Council to vary or alter the management or distribution of any money as prescribed by the House of Representatives; that it is within the power of the House of Representatives by an Act of one session to vary the appropriation or management of money prescribed by an Act of a previous session.

The law officers, however, added the most important proviso that it was open to the Council to reject any such Bill as they could not amend, without any allusion to the right of the House of Commons, as asserted in a resolution of 1860, so to manage their financial proposals as to compel acceptance of them by the Upper House. This was a significant recognition, and in 1880 Mr. Hall's Ministry introduced a separate Bill for reduction of salaries, to avoid the appearance of tacking.[1] In 1884 the same policy was followed in Queensland,[2] but the Council rejected the Bill for payment of members. The Assembly then included the item of £7,000 in the annual Appropriation Bill, as part of the total for the Legislative Assembly's establishment, and the Council cut down that item by the amount. The two Houses then agreed to ask the view of the Privy Council, and this was done. The Council, in a very brief opinion of 27 March 1886, ruled that the Constitution Act did not confer on the Council co-ordinate powers with the Assembly, so as to enable it to amend Money Bills, and that, on the contrary, the

[1] Rusden, *New Zealand*, iii. 350.

[2] *Parl. Pap.*, C. 4794; H. L. 214, 1894. In the period 1915–19 the Council reasserted in effect, and even in 1917 formally, its right to amend Money Bills; see on the whole matter Bernays, *Queensland Politics*, pp. 236–82.

Assembly was right in its claim of 12 November 1885. That claim embodied the principle that the Council should as regards Money Bills be deemed to be in the position of the House of Lords; that amendment of such a Bill was wholly contrary to the practice of the House of Lords; and that there applied to the Assembly of Queensland the famous claim of the Commons of 3 July 1878

> that all aids and supplies to Her Majesty in Parliament are the sole gift of this House, and that it is their undoubted and sole right to direct, limit, and appoint, in Bills of aid and supply, the ends, purposes, considerations, conditions, limitations, and qualifications of such grants, which ought not to be changed or altered by the Legislative Council.

The ruling was acquiesced in in New Zealand in 1898,[1] when the Speaker ruled that the Council could not amend the Old Age Pensions Bill, while the other side of the position, the right to reject, was seen in 1893 and 1895 in the rejection by the Upper House of New South Wales of the Income Tax Bill and the Land and Income Tax Assessment Bills of the Lower House.[2] It is important to note that the issue whether the Lower House can by tacking successfully defeat the wishes of the Upper House has never been decided in the Dominions. There are on record many cases of rejection of financial proposals in recent years, especially in Canada, where, after the fall of the Liberal Government of 1911, the Senate entered on a new career of activity, but the rejection of an Appropriation Bill has been avoided.[3] In 1878 in Quebec the Upper House rejected one, but Mr. Joly had a precarious majority, and the action of the Lieutenant-Governor, Mr. Letellier, in dismissing his predecessor had caused much feeling.[4] There seems, however, no question as to the right to reject, and there is no ground to suggest that the position varies with the power to add or not members to the Upper House, though it is clear that an unlimited House would run fatal risks in such a case under modern precedents of swamping, both in Queensland and New South Wales. The other Upper House which can still be swamped is

[1] Reeves, *State Experiments in Australia and New Zealand*, ii. 247.

[2] Walker, *Australasian Democracy*, pp. 36, 50 f.

[3] In 1856 a Supply Bill was thrown out in Canada as including £200,000 for buildings, disapproved by the Council.

[4] *Parl. Pap.*, C. 2445.

that of New Zealand, whose change to elective was at one time apparently agreed upon by all parties, though there appears since to have been a considerable alteration in opinion.

Minor points regarding the powers of the Houses have arisen. The most interesting is the dispute in the Transvaal in 1908 as to what constitutes a Money Bill. When the Public Service and Pensions Bill came before the Council, the President ruled that, as it contained incidentally appropriation clauses, it could not be amended in any respect by the Upper House. The opinion of the Imperial law officers was obtained from the Secretary of State on 25 March 1909, and the whole matter examined by a Joint Committee of the two Houses. It appeared that the law officers agreed that under the letters patent the Bill must be deemed a Money Bill, and thus beyond alteration by the Upper House, but that this was not the practice of the Imperial Parliament under which such a Bill might have been amended. It was agreed by the Committee that in view of union, action was needless, but there was concurrence in the view that the power of dealing with non-appropriation clauses should be granted to the Upper House, and this consideration had effect on the form of the power given to the Union Senate in s. 60 of the *South Africa Act*.[1]

In 1909 the New Zealand Council inserted an appropriation clause in a Reformatories Bill, and its action was validated *ex post facto* by a Governor's message being brought down recommending the appropriation; in 1910 the same thing was done with the Crimes Amendment Bill with the result of a heated discussion, the Speaker insisting that a Governor's recommendation must be obtained, and the House must waive privilege, or the measure must be dropped; the former course was adopted. In 1911 a Bill was introduced in the Senate of Canada to provide pensions for certain Judges, who had been Lieutenant-Governors in the Provinces, but was withdrawn on protest on constitutional grounds.[2]

[1] *Ass. Deb.*, 1909, pp. 691 ff., 898 ff.

[2] For the success of the Senate in asserting a right even to amend Money Bills see below, chap. viii, A. § 5.

VIII

THE UPPER HOUSES. II

Constitutional Relations

A. *The Nominee Upper Houses*

§ 1. *New South Wales*

FROM the early days of its life the Council of New South Wales existed under the menace of swamping. The first Council, appointed in May 1856, was to hold office for five years, and it devolved on the Governor in 1861 to appoint not less than twenty-one Councillors to hold office for life. Before, however, the time for such action arrived, the Governor, on the advice of his Government, in order to secure the passing of certain Land Bills, added Councillors to the Chamber, though it had but one night to run; the device failed because the President resigned, and the new members could not be sworn in, but no wonder that the Secretary of State deplored the precedent as wholly unwarrantable.[1] The Governor, however, had anticipated the criticism by reporting on 20 July that the new Council had been constituted of 23 members, including 12 of the late Council, with general public approval, and that it was understood that the number was not to be raised normally beyond 27. In point of practice, by 1865, when the Governor reported his refusal to add two members to the Council on a suggestion, not pressed, by his Prime Minister, the number was already 32. The Governor in his dispatch of 16 February discussed the situation with clearness, and insisted that, in order to maintain an effective Upper House, the Governor should be deemed to be independently responsible for seeing that the House was not swamped, and his action in regard to nominations should not be regarded as a matter for ministerial responsibility, involving the right of ministers to resign if their wishes were refused. His action was approved by the Secretary of State on 6 May 1865, but it is significant that, though the Premier, who had just faced a general election with untoward results, did not insist on resignation on the issue, the Colonial

[1] *Parl. Pap.*, H. C. 198, 1893–4, pp. 69–99. For this chapter see Marriott, *Second Chambers*; Temperley, *Senates and Upper Chambers*; and, especially, Lees Smith, *Second Chambers in Theory and Practice*.

Secretary did so on the score of the violation by the Governor of the rule of responsible government. Lord Granville maintained the same position on 18 December 1868, when he acknowledged the Governor's report of the addition of three members to the Council, to help to make keeping a quorum easier, by impressing on him the disadvantage of any additions based on political considerations. The Prime Minister indignantly declared that the unlimited size of the Council had been deliberately agreed on, as shown by Mr. Wentworth's speech on the third reading of the Constitution Bill, in order to allow of expansion and prevent the Upper House controlling the Lower House, trampling on the rights of the people, and breeding revolution. He asserted his right to advise the addition of new members; if these were rejected, the Governor must look for other advisers, the justice of his action in refusing advice depending on the nature and importance of the measure, the kind and length of the resistance of the Council, the proportionate number and importance of the colonists desiring the change, and the strength of their determination in regard to it. To this weighty protest Lord Granville, on 2 October,[1] could only oppose the sensible contention that the use of the Upper House would be gone if any Ministry could swamp it, ignoring the obvious reply that this consideration was inherent in the nature of unlimited Houses. The New South Wales Government returned to the attack in a minute sent to the Secretary of State by Sir H. Robinson on 10 August 1872;[2] it was pointed out that by nine votes to eight the Council had rejected the Border Duties Bill, which the Government had been returned by the people with a mandate to pass, and that of thirty-one Councillors Sir J. Martin had appointed fifteen. It was proposed to make the Council elective, but in the meantime the Ministry demanded the application of Mr. Wentworth's doctrine that the power of the Governor to add members should be used to force obedience to the wishes of the Upper House. The Governor deprecated yielding the principle of maintaining the number unchanged, and the Secretary of State on 29 November 1872[3] expressed the hope that the Government would not insist on pressing for appointments, arguing that the limitation was not really one imposed from England, but rested on a sound con-

[1] *Parl. Pap.*, H. C. 198, 1893-4, p. 81.
[2] Ibid., p. 87.
[3] Ibid., p. 98.

stitutional understanding originally arrived at locally. The argument prevailed for the moment, and in 1876 the effort to make the House elective was dropped, wisely, from the point of view of those who desired the will of the people to prevail.

But, as the only force behind the constitutional understanding was a feeble public opinion which could only be enforced by a strong-willed Governor confronted by a weak Ministry, it is not surprising that in 1888[1] the end came. Lord Carrington allowed in ten months the appointment of twenty-two members to the Council, accepting, contrary to the opinion of Sir C. Dilke, the doctrine of ministerial responsibility. The matter was further illustrated by the experience of Mr. Reid. In September 1894[2] he was refused an increase of the Council, but after a dissolution it was conceded, and he was able to carry ultimately his Land Tax proposals by the intimation that, if the Council would not agree, it would find them carried over its head by the addition of members. This was the effective reply to the rejection of the Income Tax Bill of 1893 and the Land and Income Tax Assessment Bill of 1895. Nor was there any real surprise when in 1899 the recalcitrance of the Council on the subject of federation was overcome by the creation of twelve new members to vote down the Opposition. The Council, of course, was by no means rendered useless: in 1900 and 1901 it rejected without hesitation the proposal to grant women the vote, and its chief motive for yielding in 1902 was that the Federal Parliament had conceded it for federal elections.

But the position of the Council had been fatally undermined. Mr. Wade as Premier in 1908 obtained a considerable increase of members,[3] though there was no deadlock to call for it, but next year he found his nominees recalcitrant, and his Land Bill, which aimed as usual at settlement based on compulsory dealing with private property, was drastically handled.[4] Hence in 1910[5] he appeared with a proposal to limit the number of the Upper House to half that of the Lower, and to provide a means of settling deadlocks. This was doubtless the best chance of saving the Council, but there was no enthusiasm in any quarter for the suggestion that a strong Upper House should come into being,

[1] *Parl. Pap.*, H. C. 70, 1889, p. 43.
[2] *The Times*, Sept. 14, 1894.
[3] *Parl. Pap.*, 1908, Sess. 2, pp. 79 ff.
[4] Ibid., 1909, pp. 4305 ff.
[5] Ibid., 1910, pp. 1844 ff.

and the proposal fell with its proposer in the same year. The weakness of the Labour Government of 1911–13 led to a revival of the power of the Council ;[1] in face of the fact that Mr. Beeby, one of the strongest members of the Government, resigned in December 1912, and another member was on a mission to America, it felt able in 1912 to reject proposals to refer death sentences to a Council of Judges in order to save the Executive the trouble of considering them, to enfranchise persons in receipt of Poor Relief, and, in its original form, to confiscate much of the value of the property of gas companies, substituting in lieu the British plan of regulating charges with due regard to the interests of the consumer. In 1913 it rejected a Fair Rents Bill for Sydney, an Eight Hours Bill, a Bill to allow appeals by railway servants against the decisions of the Commissioner, and one to grant, on unsound financial principles, superannuation allowances to the public services. But, with the decisive victory of the Labour party at the election of 1913 under the system of second ballots, there was a complete change of view ; the Council recognized that it had no right to obstruct the will of the people, and accepted modified forms of much of the legislation it had originally rejected. But the Labour party had resolved that it must be ended, and, though the consummation was delayed by the events of the war, which brought a Labour leader like Mr. Holman into close touch with the Liberals, drove a wedge between moderate and extreme Labour, and ultimately placed a non-Labour Government under Sir G. Fuller in power, the Labour Government of 1925, despite its majority of four only in the Assembly, asked Sir D. de Chair to add twenty-five members to the Upper House to swamp it, alleging, with not a very great deal of truth, that the Upper House had defied the will of the electorate. The new Honourables, however, failed to perform their duty, and a respite was accorded.

The circumstances which led up to the attempt were not creditable to the Lower House. It had carried on 12 August 1925, on a strict party vote of 44 to 40, a motion for sittings from 10 a.m. onwards, a device intended doubtless to prevent the effective Parliamentary action of the Opposition, who, as men of affairs, and not professional politicians living on the pay which they had grossly increased to £875 when previously in office,

[1] Keith, *Imperial Unity and the Dominions*, pp. 398–400.

and were shortly to increase from £600 to that sum, could not give up the whole day to legislation. The increase of twenty-five members was used to force through the Council, after it had once rejected it, the Government Railways Amendment Act, which restored to their positions and seniority the strikers among the railwaymen in 1917, and degraded those who were promised promotion for loyalty, thus breaking the pledged faith of the State. The Industrial Arbitration (Amendment) Bill was equally a pure piece of class legislation. Not only did it compel the inclusion in any award of preference for trade unionists, but it compelled every employee to become in fourteen days a member of a trade union specified in the award, and the Bill further laid down what unions should be regarded as duly registered and eligible to be named in awards, a device to destroy the unions of loyal employees, formed in 1917 during the strike epidemic directed against Australian participation in the war. Yet another proposal was to abolish the death penalty, the Ministry declaring that in no case would they allow any sentence to be executed, the usual cowardly failure of Labour Governments to face an unpleasant duty essential for the protection of the public. It was further desired to abolish the system of proportional representation, and to go back to the simple plan of a majority vote, but even the packed Council insisted on having at least preferential voting, the Labour aim being to win seats through the divergences in the Opposition sections. The packed Council passed the Bill to apply the rule of 44 hours' work to intra-State shipping, though it was clear, and the High Court on 19 April duly held, that the Act was invalid as contrary to a ruling of the Commonwealth Court of Conciliation and Arbitration, enjoining a 48-hour week. Moreover, as one of the newly added members pointed out, the farmers would suffer most of all, if the new system of one House were adopted, and if the proportional system disappeared. The Government admitted that one House might be objectionable if it stood alone, but offered the initiative and referendum at some future date, not as contemporary with abolition. The measure had not been carried on the adjournment on 25 January 1926, and, when it was moved on 23 February to restore the Bill to the Order Paper, it was rejected by 47 to 41 votes. The episode proves the necessity of change, but certainly it was a remarkable example

of political dishonesty to ask for abolition on the strength of so small a majority and with so little excuse. The packed Council made women eligible, but the Governor declined by adding Labour nominees to carry the swamping process further.[1]

§ 2. *New Zealand*

The Council of New Zealand, after its early claims in regard to Money Bills had been negatived, settled down to a comparatively placid existence[2] prior to the advent to power of Mr. Ballance in 1891. Already in 1883 the Whitaker-Atkinson Government suggested election by proportional representation; in 1885 Sir E. Whitaker induced the Council to pass on second reading a Bill providing for election by the two Houses in joint session; in 1887 the Ministry asked in vain the Lower House to accept a proposal for reduction of the life period of tenure to seven years and the limitation of number to half that of the Representatives. In 1890 a Bill to this effect succeeded in passing the Lower House, but the Council rejected it by 17 to 13. The Ministry was about to end its course; its position was overthrown and it was admitted by Lord Onslow that it must be reckoned to be in a minority; but, when they asked him for eleven new appointments, he did not refuse outright; in lieu, he bargained and induced them to accept six, and to give him an assurance that they had recommended these names to strengthen the Upper House, not for political advantage. A protest of forty members of the House of Representatives he met by an assertion that, as the royal prerogative of mercy was not involved, as no question arose of an appeal to the people, the election just being over, and as political rewards on leaving office were in accord with British practice, he felt he must accept advice. Lord Knutsford on 11 April 1891[3] was careful to assure Lord Onslow that his action was strictly in accordance with the constitution of the Colony, but he emphatically refused to express any opinion on the propriety of ministers' advice.

[1] Cf. Sir Harrison Moore, *Sydney Morning Herald*, 23, 24 Feb. 1926, 11 March 1926; Dr. Frederick Watson, ibid., 5 March 1926.

[2] See Reeves, *State Experiments in Australia and New Zealand*, i. 104 ff.; Dilke, *Problems of Greater Britain*, i. 424.

[3] *Parl. Pap.*, H. C. 198, 1893–4, p. 14.

The new Government, which ejected the ministers whose advice moved Lord Onslow, was inspired by a completely new spirit as opposed to the mild Liberalism of Sir R. Stout; it seized the opportunity of the turmoil caused by the results of the maritime strife in Australia and New Zealand to appear as the champion of the ideals of Labour, and postponed the formation for many years of a strong Labour party by presenting a workable programme sufficiently advanced to meet the needs of all but doctrinaire politicians. The new Government at once passed the Bill limiting the term of new members of the Council to seven years with the possibility of reappointment, but Lord Glasgow, the new Governor, declined to give them the twelve members which they asked for to give them authority in the Council, which then counted twenty-six members appointed by Conservative, six appointed by Liberal Governments. Lord Glasgow argued that this meant swamping the House—it must be remembered that in a House of life nominees many are always more or less absentees—but offered nine. The Ministry insisted on retaining office and appealing to the Secretary of State, declining to accept the argument that they should resign; if it were the duty of the Governor to refuse their advice under his constitutional duties, they could not be held responsible for his actions, and should not feel themselves justified in retiring from the administration of public affairs. The quotation of constitutional practice on which they relied was a ruling of the Secretary of State [1] in connexion with the prerogative of pardon in regard to the exercise of which a definite responsibility was laid on the Governor, and it was directed against the claim of ministers that they must be given responsibility for the exercise of the prerogative as part of the self-government of the Colony. The Governor's own view, expressed in his dispatch of 8 August,[1] was that the Ministry should have waited until defeated on an important Bill, then dissolved and obtained a mandate, on which happening either the Council would have yielded, or a case for the intervention of the Governor would have clearly arisen; he suggested that the number of the House should be fixed, but a special power to meet deadlocks given to the Governor. The Secretary of State, however, by telegram of 24 September and dispatch of 26 September,[2] advised him to yield, arguing that

[1] *Parl. Pap.*, H. C. 198, 1893–4, p. 17. [2] Ibid., p. 37.

there was really no question of swamping, and the matter at issue was not one on which a Governor should insist on making his will prevail. The Governor, accordingly, accepted the hint and granted his ministers' request. The new Government acted with great moderation, both under Mr. Ballance and, from 1893, under Mr. Seddon. The proposals it matured were slowly carried, the triennial elections showing that they had popular support. The Upper House in 1891 showed the maximum resistance ; it rejected the Land for Settlements Bill, the Land Bill, the Bill to apply one man one vote to by-elections, the Shop Hours Bill, and the Friendly Societies Bill ; twice the compulsory clauses were taken out of the Industrial Arbitration Bill ; the Bill for female suffrage was rejected in 1892, but hastily accepted in 1893, before the election, as a device to strengthen the party in opposition in the Lower House, but the effort failed, and the vote of the people brought about the passing of the *Industrial Arbitration Act* and the *Land Repurchase Act* in 1894, and the *Shops and Shop Assistants Act* in 1895. The Old Age Pensions Bill was rejected in 1897, but allowed to pass in 1898, the Speaker ruling that no amendment was possible, and fresh Liberal nominations being made to the Council. The predominance of the Ministry and the unbroken support accorded to it by the people until 1911, when it only achieved a dubious equality with the Opposition, secured harmonious working, but in 1912 the new Government of Mr. Massey found itself faced by a hostile second House.[1] Sir J. Ward had already in his policy speech in 1911 advocated the creation of Provincial Councils to relieve the Legislature of local business, and he suggested that these should elect the Council. The proposals of Mr. Massey were for an elective Council, proportional representation being adopted. The Bill passed second reading in the Council, but was laid aside until the people could be consulted. The Government then passed its resolutions through the Lower House, and in vain promoted a Bill in the Council to restrict the term of future appointments to three years. In 1913 it again asked the Council to pass a Bill on similar lines to that of the previous year, but abandoning the suggestion then made of a six years' tenure, with retirement of half the members every three years, substituting five years and thence until the next election as the

[1] Keith, *Imperial Unity and the Dominions*, pp. 411–15.

period. The Council appointed a Committee, which decided ultimately on the plan of restricting the House to forty, and filling vacancies by a joint session of the two Houses. The Committee, however, agreed generally with the views of the Government on the powers of the Upper House, but suggested that if the Houses were dissolved, and a Bill which had already been rejected by the Upper House were after the dissolution again passed by the Lower, it could be presented for assent if rejected by the Council. The advent of war resulted in a shelving of the contest and in the passing of the Act of 1914, summarized above. As passed, the Act allows of the summoning of three Maori representatives to the Council, and the five-year period will practically mean, if ever operative, that Council elections will coincide with every second election to the Lower House. The operation of the Act was postponed by Acts of 1916, 1918, and 1920, the last leaving it open to bring it into operation by proclamation. The reasons for the change of view are clear enough. The faction spirit died away in the war, and the change of members by efflux of time inevitably altered the complexion of the Council.

The best work of the Council consists in the efforts of its Statute Law Revision Committee, which considers measures in their legal aspect, and whose changes are welcomed by the House. It is also useful to carry out undertakings given in the House to bring about changes, to remove inconsistencies in Bills as sent up, to improve draftsmanship, and to add new matter which may not have been held necessary below, but the need for which appears on closer examination. The defects of nomination are flagrant: if the Government which makes appointments remains in power, the Upper House is a cipher; if it goes out, it is apt to become a centre of illegitimate opposition. Sir F. Bell in advocating an elective Senate dwelt on the right of the Lower House to control finance, and to decide the party in power; but claimed for an elected body the right to revise, to initiate, to criticize, to examine, and if necessary to condemn public administration. It is characteristic of the Council that it showed its independence firmly when it was endeavoured in 1919 to obtain its acceptance of a Bill from the House giving the right of election to either House to women; the Speaker declared it a breach of privilege to initiate the Bill in the House, and the offending clause had to be deleted before the Bill was passed.

Under the Act of 1914, however, women are made eligible for election.[1]

§ 3. *Queensland*

The abolition of the Council in 1921–2 has rendered its history of purely theoretical interest. In its earlier days the Council was an energetic body which denied emphatically in 1885 the claim of the Lower House that it was an analogue of the House of Commons, modestly disclaiming for itself any semblance of the limited authority of the Lords. It acquiesced in 1886 in the diminution of its status as to Money Bills by the decision of the Privy Council, and its position was first seriously attacked in 1907[2] when Mr. Kidston with his following of 23, and his Labour allies, 17 strong, were opposed to 31 under Mr. Philp. The Council, naturally sympathetic with Mr. Philp's more conservative views, rejected two Bills, one to establish wage boards, including such boards in agriculture, one to abolish the postal vote, which Labour thought unfair to it. Mr. Kidston asked for an assurance from Lord Chelmsford that he would add members to the Council, if it persisted in refusal to pass the measures, but did not receive it; he resigned, Mr. Philp took office, but the Opposition refused him supply on 19 and 20 November, and on 22 November addressed the Governor on behalf of the Assembly by 37 votes to 27, urging him not to give Mr. Philp a dissolution, as the House had been elected on 18 May, was willing and able to proceed with important business, including Railway Bills, and merely supported the wish of the Government that the resistance of the Council, now prolonged for four years, to reform measures should be overcome. Lord Chelmsford refused on the ground that a dissolution was proper to enable the people to decide an important constitutional issue; he recognized that he was taking responsibility—not endeavouring to pass it off on Mr. Philp, but it was sometimes the duty of a Governor to do so, and he was prepared for it. The election showed Mr. Philp in a minority of 25 to Mr. Kidston's 24 followers and Labour's 22, and the Premier hastily resigned, after spending £687,000 without statutory sanction. There was strong criticism by Mr. Kidston's new Government of the Governor's action, there was

[1] Cf. James Christie, *J. C. L.* vi. 19–26. [2] *Parl. Deb.*, c. 1735 ff.; ci. 38 ff.

talk of asking for his recall, of refusing to sanction the expenditure, but a new political re-alignment of parties solved the problem ; the postal vote was abandoned by Act No. 5 of 1908, a Wages Boards Act, No. 8, went through, the expenditure was sanctioned unostentatiously by a Bill which Labour allowed to slip through at the end of the session, without realizing what it was doing, and an Act, No. 16 of 1908, was passed to provide the referendum as a means of securing agreement between the Houses.

This Act, and Lord Chelmsford's stand for the integrity of the Council, seemed *a priori* to give the Council an assured lease of life as a useful revising Chamber with powers of delay, but the prospect was not realized.[1] In 1911[2] the Upper House drastically revised a Licensing Bill in order to secure better terms for the liquor trade, and there was talk of using the referendum, but the matter was disposed of in 1912 by agreement. Mr. Denham, who succeeded Mr. Kidston, was definitely more Conservative than his predecessor, and his fall from power in 1915 resulted in the announcement of the decision of the Labour party to secure the abolition of the Council.[3] The Upper House naturally proved recalcitrant ; the referendum was brought into play, but the result in 1917 showed a majority of 63,000 votes against abolition[4] and Mr. Ryan left matters as they were. But Mr. Theodore, on his departure into the federal arena, secured from the Governor the appointment of Mr. Lennon, one of his supporters and once a Labour Minister, as Lieutenant-Governor, though it is not intelligible how the Imperial Government took the responsibility of recommending the appointment of a flagrant partisan to the King as his possible representative. Mr. Lennon performed adequately his functions ; when the

[1] The opinion of the writer in ed. 1 (i. 568) that swamping became unconstitutional seems irrefutable; it was adopted in the memorial in Cmd. 1629, p. 20.

[2] Keith, *Imperial Unity and the Dominions*, pp. 400, 401.

[3] *Parl. Pap.*, Cmd. 1629 (1922). The legality of the abolition is beyond all doubt. Cf. *Taylor* v. *A.-G. for Queensland* (1917), 23 C. L. R. 457 ; 1918 S. R. (Qd.) 203. An Initiative and Referendum Bill was to accompany abolition, but the project was dropped, after repeated rejection earlier by the Council.

[4] For abolition 116,196 ; against 179,105 ; informal 2,968. For the drastic treatment of the Assembly's legislation in 1915–19 see Bernays, *Queensland Politics*, pp. 272 ff. A Bill to abolish the Council passed in the Assembly on second reading in 1915 by 38 to 17 ; in 1916 by 35 to 15 ; in 1918 by 34 to 15 (a Revisory Committee of the Assembly was to be created).

decidedly objectionable (as confiscatory of rights solemnly conferred, on the strength of which investments had been made by persons both within and without the State) Lands Act Amendment Bill came up in February 1920 after previous rejection by the Council, its passage was secured by the appointment by Mr. Lennon, on Mr. Theodore's advice, of fourteen new members to the Council. The day of the Council was over; the Bill for its destruction of 1921 was inevitable and was not even effectively resisted by the Opposition,[1] who doubtless realized that it was idle to seek to save the Council as a nominee body, but were divided as to the best mode of securing in lieu an elective House. Petitions to the Crown for disallowance were inevitably vain, and the measure was assented to in 1922. No doubt Mr. Theodore's action was unconstitutional in view of the result of the referendum of 1917, but there was no doubt that the day for nominee Councils with no limit of numbers was over. But it is not clear that a single Chamber is really an adequate Legislature for the enormous area of Queensland, still less that legislation on a purely class basis such as that of the Labour Governments of Queensland is really the best form of legislation which can be devised. The retirement of Mr. Theodore (25 February 1925) and the hasty refuge (22 October 1925) taken in the Supreme Court by his successor indicate that the leaders of Queensland Labour are not certain of the wisdom of a system, under which one House in which the Labour party acts by prearranged agreement, dictated largely by the State Labour party, decides all legislative issues within the wide limits of State power.

§ 4. *Natal, Transvaal, and Orange River Colony*

The lives of the Councils of the three South Africa colonies were short and not glorious. That of Natal by reason of length of tenure, by the fact that it could not be swamped, and by the personal respectability and ample means of some of its more important members, attained considerable influence, and in 1905 it went so far as to reject an Act for native taxation, though it suggested in lieu a poll tax which effected the same end in

[1] Second reading passed 39 to 30; abolition clause by 51 to 15; third reading 46 to 17. Of 59 members of Council (28 appointed before 1915) only 10 voted against to 28 for. A proposal for a Revisory Committee of the Assembly was dropped, and the members of the Council rewarded for committing suicide by free railway passes and library privileges for life.

a more respectable manner, and one not involving the danger of refusal of Imperial assent, and, at any rate, the delay of reservation on the score of racial discrimination. The Transvaal Upper House was insistent on its right to discuss matters, and asked for the right to deal with non-appropriation clauses of Money Bills; it even desired to reject the proposal to present to the King the famous Cullinan diamond, but the Government, it was alleged, secured its assent by providing a couple of members with government posts and replacing them with more loyal subjects.

§ 5. *Canada and Newfoundland*

(*a*) *The Dominion*. Canada, as attested by Lord Durham, had had a most unhappy experience of Upper Chambers under the Act of 1791, the power being placed in the hands of nominees of the Government to refuse assent to projects backed by the will of the electorate, to which the Government was not responsible. But Lord Durham could offer no concrete suggestion, and the beginning of responsible government was carried on by the system, under the Act of 1840, of a nominated body for Canada as under the existing constitutions in the Maritime Provinces. The result, of course, was that the Upper House, as nominated on the recommendation of the Conservative Government of the day, contained, to begin with, eighteen Conservatives to seven Reform members, and it ceased for the time being to have friction with the Lower House. But, when the new Government of Liberalism came in in 1848, it found itself in a minority of fourteen or fifteen, and the Governor was induced to add twelve members, with the result that the Bill to recoup rebellion losses in Lower Canada was passed by a single vote. The Conservatives denounced the Council, and the French Liberals, who had a deep hate of the Council of Lower Canada, joined with them, so that there was great difficulty in obtaining a quorum. The change to an elective body was therefore agreed to in 1856,[1] the number of members being placed at forty-eight, each for a district; the term of office was eight years, and the property qualification 8,000 dollars. But the

[1] See the Imperial Acts 3 & 4 Vict. c. 35, ss. 4–10; 17 & 18 Vict. c. 118; Canadian Act 19 & 20 Vict. c. 140; Pope, *Sir John Macdonald*, i. 277; ii. 233 ff.; Walrond, *Letters and Journals of Lord Elgin*, pp. 145 ff.; *Hansard*, ser. 3, cxxxiv. 159.

new arrangement was no more popular, and on federation it was first proposed to give the appointment of Senators to the Provinces, but this was dropped, and nomination by the Governor-General was agreed on. A deadlock provision was conceded on Lord Carnarvon's suggestion, allowing of the addition of three or six members to overcome a deadlock, but otherwise the number was limited, and the principle of affording equal representation to the three divisions of Canada—Ontario, Quebec, and the Maritime Provinces—was accepted, leaving it until 1915 to complete the system by adding formally a fourth Western block with twenty-four members and a possible addition of four or eight to meet deadlocks. Election was dismissed on the ground that the size of the areas would render the work of obtaining appointment far too expensive, and that, if elective and representative of the Provinces, the elected House might set up claims destructive of responsible government in the ordinary sense as desired in Canada.

Sir John Macdonald's tenure of power from 1867–73 and 1878–91 led to the subservience of the Senate to his will,[1] its independence becoming marked only in the period from 1873–8 when Mr. Mackenzie held power: he suggested to the Imperial Government that the power to summon additional Senators should be used to give his party some voice in the Senate, but the Secretary of State rejected the proposal on the quite sound view that the Act evidently contemplated the use of the reserve power only when parties were nearly equal and its employment would end a deadlock. The Senate, before which the correspondence was laid, entirely agreed with the Secretary of State. They also showed their contempt for Mr. Mackenzie by blocking the project for the Esquimalt-Nanaimo railway, though it formed part of the attempted settlement of the dispute between British Columbia and Canada regarding the carrying out of the terms on which she entered Federation in 1876. The Senate also by 37 votes to 20 carried a censure of Mr. Luc Letellier,[2] when he was successfully defended against Sir J. Macdonald's onslaught in the Lower House; and had the pleasure on Sir John's return to power of seeing the object of its censure removed from

[1] Goldwin Smith, *Canada*, pp. 163 ff.

[2] *Parl. Pap.*, C. 2445. For the Esquimalt railway see Canada *Sess. Pap.*, 1876, No. 41, p. 2.

office. Harmony prevailed, until in 1891 Mr. Goldwin Smith could denounce the system as rewarding contributions to the party funds, and protested against the decent cloak to the facts given by the apparent appointment by the Governor-General. The fall of the Conservatives in 1896[1] gave new life to the Senate; it blocked a Redistribution Bill, rejected a proposal to extend the intercolonial railway to Montreal, and refused to pass a very well-conceived scheme for a railway from Atlin to Dawson to give access to the Yukon, though, as Sir Wilfrid Laurier asserted with much force, had this been done the Alaska boundary award might have gone otherwise. Sir Wilfrid would have liked to have the deadlock provisions put in force, but his tentative inquiry in England in 1900 satisfied him that he would not be accorded this favour, and he therefore allowed time to enable him to imitate his predecessor, who in 117 appointments deviated but once from strict party action, while in his 81 Sir Wilfrid never made that error. The Liberal Senators avenged themselves in the years after 1911[2] when Mr. Borden was in power. In 1912 Sir R. Cartwright, who had even when his party was in power urged greater activity, incited it to reject a Bill for a Tariff Commission, which it was alleged would be a merely partisan body; to refuse subsidies of a million dollars for provincial roads, as in effect creating a fund for corruption; and to reject the proposed grant to the Temiskaming–Ontario railway, probably because Ontario was the centre of the governmental strength. An effort to interfere with a Bill to subsidize the British Columbian section of the Canadian Northern Railway was a failure, because the member in charge of the Opposition thought that the Bill could be amended, which the Speaker of the Senate ruled to be impossible. In 1913 the greater feat was accomplished of destroying the proposal to grant 35 million dollars for naval construction, as Canada's contribution to meet the dangerous condition of affairs in Europe. The proposal of aid to provincial roads was also blocked, and a proposal for the construction or purchase of local lines in the provinces was blocked by an amendment requiring each case to be submitted for Parliamentary sanction. There was a fight over redistribution, but in 1914 matters were arranged amicably enough. On the question

[1] *Senate Deb.*, 1897, pp. 735 ff.; 1898, pp. 280 ff.

[2] Keith, *Imperial Unity and the Dominions*, pp. 390–6.

of Senators also the Government compromised by agreeing to allow any change in the number to stand over, until the coming into force in the next Parliament of the increase of representation in the Lower House ; it was then possible to obtain agreement to an address to the Crown, resulting in the passing of the Imperial Act of 1915[1] reconstructing the Senate and incidentally giving the provinces the assurance that no one should ever have fewer members in the Commons than it had Senators. In the war period the Senate was ready to share the sentiments of the Government, while with the passage of years the old men who constituted more than half its membership passed away, and Mr. Borden appointed men of his own doctrines ; thus the Senate accepted the Bills for altering the franchise and imposing military service in 1917, despite the strength of feeling on both shown by Sir Wilfrid Laurier,[2] who appealed for a referendum on conscription, and denounced the franchise changes as gerrymandering. The advent of Liberals to a precarious power after the election of 1921 awakened the Senate to new energy. In 1922 the Senate had fifty-three Conservative to twenty-nine Liberal members, whose leader, Mr. R. Dandurand, appealed for a return to the mythical days when Senators were independent judges, and declared that he shunned party discipline and the party whip. The Senate eliminated from the Canada Temperance Bill Part III providing for the prohibition of the importation of liquor into provinces where there was governmental liquor control ; it rejected the Bill to repeal the *Lake of the Woods Regulation Act*, 1921, and cut out portions of the new National Defence Bill. In the following year the Senate killed the Canadian National Railways Construction Bill, which proposed to build at an estimated cost of 29 million dollars twenty-six branch lines in Western Canada, and the Canada Temperance Bill[3] which was passed by the Commons on the request of the British Columbia Government, where the Legislature had voted by 30 to 14 in favour of prohibition of importation of liquor into the Province by any save the provincial Government. The Attorney-General of the Province, in an incautious letter to the Solicitor-General of Canada, alleged that a tremendous lobby

[1] 5 & 6 Geo. V, c. 45.

[2] Skelton, *Sir Wilfrid Laurier*, ii. 527 ff.

[3] *Canadian Annual Review*, 1923, pp. 194 f., 730 f.

would be carried on against the measure, 'very liberal sums of money will be made available for the debauching of members of both sides of the House. Very substantial contributions will be offered to the campaign funds of all parties.' This indiscreet frankness helped to ruin the prospect of the Bill. The Senate also defeated an effort to reduce newspaper postage. The uncertain position of the Government, dependent on the support of the Progressives, rendered it not surprising that the Senate should remain firm in 1924 on the score of the branch railways, and the Prime Minister [1] ended the session with strong comments on the need of reform to prevent the Senate defeating the will of the people. But worse was to come. In 1925 at the close of the session the Senate set up amazing claims as to its rights regarding a Money Bill. The Banking and Commerce Committee of the Commons had reported in July 1924 unanimously that there was a moral obligation on the part of the Government to reimburse to some extent sufferers in the failure of the Home Bank. Appropriations were therefore made in 1925 of 5,450,000 dollars which would give all depositors in the bank 35 per cent. of their deposits, which amount, added to the 25 per cent. derived from the liquidation, would at least be a substantial relief. The Senate struck out from the Home Bank Bill reference to moral obligation, and based any grant on compassion; it declined to exceed 3,000,000 dollars or to award anything of right to depositors of over 500 dollars, leaving it to a commissioner to decide to what extent those with deposits above that sum were deserving of compassionate treatment. On return to the Commons the Minister of Justice pointed out that the Senate had changed the principle on which the Bill was based; that it had altered the destination of the money; that it had assumed responsibility for imposing a charge on the Treasury; and that it was a breach of privilege to originate or increase a money vote. The Senate, however, secure in the knowledge that the Government wished to help the unfortunate depositors, remained firm and compelled the Government to acquiesce in the decision. The episode is remarkable, for it

[1] *Canadian Annual Review*, 1924–5, pp. 209 ff.; 1925–6, pp. 312 ff. Needless to say, in Canada the monstrous procedure of assenting to the Bill without the Senate's amendments, adopted without protest from the Secretary of State for the Colonies in Tasmania in 1923, was not adopted.

amounts to a successful decision to amend a Money Bill, despite the clear fact that the Senate cannot have any such right either in constitutional law or by constitutional practice.

Less unconstitutional was the rejection on 8 June 1925 of the Old Age Pensions Bill of the Government, which was opposed even by some Liberal Senators and which was attacked by the leader of the Opposition as an infringement on provincial rights, and as compelling provinces which did not desire to take part in the scheme to contribute towards the cost in respect of provinces which did. In general legislation the Senate naturally asserted its special point of view, declining, for instance, to assent to the proposal to delete from the Criminal Code two drastic clauses as to sedition inserted during the anxious period of 1919, and refusing to restore a clause then deleted, which was claimed to be of value as a protection to the liberty of the subject and as essential if free criticism of governmental proposals or actions was to be possible.[1] The Senate also rejected a proposal to omit s. 41 of the *Immigration Act* as passed in 1919, which gives wide powers of deportation to the Executive Government in respect of offences against the order of the State. It was contended by the Government that the powers were unduly wide, and authorized the deportation of a British subject however long he had settled in Canada, while it was expressly provided that the power should not apply to any person born a British subject in Canada or naturalized therein. The Senate, however, held that danger of anarchic propaganda was not negligible, and that some of the most dangerous agitators in 1919 were British subjects from the United Kingdom, who ought to be liable to summary expulsion.

The question of reform presents endless difficulties. The fact that an Imperial Act is necessary to vary the federal pact means that some very considerable degree of unanimity is essential before anything can be done, and the opposition of Quebec to any change renders action almost out of the question. In view of this fact discussion of possibilities is almost otiose. In 1874 Mr. Mills proposed that the Provinces be given the choice of Senators, whether by the Government or the Legislature, and

[1] See c. 46 of 1919 which inserted in c. 146 of the *Rev. Stat.*, 1906, ss. 97 (A) and (B) and omitted s. 133. For the revolutionary movement at Winnipeg which evoked the legislation, see *Canadian Annual Review*, 1919, pp. 460–84.

this seemed to have then wide support, but remained dormant until revived by Mr. McIntyre in 1906. Sir R. Scott after his retirement from the Liberal Government in 1909 [1] proposed a scheme under which about two-thirds would be elected, the rest nominated, and the period of office reduced to seven years. Sir W. Laurier declined the proposal of election by the people, favoured by Sir R. Cartwright, but suggested in 1911,[2] very tentatively, election of some Senators by the provincial Legislatures, nomination of the rest, and a term of twelve or fifteen years. Mr. Foster [3] in reply objected to introducing federal politics into the provincial sphere—an idea denounced by Sir J. Macdonald—and urged resort to the popular vote, while Mr. Lancaster in 1909–11 urged abolition, pointing out that it had blocked a Railway Bill to compel the fencing of level crossings, for seven years, and only then let it go through in defective form. Subsequent discussions reveal merely the lack of any agreement on reconstruction ; in 1925 it was agreed that the matter should form the subject of a conference with the Provinces, doubtless a good way of disposing of the issue, since no one had any valuable suggestion to make. Obvious defects were pointed out, the excessive length of office, the party character of the body, its failure to act as in any sense a federal body, and a plea was put in for its divorce from party politics, which the Liberal Government has shown itself in some degree to favour by its reluctance to place there any minister with portfolio. Mr. King, in his earlier contributions to the debate, had laid stress on the desirability of change of powers, so that the Senate should be subject to being overridden by the House of Commons on the same conditions as apply to the overriding of the House of Lords by the Commons in the United Kingdom.[4]

(*b*) *The Provinces.* The history of the nominee Council of Quebec, like that of the Assembly, has been uneventful, comparatively speaking, because of the preponderance of one political party. When the Council threw out supply in 1878, it acted under special pressure of indignation at Mr. Joly's presence in

[1] *Canadian Annual Review*, 1908, pp. 34–6 ; *Commons Deb.*, 1909, p. 1473 ; 1909–10, pp. 2040 ff.

[2] *Commons Deb.*, 1910–11, pp. 2768 ff. [3] Ibid., pp. 2780 ff.

[4] See also Mackay, *The Unreformed Senate of Canada* (1926).

office with a minimal majority, and though doubtless a useful body as a means of revision it seems not to claim any other quality. It is very different with the Council of Nova Scotia, which has had a long and troubled history.[1] Created under the commission to the Governor of 1758, separated from the Executive Council of 1838, and enlarged in 1846, at federation it consisted of members holding office at pleasure, the restriction being that the number of appointments was not to exceed twenty-one, so far as the authority of the Governor as opposed to that of the Crown was concerned. The appointment was conferred on the Lieutenant-Governor in Council by an Act of 1872 (c. 13), but nothing was said as to tenure. A constitutional understanding, laid down in Lord Stanley's dispatch of 20 August 1845, made it clear that it was proposed that tenure should be for life, but no legal effect was ever given to this arrangement, which was conditional on the understanding also that the members could be removed for bankruptcy, conviction of infamous crime, or failure to attend for two sessions. Upon this understanding members were removed before federation in 1861, and after, in 1883, for bankruptcy. In 1879 the Assembly endeavoured to secure the assent of the Council to its abolition, but in vain, and an appeal was made to the Imperial Government for the necessary Act to enable the Lieutenant-Governor to increase the number of members—no power to that effect any longer existing[2]—but this request was refused on the score that the power of altering the Constitution was vested in the local Legislature, and should normally be exercised there alone. On 3 December 1894 the same uncomforting doctrine was laid down by Lord Ripon in response to another request for Imperial aid. The appeal had arisen from the fact that in 1890, after the failure of another attempt to abolish the Council, which had caused offence by rejecting certain Money votes, all new appointments were subject to a formal pledge to vote in due course for the abolition of the Council. The members, however,

[1] Bourinot, *Trans. Royal Soc. Canada*, II. ii. 143 ff.; *Assembly Journals*, 1894, App. No. 17.

[2] This was reasserted in 1926 by the Canadian law officers as against the provincial view; *Canadian Annual Review*, 1925-6, p. 406. The Supreme Court in Nov. 1926 granted leave to appeal to the Privy Council on both the questions of number and tenure, its members being equally divided in view.

while they honoured their obligation to vote for all governmental measures other than this, declined to commit suicide, although in New Brunswick, where a similar state of things prevailed, the Council was abolished in 1891 by a similar procedure.

The existence of the Council, therefore, continued with equal powers in theory with the Lower House, save as regards initiation or amendment of Money Bills, though it used to exercise the power of throwing out such Bills up to 1891, when it commenced a career of greater amenability to the Government, and since 1925 it has accepted the principles of the *Parliament Act*, 1911, as regards general legislation deadlocks. The power of extinguishing the Council is dubious ; it has been suggested that the Lieutenant-Governor could remove members and substitute others, or even that he could, by dismissing all the members, terminate its existence. The latter view is clearly incorrect ; the Lieutenant-Governor cannot abolish the Council, and, if it ceased to be able to function, there would be a hiatus in the legislature. That he could dismiss without violating law is probable ; the constitutional understanding of 1845 was never changed into law, and it is too much to urge that a mere dispatch can give a life tenure. It was manifestly not the intention of the Imperial Government to lay down anything in law, and the legal value of the dispatch would in any case be utterly minimal compared with the terms of the commissions under the Great Seal, which continued after 1845 to lay down the tenure of office during pleasure, though in practice under the terms of the dispatch the pleasure was exercised merely in the cases therein mentioned. On the other hand, the action in question would be clearly unconstitutional, seeing that the practice of life appointments has so long endured. The coming into office of a new Government of Conservative political views after the long domination of Liberalism resulted in the decision of the Government in 1926 to seek to obtain the disappearance of the Council as a venerable relic of useless antiquity. But how to effect this is still problematical. The Bill of March 1926 for abolition was rejected by the Council, sixteen of whose eighteen members were nominees of Liberal Governments, and the Governor-General in Council on 15 March, on the advice of his law officers, disapproved the proposal of the Lieutenant-

Governor to accept the advice of his Premier to add twenty fresh members to swamp the House.

New Brunswick fared better; its constitutional history resembled that of Nova Scotia, though no formal agreement was ever made even by dispatch to give life tenure; the number of local appointments—as opposed to additions by the Crown—was fixed at a maximum House of twenty-three by the commission to Lord Monck, which was lowered by Provincial Act in 1868 (c. 30) to eighteen, the appointment being vested in the Lieutenant-Governor in Council. The lack of value of the Council was fairly obvious, and in 1891[1] it was induced, by the device of taking pledges from new members, to assent to an Act abolishing it from the end of the then Parliament, and it disappeared, therefore, with the dissolution of 1892. A year later,[2] the Council of Prince Edward Island agreed to an Act (c. 21) for its abolition on the merger of the two Houses into a composite whole; it had been elective since 1862 (c. 18), and the Island alone of the Provinces raised its voice in favour of an elective Senate for the Dominion. Manitoba was given by the Constitution of 1870 a nominee Council first of seven, then after four years of not more than twelve members, but the new Premier, Mr. Girard, pronounced against it in 1874; the Assembly passed Bills in that year and 1875 for its abolition, and the Council in 1876 concurred in an Act.[3] In British Columbia no second chamber ever existed; it was given under 21 & 22 Vict. c. 99 a single chamber, partly elective, and the same constitution was given to the extended Province, incorporated with Vancouver Island, by 29 & 30 Vict. c. 67, thus extinguishing the bicameral Legislature enjoyed by that island under the Governor's commission of 1856. The new Legislature was made representative by reconstitution with a majority of elected members by Imperial Order in Council of 9 August 1870 under the Act 33 & 34 Vict. c. 66, and by Act No. 147 of 1871 it gave itself a single-chamber Legislature.

(*c*) *Newfoundland*. In Newfoundland the limitation of members to fifteen has, as in the corresponding limitations in the Maritime Provinces, merely applied to appointments made locally, and the power of the Crown to add nominees to secure

[1] Hannay, *New Brunswick*, ii. 345 *f.*

[2] *Prov. Leg.*, 1867–95, pp. 1221 *ff.*

[3] Ibid., pp. 806 *ff.*

harmony between the Houses has always been unquestioned. In the main the Council has not unduly obstructed the Lower House, and normally it has been in general harmony with it. In 1894 there seemed likely to be difficulties when the minority Government of the day, having secured the removal from the Assembly of several of their opponents on the score of electoral illegalities, passed a Taxation Bill, and the majority in the Council was asked by the supporters of the defeated Ministry to block the measure ; but in the long run it was allowed to go through. The intervention of the Crown was accorded in 1904 to enable Sir R. Bond to pass the *French Treaties Act*, which was of interest to the Imperial Government, and, though in 1907 and 1908 the Council defeated the Government Bills to forbid the employment of steamers in the Labrador fishery, there was no party political spirit animating the majority against the Bills. In 1909 Sir E. Morris, on becoming Premier on the fall of Sir R. Bond, asked for, and received, additions to the Council in order to give him a reasonable probability of evading obstruction.

But in 1917 an event of decisive importance occurred. The Government, as a necessary war measure, secured the passing of a Business Profits Tax Bill, which proposed to take 20 per cent. of all profits over 3,000 dollars. The Council, whose members fell to be hard hit in some cases, carried the second reading only by the casting vote of the President, and in Committee the Bill was defeated. The Government took energetic action. The Legislature was prorogued on 8 August and formally called together again for 16 August. A Government majority in the Upper House was secured by filling up four vacancies in the Council with Government nominees, and the Bill in dispute was promptly passed. Moreover, the opportunity was taken to settle matters for the future by enacting a measure giving to the Assembly the same rights of overriding the Council as the House of Commons has in the United Kingdom in respect of the Lords. Never perhaps has recalcitrance on the part of a legislative body been so sternly repressed, and it is worthy of note that the measure passed without any hint of reference to the people as to whether they desired to see the reduction of the Council to a mere power of delay in general legislation, and to no voice at all in matters of finance. The comparative indifference felt in

the Colony may be explained by the feeling that the Council had never, since responsible government converted it into a body nominated by the ruling party from time to time in the Assembly, really played any essential part in the economy of Government.[1]

B. *The Elective Upper Houses*

§ 1. *Victoria*

The difficulties experienced between nominee and elective chambers is certainly much less than that which has habitually been generated between two elective chambers, each of which necessarily feels that it represents the popular will. The most perfect instance of such friction is unquestionably that shown by the history of Victoria, where the problem is no less complex to-day than it was when the first struggle broke out in 1865.[2] The Government then sought to force its will on the Council by tacking to the Appropriation Bill a protectionist tariff—obnoxious to the Council, which represented the wealthy holders of land and the agricultural interests—and the repeal of the gold tax. The Council threw out this composite measure. The Premier then induced the Assembly to assert by resolution the powers claimed by the Commons in 1861, and the Governor to permit levy of duties on the strength of the resolution of the Assembly on the analogy of the British practice, ignoring in this two salient facts, first that the Lords would not in the long run throw out a Tax Bill, while the Council might; and second, that the practice of paying duties on the strength of a resolution in the United Kingdom merely rested on the assurance that Parliament would approve, and could be legally challenged if desired. In Victoria the merchants challenged,[3] and the Courts denied the right to collect. Then the Premier borrowed money from the London Chartered Bank, of which he was resident director, the bank being assured of payment by the Attorney-General confessing judgement in an action brought to enforce the liability. The Governor, as has been seen, was severely

[1] For a spirited defence of the Council see Sir P. McGrath's and Mr. A. B. Morine's remarks on 4 May 1926.

[2] *Parl. Pap.*, March, 28 May, June 1866; H. C. 310, 1867; H. C. 157, April and June 1868; C. 2173, pp. 103–13.

[3] *Stevenson* v. *The Queen* (1865), 2 W. W. & A'B. L. 143.

reproved by the Secretary of State for these acts. In the meantime, in November the Assembly passed a Tariff Bill which the Council defeated by 19 to 5; ministers received a dissolution, and Parliament reassembled on 12 February 1866 with fifty-eight supporters of the Government out of seventy-eight members; yet the Council again rejected the tariff. The Ministry resigned, but Mr. Fellows, leader of the Opposition, could not form a Government, so Mr. McCulloch was recalled, and the Assembly prorogued, to meet again in April. A compromise was then reached, a new Tariff Bill passed, and an Appropriation Act agreed to, the Council accepting the repeal of the gold tax as part of it.

Unhappily, Sir C. Darling was recalled as a result of his illegal acts and of a foolish dispatch on 23 December 1865, in which he had referred to ex-ministers as persons with whom he could never work, and a most unfortunate squabble arose regarding the wish of the Assembly to grant Lady Darling £20,000 as a token of sympathy. The new Governor, on learning that Sir C. Darling had retired, and that there was no Imperial objection to the vote, recommended it on 23 July 1867, the amount being tacked on to the Appropriation Bill, which the Council threw out on 20 August; a deadlock resulted for thirty-two days: ministers wished a prorogation and a reintroduction of the Bill, the Governor demurred, they resigned, he could find no other ministers and had to give them a prorogation of 10 September, the Assembly meeting again on 18 September; the Bill was thrown out by the Council on 16 October. Ministers received a dissolution; they had paid salaries under the device of confessing liability, but in December in *Alcock* v. *Fergie* [1] their opponents induced the Supreme Court to declare the practice illegal, unless money were expressly voted. On 1 January 1868 [2] Lord Carnarvon intervened by instructing the Governor that he ought not again to recommend the vote unless it was put in a separate Bill, to avoid the confusion of the rejection of the Appropriation Bill; on receipt of this dispatch, ministers who had won a victory at the election of February 1868 resigned, and no Ministry could be formed, so that Parliament had to be adjourned for two months whenever it met, as there was no Government to prepare a viceregal speech. Lord

[1] *Parl. Pap.*, H. C. 157, 1868, pp. 41 ff. [2] Ibid., p. 49.

Carnarvon on 1 February [1] undid the mischief in part by admitting that the case was not one in which it was really proper for the Governor to refuse ministerial advice. On the basis of this, Mr. Fellows in June offered to carry through Parliament the proposed grant in a separate Bill, but, while the Council would probably have accepted this, the matter was disposed of by Sir C. Darling being awarded a pension by the Imperial Government; the feeling of the Parliament found appropriate expression when, on learning of his death in 1870, both Houses gave his widow £1,000 a year for life and £5,000 for his children's education. Mr. Higinbotham,[2] later well known as Chief Justice of Victoria, then an ardent supporter of Mr. McCulloch, bitterly denounced the Imperial Government, and secured the passing by the Assembly of a trenchant denunciation of its intervention in the affairs of a self-governing colony. His remarkable speech on this subject reveals him in the light of a convinced adherent of autonomy in local affairs in its most marked degree, but his views were much above the heads of the ordinary member of the Legislature, and matters were not carried farther in the contest with the Council.

In 1877 the smouldering embers were rekindled by the decision of the Government to ask the Governor to include in the estimates recommended to the Assembly an item for payment of members, which had been since 1871 provided for by temporary Acts. The Governor [3] felt precluded from action without Imperial authority by Lord Carnarvon's unhappy dispatch of 1 January 1868, which, as he unkindly reminded that nobleman, had been the subject of a denunciation in the Assembly on 4 June 1868 as an unconstitutional interference with responsible government. Lord Carnarvon hastily authorized him to act on the advice of ministers, which he did. But [4] the Council had begun a quarrel with the Assembly over the style of a Bill to appropriate £38,000 for defence works, the Council objecting to the use of forms which seemed to treat the Assembly as occupying the place of the House of Commons. The Council took revenge by rejecting both the Defence Bill and the Appro-

[1] *Parl. Pap.*, H. C. 157, 1868, p. 50.
[2] Morris, *Memoir of George Higinbotham*, pp. 100-89.
[3] *Parl. Pap.*, C. 1982, p. 1; Rusden, *Australia*, iii. 413 ff.
[4] *Parl. Pap.*, C. 1982, p. 24.

priation Bill including members' salaries. The Ministry proceeded to get rid of many officials in order to economize, and the Attorney-General advised the Governor that the custom of Victoria rendered it legal to issue warrants for expenditure on the strength of the passing by the Assembly of the votes approved in Committee of Supply when reported to the Assembly. The Legislative Council on its side abused the Governor for partisanship, while on 26 January 1878 [1] he defended himself warmly, pointing out that the claim of the Council was that, if it defeated ministers' projects, it was their duty either to yield, to resign, or dissolve ; a dissolution would make no difference to the Government's majority, and the Council was in effect claiming to make and unmake ministries, which clearly was beyond its authority. On 17 March 1878 [2] he reported that he had signed, on a resolution of the Assembly, a warrant for the expenses of collecting the revenue, which was appropriated under the Constitution Act, s. 45 ; the legality of his signature had been asserted by the law officers of the Colony, and the Commissioners of Audit had approved. On 9 April he was able to report that matters had been adjusted, the *Appropriation Act* and other measures passed. In a dispatch of 23 March he reported the strong view of ministers that in all questions as to the law of Victoria he was bound to accept as valid the advice of his legal advisers.

The Secretary of State on 5 July 1878 [3] admitted that ministerial advice should normally be accepted if the action advised was legal ; but he reminded the Governor that he was entitled to take his stand on the law and to avail himself of such legal advice as might be available. He could not agree that it was any interference with responsible government for the Imperial Government to insist on the observance of the positive law, which was not a matter of opinion or of policy, or on proof that any breach of law was justified by necessity. On 17 August [4] he further explained very carefully the fundamental error in the Victorian view of the effect of the approval of resolutions passed in Committee of Supply as authorizing the expenditure of public money. The English practice demanded that supply for the services must be discussed in Committee of Supply, and

[1] Ibid., C. 1985, p. 42.
[2] Ibid., C. 2173, p. 32.
[3] Ibid., p. 81.
[4] Ibid., pp. 97–9.

granted by resolutions confirmed by the House of Commons. But no money was issued merely on the strength of these resolutions. It was necessary that in Committee of Ways and Means a resolution should be passed for a general grant out of the Consolidated Fund towards meeting the supply granted to the Crown. This resolution was followed up by a Bill duly assented to, which alone justified the issue by the Crown of authority to the Treasury to sanction the use of money to meet votes in supply, the principle being that the moneys made available by Act could be used to meet any votes in supply passed by the Commons, whether before or after the date of the resolution in ways and means; the *Appropriation Act* at the close of the year specifically appropriated to the various services the sums granted in Committee of Supply, and by a covering grant of ways and means provided the money required to cover the whole of the supplies granted for the year. On 25 August [1] the Secretary of State also reviewed the proceedings of ministers as regards the dismissal, for the sake of saving expense, of civil servants; justified the Governor's pressure on ministers to keep strictly within the law; and expressed the opinion that the emergency was not sufficient to justify the course actually adopted.

The Assembly in the meantime prepared to seek an amendment of the Constitution, under which the Council would be deprived of all right to reject Money Bills, including all tax and appropriation measures, which were to become law without the assent of the Council in a month after sent to that House, provided that the Council might make suggestions for change. In the case of other Bills, after being passed by the Assembly in two consecutive sessions, they would become law over the head of the Council, unless that body within twenty-one days after the second rejection addressed the Governor by resolution passed with the concurrence of an absolute majority of the whole number of the Council, asking for a referendum on the Bill. The Ministry recognized that the steps proposed were strong, but they desired to send a deputation to secure Imperial legislation.[2] The Bill to effect the reforms was passed in the Assembly by 59 votes to 22 on second reading, by 51 to 21 on the third, but the Secretary of State on 1 October intimated in no obscure

[1] *Parl. Pap.*, C. 2173, p. 99.

[2] Ibid., C. 2217, p. 4.

terms that he did not think that public feeling had been so strongly displayed as to justify an Imperial Act.[1]

The Governor on 22 November 1878 [2] addressed a very able dispatch to the Secretary of State, in which he met the disapproval of his attitude in regard to the question of civil servants expressed by the Secretary of State on 25 August. He pointed out that the Duke of Newcastle had instructed him, when Governor of Queensland, that when Imperial interests were concerned he was to consider himself the guardian of those interests; 'but in matters of purely local politics he is bound, except in extreme cases, to follow the advice of a Ministry which appears to possess the confidence of the Legislature'. The Duke attempted no definition of such cases; he compared them to instances in which a naval or military officer might feel bound to go beyond or even against his orders, and, if the Governor acted in this way, he must take the risk of the Imperial Government approving or otherwise his action, if it affected Imperial interests; while, if it were a matter of local politics, the people would judge his action, and might either uphold his decision or might adopt an attitude which would render his position untenable. The Duke further insisted that in granting responsible government it was the intention that the great colonies should learn wisdom by experience, and should not be encouraged to rely on the intervention of the Governor or the Crown. The Governor also cited the attitude of Lord Elgin in 1848–51 and of Lord Dufferin in 1873 as marked examples of perfect propriety in deferring to ministerial advice in trying circumstances, and undoubtedly he made out a convincing case for his action. The Council,[3] on its part, abused him heartily, and declared that he was straining the prerogative against the privileges of the Council, a peculiarly absurd claim. The Assembly retorted; the Council in twenty-two years had rejected eight Bills, so mutilated twenty more that the Government had had to drop them; it had maintained State aid to religion for fifteen years in the teeth of public opinion; it had ruined six Bills to facilitate mining on private land; it had altered Land Bills to suit the capitalist class; it had seven times rejected payment of members; it had rejected an Electoral Bill, a Tariff Bill, passed by a large majority in the House below, four Appropria-

[1] Ibid., p. 20. [2] Ibid., p. 42. [3] Ibid., p. 55.

tion Bills, one Temporary Supply Bill, a Bill to provide for defence when war seemed imminent, and a Bill for an exhibition on the plea that a protectionist colony had nothing to exhibit. The conduct of the Governor was warmly commended as being faithful to the principles of responsible government.[1] None the less the Secretary of State on 17 February 1879 [2] reiterated his view that the Governor should have resisted the wishes of his ministers as to the removal of judicial and civil officers; ministers might not have resigned if he had pressed them to retrace their steps, and he might have been able to keep them from adopting the strong steps which they finally took. Still, he declined to interfere when a dismissed officer petitioned for redress on the score of dismissal, stating, on 21 February, that this was a matter for the local Government to deal with.

On 27 December 1878 [3] the Governor reported the dispatch of Mr. Graham Berry and Professor Pearson to London on a delegation to seek Imperial legislation. He commented on the welcome change of attitude since Mr. Higinbotham in 1869 had carried the Assembly with him in protesting against any Imperial intervention. He suggested that the Upper House should be nominee, and should conduct its actions on the model of the House of Lords, as advocated by his predecessor, Lord Canterbury; if it remained elective, deadlocks should be provided for by a joint sitting, or dissolution of both Houses after two consecutive rejections of any Bill. Mr. Berry's mission to England failed; on 3 May [4] the Secretary of State informed Lord Normanby that the time was not ripe for Imperial intervention. All friction could be saved if the two Houses would follow the model of the Lords and Commons; the Assembly should have full control of supply, while, on the other hand, as it would refrain from adding to Appropriation Bills any clauses foreign to their purpose, the Council would have no ground for rejection of such Bills. It might be well to adopt a new Standing Order to regulate relations, but what was essential was a spirit of compromise. Imperial intervention would be possible only if the Council declined to consider a reasonable proposal as to relations in matters financial, and should persist in such refusal after an appeal had been made to the people on the precise issue.

[1] *Parl. Pap.*, C. 2217, p. 65.
[2] Ibid., p. 75; cf. C. 2339, p. 13.
[3] Ibid., p. 73.
[4] Ibid., C. 2339, p. 20.

Mr. Berry then proceeded with a proposal to make the Council nominee, with a provision for a referendum in case of deadlocks, but the Bill failed to secure an absolute majority on the third reading, and the Government fell in February 1880. It recovered office in July, and the Council saw the wisdom of some concession, but not as to powers. It agreed, however, to an expansion of the franchise, by Act No. 202 in 1881, a reduction of the property qualification, an extension of the membership to forty-two, and the reduction of the period of office of a Councillor to six from ten years, thus ensuring a more frequent appeal to a wider electorate.

The Council remained, however, with unchanged powers until 1903, when by Act No. 1864 a new compromise was achieved under the influence of the Commonwealth Constitution. The franchise was lowered, the qualification for members reduced as in 1881, but a deadlocks clause was also provided, giving the possibility of a penal dissolution of the Council, when the Assembly had already been dissolved because of any disagreement over a Bill, and on the meeting of the new Parliament the Bill had again passed the Assembly. As a concession, on the other hand, the Council was given a free hand with Bills merely imposing fines, or pecuniary penalties, or fees for licences or services, or appropriating sums so levied. Further, the Council was given the right of suggesting amendments at each of three stages—committee, report, and third reading—of Money Bills. The Council, it has been ruled, can amend non-money clauses of any Bill, and also suggest amendments to money clauses, provided that these do not increase the burden on the people.

The power of the Council is patent and undeniable; in 1909 it threw out a Land Tax Bill, in 1910 compelled large changes in an Electoral and an Education Bill, made the Government drop a Preferential Voting Bill and a Licensing Bill, and refused to permit the sale of coal from the State mine to the public direct; moreover, it quarrelled vehemently with the Government, because the Ministry rejected as it had the power to do, the President's recommendation for the appointment of Clerk to the Council.[1] It disliked female voters, but let them in in 1908. In 1911[2] it would not accept a Wages Boards Bill, and

[1] *Council Votes*, 27 Sept. 1910; *Deb.*, 1910, pp. 1342 ff.

[2] Keith, *Imperial Unity and the Dominions*, pp. 401 f.

cut down the appropriation for cold storage from £84,000 to £9,000, and even this sum was not to be spent as the Assembly desired. This case illustrates the evanescence of the line between the right to suggest and to amend. A suggestion becomes equivalent to an amendment when the Council declined to pass the Bill when the suggested amendment was not made. The Government, which had to go to the country, talked about securing a means of overcoming the resistance of the Council, but nothing came of it except that, when it was sustained in power, the Council accepted this fact as a proof of the desire of the people for the measure on cold storage, and passed it much in the shape desired by the Assembly. In 1914 again it held up, apparently to the detriment of the Liberal party at the federal elections, the passing of a Bill regarding the control of prices, an action which seemed rather too obviously dictated by mere selfishness. The close of 1925 saw the Council firmly refusing to accept the financial proposals of Mr. Allan's Government, smiling at his threat that if they were thrice rejected he would resign, and contentedly watching him succumb to their firmness of purpose.

The future outlook, however, is not rosy; the growth of Labour must ultimately give Victoria a Labour Government actually holding power as well as office, and it must be admitted that the Labour Administration of 1924 was strongly supported in the country, and might possibly have secured a majority, had it been allowed to dissolve Parliament as it desired to do, and to test the feeling of the people. If a Labour Government achieves power, it will find a very solid obstacle in the Council, entrenched in its elected position, and it is by no means clear that it will be possible in Victoria to repeat the feat recorded above of Tasmania, where taxation and appropriation measures have been assented to, when passed only by one House. The only mode of altering the Constitution without the assent of the Council is by Imperial legislation or the more unconstitutional device of a change of the Federal constitution. It is significant that the Council in November 1926 sent down a Bill, to be rejected by the Assembly by 33 votes to 30, which proposed to increase the metropolitan representation in the Assembly to twenty-six from twenty-one, and to reduce the country members to twenty-nine from forty-four, a step justified by changes of density of popula-

tion. The Labour party denounced the proposal on the score that nine safe Labour seats would be endangered by the changes in grouping of areas proposed.

§ 2. *South Australia*

The relations between the Upper House of South Australia and the Assembly have not been more satisfactory than in Victoria, but a certain difference has emerged, due to historical causes. South Australia was settled from the first as a colony of free settlers; it was neither affected by the bringing there of a considerable number of criminals, nor by the official corruption which allowed the exploitation of the colony to the east in the interest of those having places in the administration or the military forces, and their relatives and friends.

As the Constitution made no provision regarding the relative powers of the Houses beyond the usual requirement as to the origination of Bills, the matter had to be settled merely by mutual agreement. The result of this was that it was understood that the ordinary annual estimates, if not containing anything vitally new, would be passed by the Council without amendment, subject to its right to ask for a conference on the estimates. Every other measure to raise taxation or authorize expenditure was to be open for the suggestion of amendments, and those matters which were outside the scope of the ordinary estimates were to be sent up separately, so as not to take away the Council's power. This understanding, reached in 1857–8,[1] was reasserted by the Council in 1864, and in 1876 it required the withdrawal of certain items from a Loan Bill; in the next year it demanded that the proposal to build new Parliamentary Houses should be put forward separately. In vain was it argued by Sir M. Hicks-Beach and others that the Council ought to conform itself, when elective as in Victoria, to the role of the House of Lords; as an elective body, it represented the wealthier section of the community by reason of its comparatively high franchise and qualification for members. The Council maintained steadily its right of intervention, and in 1910 it rejected a land tax and an increment tax, and even went so far

[1] *Parl. Proc.*, 1857–8, i, *passim*; ii, Nos. 71 and 101; *Deb.*, pp. 340 ff., 442, 456; *Parl. Proc.*, 1877, i, *passim*; Baker, *Const. of South Australia*, pp. xii–xiv; Rusden, *Australia*, iii. 476–9.

as to refuse to accept a loan measure sent up to it, insisting on taking out £1,000,000, as it did not approve expenditure on wharves. The last step was decidedly bold, as South Australia, like most of the States, was at the time devoted to a policy of lavish expenditure on public works, with its resulting abundance of employment at high wages for manual workers in the city area. Needless to say, the Council was steadily opposed to such newfangled ideas as Workmen's Compensation Bills, on which even in 1910 it rejected a reasonable measure, at a time when Tasmania had decided to fall in line with the more advanced opinion of the other States.

Efforts to render the Council more amenable to public opinion were early mooted. The original constitution gave eighteen members with twelve years' tenure, six retiring every four years, the State being one constituency, and the rental qualification for the franchise being put at £25. In 1881 by Act No. 236 a slight reform was brought about under pressure of public opinion. The membership was increased to twenty-four, with a nine years' tenure, eight retiring every three years, and four electoral districts being created. A deadlock provision of a very narrow kind was passed; if the Assembly passed a Bill twice, a dissolution intervening, granted by reason of a first rejection of the Bill, and the Council was still unwilling to accept the measure, the Governor could dissolve both Houses, or issue writs for the election of one or two members for each division. Twenty years passed before any further reform could be accomplished. The Assembly voted on 22 December 1898 for a referendum on a householder franchise, which was approved in 1899, but the Council, which refused to pay any attention to the proposal or its result, would concede nothing, save in 1901 by Act No.779, in view of federation and the need for economy, a reduction of members to eighteen and of tenure to six years, half retiring every three years, three for one, two for the other three districts. The next conflict took place when Mr. Price's Labour Government [1] was in office. Preparations were made for a penal dissolution of the Council, the Governor granting as a necessary preliminary a penal dissolution of the Lower House under the Act of 1901, which re-enacted in substance the deadlock provision of 1881, and the Council, in view of the impossibility of finding a Ministry

[1] *Ass. Deb.*, 1906, Sess. 2, pp. 524 ff.

to support its attitude in the House below, conceded a little; it made, by Act No. 920, the rental qualification £17, but refused a double vote to joint holders, whereas what had been asked was £15 qualification and the double vote. Mr. Price's death left it to Mr. Verran, when Labour was in power in 1910, to propose a Franchise Extension Bill to give the vote to all electors for the Lower House; he quoted with much effect the remark of the Leader of the Opposition on 22 April 1906, when he protested against eighteen members representing 52,000 electors vetoing the will and aspirations of forty-two members representing 179,000 electors. The result was that, while the elective Houses had been created to further freedom, in fact the States having them were more restricted than New South Wales, Queensland, and New Zealand with their nominee Upper Chambers. But the Council smiled at the heat of the man, and calmly rejected the Bill; the Assembly could only retaliate by laying aside the Bill passed by the Upper House [1] to repeal the Act of 1907 for the surrender to the Commonwealth of the Northern Territory, of which the Council had repented. In 1910 in further retaliation the Government passed through the Assembly too late for consideration by the Council a Deadlocks Bill,[2] which proposed a joint session after two rejections, three months intervening, followed by a dissolution of both Houses on the issue. In 1911 a stronger measure, a Veto Bill, was sent up in vain; it dropped the idea of a joint session, and provided that the Bill be passed, if rejected by the Council for a third time after the dissolution of the Assembly subsequent to the second rejection. The Council rejected the Bill on the second reading, after it had passed in the Assembly by 21 to 15 and 21 to 10 on the second and third readings, and threw out the Appropriation Bill because the Government had inserted provision to establish brick and timber yards to supply these commodities to the public and not merely for governmental works. The Labour Government addressed an appeal to the Imperial Government for intervention, in the shape of a promise to pass legislation, if the Council would not accept a Bill on the lines proposed. The Government argued that the aim of the Constitution as proposed in 1853 had

[1] *Council Deb.*, 1910, pp. 181 ff., 226 ff.; *Ass. Deb.*, 1910, p. 717; Commonwealth *Parl. Deb.*, 1910, pp. 4647 ff.

[2] *Ass. Deb.*, 1910, pp. 1110, 1184, 1248.

been, by not having a nominee Upper House, to promote democratic principles; that in practice the result had been quite other; and that there should be some mode of removing deadlocks which in the United Kingdom was presented by the Crown. It was pointed out that the electors for the Upper House were but 33 per cent. of those for the Lower, and as a result of the distribution of constituencies 13 per cent. of the electorate for the Assembly elected half the members of the Council. The Council, however, retorted that the Government was weak in popular support, that the defection of one of its supporters had prevented it bringing in again the franchise measure rejected in 1910, and that the inclusion of the items for brick and timber works in the ordinary estimates was a clear breach of the formal agreement of 1857. The Government in vain argued that the agreement was undemocratic and improper; it was clearly too late to repudiate what had prevailed so long, and the contention that an elective Upper House is a replica of the Lords is unsound in theory and absolutely contradicted by unvarying practice.[1]

The request could clearly not be granted, and the Imperial Government's refusal was based on the solid grounds that such intervention must be conditional on the exhaustion of all constitutional means already existing of settling the deadlock, the demand of a large majority, and the necessity of change in order to permit the work of the State to be carried on. The Labour Government recognized that the case demanded further action on their part; a dissolution was obtained to enable the people to express their views, the Council cheerfully voting a Supply Bill of £800,000 to put matters in order, and in January the Government was defeated at the election, and Mr. Peake came into power with twenty-four votes. He recorded on 24 April the disapproval of his Government of the appeal to the Imperial Government, and he secured the passing of the Appropriation Bill minus the offending clauses. But he also held reform necessary, and he introduced a Bill in 1912 to deal with deadlocks on Money Bills. In 1913 a bolder course was essayed; a comprehensive Act was prepared, regulating, in the manner above set out, the relations of the Houses as regards money matters. At the same time the franchise was widened by

[1] Keith, *Imperial Unity and the Dominions*, pp. 402–8.

accepting as an elector every inhabitant occupier, as owner or tenant of a dwelling-house, the number of members increased in the Assembly to forty-six, and in the Council from eighteen to twenty, arranged in five constituencies of four each. The Council, while it accepted these arrangements, denying, however, a double vote in respect of occupation, would not accept a general deadlock provision consisting of a double dissolution and a joint session after the rejection twice by the Council of an Assembly Bill. In 1915, however, Labour again achieved power, and proceeded to make proposals for the restoration of power as to Money Bills to the Assembly, which, it asserted, had been taken away by the Act of 1913, the provision of adult suffrage for the Council, the alteration of electoral districts alleged to have been gerrymandered in 1913, the increase of duty on unimproved land values, the lowering of income-tax, and the reduction of charges on primary produce in transit. The contest was naturally a grave one, for the Upper House is firmly entrenched behind the votes of the more well-to-do members of the community, and the issues were obscured during the war period by more important national currents. But in October 1924 the Council was again busily at work in the region of destruction; it threw out first a Constitution Amendment (Legislative Council Franchise) Bill, which wished to assimilate the electorates; then another Bill for the settlement of deadlocks by the passing over the head of the Council of any Bill thrice passed by the Assembly in successive sessions, and a Bill to reduce the number of members in the Assembly to thirty-five and to elect them by proportional representation.

§ 3. *Tasmania*

Tasmania, until quite recently, seemed to possess an Upper House installed in unassailable power as regards Money Bills. The silence of the Constitution as to relative powers has left the Houses to settle their own disputes, and the Council has insisted on the right to amend even Money Bills, to scrutinize the estimates, and to reject Appropriation Acts. The whole issue was hotly canvassed in 1877,[1] when the Council made its views

[1] *Council Journals*, 1877, pp. 39 f., 117, 119; *Votes*, 3, 10, 11 June 1879; Rusden, *Australia*, iii. 479 f.

prevail, and again in 1879, when the Council amended the Supply Bill, and eventually only consented, when the Assembly would not accept the changes, to grant supply for eight months, of which six had passed before the Bill was assented to. Naturally, a House so powerful in finance was equally insistent on its legislative power, and, as it represented the more wealthy and Conservative class—Australian Conservatives often make an English Unionist appear a revolutionary—it is not surprising that the State has lagged behind the rest of the Commonwealth in regard to experiments in improving social conditions. Thus not until 1910 was it possible to secure more or less effective legislation for wages boards and workmen's compensation. In 1908[1] it killed Bills for a land tax, land purchase, hospitals, and the regulation of factories, while in 1910 it ran counter to the whole trend of Australian legislation by rejecting a Bill for closer settlement; in 1914 not even the pressure of war conditions made it ready to pass the measures as to control of prices and foodstuffs sent up by the Assembly. The position of that House was weakened by the fact that the two Houses were almost of the same size, having twenty-four and thirty-six members respectively, while the use of proportional representation for the lower as well as the upper chamber resulted in a very small difference of numbers between the parties in the Lower House. It was therefore difficult to argue that a majority of one in the Lower House outweighed the majority of ten or twelve which the Upper House might show against a measure. Further, there has been lacking in the country that element of militant democracy common on the mainland; the presence of many persons of moderate means, the feeling of isolation from the rest of Australia and of the indifference of the Australian Labour party to Tasmanian needs, have helped to hamper the growth of sufficient driving power to effect a change.[2]

Little has been accomplished to bring the Upper House into a more democratic frame of mind; the tenure of office was reduced by 49 Vict. No. 8 to six years, while by 64 Vict. No. 5 the high franchise was somewhat reduced. But the requirement of a freehold of £10, or a leasehold of £30 annual value, makes a very large difference between the number of electors for the

[1] Hobart *Mercury*, 21 Nov. 1908.

[2] Keith, *Imperial Unity and the Dominions*, pp. 408 ff.

two Houses; statistics available in 1926 showed under 42,000 electors for the Council as against over 114,000 for the Assembly, thus as in other States the proportion is about one to three; the proportion of women voters is in their favour as regards the Assembly, but wholly in favour of men in the Council. A very grave issue is presented in the procedure unwisely adopted by the Secretary of State in December 1924 [1] in permitting the Governor to assent to the Bills to sanction the annual expenditure, and for Land and Income Taxation, ignoring changes made in them by the Council, on the certificate of a political law officer that the assent could legally be accorded. This is a far departure from the days when a wiser and abler Secretary of State impressed, perhaps with undue emphasis, on an able Governor the duty not merely of avoiding illegality—on which the Governor was determined himself—but of preventing even unconstitutional action, such as the removal of civil servants for political purposes. It was perhaps unwise to encourage, in a country where respect for law is not so high as it ought to be, culpable laxity on the part of the representative of the Crown. Public morality undoubtedly is degraded by concessions made thus to save trouble to the Imperial Government.

§ 4. *Western Australia*

In the case of Western Australia matters have been somewhat different, because the Upper House has not a long history of high claims regularly enforced at a time when the Lower Houses were more conservative, and democratic sentiment was weak. The Governor, Sir N. Broome,[2] had the good sense to advise the insertion of a clause to prevent tacking, on the one hand, and another to obviate deadlocks, which he foresaw. Neither the Imperial Government, nor the Committee of the then existing Legislature, had the sense to agree with him, and the Constitution left the matter at the usual quite vague rule that appropriation and taxation measures should begin in the Lower House. It is fair, however, to say that Sir H. Holland would have preferred a nominee Upper House,[3] and that Sir N. Broome perhaps went too far in urging that the Lower House should be able to override the Upper after eight months' interval. There was no

[1] Keith, *J. C. L.* vii. 205 f.
[2] *Parl. Pap.*, C. 5743, pp. 15, 36.
[3] Ibid., pp. 25 ff.

trouble during the period when the Upper House was temporarily nominee; but when it was made elective it was provided, by 57 Vict. No. 14, s. 23, that the Council might in the case of any Bill, which must originate in the Lower House, at any stage send it to the Assembly with requests for omissions or amendments, which the Assembly might consider. It has been ruled, no doubt correctly, that the Council is not entitled to insist on amendments,[1] but this does not mean much, since the Council can decline, if the amendments are not made, to pass the Bill. Thus in 1907 [2] it threw out, by a majority of two, the Land and Income Tax Bill, and only gave in when the Governor prorogued the Parliament, after refusing his ministers a dissolution and declining to let them resign office. The Council then let the Bill pass with minor changes, realizing that they were obstructing the wishes of the people.

The question of reform was mooted early enough; in 1905[3] the Labour Government thought of a referendum to decide if the franchise should not be lowered, or the Council even abolished, but the Council had no intention of committing suicide, and in 1909 it remained indifferent to Labour proposals for the reduction of the franchise. But in 1910-11 it proved amenable to the extent of moderate reduction.

The advent to power[4] of a Labour Government in 1911 with a majority of 35 to 15 in the Lower House produced interesting results. The Council at once proclaimed its readiness to consider every proposal on its merits alone, without prejudice; but it rejected the scheme for a Public Works Committee of Parliament as in New South Wales, and did not accept the industrial arbitration proposals of the Ministry. Next year it rejected a State Hotels Bill, enabling the Government to set up State hotels all over the country, but accepted a Bill to set up certain special hotels. It rejected again the Public Works Committee Bill, a Bill for a railway from Norseman to Esperance, and a Land and Income Tax Bill. Further, it refused to accept the governmental policy of substituting leasehold tenure with an annual rent of 2 per cent. of the unimproved value in lieu of freehold, pointing out that France, Denmark, Belgium, Switzerland, and Norway attested the spell of freehold. Moreover, the

[1] *Parl. Deb.*, xxx. 3020; xxix. 1125. [2] Ibid., xxxi. 1504–6. [3] Ibid., xxvii. 534.
[4] Keith, *Imperial Unity and the Dominions*, pp. 409–11.

Council quarrelled with the Government over its use of part of the Treasurer's advance of £250,000, provided in 1911-12 for emergencies, for the purpose of a State shipping service to the northern ports. The Council accused the Assembly of holding that by a mere vote it could legalize expenditure without an Act, but the Government denied the impeachment, and the action of the Governor, who was accused of illegality, was also clearly not open to this charge. What happened was that by great lack of common sense the Council took no precaution in agreeing to the Treasurer's advance to limit the purposes to matters already approved by the Council at an earlier date. In 1913 the contest was resumed ; the Land and Income Tax Bill, that for a railway from Esperance northwards, that for a Public Works Committee, a Bill regarding factories, and above all, a Bill to establish the referendum and initiative, perished miserably, the last by 18 to 6 votes, the Premier having naïvely commended the measure on the score that a Saskatchewan Act had been summarized in the Colonial Office report on the Dominions, and therefore must be a good thing. The war brought about some slackening of tension, as it did elsewhere, but the struggle is still far from being settled. An effort was made in 1921 to decide the regulation of the relations of the two Houses on Money Bills, by adopting the clauses of the Commonwealth Constitution, but this really makes no difference whatever in the effective relations of the Houses, the upper chamber remaining entrenched behind its higher franchise and its elective character. This was very clearly seen in 1924, when the Labour victory resulted in many Bills being lost, while those that passed, as the *Workers' Compensation Act*, No. 40, were drastically revised.

§ 5. *The Commonwealth of Australia*

The Commonwealth Constitution gives a quite exceptional position to the Upper House, as a result of the serious application —as opposed to Canada—of the federal principle. The Upper House is deprived only of the origination of Money Bills, and the right to amend Bills imposing taxation or appropriating money for the ordinary annual services of the Government, but it can suggest where it cannot amend, and the power of suggestion is not subject to the rule affecting the power of amendment, which

forbids increasing the burdens on the people. Moreover, tacking is rigidly prohibited, whether in appropriation or taxing measures.

It was some time before the full powers of the Senate were realized. In 1901 the House sent up a Supply Bill in the old form, relating that a grant had been made, but the Senate demanded the omission of the preamble, and the insertion of a schedule to show for what the grant was made,[1] and the President in the same year directed that italics were not to be used, as in the House of Lords, for clauses in Bills originating in the Senate, by which fines and penalties were imposed. So in 1904 the Governor-General's speech was altered to treat, at prorogation, thanks as due to both Houses for the grant of supply, while at the opening of Parliament it merely alluded to the origination of Money Bills in the Lower House. In 1902,[2] on the Tariff Bill, the Senate made suggestions for amendments, some of which the House accepted, while others it rejected; the Senate then sent down some of the rejected suggestions once more, and some new ones; a compromise solved the question without settling the right to renew suggestions. In 1908 [3] the same features repeated themselves in the tariff discussion, and there is now really no possibility of denying the right of the Senate to insist on its suggestions. In the case of the Sugar Bounty Bill [4] of 1903 it was finally admitted that, while an amendment could be ruled out as imposing an extra burden on the people, the same result would be obtained by suggesting an amendment, the prohibition of amendment not being held to apply to a mere suggestion, which, if accepted, is the act of the House. On the other hand, in the case of the *Property for Public Purposes Acquisition Act*, 1901, it was held legitimate in the Senate to alter the rate of interest to be paid by the Commonwealth Government from 3 to 3½ per cent., the prohibition to impose burdens on the people being understood only in the narrow sense that applies to actual imposition of taxation upon them. In 1901 [5] there was a dispute as to what could go legitimately into the ordinary appropriation measure, the Senate

[1] *Parl. Deb.*, 1901, pp. 1021, 1153, 1174, 1190, 1352, 1471; Act No. 1 of 1901.
[2] *Parl. Deb.*, 1902, pp. 15676 ff., 15813 ff.
[3] Ibid., 1908, pp. 11437 ff., 11588 ff.
[4] Ibid., 1903, pp. 1691–1703, 1821–60, 2013–34, 2076–8, 2364–418, 2469–89.
[5] Ibid., 1901, pp. 1301 ff.

contending that nothing except normal expenditure, and therefore not that connected with the royal visit, could be classed under the Act, but it was finally admitted that, in accord with general practice, the Act should be allowed to contain all those things which naturally and regularly would be treated in connexion with the estimates of the departments for each year. In 1910 a curious dispute arose over the separate Bill brought in for works and buildings, as distinct from the ordinary estimates; the Senate amended, as was admitted to be valid, but in one case it did so by altering the destination of an item, by leaving blank the location of a quarantine station. This was clearly not in order, as the destination of a vote must be recommended to the House of Representatives by the Governor-General, and the House itself does not claim to be able to vote money without such a recommendation. The Senate, however, was obdurate; Mr. Fisher's appeal to it to alter its mind was defeated by 17 to 13 votes, and the device to avoid a deadlock which the Prime Minister adopted was simply to omit the item as a protest against the intransigence of the Senate. Mr. Cook and Mr. Kelly in the House protested with justification against the muddle, the former pointing out that the separation of the Works and Buildings Bill from the ordinary estimates rested on no logical basis. In truth, this seems clearly sound in principle; the real difference intended by the Constitution must have been between new works and routine matters, not between works and buildings and other expenditure. The inconvenience of the course adopted was seen in the same year, when the inclusion in the Bill regarding works and buildings of provision in respect of the new Federal capital nearly led to failure to pass the Bill at all, as there was doubt in the Senate whether the choice of a site was really wise, and voting was equal. Clearly it should not have been possible thus to jeopardize the whole programme of routine work by associating it with so novel an item, or, on the contrary, to prevent Senators expressing freely their views on the issue of the capital site, for fear lest they would hold up the ordinary work of the Government departments and contractors.

The provision as to tacking was discussed by the High Court in *The King* v. *Barger*,[1] where it was laid down by a majority of the

[1] (1908) 6 C. L. R. 41. Penalty clauses under the *Customs Act*, 1901, are not taxation or tacking, *Stephens* v. *Abrahams* (1903), 29 V. L. R. 201, 229.

Court that the effort of the *Excise Tariff* of 1906 (No. 16) was invalid on this score among others. The Act imposed an excise on agricultural machinery manufactured in Australia, with an exemption for machinery manufactured under certain conditions, and this provision was held by these judges to be equivalent to legislation by tacking.

A not unsatisfactory means of dealing with the problem of new public works was devised, following a New South Wales model, the *Public Works Act* of 1900,[1] by the foundation of a Public Works Committee in 1913.[2] The Committee was to consist of three members of the Senate and six of the House, chosen in the usual manner of Committees, and therefore representative of all parties. Before it must be brought all schemes for public works, the estimated cost of completing which exceeds £25,000, save in the case of defence works. The procedure in regard to any such work is that it must first be explained to the House by a minister of the Crown, and then referred on his or another member's motion to the Committee, which has power to examine the matter in all its bearings and to examine witnesses, with due protection for secrecy regarding what they may reveal of a confidential character. If the Committee reports, the House then decides, unless it first refers back for further elucidations, whether it will proceed with the proposal or not; if it decides in the negative, the project as a rule may not be re-submitted for a year, without a recommendation from the Governor-General. The procedure ensures effective knowledge of the proposals by the Senate, and diminishes idle wrangling between two ill-informed Houses on projects of expenditure.

As regards non-financial legislation the Senate has always asserted its full rights both to originate Bills, of which important measures may, like the Navigation Bill, be taken first in the Senate, and to deal freely with the proposals of the Lower House, and its relations to that body have depended very largely on the mode of its formation at any moment. The composition of the Senate is odd; it was devised at a time when there was a strong desire on the part of the democratic elements of the Commonwealth to avoid strengthening the reactionary

[1] Any public work costing over £20,000 needs approval by Act of Parliament, the Council thus having full power.

[2] No. 20 of 1913; see No. 32 of 1914; No. 19 of 1921.

elements as seen in the four elective Upper Houses of the Colonies, and hence the original proposal of the first draft Constitution of 1891, which left the election of Senators to the Parliaments of the States, was abandoned in 1897 at Adelaide for the selection of the Senators by popular vote, anticipating the decision in 1913 of the United States by which the election of Senators was taken from the State Legislatures and handed over to the people, in the hope of reducing corruption and political manœuvring. But the selection periodically of three Senators in each State has inevitably led to a most inconvenient result; practically without serious exception the result of the elections, whether before or after the introduction in 1919 of a preferential system of voting, is to give one party or another almost all the seats in the Upper House. In the earlier days of the Senate the advantage fell to Labour, and this was the cause of the famous application of Mr. Cook for a double dissolution in 1914,[1] under circumstances already described, the Upper House having amused itself in his short ministry by throwing out his measures, the Government being in a hopeless minority in the Upper House, and having the inadequate majority of one in the Lower. But the predominance of Labour in the Senate waned not long afterwards, and by 1917 it was almost possible for Mr. Hughes, during his curious and unedifying manœuvres,[2] to secure the passing of a resolution by the Senate in favour of a year's prolongation of the life of the Parliament to secure a majority in the Upper House. The Senatorial election of 1917 gave Labour not a single seat, and that of 1919 merely let it have one, so that for the years 1919–22 it was represented in that chamber by a solitary Senator, though the disparity of votes cast for the two parties was very slight. Better success in the election of 1922 was followed by disappointments in 1925, with the result that since 1917 the task of Commonwealth Governments has been greatly simplified through absence of any vital distinction of view between the two Houses, though the Senate has not in the least relaxed its right to criticize, amend, and reject. Its readiness, however, to support Mr. Bruce in his contest with the forces of disorder, in the navigation strike of

[1] Keith, *Imperial Unity and the Dominions*, pp. 106–12.

[2] *The Sunday Sun*, 8 March 1917; *The Australian Worker*, 15 March 1917.

1925, was a remarkable proof of the extent to which it was in sympathy with the Lower House.

As a protection for the States the Senate has proved wholly negligible. The Labour party, which has always, whether in power or in opposition, had much to do with shaping the attitude of the Senate, is a believer in centralization and in the reduction of the status of the States to that of local governments, increased in number, all subject to the full power of the central Parliament. Though Labour in the Senate has not shown by any means perfect obedience to party discipline, still, it respects the decisions of the Labour Parliamentary caucus fairly regularly, and in any case, its deviations from strict party views are not in the direction of State particularism. The other Senators have also seldom, if ever, shown any real tendency to protect the interests of the States in great matters, although they may be prepared to help one another in pressing the Government for financial benefits to districts in which they are interested. Being chosen by the same electors, and being on the whole of inferior calibre, the Upper House is far from fulfilling any even moderate standard of perfection, though it often enough does useful work, and is rather fond of interesting academic debates such as that of the beauties of female suffrage, which it passed for the edification of Mr. Asquith in his better days,[1] and the advantages of elective Ministries. But nothing has come of the prophecy that the Upper House would, as was thought by such authorities as Sir S. Griffith, Sir R. Baker, and Mr. Clark,[2] by reason of its federal authority, disturb the system of responsible government. With all its defects the Commonwealth Senate is not inventive, and it has been quite content to accept the view that the House of Representatives controls the Ministry of the day. Proposals for its improvement as regards mode of election have been mooted, but there has been obvious an utter lack of desire on the part of those most concerned to turn into reality the constitutional conference which figured definitely in Mr. Hughes's policy in the general election of 1922, but which never materialized, owing to the profound lack of any general agreement on lines of change.

[1] *Parl. Deb.*, 1910, pp. 6300 ff.

[2] Quick and Garran, *Const. of Commonwealth*, pp. 706 ff.

§ 6. *The Cape of Good Hope*

The Council of the Cape differed from the Lower House merely in that it had fewer members, larger constituencies, and that plumping for a candidate was permitted at the elections. It had the remarkable power [1] of amending Money Bills, though it did not exercise it to increase burdens on the people. It was able by this power to eject Dr. Jameson's Ministry, by refusing at the end of 1907 [2] to deal with supply until he consented to a dissolution. Its exercise of its powers was free enough—it appears to have forced redistribution in 1898 on the Government—but it was in close party sympathy with the Lower House, and accepted readily the legislation of 1887 and 1892 directed at the native franchise.

§ 7. *The Union of South Africa*

The Upper House of the Union was, rather curiously, not given the powers of the Cape Council; in lieu a rather complex set of rules—given above—regulates its power in respect of Money Bills. These differ in certain regards of importance from the Commonwealth model. Thus there is no attempt to restrain Taxation Acts from dealing with more than one subject of taxation, or to confine Customs and Excise Acts to these purposes alone. Moreover, while, in order to avoid the inconvenient result, already referred to in the case of the Transvaal, where the right to amend an Act was held to be taken away by the fact that it contained incidental appropriation clauses, the prohibition of amendments is confined to Bills, so far as they appropriate moneys or impose taxation, the Senate is not given the power enjoyed in the Commonwealth and in the States of Australia to suggest amendments, where amendment itself is not permissible. The right of rejection no doubt remains, but that is useless, especially when a grant can be included in the appropriations for the year. Thus in 1920, when the Government of the Union desired to give an increase of salary to members of Parliament, the President of the Council would not permit a resolution to this effect to be passed in the Council,

[1] Ord. No. 2 of 1852, s. 88.

[2] *Council Deb.*, 1907, pp. 338–74; *Ass. Deb.*, 1907, pp. 582, 589 f., 597.

on the effective ground that this was an attempt to increase a provision made by the Constitution, in an irregular shape, in lieu of altering the Constitution. But, when the item was included in the ordinary way, it was not held possible for the Council to take any action, if it had desired to do so. With this limited authority of the Senate concords the fact that it is liable to be overridden by the holding of a joint session with the Lower House—three times as numerous—in the same session, on a financial deadlock, and that a similar session may be called, if twice running it rejects a Bill of the Lower House,[1] while the Governor-General has the power of dissolving it on ministerial advice as a matter of practice if not of theory. The procedure of settling all by a single passing of a Bill and a joint session was even proposed for all Bills, in the original draft of the Constitution, but very properly this anomaly was dismissed. The immediate model for this clause was the Transvaal and Orange River Colony letters patent, but there only on the simplest theory; there was given also the possibility of a dissolution after a second defeat, and then a joint session, after a third rejection. The Commonwealth provision, which formed the model for the Transvaal, requires a dissolution of both Houses after the second rejection, which must be three months after the first, but need not be in a second session, and only after a third rejection is the joint session possible.

The delegates from the Cape evidently were not anxious to strengthen unduly the Senate, while those of the other three Colonies, having been accustomed to Upper Houses of minor power, were unwilling to experiment with anything more than a 'House of review' as Lord de Villiers, President of the Convention, styled it.[2] It is important to note that the complaints of the weakness of the Senate have not led to any popular demand for an assignment to it of increased powers, but only to the wish to strengthen its personnel.

Care was taken at the outset to make the appointment of the Senate as regards the nominated members a pure matter of governmental discretion, thus departing from the older precedents of Canada in 1867, New South Wales in 1856 and 1861, Queensland in 1859, and even the new South African Colonies

[1] Compare the treatment of the 'Colour Bar' Bill in 1925–6.

[2] Cf. Walker, *Lord de Villiers*, pp. 450 ff.

in 1906 and 1907. The elective members, eight in each province, were selected by the Parliaments on strict party lines. The result has inevitably been that the Senate, during the whole of the long period of the rule of Generals Botha and Smuts, was under the control of the party dominant in the Assembly, and it was only on General Hertzog's advent to power in 1924 that friction became inevitable. The most striking act of the Senate was its rejection in 1925 of the Colour Bar Bill introduced by the Government, which would not merely have made legal the colour bar which had illegally been imposed by regulations in the Transvaal,[1] but would have extended the principle beyond the field in which by law and custom it had operated, to other industries, and to the Cape and Natal, where it had never been accepted as part of the established rules of the country.

Projects for the reform of the Senate, a matter left open to the Parliament under the Constitution, began in 1917, but the chief importance attaches to a discussion by a Conference consisting of party representatives from both Houses, on the model of Lord Bryce's conference in the United Kingdom. The Conference was formally announced in August 1920, and its functions were to consider only matters of the Constitution. It reported in favour of reducing the nominated members to four, those selected to represent knowledge of native wishes, of keeping the numbers of elective members at eight for each province, of causing them to be elected on the system of proportional representation by the electors in each province who held the same qualification as for the Assembly elections, but were aged thirty at least, of adding say eight members elected by the two Houses of Parliament sitting together, and of reducing the term of office of Senators to seven years, while removing the property qualification of £500 in immovable property. It was suggested tentatively that, if the Senate was thus elected largely by the people, it might be given power to suggest amendments to Money Bills as in Australia, subject, however, to the rule that these suggestions could not be pressed, but must merely be left to the Assembly to handle as it pleased. Nothing, however,

[1] Regulation 179 under s. 4 of the *Mines and Works Act*, 1911; see *A.-G* v. *G. H. Smith* (1923), *J. C. L.* vi. 215–22.

came of these suggestions. General Smuts evidently found the idea unattractive, and the Senate was reconstituted for a further ten years without change being made. It is worth noting that the new proposals recognized that the old theory—not practice—of making the appointments non-political was a mistake, for it suggested in lieu a form of appointment which must have been of the most political type.

The advent to power of General Hertzog was followed by a proposal in 1926 to reduce the Senate to a nullity, by authorizing the passing over its head of any Bill which had been rejected or amended in an unacceptable way by that House in one session, and was re-passed by the Lower House in the following session. This destructive suggestion was stoutly resisted and eventually dropped, in return for the acceptance by the Senate of an amendment permitting the Governor-General to dissolve the Senate within 120 days of a general election. In such event the nominated as well as the elected Senators retire, and the former hold office for ten years, or until the next dissolution, or until a new Government is formed, whichever period is the shorter. The ground of the change is, of course, the desire to secure that every new Government shall be free to select fresh nominees, an arrangement destructive of the value of the nominated Senators, and specially unfavourable to their position, as regards half, of representing the reasonable wishes of the native population of the Union.

§ 8. *Ireland*

The history of the Upper Houses in Ireland has been too brief to require detailed investigation. The fact that the Senate of Northern Ireland was elected by a House of Commons essentially of one political outlook rendered serious friction out of the question. In the Free State, the Senate is given so feeble an influence, save what it may command by its own inherent reasonableness, that it would have been surprising had it rapidly developed any marked characteristic. The first periodic election of 1925 was not, however, specially satisfactory; it showed that to make the whole country a single constituency meant definitely assuring representation to the chosen spokesmen of organized interests such as the liquor interest, or the nominee of organizations of ex-soldiers. Moreover, the list of

Senators actually chosen was generally commented on as far from impressive by character or ability. Luckily the rule by which the Senate is allowed to fill casual vacancies in its own ranks enabled it to restore to its number the most useful of its retiring members who had failed to win sufficient support for election. If any more can be derived from the imperfect materials available, it is that local constituencies are of advantage.[1]

[1] For a Conference on the Shop Hours Bill, 1926, see Senate Report (R 39).

PART IV

THE FEDERATIONS AND THE UNION

I

THE DOMINION OF CANADA

§ 1. *The Origin of the Dominion*

LORD DURHAM recommended the union of the provinces in the belief that the French nationality would thus shortly be submerged in the English; the belief was natural enough, but wholly contrary to the event, and the government of the country was rendered artificial and unsatisfactory by the unlucky combination. The people of Lower Canada at first had a distinct grievance in the equality of representation in the Legislature, but the tide of immigration changed the distribution of population, and the people of Upper Canada were soon justly aggrieved. But at first the requirement of a two-thirds majority for a change, under the Constitution of 1840, prevented action being even contemplated, and, though this requirement disappeared mysteriously [1] in the Imperial Act authorizing the making elective of the Upper House, the state of political parties in the provinces rendered action still impossible. It had become a convention that a Government should possess a majority in both provinces, and must manage its policy to secure this end; Mr. Baldwin resigned in 1851,[2] because in Upper Canada the members proved recalcitrant and defeated a measure for a Court of Chancery. The federal idea was already in the air; Lord Durham, while combining the Canadas, had thought of a wider union, but could not press for its accomplishment at the moment, though he suggested inclusion of a facultative clause in the Act of 1840. Nova Scotia passed a resolution in favour of federation in 1854, the Cartier-Macdonald Ministry discussed it in the same year, Galt in 1858, Brown in 1859 stood out for it, but its advent might have been longer delayed but for the absolute failure of the system to work in Canada during the period from May 1862 to June 1864, when there were

[1] Garneau, *Histoire du Canada*, iii. 275, 376.

[2] Turcotte, *Canada sous l'Union*, ii. 171–3; Macdonald, *Conf. Deb.*, p. 30; Pope, *Sir John Macdonald*, i. 151, 182, 222, 245, 251, 335 f.; Dent, *The Last Forty Years*.

five administrations in Canada, each without any power, and a couple of dissolutions proved that there was no real prospect of any satisfactory government ever being found. Happily the Maritime Provinces had at the same time decided on seeking union among themselves, largely at the instance of Dr. Charles Tupper, and delegates were in conference at a task which proved far from simple, at Charlottetown, when eight Canadian ministers came to them and proposed to meet at Quebec to discuss a wider scheme of union. The Conference met from 10–28 October, and evolved a series of seventy-two resolutions, leading to federation; it is clear from Macdonald's utterances that one consideration which weighed on all was the spectacle of the military power of the United States, where a strong section of opinion had resented the British attitude during the War of Secession, while Irish agitators were anxious to embroil America with the United Kingdom through attacks on Canada.[1] He insisted also, and the Conference accepted his view, that the recent events in the United States had proved the necessity of adopting in Canadian federation the doctrine of the strength of the central government and Parliament, to prevent the appearance of any centrifugal tendencies such as had all but wrecked the United States. The resolutions were approved in 1865 in Canada; long discussions settled the terms of the separation of the two Canadas, which was the crowning merit of federation in the eyes of many of its supporters, and a delegation proceeded to London to discuss defence and other matters, though confederation for the moment was thrown back by the defeat at the general election of the pro-federation Ministry of New Brunswick. The delegates were well received in London, where the movement seemed to offer a solution of the question of defence, which had been pressing ever since in 1863 Canada refused to pass a Militia Bill making effective additions to her defence; promises were given to secure as much pressure as possible on the Maritime Provinces to accept federation; a loan for the construction of the intercolonial railway, which was an essential feature of a federation with the Maritime Provinces,

[1] See *Parl. Pap.*, 7 Feb. 1865; 8 Feb. 1867; 10 June 1868; Pope, *Sir John Macdonald*, i. 299 ff.; *Confederation Documents* (1895); *Confederation Debates* (1865); *Hansard*, ser. 3, clxxxv. 557 ff., 804, 1011, 1164 ff., 1313 ff.; Hannay, *New Brunswick*, ii. 209–70; Trotter, *Canadian Federation* (1924).

would be guaranteed; and the North-West Territories would be handed over to Canada from the control of the Hudson Bay Company. In April 1866 Dr. C. Tupper induced the Nova Scotian Legislature to agree to appoint delegates to arrange federation with the Imperial Government, though the people of Nova Scotia had never been consulted on the issue, and Sir A. Gordon, Lieutenant-Governor of New Brunswick, decidedly strained the constitutional position of a Governor in order to force his Ministry, as opponents of federation, into resignation. Mr. Tilley, who took office on its resignation, dissolved, obtained a large majority, which approved federation subject to the construction of the intercolonial railway. A meeting of delegates from Canada, Nova Scotia, and New Brunswick with representatives of the Imperial Government took place in London in December 1866, at which after some financial changes to meet provincial desires, the terms of an Act were decided upon. The *British North America Act* was passed in 1867, with no sign of appreciation of its importance by the Duke of Buckingham, who in Macdonald's view treated the measure 'as if it were a private Bill uniting two or three English parishes', or by Parliament; these were the days when Lord Blachford, the permanent Under Secretary at the Colonial Office, was a convinced believer in the ultimate separation of the Colonies from the United Kingdom as inevitable and probably desirable. An Imperial Order in Council fixed 1 July 1867 as the date of federation, and Parliament met in November, arrangements having been made that the first members of the Senate should be appointed by the Crown largely from the membership of the existing Legislative Councils. The title 'Kingdom of Canada', desired by Macdonald as a sign of the coming greatness of the Dominion and an incentive to Australia to federate likewise, was refused, probably because it might have seemed then an act of provocation to a very suspicious and dissatisfied United States. As has been mentioned, Nova Scotia was in no wise consulted on the issue by her Legislature, and Messrs. Howe, Annand, and Macdonald in vain protested against the action of the Imperial Parliament in thus deciding the fate of a territory without allowing its people to say if the Legislature was overstepping its mandate.

Almost at once one great aim was accomplished. The neces-

sity of adding the Hudson Bay territory to the Dominion was patent in view of the danger of the United States establishing, by occupation, claims on the vast lands which were left as the preserve of a small population of half-castes and Indians. In December 1867 Mr. McDougall, representing the influence of Ontario, secured the passing of a resolution in the Federal Parliament asking for the union of Rupert's Land and the North-Western Territory with Canada. An Imperial Act of 1868 [1] approved the principle of the transfer if terms were arrived at with the Company, and Lord Granville's intervention induced a settlement, under which the Company received £300,000 and an enormous grant of land in full property, in return for a complete surrender of all its governmental rights. The Dominion Parliament accepted the arrangement in June 1869, and in November the Company executed a deed of surrender to the Crown. Meanwhile, the Dominion had legislated [2] to provide for the government of the territory, and Mr. McDougall,[3] disregarding advice from Sir J. Macdonald, who did not wish to run any risks by hasty action, declared the whole territory annexed from 1 December 1869. This led to the revolt of half-castes under Riel, who was guilty of the atrocious murder of Thomas Scott, one of a small body of loyalists who sought to uphold the authority of the Crown against what might have been a serious rising, had the American and Fenian aid which Macdonald feared been forthcoming to the rebels. The rebellion was put down by a combined British and Canadian force under Colonel Wolseley, which reached Fort Garry, Riel's head-quarters, on 24 August, to find that miscreant—perhaps a madman—a fugitive, while the Dominion Parliament enacted the Manitoba Act [4] to confer on the territory comprised in the limits defined in the Act a full Provincial Government. The creation of the new régime was rendered definitive by the Imperial Order in Council of 23 June 1870 transferring Rupert's Land and the North-Western Territory to Canada, and the passing of an Imperial Act [5] to make it clear that Canada had the power to create new provinces out of lands surrendered to it, while the constitutions

[1] 31 & 32 Vict. c. 105. [2] 32 & 33 Vict. c. 3.

[3] Pope, *Sir John Macdonald*, ii. 49 ff.; Willison, *Sir Wilfrid Laurier*, i. 151 ff.; Bryce, *History of the Hudson's Bay Company*, pp. 457 ff.

[4] 33 Vict. c. 3. [5] 34 & 35 Vict. c. 28.

of these provinces were after creation exempted from change by the Dominion. The Dominion was also authorized to increase the number of members of Parliament so as to provide for the representation of the new provinces, and, with the consent of any province, to alter its boundaries and make any laws necessary in respect of such alterations. In July 1871 British Columbia was added to the Dominion on a number of conditions, including the promise to begin within two years from both ends a transcontinental railway, and to finish it in ten, and the pledge of the grant of responsible government, which was duly carried out by the Imperial Government authorizing the representative Legislature created by Order in Council of 9 August, under 33 & 34 Vict. c. 66, to enact Act No. 147 of 1871, under which responsible government as in Ontario, with a unicameral Legislature as opposed to the bicameral Legislature given to Manitoba, was established. The province received subsidies, and transferred the control of Indians and their lands to the Federation, with the obligation to transfer further lands as needed, the policy to be followed by the Federation to be as generous as that of the Colony. As the Colony had been the reverse of generous, the agreement naturally caused difficulties later on. A further ambiguity existed as to the lands surrendered by the province in order to provide for the building of the railway; in 1910 the province actually claimed that it retained power to legislate regarding water rights respecting these lands, an effort to derogate from its grant which the Privy Council disapproved.[1] Union took effect from 21 July 1871 under the Imperial Order in Council of 16 May, issued under the terms of s. 146 of the *British North America Act*.[2]

Prince Edward Island had shown immediately after the Quebec Conference a profound indifference to federation, and it was ultimately financial pressure which overcame her reluctance to act. The land had been most shamefully disposed of by the Crown to absentee landholders, without merit or interest in the territory, and land settlement was barred. In the long run terms were agreed on; an advance was to be made by Canada of 800,000 dollars to buy out the absentees, on which interest at five per cent. was to be deducted from a subsidy of 45,000 dollars annually to be paid to the province in compensa-

[1] *Burrard Power Co.* v. *The King*, 43 S. C. R. 27; [1911] A. C. 87.

[2] Canada *Sess. Pap.*, 1867–8, No. 59, pp. 3–7.

tion for it having no Crown lands to dispose of. The necessary Order in Council, following the usual addresses from the federal and local Legislatures, was issued on 26 June, providing for union from 1 July 1873. Newfoundland, however, remained firmly outside; the Government of 1868 put the issue before the electorate, which promptly defeated it heavily; in 1895, under stress of the bank failure and general distress in the Island, Sir Mackenzie Bowell's Government was given the opportunity to acquire the province, but it disputed as to the amount of debt to be taken over, and the people of the Island, coming, very naturally, to the conclusion that, if Canada were so niggardly, they would be better off as they were, definitely decided not to support the suggestion. Since then, one intrigue after another has been on foot to bring about union, especially since the settlement, first in 1904 of the difficulties over the French fishery rights, and in 1910 of those over the American rights, removed the disadvantage to Canada of being burdened with the defence of Newfoundland's rights against France or the United States. But the advantages of union would, in the first place, accrue merely to the place-hunters and money-seekers who might be given Senatorships or donations to work union, and the people of the Colony doubtless act wisely in holding out from union, unless and until they can be assured of lasting benefits. The waning of the prosperity of the Maritime Provinces, and especially of Nova Scotia, under federation is a warning against rash action. In the meantime, an accusation of favouring federation is a favourite and apparently damaging taunt; it was levelled by Sir R. Bond against Sir E. Morris, and vice versa; doubtless with equal truth or falsity, and later Mr. Coaker indignantly repudiated an accusation that he had been used by the Reid interest to seek to draw Newfoundland into the union.[1]

In 1905 out of the remaining territories not under provincial status were formed two great provinces, Saskatchewan and Alberta,[2] with provincial authority, but without the control of their lands, which, as in Manitoba, were retained by the Dominion Government as a means of promoting settlement. The possibility of further creation of provinces disappeared with the

[1] *Canadian Annual Review*, 1909, pp. 36–9; Keith, *War Government of the Dominions*, p. 242.

[2] 4 & 5 Edw. VII, cc. 42 and 43.

decision by Acts of 1912 [1] to extend widely the boundaries of Ontario, Quebec, and Manitoba so as to assign to them the lands to the north. The remainder of Canada not provincialized consists of the Yukon and the North-West Territories, the latter in a position of less constitutional development than the former. The whole of the British Dominions in North America other than Newfoundland was duly made over to the Dominion [2] by Order in Council of 16 July 1880, which was validated, if doubtful in legality, by the *Colonial Boundaries Act*, 1895, passed to make clear the right of the Crown to alter colonial boundaries.

§ 2. *The Provinces and the Dominion*

The Dominion is, in the sense of the Imperial *Interpretation Act*, 1889, a Colony, while the provinces have no such status ; [3] the powers given to a Governor of a Colony do not fall upon the Lieutenant-Governors in any circumstances, whereas in Australia, while the States have for certain purposes lost colonial status, they none the less retain it in others, namely, in those matters in which the Federal Parliament has no authority. The marks of the lessened importance of the Provinces are the appointment and removal of the Lieutenant-Governors by the Governor-General and the power of disallowance of provincial Acts, as contrasted with the direct appointment by the Crown of State Governors and the disallowance of State Acts by the Crown only. The distinction between the two cases was clearly marked by the decision of the High Court of the Commonwealth in *McKelvey* v. *Meagher* [4] that the powers given to a Governor by the *Fugitive Offenders Act*, 1881, are still vested in the Governors of the States, and that the Government and Legislature of the Commonwealth are only a central body in the sense of excluding subordinate bodies from action when they have the possibility of legislative action, perhaps only when the Legislature has actually passed legislation. There is no right of communication between the provinces and the Imperial Government as between the States and the Imperial Government ; their representatives in London are not accredited to the Imperial Government as

[1] Cc. 40, 45, and 32, and provincial Acts.

[2] *Commons Deb.*, 1878, p. 2386.

[3] A provincial loan is not a colonial loan within a trust deed ; *In re Maryon-Wilson's Estate*, [1911] 2 Ch. 58.

[4] (1906) 4 C. L. R. 265.

are State Agents-General; even in matters of honour the recognition given is limited; Executive Councillors have the style Honourable only when in office, and similar treatment is given to the President of the Council and Speaker of the Assembly. Nor does the Dominion Government admit any right on the part of the provinces to have representations to the Imperial Government forwarded to that body; it may transmit without comment, as in the case of the Nova Scotian Assembly's resolution in February 1894 in support of the abolition of the Council; or it may simply file, as in the case of British Columbia's appeal in 1907–8 for an Imperial Commission to investigate the questions of Asiatic immigration into Canada, and in still more recent instances. The Dominion may, of course, further a provincial appeal if and when it suits its own views; thus the Imperial Government and Parliament were successfully moved in 1915 to grant the prayer of Prince Edward Island that her representation in the Commons should never fall below the number of Senators, four, allotted to her in the Upper House.[1]

As we have seen, the federal principle receives very ineffective expression in the Senate, for the three Maritime Provinces and the four Western Provinces, even under the legislation of 1915, have only in that body the total representation accorded to Ontario and to Quebec. Something may be said for this on the score that this grouping accords with the great divisions of Canada, but, as the provinces need not act together, and may not share the same standpoint, there is no doubt that the smallness of representation is contrary to the federal principle as represented in the equal number of Senators allotted to the States of Australia. In any case, the mode of appointment of the Senate by nomination by the Government of the day has naturally resulted in depriving it of any federal character whatever.

§ 3. *The Lieutenant-Governor*

The position of the Lieutenant-Governor towards the Dominion Government is admittedly a counterpart of that of a Colonial Governor to the Imperial Government. It is true

[1] See *A.-G. for P. E. Island* v. *A.-G. for the Dominion of Canada*, [1905] A. C. 37; 33 S. C. R. 564, negativing the claim; the Island's early petitions were ignored, *Canadian Annual Review*, 1907, p. 426; 1908, pp. 32 f., 593 f.

that he has a normal tenure by statute of five years, and that, if removed before that date by the Governor-General, reason must be assigned, and communicated to Parliament within a week if in session, or within a week after its next session begins. But this does not mean, as Mr. Luc Letellier claimed, that the Lieutenant-Governor is beyond the control of the Dominion Government, so long as he acts within the functions of a constitutional sovereign; it merely means that the Dominion Government must take the trouble to find a ground for removing him, and must be prepared to defend it in Parliament. On the whole, Lieutenant-Governors have very fairly succeeded in working with Ministries, even when these are of different political complexion, despite the cases of Messrs. Letellier, McInnes, and Angers already recorded. Thus in 1908 the Lieutenant-Governor of New Brunswick declined to appoint to office nominees of the beaten Ministry, though he was of the same political faith. The position is not rendered easier by the fact that federal political parties are busily engaged in provincial matters; Nova Scotia long remained loyal to federal Liberalism and provincial Liberalism, and it was the disappearance of Mr. Fielding from the federal arena which heralded the fall of provincial Liberalism in 1925.

The legal position of the Lieutenant-Governor was long misunderstood by the Dominion authorities, under the influence of Sir J. Macdonald, who had always preferred union, and was determined to minimize the importance of the Provinces, and of the Imperial Government.[1] It was thought that in some way he no longer represented the Crown, and anxious eyes were cast to find some legal authority for his executive acts. It has long ago been made clear that the Lieutenant-Governor is in a province the representative of the Crown for provincial purposes, and that he possesses under the constitution all power necessary for local purposes, so far as that belongs to the Crown by virtue of the prerogative. Acts, of course, have frequently been passed to assert the powers of the Lieutenant-Governor, as for instance

[1] Lord Granville, 24 Feb. 1869, Canada *Sess. Pap.*, 1869, No. 16; Lord Carnarvon, *Sess. Pap.*, 1875, No. 7. Contrast Mowat, Ontario *Sess. Pap.*, 1888, No. 37, pp. 20–2; Blake, *Executive Power Case* (1892); Burton J., 19 O. A. R. 31, 38; Higinbotham C. J., *Toy* v. *Musgrove*, 14 V. L. R. 349, 397; Kerferd J., ibid., 409, 411.

as to the appointment of Queen's Counsel, the alteration of the Great Seals, the exercise of the prerogative of pardon, and so forth; but apart from such Acts there is no doubt that the prerogative powers of the Crown, so far as they appertain to a Provincial Government, are inherent in the Lieutenant-Governor. The Privy Council decision in *Attorney-General of Ontario* v. *Mercer* [1] that the province was entitled to escheats was a clear negation of the doctrine of its separation from the province, and the whole matter was elaborately dealt with in *Liquidators of the Maritime Bank of Canada* v. *Receiver-General of New Brunswick*,[2] where the definite claim was set up that the priority of the Crown in liquidation proceedings did not apply to the Provincial Government in competition with creditors of the bank. Stress was laid on the fact that the Lieutenant-Governor was appointed by the Governor-General, not the Crown; moreover, it was argued that the Act of 1867 definitely handed over part of the prerogative to the Lieutenant-Governor, but gave no general grant. The Privy Council asserted, as in *Exchange Bank of Canada* v. *The Queen*,[3] and in accord with the view of the Supreme Court in *Reg.* v. *Bank of Nova Scotia* [4] that the prerogative in the Dominion was as extensive as in the United Kingdom unless restricted by statute, and it asserted that the prerogative was equally available for the provinces within the sphere allotted to them. The argument on the other side essentially involved the idea that the provinces were municipal institutions, while the prerogative remained only with the Governor-General. This unsymmetrical suggestion was dismissed, on the score that in the spheres given to them the provinces possessed legislative and executive authority and property rights quite independent of, and exclusive of, the Dominion; 'the object of the Act was neither to weld the provinces into one, nor to subordinate Provincial Governments

[1] (1883) 8 App. Cas. 767. Cf. *Molson* v. *Chapleau* (1883), 3 Cart. 360, 365, 366, *per* Papineau J.

[2] [1892] A. C. 437. Cf. *Reg.* v. *St. Catherine's Milling and Lumber Co.* (1884), 13 O. A. R. 148, 165, 166, *per* Burton J. A.; *Mercer* v. *A.-G. for Ontario* (1881), 5 S. C. R. 538, 637, *per* Ritchie C. J.

[3] (1886) 11 App. Cas. 157. Cf. as to forfeiture on felony, *Dumphy* v. *Kehoe* (1891), 21 R. L. 119.

[4] (1885) 11 S. C. R. 1, following *In re Oriental Bank*, 28 Ch. D. 643; *In re Bateman's Trust*, L. R. 15 Eq. 355.

to a central authority, but to create a Federal Government, in which they should all be represented, entrusted with the exclusive administration of affairs in which they had a common interest, each province retaining its independence and autonomy'. As laid down in *Hodge* v. *The Queen*,[1] within the limits of subject and area the local Legislature was supreme, and had the same authority as the Imperial Parliament or the Dominion Parliament. Appointment by the Governor-General in Council meant appointment by the Executive Government of the Dominion, and this was vested in the Queen. When duly appointed in this manner, the Lieutenant-Governor was as much the representative of the Crown for provincial purposes as the Governor-General for Dominion purposes. Ss. 109 and 126 of the Act specified the territorial and non-territorial revenues of the provinces, and it has been determined in several cases that the territorial revenues were vested in the Crown as the sovereign head of each province, negating the alleged severance of the Crown and the province, and it followed by parity of reasoning that non-territorial revenue and revenue rights adhered in the Crown, including the prerogative right of priority in liquidation. It appears that, if the Crown, in all three aspects, had claims against a bank in liquidation, in the absence of legislation to the contrary, each could claim priority; if on the other hand a legislative Act *intra vires* of any of these three barred the priority, it might be held to apply to all.

The view of the Privy Council disposes definitely of the Supreme Court's views in *Lenoir* v. *Ritchie* [2] denying the power of the Lieutenant-Governor by assent to a Provincial Act to give himself the right to create Queen's Counsel and to allot them precedence at the Bar, and the Minister of Justice's declaration that the use of the name of the Queen in such an Act was improper.[3]

The constitution gives the provinces constituent powers, save as regards the office of Lieutenant-Governor, which cannot be altered either by the Dominion or the province. But it is not clear that to ascribe to him fresh powers and functions in any way exceeds legislative authority. In 1887 a Manitoba Act

[1] (1884) 9 App. Cas. 117. [2] 3 S. C. R. 575; *Sess. Pap.*, 1877, No. 86.

[3] *Prov. Leg.*, 1867–95, p. 99. His assent is that of the Crown, *Théberge* v. *Landry* (1877), 2 App. Cas. 102, 108.

(48 Vict. c. 2) passed, authorizing the Lieutenant-Governor to appoint deputies to sign marriage licences, money warrants, patents of incorporation of companies, licences to incorporate companies, and commissions under any Provincial Act, and making him for purposes of suit a corporation sole. The Minister of Justice held the Act *ultra vires*,[1] and disallowed also a Quebec Act (49 & 50 Vict. c. 98) on this ground.[2] In 1889 a very interesting discussion was conducted by Sir John Thompson with Mr. O. Mowat over the validity of the Ontario Act (51 Vict. c. 5) regarding executive power in the province; the minister thought it *ultra vires*, especially as regards the grant of pardoning power[3] to the Lieutenant-Governor. Mr. Mowat argued that the giving of extended powers to the Lieutenant-Governor was quite different from altering the character of his office; the issue was referred to the Courts, and the Supreme Court,[4] the Court of Appeal, and the Supreme Court of Canada held that the Act was not necessarily *ultra vires*, partly because it professed to legislate as far as the province had authority, and the judgements therefore leave it uncertain precisely how far the Act was supposed to be valid. Still, the result was that a Quebec Act of 1889 (c. 12), a New Brunswick Act (c. 7), and a Manitoba Act of 1890 (c. 15) were left in operation,[5] and the provincial statutes all now confer as a matter of course the pardoning power in respect of provincial offences, though the British Columbia Act, 62 Vict. c. 16, revived for a time the old doubt regarding the pardoning prerogative.[6]

The executive authority of the Lieutenant-Governors clearly extends to all matters necessarily implied in the grant of legislative power. Prior to 1878 it was customary for the Crown to delegate expressly the rights of proroguing and dissolving the provincial legislatures, but this power was regarded as otiose by Mr. Blake, who contended that they possessed it *virtute officii*, and the Imperial Government acquiesced in this view.

It is fairly certain that in one respect the office of the Lieu-

[1] *Prov. Leg.*, 1867-95, p. 821.

[2] Ibid., pp. 314, 338.

[3] Power to remit penalties had already been given (48 Vict. c. 13, s. 16).

[4] *A.-G. of Canada* v. *A.-G. of Ontario*, 20 O. R. 222; 19 O. A. R. 31; 23 S. C. R. 458.

[5] *Prov. Leg.*, 1867-95, pp. 432, 752, 929.

[6] Ibid., 1899-1900, p. 133.

tenant-Governor is free from possibility of interference by the Legislature. The decision of the Privy Council in the case of the Referendum Act of Manitoba [1] indicates with satisfactory clearness that the Legislature may not deprive him of the right to give or withhold the royal assent to measures passed by the Legislature. If, therefore, any scheme of initiative or referendum is to be held valid, it must provide that the measure enacted shall be submitted in the ordinary way to the Lieutenant-Governor.

§ 4. *The Legislative Powers of the Dominion and the Provinces*

It appears to have been the laudable, if idle, hope of the framers of confederation that they would be able to produce a measure which would so definitely assign to the federation on the one hand and to the provinces on the other their respective spheres of authority that no question of conflicts of law could ever arise.[2] If so, their hope was utterly defeated, for the number of complexities which have arisen regarding the interpretation of the Constitution is deplorable, and it is known that the chief fact which turned Lord de Villiers into a vehement opponent of federation, and induced him to throw all his influence as President of the South African Conference into the fight for the unification of South Africa, was the experience of Canadian conditions derived from a careful study, during a visit to that country, of the complexities of the Dominion Constitution. The Act itself seems only on the heads of agriculture and of immigration to have realized that conflicts were unavoidable ; it does not even contain the provision that a Dominion law generally overrides a provincial law, apparently holding that in the ordinary spheres of their operation the two laws could never conflict. The acquiescence of the people of the Dominion in the very real disadvantages which arise from the interference, by the difficulty of interpreting the powers given, with the carrying out of legislative reform, is in part explained by their proximity to the United States, where problems of this kind are an everyday feature of society, but the loyalty with which the decisions of Courts rejecting the validity of excellent Acts on technical reasons is accepted is a strong proof of the spirit of

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

[2] Sir J. Macdonald, *Conf. Deb.*, p. 32.

legality which prevails among the inhabitants of the Dominion, in which also the criminal law is administered with a regularity and firmness which cause admiration and sometimes annoyance among the American citizens, who are wont to see sensational murderers escaping the supreme penalty, and find it hard that the same sort of deeds committed in Canada meet with short shrift and stern retribution.

The following sections of the Constitution show the distribution of powers :

Powers of the Parliament.

91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of *Canada*, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of *Canada* extends to all Matters coming within the Classes of Subjects next herein-after enumerated ;[1] that is to say,—

1. The Public Debt and Property.
2. The Regulation of Trade and Commerce.
3. The raising of Money by any Mode or System of Taxation.
4. The borrowing of Money on the Public Credit.
5. Postal Service.
6. The Census and Statistics.
7. Militia, Military and Naval Service, and Defence.
8. The fixing of and providing for the Salaries and Allowances of Civil and other Officers of the Government of *Canada*.
9. Beacons, Buoys, Lighthouses, and *Sable Island*.
10. Navigation and Shipping.
11. Quarantine and the Establishment and Maintenance of Marine Hospitals.
12. Sea Coast and Inland Fisheries.
13. Ferries between a Province and any *British* or Foreign Country or between Two Provinces.
14. Currency and Coinage.

[1] See Canada *Revised Statutes*, 1906. Divorce is the chief subject on which no legislation had been passed until 1927.

15. Banking, Incorporation of Banks, and the Issue of Paper Money.
16. Savings Banks.
17. Weights and Measures.
18. Bills of Exchange and Promissory Notes.
19. Interest.
20. Legal Tender.
21. Bankruptcy and Insolvency.
22. Patents of Invention and Discovery.[1]
23. Copyrights.
24. *Indians*, and Lands reserved for the *Indians*.
25. Naturalization and Aliens.
26. Marriage and Divorce.
27. The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.
28. The Establishment, Maintenance, and Management of Penitentiaries.
29. Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

Exclusive Powers of Provincial Legislatures.

92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next herein-after enumerated ; that is to say,—

1. The Amendment from Time to Time, notwithstanding anything in this Act, of the Constitution of the Province, except as regards the Office of Lieutenant Governor.
2. Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes.
3. The borrowing of Money on the sole Credit of the Province.
4. The Establishment and Tenure of Provincial Offices and the Appointment and Payment of Provincial Officers.

[1] The Parliament has dealt with trade marks by 42 Vict. c. 22 ; see ***Standard Ideal Company*** v. ***Standard Sanitary Manufacturing Company***, [1911] A. C. 78, at p. 84 ; ***Partlo*** v. ***Todd***, 17 S. C. R. 196 ; ***Boston Rubber Shoe Co.*** v. ***Boston Rubber Co. of Montreal***, 32 S. C. R. 315.

5. The Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon.
6. The Establishment, Maintenance, and Management of Public and Reformatory Prisons in and for the Province.
7. The Establishment, Maintenance, and Management of Hospitals, Asylums, Charities, and Eleemosynary Institutions in and for the Province, other than Marine Hospitals.
8. Municipal Institutions in the Province.
9. Shop, Saloon, Tavern, Auctioneer, and other Licences in order to the raising of a Revenue for Provincial, Local, or Municipal Purposes.
10. Local Works and Undertakings other than such as are of the following Classes :—

    a. Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province :

    b. Lines of Steam Ships between the Province and any *British* or Foreign Country :

    c. Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of *Canada* to be for the general Advantage of *Canada* or for the Advantage of Two or more of the Provinces.
11. The Incorporation of Companies with Provincial Objects.
12. The Solemnization of Marriage in the Province.
13. Property and Civil Rights in the Province.
14. The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.
15. The Imposition of Punishment by Fine, Penalty, or Imprisonment for enforcing any Law of the Province made in relation to any Matter coming within any of the Classes of Subjects enumerated in this Section.
16. Generally all Matters of a merely local or private Nature in the Province.

Education.

93. In and for each Province the Legislature may exclusively make Laws in relation to Education, subject and according to the following Provisions :—

(1) Nothing in any such Law shall prejudicially affect any Right

or Privilege with respect to Denominational Schools which any Class of Persons have by Law in the Province at the Union :

(2) All the Powers, Privileges, and Duties at the Union by Law conferred and imposed in *Upper Canada* on the Separate Schools and School Trustees of the Queen's Roman Catholic Subjects shall be and the same are hereby extended to the Dissentient Schools of the Queen's Protestant and Roman Catholic Subjects in *Quebec* : [1]

(3) Where in any Province a System of Separate or Dissentient Schools exists by Law at the Union or is thereafter established by the Legislature of the Province, an Appeal shall 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 of the Queen's Subjects in relation to Education :

(4) In case any such Provincial Law as from Time to Time seems to the Governor General in Council requisite for the due Execution of the Provisions of this Section is not made, or in case any Decision of the Governor General in Council on any Appeal under this Section is not duly executed by the proper Provincial Authority in that Behalf, then and in every such Case, and as far only as the Circumstances of each Case require, the Parliament of *Canada* may make remedial Laws for the due Execution of the Provisions of this Section and of any Decision of the Governor General in Council under this Section.[2]

Uniformity of Laws in Ontario, Nova Scotia, and New Brunswick.

94. Notwithstanding anything in this Act, the Parliament of *Canada* may make Provision for the Uniformity of all or any of the Laws relative to Property and Civil Rights in *Ontario, Nova Scotia*, and *New Brunswick*, and of the Procedure of all or any of the Courts in those Three Provinces, and from and after the passing of any Act in that Behalf the Power of the Parliament of *Canada* to make Laws in relation to any Matter comprised in any such Act shall, notwithstanding anything in this Act, be unrestricted ; but any Act of the Parliament of *Canada* making Provision for such Uniformity shall not have effect in any Province unless and until it is adopted and enacted as Law by the Legislature thereof.[3]

[1] On the school systems of the province there is a very copious literature issued by the Government of Ontario in its *Sess. Pap.* annually.

[2] No such legislation has ever been passed.

[3] This action has never been taken ; see Lefroy, op. cit., pp. 315, n. 1 ; 575, n. 2.

Agriculture and Immigration.

95. In each Province the Legislature may make Laws in relation to Agriculture in the Province, and to Immigration [1] into the Province; and it is hereby declared that the Parliament of *Canada* may from Time to Time make Laws in relation to Agriculture in all or any of the Provinces, and to Immigration into all or any of the Provinces; and any Law of the Legislature of a Province relative to Agriculture or to Immigration shall have effect in and for the Province as long and as far only as it is not repugnant to any Act of the Parliament of *Canada*.

There is no doubt now that the reference to 'exclusive' powers in ss. 91 and 92 are strictly correlative powers terms, and that in neither case is there any attempt to deprive the Imperial Parliament of legislative authority; [2] that Parliament cannot bind itself, of course, and there is no doubt whatever that the *Colonial Laws Validity Act*, 1865, applied to Canada. It is indeed the foundation of all the decisions that Acts are invalid because they are not within the limits of the powers conferred by the constitution on the Dominion or the provinces. It lies with the Courts to consider the validity of any Act founded on, perhaps even to note the unconstitutionality of a measure not challenged in the case before it. The presence of invalid matter need not render an Act wholly void; the issue is whether the invalidity is such that it would not be right to assume that the Legislature meant the rest of the Act to stand, with the invalid part removed, a fact which is usually fairly obvious.[3] It is valid to insert in an Act a limitation 'so far as the Legislature has power thus to enact', and it may save an Act from being held invalid if the enactment can be read in a reasonable sense as

[1] This power has been practically never successfully exercised. See below, pp. 536, 537.

[2] *Smiles* v. *Belford* (1876), 23 Gr. 590; 1 O. A. R. 436; *Routledge* v. *Low* (1868), L. R. 3 H. L. 100; *City of Fredericton* v. *The Queen* (1880), 3 S. C. R. 505, 529, 530; *A.-G. of Canada* v. *A.-G. of Ontario* (1890), 20 O. R. 222, 245; the *Thrasher Case* (1882), 1 B. C. (Irving) at p. 214; *Ex parte Renaud* (1873), 1 Pugs. 273, 274; *Merchants' Bank of Canada* v. *Gillespie* (1885), 10 S. C. R. 312; Part V, chap. viii.

[3] *Liquor Licence Laws of 1883-5*, 4 Cart. 342, n. 2; *McKilligan* v. *Machar* (1886), 3 M. R. 418; *Allen* v. *Hanson* (1890), 16 Q. L. R., at p. 64; 18 S. C. R. 667, 673.

possessing validity.[1] There are no restrictions on the validity of Acts other than those of repugnance, territorial limitation, and violation of the status of a dependency; the rule that private property ought not to be confiscated is a moral principle, which may govern interpretation of a dubious clause, but violation of it will not make a law invalid.[2] Nor is it illegitimate to pass *ex post facto* legislation, if the Legislature really means to do so, and makes the purpose clear.[3] There is no principle, such as exists in the United States, that Acts must be read as not violating treaties, as at one time the British Columbian Courts,[4] with a much higher regard for international comity than sense of law, were inclined to hold. Nor is there any rule that all citizens must be given the same treatment. The interpretation of the Act may be aided by consideration of the course of legislation in the Dominion and the provinces since 1867, but it stands to reason that only the Courts can validly interpret the Act. Moreover, the final Court of interpretation is the Privy Council. Decisions of the Supreme Court standing by themselves are interesting and useful, but they do not possess any definitive value as expositions of the constitution.

The one principle governing the interpretation of the Act which can be ascribed to the Privy Council is its determination to treat it on the normal principles of a British statute, and therefore to give every part its natural meaning when read in conjunction with the rest of the statute, without allowing any overriding power to any conception of federalism. This view stands in complete contrast with the doctrine at one time accepted by the High Court of the Commonwealth, when in *D'Emden* v. *Pedder*[5] and other cases it accepted the view that the American doctrine of exemption of instrumentalities of the

[1] *A.-G. of Canada* v. *A.-G. of Ontario*, 20 O. R. 222, 246; 19 O. A. R. 31, 40; 23 S. C. R. 458, 471; *In re Windsor and Annapolis Railway Co.*, 4 R. & G. 312.

[2] *L'Union St. Jacques de Montréal* v. *Bélisle* (1874), L. R. 6 P. C. 31; *In re Goodhue*, 19 Gr. 366; *Municipality of Cleveland* v. *Municipality of Melbourne*, 4 L. N. 277; *In re McDowell* (1892), 22 O. R. 563; *Licence Commrs. of P. E. County* v. *County of P. Edward* (1874), 26 Gr. 452; *Kelly* v. *Sullivan*, 2 P. E. I. 34; 1 S. C. R. 1.

[3] *A.-G. of Canada* v. *Foster* (1892), 31 N. B. 153.

[4] *Tai Sing* v. *Maguire* (1878), 1 B. C. (Irving), at p. 108; *Reg.* v. *Wing Chong* (1885), 2 B. C. (Irving), at pp. 161, 162; *Reg.* v. *Gold Commrs. of Victoria District*, ibid., 260.

[5] (1904) 1 C. L. R. 91.

federation or the states from interference by the other, applied to the Commonwealth Constitution, despite the dissent of the Privy Council in *Webb* v. *Outtrim*.[1] It is curious that in support of this view the Chief Justice of the Commonwealth adduced a case in the Canadian Courts asserting that provincial authority cannot impose taxation on the salary of a provincial federal officer, which was manifestly inconsistent with authority, and ultimately was definitely overruled.[2] Whatever may be said for the rule in American law, where the constitution is rigid, and the states are not under any direct control by the federation, the case is different in Canada, where the Dominion Government possesses the power of disallowance of Provincial Acts; it is true that this power is non-existent in the Commonwealth, but, on the other hand, the Commonwealth could always move the Imperial Government to disallow any State Act which seriously menaced the Commonwealth. The true principle was well expressed in *Bank of Toronto* v. *Lambe*,[3] where an effort was made to attack the levy of direct taxation under s. 92 (2) on incorporated companies by the province of Quebec, on the score that by increasing unduly the taxation the Legislature might nullify the Dominion power of incorporation of companies. It was held that if the power were given by the section in question, it would be quite improper to limit it because it might be abused or lessen the range of action open to the Dominion.

Some confusion has recently been caused by the statement of Lord Haldane in *Attorney-General for the Commonwealth of Australia* v. *Colonial Sugar-Refining Co.*,[4] that Canada has not a federal constitution properly so called, such a term applying more properly to such a case as that of Australia or the United States, where original states, while agreeing on a measure of delegation, still continue to preserve in large measure their original authority. In Canada, on the other hand, the provinces surrendered their constitutions, to be given a new constitution in which the residual power was given to the central government, and lessened authority of a limited kind was handed back

[1] [1907] A. C. 81.

[2] *Leprohon* v. *City of Ottawa*, 2 O. A. R. 522; contrast *Abbott* v. *City of St. John*, 40 S. C. R. 597; *Caron* v. *R.*, [1924] A. C. 999.

[3] (1887) 12 App. Cas. 575; *Fortier* v. *Lambe*, 25 S. C. R. 422.

[4] [1914] A. C. 237.

to the provinces. It is difficult to know whether this was meant as a serious contribution to the conception of a federation; if so, it is clearly based on a very imperfect comprehension of the term; for legal purposes the observation appears to be without value, and in any case it cannot be understood, being an *obiter dictum*, as in any way overruling the absolutely clear judgement of Lord Watson, a much abler judge, in *Liquidators of the Maritime Bank of Canada* v. *Receiver-General of New Brunswick*, in which the continuity of the life of the provinces and the creation of a federation to deal with their common interests is described. Nor is there any excuse for the attempt to view as delegation the creation of such an entity as the Commonwealth of Australia; the provinces of Canada and the states of Australia were equally in the same position; they agreed to the creation of a Federal Government, and had it created by the Imperial Parliament, and their constitutions, while they differ in detail, are fundamentally similar, a fact which it is foolish to ignore. The real problem of interpretation of the Act is simply to give a fair interpretation to its whole scheme, neither to aggrandize the Dominion at the expense of the provinces nor to deny the Dominion just power because it may restrict the authority of the provinces. This principle may be traced in some detail.

(*a*) *Election Petitions.*

Thus the Privy Council[1] has ruled that, though the provinces alone can legislate as to civil Courts and procedure in the provinces, there is no ground for denying the right to the Dominion to impose on a provincial Court the duty of dealing with disputed elections, refusing to give leave to appeal from the Supreme Court's holding to this effect, on the ground *inter alia* of the objections to delay in disposing of such cases, which have led to refusal to hear appeals on this head from the Supreme Court's rulings.[2]

(*b*) *The Temporalities Fund.*

In *Dobie* v. *The Temporalities Board*[3] it was held that it was not possible for the Quebec Legislature to repeal an Act of the united province dealing with the Temporalities Fund of the

[1] *Valin* v. *Langlois* (1880), 5 App. Cas. 115; 3 S. C. R. 1; 5 Q. L. R. 1.

[2] Glengarry election case, *Kennedy* v. *Purcell*, 7 July 1888; see 14 S. C. R. 453.

[3] (1882) 7 App. Cas. 136.

Scottish Church—derived from the old church lands—on the ground that only the Federal Parliament could effect such a repeal, and that the measure was really an effort to alter substantially the class of persons interested in the fund, and not merely an effort to regulate the operations of a business carried on by a corporation in the province. On the other hand, Alberta was permitted to regulate the medical profession in the province, although the College of Physicians and Surgeons of the North-West Territories had not been dissolved under s. 16 (3) of the *Alberta Act*.[1]

(*c*) *The Liquor Traffic.*

On no topic[2] is the position more unsatisfactory than as regards power to deal with the regulation of the liquor traffic. Ontario in 1874 legislated (c. 32) to require a licence for the sale of liquor in the province. This was ruled *ultra vires* by the Supreme Court,[3] which denied that it was direct taxation under s. 92 (2), and discriminated it from a licence on shops, &c., under s. 92 (9), holding that it interfered with the Dominion power under s. 91 (2) to regulate trade and commerce. But the Privy Council in *The Brewers' and Maltsters' Association Case* in 1897[4] held that a licence on brewers could perfectly validly be imposed as direct taxation, and also as valid under s. 92 (9). In 1878 the Dominion passed an Act (c. 16) which provided that, when brought into operation in any county or city, retail sale of liquor became illegal, and a third offence might be punished by imprisonment. This was held *ultra vires* by a New Brunswick Court in 1879[5] but approved by the Supreme Court and the Privy Council in *Russell* v. *Reg.*[6] In this case it was left open whether the validity of the measure might not be supported by a broad interpretation of the power to regulate trade and commerce in s. 91 (2), but it was decided in 1896[7] that this was not the case; the measure must be viewed in the light of such a

[1] *Lafferty* v. *Lincoln*, 38 S. C. R. 620.

[2] Cf. Quick and Garran, *Const. of Commonwealth*, pp. 544 ff.

[3] *Severn* v. *The Queen* (1877), 2 S. C. R. 70; *Reg.* v. *Justices of King's County*, 2 Pugs. 535 (New Brunswick Act, 36 Vict. c. 10).

[4] [1897] A. C. 231.

[5] *City of Fredericton* v. *The Queen* (1879), 3 P. & B. 139; 3 S. C. R. 505.

[6] (1882) 7 App. Cas. 829. Cf. *Sess. Pap.*, 1883, No. 80.

[7] *A.-G. for Ontario* v. *A.-G. for the Dominion*, [1896] A. C. 348.

measure as one forbidding the use of a noxious poison, and supported on the ground that drastic limitation of drinking was essential for the peace, order, and good government of Canada, a rare instance of the use of the general power of Dominion legislation. It was, however, recognized that the local option clauses of the Act were not such as to make it merely local in effect, and therefore a proper subject for provincial legislation. As a result of the upholding of the validity of the Act of 1878, a further Act of 1883, amended in 1884, was passed to provide a general licensing system throughout the Dominion, the net proceeds to be paid to the municipalities concerned. But the validity of this system was questioned, as in *Hodge* v. *The Queen*[1] the Privy Council upheld the right of Ontario to provide for the licensing of taverns and the regulation of licensed premises. The Acts therefore were, under an Act of 1885, referred to the Supreme Court and the Privy Council, which pronounced them *ultra vires*,[2] save in so far as they might be ancillary to the Act of 1878, and perhaps as regards certain provisions as to 'wholesale' and 'vessel' licences. The ground of the decision was presumably the fact that the Dominion Acts regulated the whole matter on a municipal basis, thus invading the essential sphere of the provinces.

In 1893 the Supreme Court[3] was asked to say, with reference to Ontario legislation of 1890 and 1891, whether the provinces had power to forbid the sale, importation, or manufacture of liquor in the province, whether at least they could forbid sale in parts of the province in which the Canada *Temperance Act* of 1878 was not in operation, and whether retail sale might be forbidden even if wholesale sale could not be. The Court by three voices to five negatived the powers suggested, but two judges thought the provinces could prohibit sale, but not manufacture and importation. The Privy Council held valid the Ontario Acts, save in parts where the Canada Act was in force; it was held that importation could not be prohibited, but possibly manufacture might be regarded as a provincial issue. The Court, however, laid down the most important doctrine,

[1] (1884) 9 App. Cas. 117; *Sulte* v. *City of Three Rivers*, 11 S. C. R. 25.

[2] 48 & 49 Vict. c. 74; 46 Vict. c. 30; 47 Vict. c. 32; *Sess. Pap.*, 1885, No. 85; 4 Cart. 342, n. 2.

[3] 17 L. N. 139; [1896] A. C. 348; Wheeler, *Confed. Law*, pp. 1042 ff.

that under its mere general power of legislation Canada could not interfere with matters given by s. 92 to the exclusive authority of the province. On the other hand, under the specific powers she could legislate even when there was inconsistency with valid provincial legislation under the specific powers of the provinces. In such cases there was no real collision of powers ; only, in one aspect a matter might be subject to federal control, in another to provincial, and in case of contest the federal must prevail. The Canada Act was explained not as a regulation of trade and commerce, which in fact it sought to destroy, but under the general authority. Shortly after, a Dominion referendum on prohibition failed to be efficacious, for it gave only a majority of 14,000 in a total of 543,049, despite the fact that in separate referenda Ontario, New Brunswick, Prince Edward Island, and Manitoba showed themselves favourable to the system.[1] In 1902 [2] it was ruled that a Manitoba Act of 1900 was *intra vires*, despite the fact that by its regulation of licences it diminished the federal revenue and interfered with business relations outside the province.

The war of 1914, by strengthening the movement for prohibition, then marked in the United States, called attention to the grave inconvenience of the division of power between the central and the provincial governments. The provinces, beginning with Saskatchewan and Alberta in 1915, legislated [3] to secure prohibition as far as their powers extended, and the Dominion in 1916 prohibited the sending of intoxicants from one province to another to be sold or used there in contravention of the laws of the province. Further, Orders in Council of 24 December 1917 and 11 March 1918 under the War Measures Act prohibited importation of liquor over 2½ per cent. proof into the Dominion, and inter-provincial transport and manufacture. But an effort in 1919 to enact these provisions in a permanent Act failed, owing to Senate opposition, and all that could be done was to forbid the manufacture in a province of liquor to be used in contravention of the law of the province.

[1] Quebec was the obstacle, as ever; cf. Sir W. Laurier, *Commons Deb.*, 1899, i. 95. See 61 Vict. c. 51.

[2] *A.-G. for Manitoba* v. *Manitoba Licence Holders' Association*, [1902] A.C. 73.

[3] See on such Acts *R.* v. *Nat Bell Liquors Ltd.*, [1922] 2 A. C. 128 ; *Canadian Pacific Wine Co.* v. *Tuley*, [1921] 2 A. C. 417 ; *Rex* v. *Shaw* (1917), 28 Man. 325.

In this year, however, the reaction against prohibition, which is still in full swing,[1] began to operate, though substantial improvement in conditions of sale of liquor still remained.

In 1922 the Dominion further supplemented, by c. 11, the legislation of 1919 which had enabled a province by a referendum of its Dominion electorate to prevent the importation of liquor, by enabling the Government of any province in which importation was thus prohibited to obtain a Dominion Order in Council prohibiting the keeping of intoxicating liquor in the province for export, and the exportation from the province of such liquor, by persons other than brewers and distillers duly licensed by the Government of the Dominion. This was necessary, because it had been held that the export prohibition attempted in Saskatchewan legislation of 1917 was *ultra vires*.[2] A further attempt to authorize prohibition of importation into provinces such as British Columbia and Quebec, where liquor was more or less a governmental monopoly, was rejected by the Senate. In *Rex* v. *Nat Bell Liquors Ltd.*,[3] the validity of the prohibition of the sale of liquor in the province as enacted by Alberta in 1916 as amended in 1917 and 1918 was upheld; the province, by the *Liquor Export Act*, 1918, had recognized the powers of the Dominion and saved the provincial legislation from successful impeachment. It was also held that confiscation of stocks of liquor was a perfectly valid penalty within the meaning of s. 92 (15) of the constitution. It is interesting to note that in *Attorney-General for British Columbia* v. *Attorney-General for Canada* [4] it has been decided by the Privy Council that the Dominion can levy customs duties on whisky imported by the Government of British Columbia, though it was claimed that under s. 125 of the constitution the property of a province could not be taxed by the Dominion. The point was difficult, but the Council held that this rule must not be deemed to override the essential powers of the federation under s. 91 to legislate for trade and commerce and taxation. The Commonwealth ruling [5] under which the Commonwealth can tax imports by

[1] The Ontario Government in 1926 fought on a policy of control only, as in the Western Provinces.

[2] *In re An Application by the Hudson Bay Co.*, [1917] 3 W. W. R. 167.

[3] [1922] 2 A. C. 128. [4] (1923) 40 T. L. R. 4.

[5] *A.-G. for N. S. Wales* v. *Collector of Customs*, 5 C. L. R. 818. Cf. *City of*

State governments, despite a similar prohibition, on the score that customs duties were a tax on importation, not on property, was noted by the Council, but not homologated, a characteristic distinction between the methods of handling such cases by the two Courts.

(d) Fisheries and Harbours.

Only by slow degrees has the position regarding fishery rights been clarified ; the difficulty arises by reason of the Dominion power as to navigation and fisheries under s. 91 (10 and 12), as opposed to the provincial right to deal with property and civil rights under s. 92 (13).[1] The essential principles now are that the Dominion possesses the sole right to regulate fishing in the sea, and in estuaries and other tidal waters, the question of proprietary rights or otherwise in waters below low-water mark and the three-mile limit being left unanswered, as issues of international law are involved.[2] As regards non-tidal waters the Dominion has no proprietary rights save in such cases as the British Columbia lands surrendered to the Dominion in connexion with the construction of the railway to the Pacific. The proprietary rights of the provinces over non-tidal waters give them the power of regulation by the grant of leases or licences, and in connexion with tidal fisheries they can also regulate the use of the *solum* above low-water mark, subject, however, to the duty not to interfere with the public right of fishery. On the other hand, the Dominion has the right to make regulations for every fishery whatever, which may severely impinge on provincial legislation, but may not confer proprietary rights, nor oust one set of proprietors in favour of another.

In the case of harbours there is a like conflict between the powers of the Dominion as to navigation and the proprietary rights of the provinces. The Dominion is indeed given by s. 108

Montreal v. *A.-G. for Canada*, [1923] A. C. 136, as to provincial rights to tax interests in Dominion property.

[1] *The Queen* v. *Robertson*, 6 S. C. R. 52 ; *Holman* v. *Green*, 6 S. C. R. 707 ; *A.-G. for the Dominion* v. *A.-G. for the Province of Ontario*, 26 S. C. R. 440 ; [1898] A. C. 700. There is no private property in the great lakes or rivers, 26 S. C. R. 520 (cf. *The Queen* v. *Moss*, ibid., 322), nor in a salt lagoon, *Williams* v. *Booth*, 10 C L. R. 342.

[2] *A. G. for British Columbia* v. *A.-G. for Canada*, [1914] A. C. 153, 174 ; *A.-G. of Canada* v. *A.-G. of Quebec*, [1921] 1 A. C. 413.

certain property in the provinces, including public harbours, which has been definitely interpreted to mean such harbours as then existed, and as a result the Privy Council has held that the Act of 1867 vested in the Dominion Montreal Harbour as it then existed, while the bed and foreshore of the St. Lawrence were vested in the Province of Quebec. After that it appears the Dominion had no power, merely in virtue of its power of legislation as to navigation, to appropriate without compensation a large area for railways, docks, and quays, and that all that it could do was to authorize taking of property for these purposes subject to compensation, though in the special case in question it was held by the Court that the Province of Quebec had definitely waived any right to object to the proprietary claims of the Dominion. It may be noted that in this case the Dominion had not acted on the wide power given by s. 92 (10) to declare any public work situated in a province to be for the general advantage of Canada, and thus to remove it from provincial jurisdiction wholly.[1] In the case of railway legislation compensation for appropriating provincial lands is not requisite.[2]

(*e*) *Escheats and Bona Vacantia.*

The belief that the provinces were divorced from the Crown led to the disallowance of an Ontario Act of 1874 regarding escheats,[3] but in Quebec it was ruled in 1876 that escheats belong to the province, and an agreement [4] was then reached to allow the province ordinary escheats, the Dominion forfeitures in treason, felony,[5] &c. In the Ontario case of Andrew Mercer,[6]

[1] *Montreal Corporation* v. *Montreal Harbour Commissioners*, [1926] A. C. 299. For a definition of a harbour see *English Bay Co.* v. *A.-G. for Canada*, [1909] A. C. 999.

[2] *A.-G. for Quebec* v. *Nipissing Central R. Co.* (1926), 42 T. L. R. 591.

[3] Canada *Sess. Pap.*, 1877, No. 89, pp. 88 ff.; 37 Vict. c. 8. For Manitoba see 47 Vict. c. 26, also disallowed (*Prov. Leg.*, 1867–95, pp. 838 f.), but the public lands there remained the property of the Dominion as in Saskatchewan and Alberta; see 9 & 10 Edw. VII, c. 18. All that is reserved is 'Crown lands, mines and minerals, and royalties incident thereto', i. e. not all *iura regalia*; 2 *Can. Bar Review*, 250–5.

[4] *Sess. Pap.* 1877, No. 89, pp. 88–105; *A.-G. of Quebec* v. *A.-G. of Canada* (1876), 1 Q. L. R. 177; 2 Q. L. R. 236; customs forfeitures appertain to the Dominion (ibid., p. 241).

[5] Contrast *Dumphy* v. *Kehoe* (1891), 21 R. L. 119.

[6] *Mercer* v. *A.-G. of Ontario*, 5 S. C. R. 538.

based on legislation in accordance with this agreement, the Privy Council [1] held that the case was covered by the grant by s. 109 to the provinces of lands, mines, minerals, and royalties. The same doctrine has been applied to precious minerals,[2] and to *bona vacantia*,[3] which the Dominion desperately claimed on the score that they could be distinguished from escheats. The Council has left open the ownership of flotsam and jetsam, deodands, sturgeons, and swans, but it may be hoped that the issue is stilled for ever in practice. In cases such as Manitoba, Saskatchewan, and Alberta, where the territorial revenues have never been wholly handed to the provinces, the Dominion, of course, remains entitled to *iura regalia*,[4] but Alberta has enacted that even escheats of Crown lands reserved to the Dominion pass to the Alberta University.[5]

(*f*) *Pardon and Precedence.*

As we have seen, the same erroneous view regarding the Crown and the provinces resulted in the denial to the Lieutenant-Governors of the right to obtain even by legislation the pardoning power, and to regulate precedence of King's Counsel appointed by them. The Supreme Court reluctantly admitted, on technical grounds,[6] the validity of the former power after the connexion of the Crown with the provinces had been declared by the Privy Council in *Liquidators of the Maritime Bank of Canada* v. *Receiver-General of New Brunswick*,[7] and the right to appoint Queen's Counsel was not definitely established until 1898 in *Attorney-General for the Dominion of Canada* v. *Attorney-General for the Province of Quebec*.[8] The decisions make clear a proper federal distinction; pardon in federal cases rests with the Governor-General, in provincial with the Lieutenant-Governors; King's Counsel and their precedence in federal

[1] *A.-G. of Ontario* v. *Mercer* (1883), 8 App. Cas. 767.

[2] *A.-G. of British Columbia* v. *A.-G. of Canada* (1889), 14 App. Cas. 295.

[3] *Rex* v. *A.-G. of British Columbia*, [1924] A. C. 213; 63 S. C. R. 622.

[4] *Trusts & Guarantee Co.* v. *The King*, 54 S. C. R. 107.

[5] *Western Trust Co.* v. *A.-G. for Canada*, [1926] 1 W. W. R. 337, which claims for the province all escheats of privately owned lands on 1 Sept. 1905, and *bona vacantia* since then.

[6] 23 S. C. R. 458; 19 O. A. R. 31; 20 O. R. 222.

[7] [1892] A. C. 437.

[8] [1898] A. C. 247; 23 O. A. R. 792.

Courts rest with the federation, the provinces can appoint and give precedence in provincial Courts.

(*g*) *Ferries.*

On the strength of the rule as to escheats and the connexion of the Crown with the provinces, Ontario [1] claimed that the power of dealing with international and inter-provincial ferries under s. 91 (13) was merely a power to regulate, after a ferry had been brought into being by the province, and that the proprietary rights in ferries and the prerogative to grant a ferry were vested in the province. The Supreme Court, however, on a reference by the Governor in Council, *In re Inter-Provincial and International Ferries* [2] ruled that the power to create a ferry belonged under the power of regulation to the Dominion Parliament, and it indicated that the prerogative was obsolete. In South Australia it has been ruled that special delegation is requisite for the exercise of this prerogative by a State Governor.[3]

(*h*) *Lands in British Columbia.*

In *McGregor* v. *Esquimalt and Nanaimo Railway Co.*[4] was discussed the position of the Dominion in respect of the lands granted by British Columbia under 47 Vict. c. 14 in respect of the Pacific railway. The province, after the Dominion grant had been made to the railway, passed an Act (3 & 4 Edw. VII, c. 54) conferring on original settlers certain rights in the lands in question ; it was allowed by the Dominion Government to remain in operation, but questioned in the Courts. But, greatly to the surprise of the Minister of Justice, it turned out that the Act was quite valid ; it was merely a variation of an earlier provincial grant, and, if open to objection as a breach of agreement, that was an objection which might have justified disallowance, but did not invalidate the actual Act. Similarly,

[1] Cf. *Perry* v. *Clergue*, 5 O. R. 357. Local ferries are provincial ; see *Dinner* v. *Humberstone* (1896), 26 S. C. R. 252, 266, 267.

[2] 36 S. C. R. 206. [3] *Dewar* v. *Smith*, 1900 S. A. L. R. 38.

[4] [1907] A. C. 462. Contrast Sir C. Fitzpatrick's lack of prevision, *Prov. Leg.*, 1904–6, pp. 125 f.

it has been ruled in *Attorney-General of British Columbia* v. *Attorney-General of Canada* [1] that the precious minerals under the lands did not pass to the Dominion, which had not been given the lands in full ownership but merely the authority to appropriate the revenues which might be derived from the lands *qua* lands. But an effort of the province to claim the water rights over the lands was rebutted in *Burrard Power Co.* v. *the King*,[2] and it has been ruled that only the Dominion can issue land grants.[3] It is clear that, if any less powers were conceded, the rights of the Dominion would have been reduced to a farce.

(*i*) *Indian Lands.*

Confusion has existed on the score of Indian lands; the royal proclamation of 1763 declared that unoccupied lands were for the present to be reserved for the Indians, and could only be acquired from them by the Governor. In 1873 the Indians in Ontario surrendered to the Dominion, under reservation of certain hunting and fishing rights, certain areas of lands, and the issue at once arose whether the Dominion or the province was proprietor of the lands. It was held by the Privy Council [4] that the province was the owner; that the Indians had never had more than a usufructuary right, held at the benevolence of the Crown; that the lands themselves were not bound by any obligation to pay annuities or other sums to the Indians; but that the province was under a moral obligation to reimburse the Dominion in respect of any promises made to the Indians and not yet fulfilled, and must observe the rights retained by the Indians as to hunting and fishing. That the obligation of the province was not a legal one appeared clearly in *The Dominion of Canada* v.

[1] (1889) 14 App. Cas. 295. Cf. [1911] A. C., at pp. 94, 95.

[2] 43 S. C. R. 27; [1911] A. C. 87.

[3] *The Queen* v. *Farwell* (1893–4), 3 Ex. C. R. 171, 289; 22 S. C. R. 553, 561.

[4] *St. Catherine's Milling and Lumber Co.* v. *Reg.* (1889), 14 App. Cas. 46; 13 S. C. R. 577; 13 O. A. R. 148; cf. *Ontario Mining Co.* v. *Seybold*, [1903] A. C. 73. As to the annuities, see also *A.-G. for Canada* v. *A.-G. for Ontario*, [1897] A. C. 199; 25 S. C. R. 434. Since 1894 dealings with Indian lands have, of course, been based on agreement with the provinces; see [1903] A. C. 73, 83, for a grant without assent is merely a nullity; see 54 Vict. c. 3 (Ontario); 54 & 55 Vict. c. 5 (Canada). On extinction of title, ordinary law applies, *Church* v. *Fenton*, 28 U. C. C. P. 384; 4 O. A. R. 159; 5 S. C. R. 239.

The Province of Ontario[1] decided in 1910; the Dominion claimed to be relieved from payments undertaken under a treaty of 3 October 1873, by which Indians surrendered 50,000 square miles, which were now known to be part of the province of Ontario. The equitable claim for the Dominion seemed clear, once it was established that the ownership of the land went to the province; but the Privy Council could find no principle of law to support the claim. The Dominion right as to the lands had never been territorial; it had charge of Indian affairs, and, acting as the national treaty-making power for this purpose, dealt with the Indians and secured the surrender of the lands, which thus became available for Ontario. But Ontario could not thus be bound to pay sums regarding which it had not been consulted. The Dominion could not be regarded as a purchaser of real estate who pays off an existing encumbrance without notice of an infirmity of title; the Dominion never was owner of the lands; the real analogy was when one person for his own interest did something which enured to the advantage of another, creating, it might be, a moral claim to aid, but not a legal right. The suggestion to the contrary in the earlier case was explained away as probably merely referring to the moral issue, or as an *obiter dictum*. It seems also that the Dominion cannot make a grant of reserves to Indians without the legislative approval of the province as owner of the lands. On the other hand, where Indians are entitled to rent for lands, the Dominion Government is the proper authority to recover it, as being entrusted with the control of Indian affairs. Save when special Dominion provisions apply, an Indian has the usual rights and liabilities under provincial law.[2]

(*j*) *Debt Liability.*

Sections 111 and 112 of the constitution regarding the provincial liability for debts have caused some difficulty. Ontario and Quebec were made liable for the repayment of the balance over 62,500,000 dollars of their debts, that amount being assumed

[1] [1910] A. C. 637; 42 S. C. R. 1; Ontario *Sess. Pap.*, 1908, No. 71. For the Dominion right to recover rent due to Indians see *Mowat* v. *Casgrain*, R. J. Q. 6 Q. B. 12.

[2] *R. ex rel. Gibb* v. *White*, 5 Ont. P. R. 315; *R.* v. *Hill*, 15 O. A. R. 406; *Sanderson* v. *Heap*, 19 Man. L. R. 122.

by the Dominion. It was held in *Attorney-General for Canada* v. *Attorney-General for Ontario* [1] that the provinces were bound to repay certain annuities payable to the Ojibeway Indians under the Huron and Superior Treaties, as determined by an arbitration of 7 January 1896, and also to pay the increased annuities due under the treaties. This was followed by the Supreme Court in *The Province of Quebec* v. *The Dominion of Canada*,[2] which made it clear that the lands were not actually burdened with the annuities, and therefore payable by Ontario alone, as the other province was anxious to have established. The same principle was applied in *The Queen* v. *Yule* [3] to the case of a toll-bridge built under a Canadian Act of 1845, which was to revert in fifty years to the province, subject to payment of its value. It was ruled that the bridge was not burdened by the obligation, which then would be paid by Quebec, but the obligation fell on the Dominion, which would recover from both Ontario and Quebec.

(*k*) *Immigration.*

The most important question which has been raised on immigration is whether it is within the power of the provinces to legislate to restrict Asiatic immigration; the Imperial Government has declined to express any view on the subject.[4] In most cases no legal issue has been possible, the Dominion Government having decided to disallow on Imperial grounds of public policy. But in a couple of cases it has been held in British Columbia that the provincial legislation against Asiatic immigration in 1908 was invalid, in the case of Japanese,[5] as repugnant to the terms of the Dominion Act of 1907 providing for the application to Canada of the Anglo-Japanese treaty under which Japanese were given right of access to Canada, and as regards others [6] because the Act conflicted with the Dominion immigration legislation which authorized the landing of every immigrant not rejected by the medical inspector of the Domi-

[1] [1897] A. C. 199; 25 S. C. R. 434. [2] (1898) 30 S. C. R. 151.

[3] (1899) 30 S. C. R. 24; 6 Ex. C. R. 103.

[4] Lord Derby 31 May 1884; *Prov. Leg.*, 1867-95, pp. 1092-4. As regards paupers, see Sir J. Thompson, ibid., pp. 634 f.

[5] *In re Nakane and Okazake*, 13 B. C. 370.

[6] *In re Narain Singh*, 13 B. C. 477.

nion. This provision, aimed at preventing improper detention on other grounds, thus incidentally served to defeat an unwise use of provincial power.

(*l*) *Education.*

The strange provisions of the Constitution aimed at preserving Roman Catholic privileges outside Quebec and Protestant privileges therein has caused much dispute. In 1871 New Brunswick legislation was challenged, but in *Maher* v. *Town of Portland*[1] its validity was upheld in the Court below, and the Privy Council approved this decision; Lord Carnarvon negatived an appeal to bring Imperial pressure to bear on the province to induce it to alter its legislation—which it was too late for the Dominion to disallow—by pointing out that this course would be as unconstitutional as for the Dominion to seek to legislate against the province.[2] In 1877 the Roman Catholic minority in Prince Edward Island[3] pressed for the reservation of a Bill regarding public schools, and, when the Lieutenant-Governor declined to act thus, petitioned the Dominion Government for disallowance. But the Government took no action, on the sound ground that there was no violation of legal right in the Act; in point of fact unauthorized text-books had been introduced into the undenominational schools by Catholic teachers.

In Manitoba in 1870, when the province was created, there was no legal system, only denominational schools existed, and accordingly the provisions of the Constitution, s. 93, were applied by 33 Vict. c. 3, s. 22, with the addition of safeguarding rights possessed at the union in practice as well as in law. But one point, which was clear in the original Act, was left obscure, namely, whether the right of appeal to the Governor-General in Council arose if a system of separate schools were instituted after the date of union. In fact, after union and up to 1890,[4]

[1] 1 Pugs. 273; 2 Cart. 445; 34 Vict. c. 21 repealing 21 Vict. c. 9; *Ex parte Maher*, P. C., in Wheeler, *Confed. Law*, pp. 362 ff.

[2] Canada *Sess. Pap.*, 1877, No. 89, pp. 343–428; *Prov. Leg.*, 1867–95, pp. 661 ff.; for the compromise system in force see Hannay, *New Brunswick*, ii. 293–317, 362–5.

[3] *Ass. Journals*, 1878, p. 2 and App. A.; *Prov. Leg.*, 1867–95, pp. 1184–99.

[4] Sir J. Thompson, *Prov. Leg.*, 1867–95, pp. 947 ff.

there prevailed a system under which each denomination could provide its own schools and obtain State aid. In 1890, however, Manitoba started a new policy in regard to both education and the use of the French language, which had been imposed on her in her constitution as in Quebec. This was undone by legislation, and two Acts (cc. 37 and 38) established a set of undenominational schools, depriving the Roman Catholics of their right to maintain their own schools and receive State aid. They asked for disallowance, but the Dominion Government declined so serious a step, holding that, if any right had been taken away, there was the remedy of remedial legislation under the constitution. The matter accordingly went to the Privy Council, which in *City of Winnipeg* v. *Barrett* [1] gave the victory to the province, for it held that the legislation impugned did not deprive the minority of any right existing by law or practice, for the only privilege they had in 1870 was that of paying for the education of their children, which they could still do. But in *Brophy* v. *Attorney-General for Manitoba* [2] it restored the unrest, for it held that the passing of the Act of 1871 created a state of affairs which was altered to the detriment of the minority by the legislation of 1890, and gave them the right to appeal to the Governor-General in Council, who, however, alone would be able to decide what remedy should be applied. The Dominion Government then, on 21 March 1895, formulated demands on the Manitoba Government, which rejected them and determined to resist dictation of any kind. The Dominion Government introduced a remedial Bill into the Parliament in 1896; it was bitterly resisted [3] and could not be passed before the Parliament expired by lapse of time, while the general election ejected the Government from power. Sir W. Laurier,[4] who took office, at last arranged a compromise under which Manitoba conceded a limited, but not ungenerous, measure of facility for the teaching of French and of religion in the schools. The plan of separate schools was also, with equal unwisdom and injustice,

[1] [1892] A. C. 445; 19 S. C. R. 374; 7 M. R. 273.

[2] [1895] A. C. 202; 22 S. C. R. 577.

[3] *Sess. Pap.*, 1896, No. 39; 1897, No. 35; Manitoba *Sess. Pap.*, 1909; *Canadian Annual Review*, 1907, pp. 575 ff.

[4] Willison, *Sir Wilfrid Laurier*, ii. 201–77; Skelton, i. 440–85; ii. 13–44; 60 Vict. c. 27.

despite the resignation of Mr. C. Sifton, and Mr. Fielding's opposition, imposed by the constitutions on Saskatchewan and Alberta in 1905 ;[1] the general nature of the privileges accorded is exemption from rates for other denominational schools ; right to have separate schools if desired ; and half an hour's religious instruction from 3.30–4 p.m. for such children as are desired by their parents to have it. An effort to further fetter Alberta [2] was one of the causes of Mr. Mackenzie King's fall in 1926.

But the struggle was to reopen on the language issue. In Ontario [3] in certain districts it was found by a Commission that English was very badly taught, or not taught at all, and a famous Instruction, No. 17 of 1912, was issued, which required the use of English as the medium of instruction save for children in Form I, whose native speech was French, though the Inspector might authorize a more prolonged use if the children did not understand English ; the teaching of French was restricted normally to an hour a day, and, though it might be taught in newly opened schools, that required special authority. There was great indignation among French Roman Catholics, who had been gradually ousting English-speaking Catholics from authority in the Church, and the Board of Trustees of the Roman Catholic Separate Schools of Ottawa decided to defy the Government, declining to permit inspection of the schools, replacing the staff by cheap members of the religious orders, some unqualified under Ontario law, and seeking to borrow money to open new schools in which French would be taught despite the law. The English Catholics on the Board, however, obtained an injunction against the employment of unqualified teachers or the borrowing of money, whereupon the Board closed the schools and dismissed the teachers. The Courts ordered them to reopen the schools and to employ qualified teachers only, while the Legislature in 1915 (c. 45) made the Instruction of 1912 as amended in August 1913 binding on the

[1] Skelton, ii. 224–47 ; *Canadian Annual Review*, 1905, pp. 44 ff. ; 1907, pp. 587 ff. ; 1908, pp. 486, 491.

[2] Quebec insisted on this when it was proposed to give Alberta her natural resources.

[3] *Parl. Pap.*, Cd. 6091, pp. 65 f. ; Keith, *War Government of the Dominions*, pp. 292–5 ; G. M. Wrong, *The New Era in Canada*, pp. 229 ff.

Board, and authorized the Government to replace the Board by a Commission, which proceeded to remove unqualified teachers, amid vehement protests from Quebec, where the Legislature unconstitutionally authorized municipalities to vote contributions to the campaign against Ontario. The Opposition in the Federal Parliament pressed for disallowance; Mr. Lapointe and Sir W. Laurier [1] led the attack, but had to admit that the legislation as to language was constitutional, and the Government was sustained by 107 votes to 60, the Liberals of Manitoba, —which in 1916 also altered its legislation to insist on the use of English,—Saskatchewan, and Alberta supporting the Government, though Sir W. Laurier's threat of resignation of his leadership kept all but one of the Ontario Liberals loyal, and Mr. Borden coerced his French supporters by a threat of a dissolution.

The Privy Council decided on 2 November 1916 the whole issue in a very sensible way; [2] it ruled that the Commission was illegal, because it did conflict with the right of five or more Roman Catholics who desired separate schools, to have one and to elect managers. But it equally ruled that the Board must act according to law, must use only qualified teachers, and must respect the instructions as to language. The Commissioners handed over control, and it was merely stupid malignity which induced the Board to attempt to make the Bank of Quebec, the Bank of Ottawa, and the Commissioners responsible for the refund of moneys expended in connexion with the carrying on of the schools.[3] The Legislature very properly intervened to declare the sums properly expended, and to provide that they should be reimbursed to the Commissioners by the Board, with the result that the Privy Council held the enactment plainly valid, and left the Board with the satisfaction of having wasted its resources in a deplorable exhibition of animus against the English language. The essential result of the litigation is that

[1] Skelton, ii. 468–90; *Mackell* v. *Ottawa Separate School Board*, 32 O. L. R. 245.

[2] *Ottawa Separate Schools Trustees* v. *Mackell*, [1917] A. C. 62; *Ottawa Separate Schools Trustees* v. *Ottawa Corporation*, [1917] A. C. 76.

[3] *Ottawa Separate Schools Trustees* v. *Quebec Bank*, [1920] A. C. 230. For Ontario religious cases see *McDonald* v. *Lancaster Separate School Trustees* (1915), 34 O. L. R. 346; *Toronto Corp.* v. *Roman Catholic Separate Schools Trustees*, [1926] A. C. 81.

there is no privilege whatever in Canada on language grounds in matters educational. Nor, in view of the unpassable gulf created by differences in language, is it desirable to extend the use of French in a Dominion which is far too little united in sentiment as it is, as the war only too clearly established.

A different but very real grievance has been suffered by the Protestants of Montreal, for by an Act of 1903 Jews were placed under the Protestant School Boards, and made subject to the same obligations and permitted to enjoy the same rights and privileges as Protestants. By 1924 the matter had developed into a serious question, for, the number of the Jews having increased, Jews were desirous of representation on the Protestant Board of School Commissioners of Montreal, and of having Jewish teachers appointed to teach Jewish children, difficulties from which Roman Catholics were exempt. Reference as to the constitutionality of the Act of 1903 was made under a special Act in 1925 to the Courts, and the Supreme Court on 2 February 1926 ruled that Jews could not be appointed to the Board, and that it could not be required to appoint Jewish teachers. It also ruled that the Act of 1903 was *ultra vires* 'in so far as it would confer the right of attendance at dissentient schools upon persons of a religious faith different from that of the dissentient minority'. It also held very reasonably that to erect separate schools for Jews was quite within the powers of the province, as such legislation would not necessarily interfere with the rights and privileges enjoyed by Roman Catholics or Protestants at union.[1]

(*m*) *The Privileges of the Legislatures.*

The low opinion of the status of the Legislatures of the provinces resulted up to 1876 in the disallowance of efforts by these bodies to take to themselves privileges,[2] but in 1896 the Privy Council in *Fielding* v. *Thomas* [3] gave the *coup de grâce* to this doctrine, and established their right to legislate to protect

[1] *Canadian Annual Review*, 1924–5, pp 321 f.; 1925–6, pp. 391 f. In Ontario very wide claims were put forward by Roman Catholic Separate Schools to be entitled to share in grants equally with public schools on an attendance basis; the issue was undecided in 1926; 59 O. L. R. 96.

[2] *Landers* v. *Woodworth*, 2 S. C. R. 158.

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

themselves, seeing that without legislation they possessed no powers other than those essential for the mere orderly conduct of their business, and could not punish as a contempt a refusal to attend as a witness when summoned. The difficulty that was specially felt in that case was the enactment in the measure that the two Houses should be deemed Courts of Record in this regard, for criminal law is assigned to Canada under the constitution, but the Privy Council had no difficulty in holding that the special power in this case was a proper incident of the assertion of Parliamentary privilege, and could not be deemed an effort to invade the sphere of criminal law.

(*n*) *Naturalization and Aliens.*

The conflict of Dominion and provincial power is clear as regards the treatment of aliens. Does the Dominion power mean that the Dominion can regulate all civil rights of aliens, although it could not otherwise deal with the topic? There is no answer available, for the Privy Council has very conveniently managed to evade [1] giving any clear answer as to whether the power to legislate as to aliens includes power to deal differentially, as regards insurance or company legislation or otherwise, with persons or companies merely because they are alien.

As regards the provinces the cases fall under two distinct types. In *Cunningham* v. *Tomey Homma* [2] the Privy Council ruled that s. 8 of the Provincial Elections Act of British Columbia disfranchising a naturalized Japanese was not *ultra vires*; the Dominion Parliament had, indeed, the sole power to prescribe conditions of naturalization, but the rights and privileges of such a person must in the provinces be regulated by provincial law. With this accords the important decision in *Brooks Bidlake and Whittall Ltd.* v. *Attorney-General for British Columbia* [3] that it is open to the Legislature and Government of the province to insert the condition, that no Chinese may be employed, in licences to cut timber on governmental land, and to refuse renewal of licences to any firm which employs Chinese in violation of the condition. The power to manage the provincial property under s. 92 (5) was deemed to cover such a limitation

[1] Cf. *Attorney-General for Canada* v. *Attorney-General for Alberta*, [1916] 1 A. C. 597.

[2] [1903] A. C. 151.

[3] [1923] A. C. 450.

of the exploitation of the timber. It is not at first sight easy to reconcile this view with the decision in *Union Colliery Co.* v. *Bryden*,[1] which held that the prohibition of the employment of Chinese underground under the *Coal Mines Regulation Act* of the province was invalid, as not an exercise of the regulation of mines, but an effort to drive Chinese from the province by preventing them obtaining a living there; it may, however, be admitted that the limited application of the former provision as to timber licences may be made a ground of differentiation, though *de facto* the distinction is not great. With the *Union Colliery* decision agree early British Columbia judgements,[2] which negated the right of the Legislature to impose special differential legislation on Chinese, as being intended to exclude them from the province in derogation to the Dominion exclusive right to legislate as to aliens, and to regulate trade and commerce. Further, in the case of *Attorney-General for British Columbia* v. *Attorney-General for Canada*[3] the Privy Council showed a certain tendency to alter its point of view from that taken regarding the prohibition of the employment of Chinese in cutting timber on Crown grants, and appeared to hold that such a wide prohibition might really be an interference with the Dominion power of legislation regarding aliens, so that the matter may still be reconsidered. Different, probably, is such a case as *Quong Wing* v. *The King*[4] in which the Supreme Court held that the Saskatchewan Act forbidding the employment of white women in Chinese restaurants, laundries, &c., was *intra vires*; the aim of such an Act is manifestly rather to preserve morality than to attack Chinese or prevent them obtaining a living.

[1] [1899] A. C. 580.

[2] *Tai Sing* v. *Maguire* (1878), 1 B. C. (Irving) 101; 42 Vict. c. 35; *Reg.* v. *Wing Chong*, 2 B. C. (Irving) 150; 47 Vict. c. 4; *Reg.* v. *Gold Commrs. of Victoria District*, 2 B. C. (Irving) 260.

[3] [1924] A. C. 203; 63 S. C. R. 293. The actual decision was based on the Japanese treaty, put in force by a Dominion Act, as overriding the *Oriental Orders in Council Validation Act*, 1921 (11 Geo. V, c. 49), which was disallowed in 1922.

[4] Keith, *Imperial Unity and the Dominions*, pp. 197 f.; 49 S. C. R. 440.

(*o*) *Administration of Justice and Criminal Law.*

The Dominion alone controls criminal law, and thus an Ontario Act to prevent the profanation of the Lord's Day was held *ultra vires*.[1] Permission to relax the observance of the day, e. g., by running excursion trains, can exist only under the authority given by the Dominion Parliament, which in its legislation leaves the way open for local permission in such cases ;[2] such legislation by the provinces may be upheld on various grounds. A province might in itself validly forbid the publication of betting news in the press, but it cannot do so when a Dominion Act exists forbidding such publication with intent to aid betting, since a general prohibition would be equivalent to an attempt to extend the Dominion Act.[3] Matters plainly criminal are beyond the provinces ; tampering with witnesses cannot be penalized by the Ontario *Liquor Licences Act*.[4] But it does not invalidate a provincial statute because it penalizes what it styles a common nuisance, if that nuisance is not *per se* an indictable offence at common law.[5] And the same Act may be obnoxious to two treatments ; the Dominion may punish frauds in the supply of milk to cheese factories,[6] yet the province may also punish as a matter of civil law.[7] A province may impose penalties including hard labour,[8] confiscation of liquor,[9] or imprisonment on default in meeting a judgement.[10]

But criminal law must be understood in the correct sense of that term, and above all, the Dominion cannot enact as matters of criminal law provisions which really are intended for another purpose. The attempt to justify the *Liquor Licence Act*, 1883, by reference to the Dominion control of criminal law was one of the early attempts to use this power as a means of effecting matters dubiously within the ambit of Dominion authority ;

[1] *A.-G. for Ontario* v. *Hamilton Street Railway*, [1903] A. C. 524.
[2] *Lord's Day Alliance* v. *A.-G. of Manitoba*, [1925] A. C. 384.
[3] *R.* v. *Lichtman*, 25 O. W. N. 83.
[4] *Reg.* v. *Lawrence*, 43 U. C. Q. B. 164 ; 1 Cart. 742.
[5] *Pillow* v. *City of Montreal* (1885), M. L. R. 1 Q. B. 401.
[6] *Reg.* v. *Wason* (1890), 17 O. A. R. 221.
[7] *Reg.* v. *Stone* (1892), 23 O. R. 46 ; *McCaffrey* v. *Hall* (1891), 35 L. C. J. 38.
[8] *Hodge* v. *The Queen* (1884), 9 App. Cas. 117.
[9] *Rex* v. *Nat Bell Liquors Ltd.*, [1922] 2 A. C. 128.
[10] *Ex parte Ellis*, 1 P. & B. 593 ; 2 Cart. 527.

it failed, and the same result was seen in the case of the *Combines and Fair Prices Act* of 1919.[1] Equally decisive was the refusal to allow Canada thus to assert control over insurances by other than provincial companies by penalizing as she did in an Act of 1917 [2] all insurers who carried on business without a licence, when earlier [3] the Privy Council had ruled that it was impossible for the Dominion directly to insist on the power to licence for such a trade as insurance, whatever her powers might be as to aliens, or, under the head of trade and commerce, as to persons immigrating into Canada, though not aliens. So also the attempt to justify under the head of criminal law the *Industrial Disputes Investigation Act* was decidedly rejected.[4]

The federation has undoubted power to confer authority in federal matters on provincial courts,[5] but it may also create special courts or bodies with judicial authority in matters over which it has jurisdiction, such as bankruptcy,[6] or patents,[7] or the revision of electoral rolls ; [8] so also the Railway Commissioners have many quasi-judicial functions of high importance.[9] The judges of the Superior, District, and County Courts are appointed by the Governor-General, and the federation exercises a control over provincial legislation in any way interfering with the positions given by the federation, as by increasing a salary or determining the place of residence of a judge, or seeking to establish magistrates' courts presided over by provincially appointed judges. An effort to regulate the position of the judges of the Supreme Court of Ontario was held invalid.[10] The provinces appear to have the right of appointing justices of the peace and magistrates,[11] though Sir J. Thompson held that

[1] *In re Board of Commerce Act*, 1919, [1922] 1 A. C. 191.

[2] *A.-G. for Ontario* v. *Reciprocal Insurers*, [1924] A. C. 328.

[3] *A.-G. for Canada* v. *A.-G. for Alberta*, [1916] 1 A. C. 588.

[4] *Toronto Electric Commrs.* v. *Snider*, [1925] A. C. 396.

[5] *Valin* v. *Langlois* (1880), 5 App. Cas. 115.

[6] 3 S. C. R., at p. 76. [7] *In re Bell Telephone Co.*, 7 O. R. 605.

[8] *In re North Perth, Hessin* v. *Lloyd* (1891), 21 O. R. 538.

[9] *C.P.R. Co.* v. *Northern Pacific &c. Co.* (1888), 5 M. R., at p. 313.

[10] *A.-G. for Ontario* v. *A.-G. for Canada*, [1925] A. C. 750 ; 14 Geo. V, c. 30. Contrast *Scott* v. *A.-G. for Canada*, 40 T. L. R. 6.

[11] Cf. *In re County Courts of British Columbia*, (1892) 21 S. C. R. 446 ; *Ganong* v. *Bayley*, 1 P. and B. 324 ; *R.* v. *Bennett*, 1 O. R. 445 ; *R.* v. *Horner*, 2 Cart. 317 ; *R.* v. *Bush*, 15 O. R. 398 ; *Richardson* v. *Ransom*, 10 O. R. 387.

this extended only to the action of such officers in respect to provincial offences, and the Governor-General has a general prerogative delegation of appointing officers. It has been held [1] that the prerogative to create courts of oyer et terminer and of jail delivery remains, as it has not been taken away by Parliament or the Legislatures; the matter is academic.

(*p*) *Trade and Commerce.*

The *prima facie* tendency to give trade and commerce a wide sense when applied to the powers of the Dominion is negatived by the obvious fact that so many matters which normally fall under trade and commerce are specifically enumerated, indicating that the term must have only some general sense. In point of fact the words are extremely difficult of exact definition; they may include political arrangement affecting trade, and requiring legislative sanction; inter-provincial regulation of trade; and perhaps general control of trade; but in concrete cases very little has been allowed to rest on them alone as authority. It is now clear that the decision in *Russell* v. *The Queen* [2] does not rest on the commerce power; the decision in *Hodge* v. *The Queen* [3] that the Ontario *Liquor Licence Act* was valid negatived any wide sense of the exclusive Dominion power over trade and commerce, and the condemnation of the Dominion Act regarding liquor licences of 1883 completed the case against the wide sense of the terms.[4] Still more important was the ruling in *Attorney-General for the Dominion* v. *Attorney-General for Alberta* [5] that the trade and commerce power did not enable the Dominion to regulate by means of licences the trade of insurance throughout Canada, nor could it do so under the general power to legislate for peace, order, and good government, nor by imposing penalties bring it under its powers as to criminal law. The same doctrines were applied in the controversy over the attempt by the *Board of Commerce Act*, 1919,[6]

[1] *R.* v. *Amer*, 42 U. C. Q. B. 391.

[2] (1882) 7 App. Cas. 829. [3] (1884) 9 App. Cas. 117.

[4] See also [1896] A. C. 348, 363. Contrast 24 S. C. R. 170, 204 ff., *per* Gwynne J.; 230 ff., *per* Sedgewick J.; *Fredericton* v. *The Queen*, 3 S. C. R. 505; *Reg.* v. *Justices of King's County* (1875), 2 Pugs. 535.

[5] [1916] 1 A. C. 588.

[6] *In re Board of Commerce Act*, 1919, [1922] 1 A. C. 191.

and the *Combines and Fair Prices Act*, 1919, to penalize hoarding and undue accumulations of food and to compel the sale at reasonable prices of surplus stocks. The Council ruled that this was an interference with the provincial control of property and civil rights; the immediate war urgency was over, thus rendering it impossible to bring the Acts under those very special conditions of urgency which might justify federal legislation overriding private rights as laid down in *Fort Frances Pulp and Power Co.* v. *Manitoba Free Press*.[1] The *Industrial Disputes Investigation Act*, 1907, was also ruled invalid,[2] neither the commerce power, nor the criminal law power, nor the general power being held sufficient to authorize Canada to decide provincial disputes between workers and employers. It might, indeed, have been expected that the Council would allow the Federal Parliament power to regulate disputes which extend beyond one province as in the Commonwealth such disputes fall under the federal power of legislation for conciliation and arbitration. But the Council contented itself with suggesting concurrent provincial legislation, though plainly that is quite inadequate to control industrial unrest extending over several provinces and requiring a uniform settlement. On the other hand, the Ontario *Reciprocal Insurances Act*, 1922, has been held valid as a fair use of the provincial powers.[3]

(*q*) *The Powers of Companies.*

Great confusion exists regarding the relative powers of the Dominion and the provinces as to the incorporation of companies and the authority thus given.[4] That the Dominion can incorporate companies is clear, and that such a company has a status which cannot be denied by the provinces is also certain. If the Dominion authorizes a company to make telephones, it cannot be hampered by the decision of the province that the

[1] [1923] A. C. 695.

[2] *Toronto Electric Commrs.* v. *Snider*, [1925] A. C. 396.

[3] *A.-G. for Ontario* v. *Reciprocal Insurers*, [1924] A. C. 328.

[4] *C.P.R. Co.* v. *Ottawa Fire Insurance Co.* (1907), 39 S. C. R. 405. Cf. *Citizens' Insurance Co.* v. *Parsons* (1882), 7 App. Cas. 96; *Colonial &c. Association* v. *A.-G. of Quebec* (1884), 9 App. Cas. 157; *Standard Ideal Co.* v. *Standard Sanitary Manufacturing Co.*, [1911] A. C. 78; *Clegg* v. *Grand Trunk R. Co.*, 10 O. R. 714; *Hamilton Powder Co.* v. *Lambe*, M. L. R. 1 Q. B. 460; Keith, *Journ. Soc. Comp. Leg.*, xiv. 357–68; *J. C. L.* iv. 201–9.

assent of a municipality is necessary before telephone lines can be laid within its area.[1] If the Dominion gives a company powers as to the sale of electricity over the whole of Canada, it cannot be prevented from exercising them according to *La compagnie hydraulique de Saint-François* v. *Continental Heat and Light Co.*,[2] because a province has conferred on another company powers expressed in some measure to be exclusive of those of any other company. Nor can provinces insist on a Dominion company taking out a licence to do business in the province nor of registering itself as a condition of doing business in the province.[3]

The mere incorporation of companies is, it is clear, an exercise not of the specific powers of the Dominion, but of the residual power, and such a company is subject as regards its operations or its power to hold land as opposed to its status and character as a company, right to sue, &c. to the provincial legislation. On the other hand, incorporation for the purpose of carrying out one of the exclusive and specific powers places the company when exercising such rights above provincial legislation.

As regards provincial companies the power of s. 92 (11) is that of incorporation of companies with provincial objects. Incorporation covers the constitution of the company, the designation of its corporate capacities, the relations of the members of the company to the company, and the powers of the governing body. The question of the limitation to provincial objects was long much discussed, but the Privy Council[4] has definitely rejected the view of the Supreme Court that these terms implied a provincial territorial limitation, so that a company thus incorporated could not by any means be given authority to act beyond the province nor accept authority from any other source to act outside the province. All that the province by Act or executive action can bestow are powers exercisable in the province, but it can create a capacity similar to that of a natural person, which then permits of the company acquiring from other sources power to act beyond the province. This capacity can be given by statute expressly or it could be

[1] *City of Toronto* v. *Bell Telephone Co.*, [1905] A. C. 52.

[2] [1909] A. C. 194. [3] *John Deere Plow Co.* v. *Wharton*, [1915] A. C. 330.

[4] *Bonanza Creek Gold Mining Co.* v. *The King*, [1916] 1 A. C. 566; *A.-G. for Canada* v. *A.-G. for Alberta*, ibid., 588; *A.-G. for Ontario* v. *A.-G. for Canada*, ibid., 598; *Great West Saddlery Co.* v. *The King*, [1921] 2 A. C. 91.

acquired by the incorporation under the prerogative, that prerogative having belonged to the Crown before federation and having passed by the terms of ss. 12 and 65, distributing executive power, to the Lieutenant-Governors as regards the incorporation of provincial companies. Naturally an orgy of legislation in the provinces followed this dictum, the Legislatures being normally glad thus to extend the scope of authority of their companies. It must be realized as a matter of history that the power to create corporations with unrestricted personality alleged to have existed in Canada before federation was evidenced in a very feeble degree by facts, and most lawyers had believed the prerogative to have been incapable of exercise by the Governor-General or Lieutenant-Governor without Legislative authority or express delegation of which clear cases were cited.[1] All the companies which were being created in the provinces in the charter form were companies created under statute, though this was interpreted by the Privy Council to be a keeping alive of the old practice of prerogative creation. The nature of the evidence, which produced this remarkable view on the part of the Council, is obscure, and it is impossible not to feel that this view of the Council was hardly borne out by facts which in constitutional law are a good deal more important than abstract considerations of the prerogative. It is noteworthy that at other times the Privy Council has concurred with the House of Lords[2] in the view that the prerogative disappears when the area is occupied by Legislative enactments. But the Council, happily, is not subject to cross examination. Incidentally the decision took away the justification for the disallowance, at one time not rare, of provincial Acts as *ultra vires* on the score that they attempted to confer powers beyond the limits of the province on companies;[3] thus cc. 43–5 of Saskatchewan of 1909, and c. 82 of Quebec of 1910, and c. 82 of Manitoba of 1910 all were disallowed on this score.[4]

[1] See Hodgins, 4 *Can. Bar Review*, 86 ff.; Ewart, 36 C. L. T. 697 ff.; Mulvey, 39 C. L. T. 79 ff.; 40 C. L. T. 832 ff.; Thompson, 42 C. L. T. 525 ff.

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

[3] If a power company connects its wires with those of a foreign country, the Dominion has jurisdiction; *Hewson* v. *Ontario Power Co.*, 36 S. C. R. 596; *City of Toronto* v. *Bell Telephone Co.*, [1905] A. C. 52, overruling *R.* v. *Mohr*, 7 Q. L. R. 183. Cf. *Dow* v. *Black*, L. R. 6 P. C. 272.

[4] A provincial company, however, has not unfettered capacity in the pro-

(r) *Railways, &c.*

The effect of s. 92 (10) taken in conjunction with s. 91 (29) is to give the Dominion exclusive power with regard to railways, canals, telegraphs, and other works extending beyond the limits of a province. But the difficulty here is that it is not certain what can fairly be regarded as legislation for railways and what is merely an invasion of the provincial control of property and civil rights. Thus in *C.P.R. Co.* v. *Corporation of the Parish of Notre Dame de Bonsecours* [1] it was held that the Quebec Legislature might validly call upon a railway under Dominion authority to clean a drain and prevent it becoming a common nuisance. But the court later held in *Madden* v. *Nelson and Fort Sheppard Railway Co.*[2] that the Legislature of British Columbia could not compel the company to fence the line, a decision followed in Canada regarding the building of crossings over the line, and the prevention of the escape of sparks from engines, or, in *Attorney-General for Alberta* v. *Attorney-General for Canada*,[3] the crossing of a Dominion by a provincial line. The federal power to forbid railway companies contracting out of liability for injuries to employers was affirmed in *Grand Trunk Railway Co.* v. *Attorney-General of Canada*,[4] and in *Toronto Corporation* v. *C.P.R. Co.*[5] it was ruled that the Railway Committee of the Privy Council could compel the city to pay a sum in respect of the cost of safeguarding crossings by the use of gates or bridges. But the Dominion cannot impose [6] on a provincial railway rates for through traffic; such a power is neither justified by the residual authority, nor the trade and commerce power, nor the railway power; if the provincial railway will not co-operate, the provincial Legislature

vince, but is bound by its charter; *Edwards* v. *Blackmore*, 42 O. L. R. 105, *per* Meredith C. J. *diss.*; *Canadian Bank of Commerce* v. *Cudworth Rural Tel. Co.*, [1923] S. C. R. 618; *In re North-western Trust Co.*, [1926] 1 W. W. R. 426. This undoes much of the mischief of the Privy Council's action.

[1] [1899] A. C. 467.

[2] [1899] A. C. 626. So *Grand Trunk Railway Co.* v. *Therrien* (1900), 30 S. C. R. 485; *C.P.R. Co.* v. *The King* (1907), 39 S. C. R. 476. Cf. *Monkhouse* v. *Grand Trunk Railway Co.*, 8 O. A. R. 637.

[3] [1915] A. C. 363.

[4] [1907] A. C. 65; 36 S. C. R. 136.

[5] [1908] A. C. 54; 37 S. C. R. 232; 25 O. A. R. 65; cf. *The City of Carleton* v. *The County of Ottawa*, 41 S. C. R. 552.

[6] *City of Montreal* v. *Montreal Street Railway*, [1912] A. C. 333.

can intervene, or the Dominion may exercise its power, and, despite the provincial character of the railway, declare it to be for the public advantage of Canada and thus achieve complete control over it. Very interesting possibilities are suggested by this provision which may conceivably be used to justify a good deal of the amended *Industrial Disputes Investigation Act*, 1925. The amendment makes the Act apply to those undertakings which are within the Legislative power of the Dominion, including works in connexion with navigation and shipping; works which are under Canadian jurisdiction under s. 92 (10) in all its branches; works carried on by aliens or foreign corporations; and works executed by companies under Dominion charter. In this modified form a good deal may be saved from the wreckage of the declaration of the Lemieux Act of 1907 unenforceable.[1]

The exact extension of s. 92 (10) may at times be dubious, but it is clear that, if an Act authorizes a company to connect its line or wires with those of a foreign country, it falls under the clause, and presumably this will apply whenever a company though limited to the province as far as its statutory power goes by reason of its natural personality under the doctrine of the *Bonanza Creek Gold Mining Co.*[2] case accepts connexion with an extra-provincial line. If legislation is passed under this power, it overrides, of course, any provincial legislation under the provincial power to incorporate companies or regulate property or civil rights.

(*s*) *Banking, Insolvency, &c.*

There is an obvious conflict between powers as to banking, &c., and powers as to civil rights, and in *Tennant* v. *Union Bank of Canada*[3] it was contended for the province that the Dominion had no power to make warehouse receipts negotiable instruments; though it was conceded that it might legislate to curtail authority given by the provinces, it could not, it was urged, increase the power of banking corporations. On the other hand, in *Attorney-General of Ontario* v. *Attorney-General for the*

[1] *Toronto Electric Commrs.* v. *Snider*, [1925] A. C. 396.

[2] [1916] 1 A. C. 566. The Dominion can invade provincial land rights in its railway legislation; *A.-G. for Quebec* v. *Nipissing Central R. Co.* (1926), 42 T. L. R. 591; *A.-G. for British Columbia* v. *C.P.R. Co.*, [1906] A. C. 204.

[3] [1894] A. C. 31; 46 Vict. c. 120.

Dominion of Canada,[1] it was decided that an Ontario Act under which voluntary assignments were ranked preferentially to incompleted judgements was not invalid, so long as there was no provision of an Act passed by the federation which actually conflicted with the provincial enactment. The Dominion power is to be interpreted strictly; an Act for the liquidation of all building societies in Quebec, whether solvent or not, is clearly *ultra vires*.[2]

(*t*) *Navigation.*

The Dominion power as to navigation extends [3] to authorizing the formation of a company to operate in a single province, though a province may also incorporate such a company,[4] since in incorporation it is not limited to creating companies limited in their action to the sphere of public authority of the province, the term 'provincial purposes' in s. 92 (11) having a local sense. But a Legislature cannot authorize a boom company to obstruct the navigation of a tidal and navigable river.[5] On the other hand the Legislature may extend the boundaries of a municipality to deep water,[6] and allow municipalities to impose an annual tax on ferrymen or steamboat ferries.[7] The Dominion can, of course, protect itself by exercise of the power of disallowance, and it has not rarely done so. So also it has disallowed a Manitoba Act (53 Vict. c. 31) as an interference with quarantine. Regulations as to collisions [8] necessarily lie with the Dominion subject to the Imperial Legislation on the head.

[1] [1894] A. C. 189; 20 O. A. R. 489. Cf. *Kinery* v. *Dudman* (1876), 2 R. & C. 19; *Peek* v. *Shields* (1880-3), 31 U. C. C. P. 112; 6 O. A. R. 639; 8 S. C. R. 579.

[2] *McClanaghan* v. *St. Anne's Mutual Building Society*, 24 L. C. J. 162; *Coté* v. *Watson*, 3 Q. L. R. 157; *Schoolbred* v. *Clarke*, 6 O. A. R. 639; 17 S. C. R. 265; *Allen* v. *Hanson*, 18 S. C. R. 667.

[3] *Colonial Building &c. Association* v. *A.-G. for Quebec* (1884), 9 App. Cas. 157.

[4] *Macdougall* v. *Union Navigation Co.* (1891), 21 L. C. J. 63; *Dinner* v. *Humberstone*, 26 S. C. R. 252.

[5] *Queddy River &c. Co.* v. *Davidson*, 10 S. C. R. 222; contra *McMillan* v. *South-west Boom Co.*, 1 P. & B. 715.

[6] *Central Vermont R. Co.* v. *St. John's*, 14 S. C. R. 288; *Normand* v. *St. Lawrence Nav. Co.*, 5 Q. L. R. 215.

[7] *Longueil Nav. Co.* v. *City of Montreal*, 15 S. C. R. 566.

[8] *The 'Cuba'* v. *McMillan* (1891), 26 S. C. R. 651; *C.P.R. Co.* v. *The Steamship 'Storstad'*, [1920] A. C. 397. For the Dominion power as to pilotage (4 & 5 Geo. V, c. 123) see *Paquet* v. *Pilotage Corp.*, [1920] A. C. 1029.

(*u*) *The Plenary Power of the Provinces.*

The Dominion constitution does not contain explicitly, or by necessary implication, any doctrine forbidding legislation by Dominion or province because thus the sphere of action of the other will *de facto* be seriously diminished. The American doctrine, which forbids interference with state instrumentalities,[1] is not applicable to Canada; the provinces can tax the salaries of federal officers;[2] true they could not differentiate in such taxation or frame their taxation to hit the federal officer as such, but that would be invalid because the purpose of the Act would cease to be taxation and become something outside provincial authority. There is nothing to prevent the imposition of a tax on the produce of the sale of an insolvent's effects.[3] A Legislature may insist on a licence system for brewers, it may forbid sale of liquor, and, if the Privy Council felt that it could not forbid importation or exportation and was dubious regarding manufacture, that was because it was difficult to bring these activities under private and local matters.[4] Moreover, the mere fact that the Dominion has power is no bar to legislation, if it can be brought under a provincial power, until the Dominion enacts provisions with which the local law will conflict, or which may be regarded as barring the local law. Thus in *L'Union S. Jacques de Montréal* v. *Bélisle*[5] the Legislature was allowed to force two widows to forgo rights in order to save a society from insolvency, and Sir J. Thompson allowed a Nova Scotia Act of 1888 to remain operative though it took precautions against the carriage of disease by boat from one part of the province to another.[6]

[1] *McCulloch* v. *State of Maryland*, 4 Wheat. 316.

[2] *Caron* v. *R.*, [1924] A. C. 999 (on p. 1004 'indirect' is a lapse for 'direct' taxation as appertaining to the provinces); *Abbott* v. *City of St. John* (1908), 40 S. C. R. 597. Contra, *Leprohon* v. *City of Ottawa* (1877–8), 40 U. C. Q. B. 478; 2 O. A. R. 522; *Ex parte Owen* (1881), 4 P. & B. 487; *Ackman* v. *The Town of Moncton* (1884), 24 N. B. 103; *Reg.* v. *Bowell* (1896), 4 B. C. 498.

[3] *Coté* v. *Watson* (1877), 3 Q. L. R. 157 is overruled by *The Brewers' and Maltsters' Association of Ontario* v. *A.-G. for Ontario*, [1897] A. C. 231. For an absurd effort to override a decision ([1907] A. C. 315), see *Toronto Corp.* v. *Toronto Railway*, [1910] A. C. 312.

[4] [1896] A. C. 348, 371.

[5] (1874) L. R. 6 P. C. 31.

[6] *Ex parte Ellis* (1878), 1 P. & B. 593; *C. P. Nav. Co.* v. *City of Vancouver*, 2 B. C. 193; *Ringfret* v. *Pope*, 12 Q. L. R. 303.

(*v*) *Local Legislation.*

The provincial powers under s. 92 (10 and 16) are wide, and authorize regulations either for the whole province [1] or parts [2] thereof. The power extends to public health and the regulation of conditions of employment; thus Bills for vaccination in 1869 and for the employment of children in 1897 have been withdrawn in the Dominion House of Commons on the score that they would interfere with provincial spheres.[3] In virtue of these heads, or that of property and civil rights, the provinces alone are competent to pass legislation of the important type of limitations of the hours of working, factory legislation, and measures safeguarding public health.

(*w*) *Municipal Institutions.*

The chief difficulty which has arisen regarding the power as to municipalities under s. 92 (9) is the extent of the powers which can be conferred on such bodies when created. The answer is now clear; they can be given any authority which validly belongs to the province itself under s. 92 and which in its nature is not incapable of delegation. But the Legislatures have not the right to confer powers to the unfettered extent belonging to the old Legislatures of the pre-federation period which were not limited by the existence of the federation.[4]

(*x*) *Marriage.*

The question of the respective legal authority of the Dominion and the provinces became a burning issue in 1911-12 in Canada as the result of the decision in the *Hébert* [5] case in which, as the outcome of the promulgation of the famous *Ne temere* decree, Mr. Justice Laurendeau held that the marriage of two Roman Catholics otherwise than before a Parish priest was null and void. It was proposed in the Dominion Parliament to annul the result by legislation, the explanation of the heat engendered being, of course, the annoyance felt at the apparent power of

[1] *Hodge* v. *The Queen* (1884), 9 App. Cas. 117; *The Queen* v. *Robertson* (1886), 3 M. R. 613. Contrast *Prov. Leg.*, 1867-95, p. 927.

[2] [1896] A. C. 348, 365.

[3] *Commons Deb.*, 1869, p. 64; Biggar, *Sir O. Mowat*, ii. 660 f.

[4] *A.-G. for Ontario* v. *A.-G. for the Dominion*, [1896] A. C. 348, 363, 364; *Cooey* v. *Municipality of County of Brome*, 21 L. C. J. 182, 186.

[5] Cf. Ewart, *Kingdom Papers*, i. 121-32; Q. R. 41 S. C. 249.

the Pope to dictate the laws of Quebec, and as a result the Supreme Court was asked to consider the validity of a Bill under which it was proposed to provide that, if a marriage were performed in a province by a person with a definitely limited authority to perform marriages, nevertheless, any pair of persons married by him would be deemed to be duly married, or in other words, if a Protestant minister were held only to have authority by Quebec law to marry non-Catholics, none the less the Dominion Act would give him the wider authority. The Supreme Court and the Privy Council [1] very properly denied the validity of the proposed legislation, which would reduce the provincial power to deal with solemnization of marriages to the idle right of prescribing forms which might be neglected without affecting the validity of the marriage. The majority, however, of the Court held with Mr. Justice Charbonneau in another ruling that there was no law in Quebec limiting the authority of a Protestant minister, and that two Catholics could validly be married by him.[2] The other point of difficulty is the validity of the attempt of Ontario in 1919 (c. 35) to make parental consents an essential feature of the validity of a marriage ; [3] it is clear that under existing doctrines of private international law great difficulties may arise. Marriages of minors outside Ontario without the necessary consents would doubtless be held valid in other courts, and presumably also in those of Ontario, so that the evasion of the legislation would appear rather too easy. But in any case does solemnization include consents? The evidence for it is quite inadequate, and it may well be that even in the most limited sense the enactment in question is invalid.

(*y*) *Taxation.*

Much difficulty has been raised by the issue of taxation, but the principles are clear enough. In 1884 in *Attorney-General for Quebec* v. *Reed* [4] it was held that an Act imposing a tax of

[1] *In re Marriage Legislation in Canada*, [1912] A. C. 880.

[2] Cf. *Burn* v. *Fontaine*, 4 R. L. 163 ; *Delpit* v. *Coté*, R. J. Q. 20 C. S. 338, where the authority of the Civil Courts is asserted ; it is established in *Despatie* v. *Tremblay*, [1921] 1 A. C. 702 ; Belleau J. in *Canadian Annual Review*, 1925–6, p. 393.

[3] Cf. Beck J. in *Henderson* v. *Breen*, [1923] 2 W. W. R. 480 ; *Peppiatt* v. *Peppiatt*, 30 D. L. R. 1 ; Scott, 2 *Can. Bar Review*, 383 ff. ; Keith, *J. C. L.* vi. 198 f. Cf. Saskatchewan Act, 1924, c. 36.

[4] (1885) 10 App. Cas. 141.

10 cents on each exhibit filed in court could not be held to be direct in the sense of Mills's definition, which was doubtless contemplated by the framers of the Act of 1867, and under which a direct tax is one demanded from the very persons who are desired to pay it, as opposed to an indirect tax where the person who has to pay will naturally pass on the burden to others. In *Bank of Toronto* v. *Lambe* [1] in 1887 a tax imposed on banks varying with the amount of paid-up capital and number of places of business in the province was held *intra vires*. So in the *Brewers' and Maltsters' Association of Ontario* v. *Attorney-General for Ontario* [2] it was ruled that it was legitimate to raise by licence a tax from brewers and distillers. But in *Cotton* v. *Rex* [3] a Quebec succession Act which imposed duties on all transmissions of property within a wide range, and endeavoured to tax property outside the province was held invalid because in the view of the Privy Council the tax would often fall to be paid by the notary who would have to reimburse himself from the beneficiaries, while in the case of a bequest, say, of bonds in New York, to persons not domiciled in the province, the legatee would be able to secure transfer to him of the bonds, leaving the notary helpless to obtain redress. The Quebec Legislature, which held that the Act had been misinterpreted by the court, hastily revised the legislation in order to make it clear that the beneficiaries alone were taxed, not the notary.[4]

The local limitation of provincial taxation was affirmed in *Woodruff* v. *Attorney-General for Ontario*,[5] but it is not at all clear how far in *Cotton* v. *Rex* the Privy Council was prepared to accept the doctrine laid down in that case. It is clear that a province can tax everything locally situate therein, and that the doctrine *mobilia sequuntur personam* does not subtract personal estate of a person dying, not domiciled in the province, from the operation of this power. Equally it seems the province should not have the power to tax goods situate outside, and Manitoba seems to have taken the sound view of her powers

[1] (1887) 12 App. Cas. 575. Cf. *Rex* v. *Caledonian Collieries, Ltd.*, [1926] 1 W. W. R. 96: a tax on coal revenues is direct.

[2] [1897] A. C. 331. But a tax on dealers in grain futures is invalid; *A.-G. for Manitoba* v. *A.-G. for Canada*, [1925] A. C. 561. [3] [1914] A. C. 176.

[4] *Alleyn* v. *Barthe*, [1922] 1 A. C. 215. By Act 12 Geo. V, c. 90 the law is extended to cover transmissions of property of persons domiciled in Quebec to non-residents. [5] [1908] A. C. 508.

when, by Acts of 1910 (c. 20) and 1911 (c. 26), she decided not to attempt to tax property outside the province, but to tax property in Manitoba on a scale graduated according to the total value of property passing.[1] In this there is nothing immoral and certainly nothing obviously illegal. Similarly Quebec in her revised legislation levies duties not on the property but on the transmission within the province of property ; no doubt it may be questioned when a transmission within the province takes place, but it would seemingly do so in every case where the recipient of the property was domiciled or ordinarily resident in the province.

The local issue was also raised in *Royal Bank of Canada* v. *Rex*,[2] which involved the proposition that the Legislature of Alberta was unable to legislate so as to cancel the right of lenders in London to reclaim from the Bank of Montreal money subscribed under a definite loan project which had been rendered impossible of being carried into effect by a decision of the Alberta Government, such legislation being justifiable neither as dealing with property and civil rights nor as of a local and private nature. Complex questions, of course, may arise as to whether a debt or other thing has a local situation in a province or not.[3] The Supreme Court of Canada has suggested in *Smith* v. *Provincial Treasurer* [4] that provincial Legislatures are bound to impose succession duties only in respect of persons dying domiciled in the province, including in these cases property outside, and that other provinces cannot tax, but this seems dubious in the extreme.[5]

A few general principles emerge from the confusion. The Dominion may under its specific powers legislate specially for

[1] For British Columbia see *Royal Trust Co.* v. *British Columbia Minister of Finance*, [1922] 1 A. C. 87.

[2] [1913] A. C. 283 ; Keith, *Imperial Unity and the Dominions*, pp. 134–6 ; above, p. 334.

[3] *R.* v. *Lovitt*, [1912] A. C. 212 ; *Jones* v. *The Canada Central R. Co.* (1881), 46 U. C. Q. B. 250 ; *Nickle* v. *Douglas*, 35 U. C. Q. B. 126 ; 37 U.C.Q.B. 51 ; *Cowan* v. *Wright* (1876), 23 Gr. 416; *A.-G. of Ontario* v. *A.-G. for the Dominion* [1894] A. C. 189 ; *Brassard* v. *Smith*, [1925] A. C. 371 (shares in Quebec law to be held situate where registered and transferable) ; *A.-G.* v. *Higgins*, 2 H. & N. 329.

[4] 58 S. C. R. 570.

[5] *In re Succession Duty Act and Walker*, [1922] 1 W. W. R. 803, *per* Hunter, C. J., B. C. ; *In re Parker*, 36 B. C. R. 299 ; 4 *Can. Bar Review*, 587 f.

any part of Canada ;[1] it is bound by no principles against discrimination. Under its residual or general power the case is more difficult, for this power does not apply to 'any matter which is in substance local or provincial and does not truly affect the interests of the Dominion as a whole '.[2] Nor can the Dominion make a provincial subject federal by the process of legislating as regards it for the whole of Canada, though the absence of such a power may be really disadvantageous, as shown in the case of the prevention of disputes extending over several provinces.[3] The specific powers can be exercised freely, even if their exercise incidentally results in the Dominion dealing with matters which are normally the exclusive property of the provinces, a fact expressly recognized by the proviso to s. 91. The residual power must not trench on matters appertaining to the provinces, except probably in times of national danger when the requirements of the peace, order, and good government of Canada may authorize legislation which would normally be invalid.[4] Legislation of a miscellaneous kind has been held valid under it, such as arrangements for taking evidence in any court for the purpose of actions pending in British or foreign courts, the Canada Temperance Act, 1878, and action under the War Measures Act.[5]

In the case of a provincial Act the first step in considering its validity is to find whether it *prima facie* falls under any of the sixteen heads of s. 92 ; then to examine whether the matter is really one of the exclusive rights of the federation under s. 91. If not, the Act will be valid. But it must be remembered that there may be cases where both the Dominion and the province can legislate for the same subject in different aspects; the province, as Lord Watson [6] observed, might forbid the sale of arms or their carrying of them by young persons, but it would be for the Dominion to regulate generally the sale of arms and to penalize the carrying of arms with seditious intent. Or the province may regulate municipalities and penalize corrupt acts,

[1] *McCuaig and Smith* v. *Keith* (1879), 4 S. C. R. 648.

[2] *A.-G. for Ontario* v. *A.-G. for the Dominion*, [1896] A. C. 348.

[3] *Toronto Electric Commrs.* v. *Snider*, [1925] A. C. 396.

[4] *A.-G. for Ontario* v. *A.-G. for the Dominion*, [1896] A. C., at p. 359; *Tennant* v. *Union Bank of Canada*, [1894] A. C. 31.

[5] *Fort Frances Pulp and Power Co.* v. *Manitoba Free Press*, [1923] A. C. 695.

[6] [1896] A. C., at p. 362.

but the Dominion might find municipal government so corrupt as to necessitate making corruption in municipal affairs a criminal offence. If there is any conflict of legislation, the rule is simply that the federal Act prevails ; [1] this is not formally enacted, but results from the nature of the case, the province being inferior in status to the federation. A province may prohibit publication of betting news, but not if a Dominion Act occupies the field, and the province is in effect seeking to extend its operation.[2]

Neither the Dominion nor the provinces can evade the restrictions on their powers by colourable legislation ; the court looks merely to substance, not form. If Manitoba imposes a tax on persons selling grain for future delivery whether as principals or agents, and enacts that the tax is to be considered a direct tax, the Privy Council will disallow the claim and reject the validity of the Act if it is clear that the tax is really passed on and is indirect.[3]

Neither the Dominion nor the provinces have the power directly to repeal legislation made by the other, whether *intra vires* or *ultra vires*.[4] Even as regards pre-federation laws on matters within its sphere of operation the Dominion cannot in the strict sense repeal, but overrides only by repugnancy, so that on repeal of the Dominion Act the old Act will revive in its full extent, though *prima facie* it does not appear natural that the Dominion power should thus be restricted. In the case of the provinces power to repeal pre-federation Acts extends only, of course, within their powers of legislation, and the province of Ontario or of Quebec cannot repeal an Act of the United Canada applying to the whole province in such a manner as not to be severable.

The power to regulate does not normally include the power to prohibit. This is held in *Corporation of Toronto* v. *Virgo* [5] and repeated in the *Prohibitory Liquor Laws* case.[6]

[1] [1896] A. C., at p. 366; *La compagnie hydraulique de Saint-François* v. *Continental Heat & Light Co.*, [1909] A. C. 194.

[2] *R.* v. *Lichtman*, 25 O. W. N. 83.

[3] *A.-G. for Manitoba* v. *A.-G. for Canada*, [1925] A. C. 561.

[4] Lefroy, *Leg. Power in Canada*, pp. 365–71 ; *A.-G. for Ontario* v. *A.-G. for the Dominion*, [1896] A. C. 348 ; Wilson, 38 C. L. T. 163–8.

[5] [1896] A. C. 88, 93.

[6] [1896] A. C. 348, 365. In *Toronto Railway* v. *City of Toronto*, [1920] A. C.

§ 5. *The Disallowance of Provincial Acts*

The effect of s. 90 of the Constitution is to confer on the Lieutenant-Governor the right to assent to, or withhold assent from, or reserve a provincial Bill passed by the Legislature, and for the Governor-General to assent to a reserved Bill within a year from the date when it first was presented to him, and to disallow an Act within a year after its receipt by the Dominion Secretary of State. The grant of this power is a precise replica, with the shortening of the period from two years to one, of the power given to the Crown in respect of Dominion Acts, and it was doubtless held to follow almost as a matter of course from the decision to put the provinces and their Lieutenant-Governors under the Governor-General as the Dominion was under the Crown. Moreover, the decision obviated the necessity of imitating the prohibition in the American Constitution forbidding the States to pass laws impairing the obligation of contracts or *ex post facto* laws.[1] The mode of dealing with such measures as were passed by the provinces was decided after careful consideration by the Privy Council on 9 June 1868; the Minister of Justice was to report as rapidly as possible on Acts not seeming to be open to criticism, and to send on separately, with detailed review, Acts open to doubt (1) as wholly illegal or unconstitutional; (2) as partially illegal or unconstitutional; (3) as clashing with the legislation of the Dominion where there were concurrent powers; and (4) as affecting the interests of the Dominion as a whole. This procedure has remained in substance unaltered, and disallowance

446 it was ruled that imposing a penalty for a past default (failure to supply additional cars) was not a valid exercise of the power to enforce an order. But a Legislature may impose imprisonment for a contempt already committed, as in 1922 in *Roberts's* case in Quebec; it can re-make a testator's will (*In re Hammond* (1921), 51 O. L. R. 149), or stop litigation, even in progress (*Smith* v. *City of London* (1909), 20 O. L. R. 133); cf. *Delamatter* v. *Brown* (1908), 13 O. W. R. 58, 63. Nor despite Senator Belcourt's plea (2 *Can. Bar Review*, 170 ff.) are they bound to respect the French language outside Quebec either as a fundamental right or under *Magna Carta*; Keith, *J. C. L.* vi. 200 f. Contrast the American rule, *Meyer* v. *State of Nebraska*, 43 S. C. Rep. 625.

[1] For the effect of this power on the interpretation of the constitution see *Bank of Toronto* v. *Lambe* (1887), 12 App. Cas. 575, 587; *Angers* v *The Queen Insurance Co.*, 22 L. C. J. 307, 309, 310; *Severn* v. *The Queen*, 2 S. C. R. 70, 102, 108, 109.

rests on the advice of the Privy Council, based on the Minister of Justice's report.[1]

As the power was accorded to the Governor-General, the question was raised by Sir John Young [2] as to whether he was to consult the Imperial Government as to disallowance, or merely to act on the advice of Ministers; Lord Granville on 8 May 1869 instructed him that he might normally act on advice, but should refer home in case of all measures which he deemed gravely unconstitutional or to be such as, if passed by the Dominion, he would be expected under his instructions to reserve for the consideration of the Crown. The same rule was laid down in dispatches of 30 June 1873 [3] and 31 December 1874 [4] regarding the Education Act of New Brunswick and the Land Act of Prince Edward Island, but the President of the Council on 13 December 1872 observed in connexion with the educational dispute that the power of dealing with such Acts lay with the Governor-General in Council, and not with the Queen in Council. Mr. Blake naturally took the matter into consideration in his revision of the constitutional relations of the countries, and on 8 March 1875 the Ministry advanced the claim that the matter was one for ministerial decision. Lord Carnarvon demurred on 5 November 1875; [5] the constitution, he held, did not contemplate any interference by the Dominion with Acts within the constitutional powers of the provinces, and on this view he assumed that Ministers would not feel bound to retire, if their advice were rejected by the Governor-General, since the matter would be one for which they were not responsible, though Parliament might insist on knowing what advice they had tendered. He adduced as parallel the case of pardons where the Governor-General was given power to dissent from Ministers, and their resignation was not deemed essential. Mr. Blake controverted these views at length; he held that the matter being local, no Imperial interests could be involved as contrasted with the case of pardon. Ministers must be allowed to decide, with the option of resigning, if the Governor-General

[1] *Sess. Pap.*, 1869, No. 18; 1870, No. 35, pp. 6, 7.
[2] *Sess. Pap.*, 1870, No. 35, pp. 3 f.; *Prov. Leg.*, 1867–95, pp. 62–4.
[3] *Sess. Pap.*, 1874, No. 25, p. 13; 1876, No. 116, pp. 84 f.
[4] *Sess. Pap.*, 1885, No. 34, p. 368.
[5] *Sess. Pap.*, 1876, No. 116, pp. 83 f.

would not take their advice, and if the Governor-General wished to disallow he must have the advice of the Council, just as the Queen disallowed by Order in Council. In vain on 1 June did the Secretary of State urge that the omission of the terms 'in Council' in s. 90 of the Act was intended to intimate independent power, and point out that, if the Dominion view prevailed, the provinces would lose all protection from interference; Mr. Blake countered with the remark that the provinces were strong enough to prevent the Dominion rashly intervening, and this was a better safeguard than either independent action, or action on Imperial instructions, by the Governor-General. The Secretary of State on 31 October suggested that, if the Governor-General consulted his Ministers, he would be acting in Council, as was held proper by the President of the Council, even if he did not take their advice, a sophism born of Crown Colony rule which Mr. Blake declined to accept.

The arguments on the subject are in part inconclusive; that a Governor-General must always act on ministerial advice, as asserted by Sir J. Macdonald,[1] is, like the enactments of various Interpretation Acts, subject to investigation in each case as to whether there is not an incongruity between such a principle and the power; if pressed, the doctrine would mean that a Governor-General could never dismiss a Minister and must dissolve Parliament as often as he asked him so to do. In fact the power probably was intended to be exercised independently, if desired by the Governor-General, since it was obvious that local Acts might quite well touch Imperial interests, but the clumsy device of legislating in s. 90 by reference to the powers of the Crown as regards Dominion legislation destroyed the possibility of the Governor-General acting save in Council, since the Crown disallowed in Council. This being so, it is plain that, as Mr. Blake said, the Governor-General must get a Ministry to advise him if he desired to disallow, though in theory he might have done so by dismissing a recalcitrant Ministry and appointing one of his own for the nonce to advise him to act. It is at any rate clear that the Governor-General is entitled to consult the Imperial Government on provincial Acts, if he thinks fit, for he retains the right to put pressure on his Ministry. Thus

[1] *Parl. Pap.*, C. 2445, p. 109; Higinbotham J. in *A.-G.* v. *Goldsbrough*, 15 V. L. R. 638, 647.

there was no attempt when Mr. Butt [1] in 1878 complained of the New Brunswick Act as to Orangemen to deny that intervention was possible, and in fact the Dominion Government has regularly admitted that it is proper and right to use its powers of disallowance on representations from the Imperial Government in Imperial interests. Thus, while Canadian interests were also involved, the disallowance of a long series of British Columbian Acts imposing disabilities on Asiatics was partly motived by Imperial considerations; one of 1907 against immigration was not assented to by the Lieutenant-Governor; in fact a 'not' had been omitted, and the Bill was therefore useless. Next year it was ultimately disallowed after it had been pronounced invalid as contravening the provisions of the Dominion Act confirming the application to the Dominion of the Anglo-Japanese treaty.[2] Similarly on Imperial suggestion Ontario Acts were disallowed in 1909 and 1910 because they forbade members of the Institute of Chartered Accountants in England to use the style 'Chartered Accountant' in the province.[3]

The power of giving instructions as to reservation belongs to the Dominion Government, but is not in normal use, nor is it customary to instruct the Lieutenant-Governor to disallow by refusing his assent. But refusal of assent is not unknown; it was done five times in 1874–9 by the Lieutenant-Governor of Nova Scotia, who explained the action as due to the desire of ministers not to pass legislation *ultra vires*; they therefore examined each Bill before advising assent, preferring to avoid thus the necessity of disallowance by the Dominion. Refusals also took place in New Brunswick in 1870, 1871, and 1872, and again in 1877 and 1879. At one time indeed the feeling seems to have prevailed that the provinces should take the responsibility of deciding on this point; thus when certain Ontario Bills were reserved in 1873, Sir J. Macdonald said that the Ministry should have decided whether they were to be assented

[1] *Parl. Pap.*, H. C. 389, 1878. Lord Stanley referred home for instructions as to the Jesuits' Estates Act of Quebec of 1888; Hopkins, *Sir John Thompson*, p. 143; *Prov. Leg.*, 1867–95, pp. 395 ff. Cf. *Parl. Pap.*, C. 1351, pp. 42 ff., 50, 54–64; *Sess. Pap.*, 1877, No. 89, pp. 435 f.

[2] British Columbia *Sess. Pap.*, 1908, D. 15, 43; G. 59; *In re Nakane*, 13 B. C. 370; *Canadian Annual Review*, 1907, pp. 382 f.; 1908, pp. 540 f.

[3] Cf. a British Columbia Act of 1905; *Prov. Leg.*, 1904–6, p. 159.

to, and did nothing to bring them into operation.[1] In 1878 the Lieutenant-Governor of Quebec reserved a railway Bill, against ministers' wishes, dismissed them, and was advised by the new Premier to reserve ;[2] the Bill never became law, a new Act (41 & 42 Vict. c. 3) taking its place. The modern usage is certainly the completion of legislation and then disallowance, but there is no reason to suppose that either reservation or refusal of assent is obsolete, still less is there ground to accept either the dictum of Sir J. Macdonald that a Lieutenant-Governor should never refuse assent on ministers' advice or Mr. Todd's conclusion that he should only refuse assent, if at all, on that advice. If the ministers find that an enactment is mistaken, they can quite properly take the responsibility of telling the Lieutenant-Governor so, and facing Parliament on the issue ; on the other hand, if the Legislature is about to pass an unwise Bill offending Imperial or Dominion interests vitally, the Dominion Government would be lacking in a sense of duty if it did not forbid assent, if the matter were such that enactment might result in irreparable injury, for it must be remembered that an Act ceases to be valid from the date of disallowance,[3] but the validity of matters already done under it is not thereby effected.

Disallowance has been resorted to either because Acts were unconstitutional in whole or part ; or were contrary to Imperial policy ; or to Dominion policy ; or were deemed unjust and improper. But there has been no rule of disallowing merely because an Act may be doubtful in legality ; it has instead sometimes been left alone and the province invited to alter ; or, if it invaded Dominion spheres, the Dominion had passed legislation to meet the need. The number of Acts disallowed was comparatively small in the earlier period ; up to 1878 of 4,606 Acts passed by the seven provinces, there were disallowed in Ontario 3, Quebec 2, Nova Scotia 4, Manitoba 6, and British Columbia 12, while none had been disallowed in New Brunswick and Prince Edward Island. Up to 1882 only four more were disallowed, in 1883–7 out of some 6,000 Acts only 15 perished thus, and up to 1906

[1] Ontario *Sess. Pap.*, 1874, Sess. 1, No. 19 ; *Prov. Leg.*, 1867-95, pp. 1225, 77, 104, 763, 807, 915, 1018, 1045, 1200 f.

[2] *Ass. Journals*, 1877–8, pp. 230, 272.

[3] *Wilson* v. *Esquimalt & Nanaimo R. Co.*, [1922] 1 A. C. 202.

the total disallowances were only Ontario 8, Quebec 4, Nova Scotia 6, New Brunswick 1, Manitoba 27, British Columbia 40, Prince Edward Island 0. There had also been reserved in Ontario 3, Quebec 6, Nova Scotia 2 (one later assented to), New Brunswick 4 (all assented to), Manitoba 14 (5 assented to), British Columbia 6 (5 assented to), and Prince Edward Island 5 (3 assented to). In many cases the disallowance was based on unsound constitutional views, as in the case of the disallowance of Acts regarding Parliamentary privileges or appointments of Queen's Counsel or the executive power of pardoning.[1] The Courts, however, were very clear in pronouncing that disallowance was an extreme step, which ought to be confined to cases of great and manifest necessity or obvious unconstitutionality. Any other use would be to substitute Dominion views for those of the people of the provinces in matters expressly relegated to them, and would menace provincial independence. These views were sometimes acted on; thus in 1871 the famous Ontario Act [2] to settle the Goodhue estate against the wishes of the testator was left to its operation, despite strong objections; the Courts eventually invalidated the Act on a technicality of construction. Far more important was the decision to leave in force the famous Act of 1888 (c. 13) in Quebec,[3] which restored to the Jesuits compensation for the property lost on the annexation of Canada, but this was largely due to Sir J. Macdonald's determination to keep in good odour with the people of Quebec. The refusal to disallow the Manitoba Education Acts of 1890 [4] was largely motived by the knowledge that remedial legislation was possible under the Constitution.

In general, however, Sir J. Macdonald, in the period from 1878 showed himself a strong enforcer of what he deemed provincial duties even in their own sphere. One McLaren had by erection of works converted a non-floatable stream into one suited for floating logs; [5] Caldwell, who cut logs higher up the

[1] Biggar, *Sir Oliver Mowat*, ii. 509 ff.

[2] 19 Gr. 366. Ontario not rarely thus treats wills; cf. 9 Geo. V, c. 25; *In re Hammond* (1921), 51 O. L. R. 149.

[3] *Commons Deb.*, 1889, pp. 811–910; *Prov. Leg.*, 1867–95, pp. 386 ff.; Hopkins, *Sir John Thompson*, pp. 116–36; Willison, *Sir Wilfrid Laurier*, ii. 40–6; Skelton, i. 381–91.

[4] *Prov. Leg.*, 1867–95, pp. 947–9; Hopkins, op. cit., pp. 255–72.

[5] Biggar, *Sir Oliver Mowat*, i. 338–45; Bourinot, *Const. of Canada*, pp. 144 ff.

river, demanded under the existing law the right to float his logs down, but McLaren obtained a decision giving him an injunction from the Court of Chancery. The Legislature in 1881 intervened to compel owners such as McLaren to permit the use of their works on payment of a fee ; the Dominion Government disallowed the Act because it turned the owner into a mere toll-keeper and it invalidated a decision of the Court of Chancery, and in 1882 and 1883, despite the Provincial Government's strong and just protests, re-enactments of the law were disallowed. Ultimately an Act of 1884 was allowed to stand, and the Privy Council further held that the Court of Chancery had been wrong, thus rendering Sir J. Macdonald's championship absurd. There was more ground for his onslaught from 1882–7 [1] on Manitoba's railway legislation, because the Dominion had agreed with the Canadian Pacific Railway Co. not for twenty years to sanction railway construction to the south save in certain directions. Two British Columbia Acts perished in 1883 for the same cause. In 1888 the ban was removed by 51 Vict. c. 32 under an agreement with the Company, but not before Manitoba had been stirred to a dislike of the Conservative Government, which was to do much to bring about the bitterness of the education struggle of 1890-6. The Company made a very energetic attempt even then to defeat the new Manitoba Act of 1888 by arguing that the Legislature had no power to authorize a line crossing the Pacific Railway, but the Courts disallowed this claim.[2]

But the advent of the Liberal Government to power brought about a change in view. Sir O. Mowat was followed by Mr. D. Mills in the view that injustice was no ground for disallowance ; if the Ontario Insurance Act (1 Edw. VII, c. 21) was unfair, it was not the responsibility of the Dominion Government,[3] and he declined to disallow the British Columbia Act (1 Edw. VII, c. 45), though it interfered with rights acquired under earlier legislation and litigation actually pending. Mr. Fitzpatrick next year repeated his sentiments of disapproval of the Act, but

See (1884) 9 App. Cas. 392 ; 6 O. A. R. 456 ; 8 S. C. R. 435 ; *Prov. Leg.*, 1867-95, pp. 171 ff. ; *Sess. Pap.*, 1882, No. 149*a*.

[1] *Sess. Pap.*, 1882, No. 166 ; 1886, No. 81 ; *Prov. Leg.*, 1867-95, pp. 862 ff., 1082.

[2] 12 L. N. 4, 5.

[3] *Prov. Leg.*, 1901-3, p. 4.

refusal to intervene, and thus to make the Dominion Government the judge of the propriety of measures enacted by the responsible Legislature.[1] Mr. Aylesworth[2] was still more emphatic in the Cobalt case in Ontario, where Ontario Acts (6 Edw. VII, c. 12; 7 Edw. VII, c. 15) were passed which seemed to deprive private individuals of existing rights at law during litigation. On 1 March and 18 May 1909 the matter was eagerly discussed in the Dominion House of Commons,[3] where Mr. Aylesworth stood firm in his insistence on the duty to leave untouched legislation with provincial authority, which he held ought to be deemed a fundamental principle of the constitution as sacred as the right of property itself. He admitted frankly that before 1896 the Acts would have been disallowed; Draper C.J. in the *Goodhue* case had insisted that the Governor-General had the duty, as he had the power, to disallow any Act contrary to natural justice and equity; Sir J. Macdonald in 1881 had assumed the duty of the Dominion to prevent the violation of private rights, and in 1893 it was stated by the Minister of Justice that violation of vested rights of property and obligations of contract without compensation would afford ground for disallowance.[4] The words of Mr. Aylesworth were relied on by the Government of Ontario in 1909, when it protested against the view that the Act, 9 Edw. VII, c. 19, validating contracts made with the Hydro-Electric Commission by municipalities, without confirmation by the ratepayers, should be disallowed as negating rights declared by the Court to be inherent under existing law in the ratepayers. Disallowance was refused, and it is fair to say that in the *Cobalt* case the Privy Council, agreeing with the Appeal Court of Ontario, held that no rights were actually violated.[5]

Mr. Aylesworth's stand was the more remarkable, as it was free from suspicion of political bias, Ontario being resolutely Conservative. On Imperial and Dominion grounds in cases

[1] Ibid., pp. 46, 70.

[2] *Prov. Leg.*, 1904–6, p. 8; Dicey, 45 C. L. J. 459.

[3] *Deb.*, 1909, pp. 1750 ff., 6920 ff.; *Canadian Annual Review*, 1909, pp. 378–81; 1907, pp. 497 f.; 1908, pp. 284–6; 1910, pp. 405, 417.

[4] 19 Gr. 366, 386; *Prov. Leg.*, 1867–95, pp. 178, 239 (Ontario Act 55 Vict. c. 8).

[5] *Florence Mining Co.* v. *Cobalt Lake Mining Co.*, 102 L. T. 375; 18 O. L. R. 275.

where the provinces passed beyond their sphere, as in the British Columbia immigration legislation, he was ready freely to disallow, and he carried on a spirited campaign of disallowance of provincial Acts purporting to give the companies formed by the provinces powers to exercise powers beyond the provinces, action now discredited by the *Bonanza Creek Gold Mining Co.* v. *The King* [1] decision. The Conservative Government, while by agreement with the Conservative administration in British Columbia it secured for the time being a cessation of provincial anti-Asiatic activity and compelled Saskatchewan to restrict its activities in this regard to Chinese, displayed a greater inclination to disallow on grounds of justice. Thus the Minister of Justice, Mr. Doherty, only refrained from disallowance in a couple of cases reported on by him on 20 January and 23 March 1912 with some hesitation, and distinctly enunciated the view that the power might 'on proper occasion be invoked properly for the purpose of preventing, not inconsistently with the public interest, irreparable injustice or undue interference with private rights or property through the operation of local statutes *intra vires* of the Legislature '.[2] In 1918 he carried the matter to the extent of disallowing an Act (7 & 8 Geo. V, c. 31) of British Columbia, but the case was unusual; the Act interfered with a contract to which the Federal Government was a party, and disallowance, therefore, might be regarded as falling under the indubitable right of the Dominion to protect its own honour. But a very different case was that of the disallowance of the Nova Scotia Act, 12 Geo. V, c. 177. The Act vested in Jane E. Macneil a certain lot of land, which had been conveyed to her fraudulently according to a judgement of the Supreme Court of Nova Scotia *in banco* affirmed on 2 February 1915 by the Supreme Court of Canada, and which had, thereafter, passed bona fide and for valuable consideration into the hands of third parties. The Legislature, however, was induced by a measure not brought forward by the Government to pass the Act which contained a dubious provision as to saving rights existing in 1911. Sir L. Gouin on 17 October 1922 recommended the disallowance of the Act, and it was accordingly disallowed. There can be no doubt of the

[1] [1916] 1 A. C. 566.

[2] Cf. Keith, *Imperial Unity and the Dominions*, pp. 433 f.

extreme unsoundness of the measure ; indeed the local Government was so convinced of it, that it made a half-hearted effort to have it repealed in time to avoid disallowance, but did not press through the repeal ; on the other hand, it expressed its willingness to have the Act disallowed, provided it were not drawn into a precedent. This fact, frankly, deprives the disallowance of much of its importance, and it may be added that it also agreed to the disallowance of a measure changing the rule of the road.[1] This no doubt shows a certain lack of steadfastness of view and lack of appreciation of the disadvantages of allowing hard cases to affect constitutional issues, but the discussions of the Macneil Act in the House of Commons lacked a certain amount of reality. It was argued that there had been marked relaxation of the use of the Imperial power of disallowance as in the case of the Queensland Act of 1920[2] regarding land, and that a similar plan should be followed in the case of Canada. It might also have been pointed out that Sir L. Gouin's indignant protest against the Legislature constituting itself, as he put it, a Court of Appeal from the Supreme Court of Canada was very much beside the mark as the annulment of judicial decisions, which are not even suspected of error, but which reveal an unsatisfactory state of the law, is not rare, and Quebec in 1914 had distinguished itself by its violent attack on the Privy Council for its decision in *Cotton* v. *Rex*.[3] But it is noteworthy that the Liberal Government was put in the position of departing from the precedents of Mr. Aylesworth and his predecessors, while the Conservatives who intervened in the debate championed the views of their former adversaries.[4]

[1] Cc. 14 and 40 of the Acts of 1922 were both disallowed as the minister reported them to be contradictory. In 1923 accordingly a new Act adopted clearly the ordinary overseas rule of the road.

[2] Keith, *War Government of the Dominions*, pp. 258 ff.

[3] [1914] A. C. 176. Note too that the Quebec Act of 1922 to imprison Mr. Roberts for contempt was not disallowed, Roberts having admitted his error and being released before a decision was arrived at.

[4] The Ontario *Judicature Act*, 1924, which claimed the right to control the appointment of judges to the Appellate Division, was not disallowed but pronounced invalid by the Privy Council, *A.-G. for Ontario* v. *A.-G. for Canada*, [1925] A. C. 750. It appears to have been in part an attack on Latchford J. for his censure of Mr. Ferguson in 1922 ; *Canadian Annual Review*, 1924–5, p. 294.

§ 6. *The Judicature*

The Constitution left it to the Dominion to establish, if it thought fit, a Court of Appeal for Canada, in striking contrast to the importance attached in the case of the Commonwealth to the establishment of the High Court as an essential feature of federation. It assigned to the provinces the full power to create Provincial Courts, civil and criminal, and to regulate civil procedure, while giving criminal procedure with criminal law to the Dominion, and permitting it to create Dominion Courts as well as a Court of Appeal. On the other hand, it imposed on the Dominion the duty of paying the salaries, and the privilege of making the appointments to the Superior, District, and County Courts, subject to the rule that unless and until the power granted in s. 94 to assimilate the laws of Nova Scotia, New Brunswick, and Ontario is used, the judges for these provinces must be chosen from the bar of each, a rule applicable also by law to Quebec and by usage to Prince Edward Island. The Courts of Probate in Nova Scotia and New Brunswick are left outside of the federal control, but most other attempts to create independent Provincial Courts have come to nothing, though some judicial authority has been permitted to be accorded by the provinces to boards and commissions.

The Supreme Court of Canada was constituted in 1875 as a Court of Appeal from the Provincial Courts with regard to all such matters as may under the terms of Dominion legislation be brought on appeal. The regulations vary considerably with regard to the different provinces. It was proposed to cut off the right of appeal to the Privy Council, but on intimation of the doubt whether the Act to accomplish this would be allowed to go into operation, the prerogative to grant right to appeal was preserved; it was later negatived as regards criminal cases, though the validity of the Act is clearly nil,[1] but the Privy Council does not, as a rule, hear appeals from Colonial Courts in criminal cases. Appeals also lie direct from Provincial Courts either as of right or by special leave[2] to the Privy Council.

[1] Now laid down by the Privy Council, *Nadan* v. *R.*, (1926) 42 T. L. R. 356; A. C. 482.

[2] No local Act can bar the appeal; *Toronto Railway* v. *City of Toronto*, [1920] A. C. 446.

The result is that the Privy Council is really the final Court for constitutional issues. To the Supreme Court there may be referred by the Governor in Council important questions of law or fact touching the interpretation of the *British North America Acts*; or the constitutionality or interpretation of Dominion or provincial legislation, or the appellative jurisdiction in educational matters conferred by the *British North America Act* and later provincial constitutional Acts, or the powers of the Parliament or the legislatures of their Governments in regard to any matter, or generally any question of any kind deemed proper for submission by the Governor in Council. The answers given in such a reference are, though advisory, to be deemed liable to appeal. Provision is also made, if the provinces [1] agree, under which the Supreme and Exchequer Courts may be made the tribunals to consider disputes between the Dominion and a province or between two provinces.

The Exchequer Court is the other Dominion Court. It has admiralty jurisdiction [2] and hears petitions of right, and if the provinces legislate to that effect, it can deal with disputes between the Dominion and a province or between two provinces. Otherwise federal jurisdiction is exercised in the Provincial Courts, though the procedure in criminal cases and in bankruptcy depends on Dominion enactments. But each judge of the Supreme Court has a parallel power to issue a writ of *habeas corpus* in any criminal matter, with the possibility of appeal to the full Court in case of refusal. Election petitions are assigned to the Provincial Courts, which also deal with provincial election petitions.

It lies entirely with the Dominion Parliament to decide what appeal will be allowed from Provincial Courts. The attempt of Manitoba in *Crown Grain Company Ltd.* v. *Day* [3] to create a jurisdiction of a special kind, whence no appeal would lie, has been definitely negated by the Privy Council. The same body has upheld the right of the Parliament to authorize the Governor in Council to elicit advisory judgements from the Supreme

[1] See Saskatchewan Act, 1921, c. 4 as an example.

[2] A separate division exists in Toronto, formerly the Maritime Court of Ontario, created 1877; *McCuaig and Smith* v. *Keith*, 4 S. C. R. 648.

[3] [1908] A. C. 504; *City of Halifax* v. *McLaughlin Carriage Co.*, 39 S. C. R. 174; *Clarkson* v. *Ryan*, 17 S. C. R. 241.

Court.[1] The Court itself was inclined at first to limit its answers to cases where there was definite legislation upon the validity of which it could pronounce, as in the liquor licences question,[2] the bigamy sections of the Criminal Code,[3] the right of fishery,[4] the representation of the provinces in the House of Commons, &c.,[5] but by 6 Edw. VII, c. 50 the obligation of answering even when there had been no legislation was imposed by the Parliament. On the question of the validity of the Dominion legislation being raised the Supreme Court by a majority asserted its validity, though Girouard J. denied that the Court could legally deal with provincial issues on reference. The Privy Council recognized that the practice might be inconvenient, but it could not deny that the *British North America Act* had in theory given to Canada or the provinces all that was necessary for self-government, and it seemed hard to deny that the right to ask the Executive for advice might be part of the rights of self-government. The power to refer any matter to the Privy Council itself under s. 4 of the Act of William IV was the model on which the Dominion had acted, and it seemed impossible to deny that a course permitted in the case of the Privy Council might be proper to follow in Canada. Moreover, since 1875 on six occasions appeals from such references had been heard by the Council, and it could hardly be supposed that it would have agreed to deal with them if they had been improper to be brought. It was always open to the Court to represent that it could not answer effectively certain questions, and the Parliament could control the Executive if it put wrong questions.

The provinces have all Supreme Courts with various differences of nomenclature, and in Ontario [6] and Quebec complex organization. Thus in Ontario there are two Appellate Divisions each with five judges, and a Trial Division with nine. The tendency has gradually been to create a formal Court of Appeal as in Manitoba, British Columbia, Saskatchewan, and

[1] *A.-G. for Ontario* v. *A.-G. for Canada*, [1912] A. C. 571.
[2] 24 S. C. R. 170; [1896] A. C. 348.
[3] 27 S. C. R. 461. [4] 26 S. C. R. 444; [1898] A. C. 700.
[5] 33 S. C. R. 475, 594; [1905] A. C. 37.
[6] Cf. *A.-G. for Ontario* v. *A.-G. for Canada*, [1925] A. C. 750; Acts 1923, c. 21; 1924, c. 30.

Alberta in lieu of the older practice of constituting the Supreme Court *in banco* the appellate Court. It is the practice to enact that the Governor in Council may refer matters to the Courts for advisory judgements, and these judgements are to be treated as final for purposes of appeal; but it has been ruled that such enactments have no effect as regards the Dominion Supreme Court, and that it can only hear appeals in these cases if this is provided for by Dominion legislation,[1] and the necessary legislation was only passed in 1922. On the other hand, appeals can be taken to the Privy Council. Appeals lie to the Privy Council either by special leave, or as of right in cases set out in detail in the various Orders in Council passed in 1910–11 allowing appeals in certain cases, and also permitting the Courts to grant leave to appeal whenever they think fit, even if the specified conditions are not complied with. In the case of Ontario and of Quebec, on the other hand, the conditions of appeal are laid down by local Act. It may be noted that the right to hear appeals from these Courts rests not merely on the prerogative but on the Imperial Act of 1844, and that it cannot be barred. Ontario, which has had aspirations for ridding itself of appeals both to the Privy Council [2] and in 1909 the Supreme Court, has long since realized that it cannot of its own power accomplish either end. Where appeals lie as of right it is always from the Court of Appeal, or corresponding highest division of the Supreme Court.

Divorce jurisdiction is not possessed by Ontario or Quebec. It is possessed by the maritime provinces—though Prince Edward Island has long disused it—for they had it before the advent of federation, though they are powerless to legislate for divorce which was made a federal subject. In *Watts* v. *Attorney-General for British Columbia* [3] it was admitted to exist for British Columbia, having been introduced there with English law before federation. But a more surprising result was achieved in 1919 when it was laid down in the cases of *Board* v.

[1] *Union Colliery Co.* v. *A.-G. of British Columbia*, 27 S. C. R. 637; 54 Vict. c. 5.

[2] *Canadian Annual Review*, 1921, pp. 232–4; 1922, pp. 652 f.

[3] [1908] A. C. 573. On the demerits of divorce by Act, really by the Senate normally, see *Senate Deb.*, 1910–11, pp. 293 ff. For non-publication of reports see 1924, c. 11. A bill for Ontario passed the Senate in 1927.

Board [1] and *Walker* v. *Walker* [2] that it had been a delusion to suppose that Manitoba, Saskatchewan, and Alberta were devoid of divorce jurisdiction; rather they had been possessed of it all along through the grant to them of English law, it being a delusion to suppose that the divorce legislation of England was of a purely local kind, and required a special Court to be created for its existence. It remained, however, necessary in Ontario and Quebec, and in the absence of an effective Court in Prince Edward Island, for those desiring divorce to seek the aid of Parliament in which the Senate exercised the functions of a Court, but naturally far from well. Moreover, the opposition of French Canada long checked the possibility of giving divorce on other than the old grounds of 1857,[3] since the jurisdiction introduced into the new provinces at first extended no farther than that.[4]

§ 7. *Financial Relations*

Part VIII of the British North America Act created for the Dominion a consolidated revenue fund, including all the revenues of the provinces save what was specifically reserved for them or might be raised by them under s. 91 of the Act. It charged the fund with the cost of collection, interest on the debt, and the salary of the Governor-General, which take priority to appropriations made by the Parliament. All stocks, bankers' balances, cash, and securities were transferred to Canada to be taken in reduction of the public debt of each province, and the public works enumerated in Schedule III of the Act were transferred to the Dominion. Then by s. 109 all lands, mines, minerals, and royalties, and sums due or payable

[1] [1919] A. C. 956. [2] [1919] A. C. 947.

[3] An Act of 1925 equalized on the lines of the Imperial Act of 1923 the grounds of divorce.

[4] As regards appeal generally see *Toronto Railway Co.* v. *Balfour*, 32 S. C. R. 239; *Finnie* v. *City of Montreal*, ibid., 335; *Town of Aurora* v. *Village of Markham*, ibid., 457; *Rice* v. *The King*, ibid., 480; *Hartley* v. *Matson*, ibid. 575; *Lake Erie &c. R. Co.* v. *Marsh*, 35 S. C. R. 197; *Gilbert* v. *The King*, 38 S. C. R. 284; *James Bay R. Co.* v. *Armstrong*, ibid., 511; *Hamel* v. *Hamel*, 26 S. C. R. 7; *Turcotte* v. *Dansereau*, 24 S. C. R. 578; *Toronto R. Co.* v. *The King*, [1917] A. C. 630; *Windsor, Essex, &c. Co.* v. *Nelles*, [1915] A. C. 355. The Supreme Court takes judicial note of the laws of each province; see *Logan* v. *Lee*, 39 S. C. R. 311; *Cooper* v. *Cooper* (1888), 13 App. Cas. 88.

in respect thereof were declared to belong to the several provinces in which they were situated, subject to any trusts [1] in respect thereof, and to any interest other than that of the province in them. It has been decided that the interests of the Indians are not included within this last term. By s. 117 all other property of the provinces is continued to them, and they retain any assets connected with the part of their public debts legally incumbent on them. The Dominion assumed for the provinces debts amounting to 62,500,000 dollars for Ontario and Quebec, 8,000,000 for Nova Scotia, and 7,000,000 for New Brunswick, the provinces to pay five per cent. on the balance. Subsidies were to be given of eighty, seventy, sixty, and fifty thousand dollars to the provinces in order, plus eighty cents per head of population as ascertained at the census of 1861, with increases at the decennial censuses for the small provinces until the population reached 400,000. These payments were to be final settlements, and to be made half-yearly in advance less sums due on debt account. Terms were settled specifically with the other provinces as they were created.[2] British Columbia retained her lands, but surrendered the large area of railway lands, including, as decisions have shown, water rights, but not minerals, with a view to the construction of the Pacific Railway. Prince Edward Island, having no public lands, received a grant, while Manitoba, Saskatchewan, and Alberta were deprived of public lands, though in 1885 a partial cession was made to Manitoba of her swamp lands.

The settlement naturally did not satisfy Canadian provincial aspirations, and in 1906 there was agreement on a change of subsidies, as the outcome of long agitation. British Columbia,[3] unsatisfied, sent her Premier, Mr. McBride, over to London to ask the Imperial Government to press the Dominion for a doubling of the terms provisionally concurred in in Canada, but

[1] Cf. *Booth* v. *McIntyre* (1880), 31 U. C. C. P. 183, 193, 194; *St. Catherine's Milling and Lumber Co.* v. *Reg.* (1899), 14 App. Cas. 46; Biggar, *Sir Oliver Mowat*, ii. 459–63.

[2] See *Sess. Pap.*, 1885, No. 34; *Rev. Stat.*, 1906, cc. 28, 99; Willison, *Sir Wilfrid Laurier*, i. 369–408; Manitoba, *Sess. Pap.*, 1910, pp. 107 ff. See 33 Vict. c. 3 (Manitoba); 4 & 5 Edw. VII, cc. 3 (Alberta) and 42 (Saskatchewan).

[3] British Columbia *Sess. Pap.*, 1907, D. 1; 1908, C. 1; *Canadian Annual Review*, 1908, p. 524.

that Government acted with great propriety. It pointed out that it was quite true that the *British Northern America Act* represented a compact, and that alteration of it by an Imperial Act was only justifiable if all parties agreed to change in substance ; but this was so in the case at issue, and it was assumed that British Columbia would not wish to hold out and hinder the payment to the other provinces of the increased subsidies provided for in the proposals. Mr. McBride, of course, raised no further objection, as the Dominion was adamant and would pay nothing unless under the new scheme, which accordingly became law as c. 11 of the Acts of 1907. Under it the provinces receive a fixed grant based on population : dollars 100,000 if under 150,000 ; 150,000 if not over 200,000 ; 180,000 if not over 400,000 ; 190,000 if not over 800,000 ; 220,000 if not over 1,500,000 ; and 240,000 if over that number. Further grants are made on the basis of 80 cents a head of population up to 2,500,000, and 60 cents for any surplus. British Columbia received a ten years' grant of 100,000 in view of exceptional needs of development, Saskatchewan and Alberta 93,750 for five years for public buildings suited for their new provincial status. The Imperial Government declined to insert in the Act any statement that the subsidies as fixed were final and unalterable, though the agreement cited as the base of the legislation was allowed to allude to this, on the score that the Imperial Parliament could never bind a successor. New terms had to be made with Ontario, Quebec, and Manitoba on the addition to them of new territories in 1912.[1]

The Conservative party, which long declared its conviction [2] that the western provinces should have their lands returned to them, failed when in power in 1912–21 to carry through the transfer, and it was not until 1926 that it was announced that the Liberal Government had succeeded in coming to terms with Alberta for their surrender on terms. But the proposal failed to pass owing to the effort to fetter the province by restrictions as to separate schools.[3] It was contested in the west that the reservation of the lands by Canada in the creation of the provinces was never *intra vires*,[4] but the failure ever to bring the

[1] *Parl. Pap.*, Cd. 6863, pp. 17 f. ; Dominion Acts of 1912, cc. 40, 45, and 32.
[2] *Canadian Annual Review*, 1905, pp. 314–21, 333, 387 ; 1907, pp. 605 ff.
[3] See below, § 13. [4] Thompson, 39 C. L. T. 417 ff. ; 40 C. L. T. 101 ff., 852 ff.

matter before the Courts suggests that the reasoning was more theoretic than substantial.

The Act provided also for free trade in all products or manufactures between the provinces, though for the time being the provincial duties were to remain until superseded by a Dominion tariff. New Brunswick was permitted to maintain or reduce its lumber duties; these, however, were bought out by the Dominion in order to implement the treaty of Washington, 1871.[1] The Dominion and provinces were forbidden by s. 125 to tax the lands or property of the other, but the value of this prohibition has been seriously affected by the ruling that the Dominion power to tax overrides this section in so far as it enables the Dominion to levy duties on whisky imported by British Columbia.[2] It certainly does not appear how, if this ruling is impartially applied, the provinces can be debarred from taxing the lands or other property of the Dominion,[3] save, of course, by the method of disallowance, which, accordingly, might have to be resuscitated for this purpose.

All revenues raised by the provinces under their powers or left to them by s. 126 are formed into a consolidated revenue fund for each province.

§ 8. *Treaty and Other Matters.*

The Act of 1867 contained a number of provisions for the period of transition, and changes necessary on the separation of Ontario and Quebec. Officers with federal functions were to remain at their posts, but the Governor-General in Council was given power to appoint officers for federal purposes; provincial officers were continued in office, and arrangements made for the constitution of officers in Ontario and Quebec to replace those of the united province. It was also laid down that the pecuniary claims of the two provinces should be decided by arbitration;[4] there was for a time a deadlock, but it was decided that the

[1] s. 124; 36 Vict. c. 41.

[2] *City of Montreal* v. *A.-G. for Canada*, [1923] A. C. 136; *A.-G. for British Columbia* v. *A.-G. for Canada* (1923), 40 T. L. R. 4; [1924] A. C. 222.

[3] Cf. *Smith* v. *Council of Rural Municipality of Vermillion*, [1916] 2 A. C. 569; *Hudson's Bay Co.* v. *Bratt's Lake Rural Municipality*, [1919] A. C. 1006; *In re Town of Cochrane* v. *Cowan*, 50 O. L. R. 169, 173.

[4] *Sess. Pap.*, 1871, No. 21.

retirement of the Quebec arbitrator did not render the award of the other two invalid,[1] and it was acted on; the case was cited as a useful precedent by the Privy Council in the Irish boundary reference of 1924. The Governor-General in Council was to distribute the records, and certified copies were to be receivable in evidence, doubtless as a matter of convenience when a record was housed in the other province in either case. Powers to repeal existing legislation to the same extent only as previously, and subject to the new distribution of authority, were accorded, though difficulties have arisen as to the interpretation of the authority thus given. The Lieutenant-Governors of the newly created provinces were given authority to appoint and use new seals.

Further arbitration between the provinces and Dominion was provided for by concurrent legislation in 1891, and the matter has been elucidated by several decisions of the Privy Council.

S. 145 of the Act provided for the commencement within six months of the intercolonial railway[2] from Halifax to the St. Lawrence, the maritime provinces insisting on the construction as the essential justification of union. In 1871 similarly the terms agreed on made the construction of the Pacific Railway an essential part of the bargain. Unluckily the difficulties of the undertaking had been under-estimated; two members of the Provincial Cabinet were sent to England to ask for Imperial intervention, and Lord Carnarvon, on 18 June 1874, offered to arbitrate. The offer was accepted, and on 16 August he submitted suggestions, followed on 17 November by a definite award. Unhappily there was more delay, and the Legislature, on 2 February 1876, petitioned the Queen to secure the performance of the Dominion obligations. Lord Dufferin took up the case of his ministers, and in a tour to the west did much by his speeches to explain to the people of British Columbia the grave difficulties of construction and to

[1] *In the matter of an Arbitration and Award between the Province of Ontario and the Province of Quebec*, 4 Cart. 712. See also the arbitration of 1891 (54 & 55 Vict. c. 6; Ontario, 54 Vict. c. 2; Quebec, c. 4); *A.-G. for Ontario* v. *A.-G. for Quebec*, [1903] A. C. 39; *Province of Quebec* v. *Province of Ontario*, [1910] A. C. 627; *Province of Ontario and Dominion of Canada* v. *Province of Quebec*, 25 S. C. R. 434.

[2] Sandford Fleming, *The Intercolonial Railway* (1876).

vindicate the good faith of his ministers. But the trouble broke out again in 1878, and formed part of the unrest which induced the electors to return Sir J. Macdonald to power, condoning the malpractices of 1872–3. The province had asked, vainly, for a reference to the Privy Council, which Canada declined.[1]

Of great importance is the provision in s. 132 which confers on the Parliament and Government of Canada all powers necessary or proper for performing the obligations of Canada or any province thereof, as part of the British Empire, towards foreign countries arising under treaties between the Empire and such foreign countries. It is clear that in law as opposed to constitutional usage the effect of this section might easily be to enable the Dominion, by accepting treaties in matters outside the scope of Dominion authority, to legislate over the heads of the provinces; thus the whole mass of Labour conventions under the procedure invented by the League of Nations Covenant might, if thrown into definitive treaty form, be enacted by Canada to the utter overthrow of provincial autonomy. In point of fact the obligation accepted by these treaties is merely one of bringing matters before the appropriate parties, and the Dominion Government has definitely adopted the doctrine that it does not propose to take advantage of s. 132 to interfere with matters belonging to the autonomy of the provinces. But naturally the Dominion has never relinquished the right to legislate under this power when it is necessary in respect of a treaty containing matters which may incidentally affect the provinces.[2]

It would, however, be quite illegitimate to suggest that the Dominion Parliament alone can legislate to carry out treaty obligations. Where a matter is normally and fully under provincial jurisdiction, and a treaty affects it, clearly it is proper

[1] *Sess. Pap.*, 1875, No. 19; 1876, No. 41; 1885, No. 34; Willison, *Sir Wilfrid Laurier*, i. 369–408; Skelton, i. 247–83. For judicial decisions on the terms see *A.-G. of British Columbia* v. *A.-G. of Canada* (1889), 14 App. Cas. 295; *Burrard Power Co.* v. *The King*, 43 S. C. R. 27; [1911] A. C. 87.

[2] So the Japanese treaty applied by Dominion Act is paramount; *A.-G. of British Columbia* v. *A.-G. of Canada*, [1924] A. C. 203 (3 & 4 Geo. V, c. 27); the provincial Act (11 Geo. V, c. 49) was disallowed, 31 March 1922. See also the *White Phosphorus Matches Act*, 1914 (c. 12), the *Maritime Conventions Act*, 1914 (c. 13), 14 & 15 Geo. V, c. 12, &c.

that provincial legislation should be passed, and that the treaty should be accepted on the strength of such legislation.[1] Where, however, the matter is one of high political importance, then the Dominion may properly legislate, not merely as a legal right, but constitutionally. The necessary legislation to approve the ratification and carrying into effect of the protocol accepting the statute of the Permanent Court of International Justice was properly passed by the Dominion Parliament.[2] A more dubious case was the *Migratory Birds Convention Act*, 1917 (c. 18), which was passed to validate the convention with the United States for the protection of such birds. It has been ruled[3] that the statute overrides, so far as it is inconsistent with, the *Game Protection Act*, 1916 (c. 44), of Manitoba. On the other hand, *In re Legislative Jurisdiction over Hours of Labour Reference*[4] is a clear and sound expression of the views of the Supreme Court on reference that, where a convention has been agreed to under the Labour clauses of the League Covenant, the subject-matter being hours of labour, the natural authority to legislate is the provinces, and that the duty of the Dominion under the treaty of peace is fulfilled by bringing the matter before these legislatures, save, of course, in respect of the non-provincial areas and Dominion Government employees.

Two difficulties have been suggested but need no elaborate refutation. It is true that the Privy Council, as we have seen, has whittled down the prohibition of Dominion taxation of provincial property in s. 125 of the *British North America Act* by ruling that it does not override the taxing power given in s. 91, and, by parity of reasoning, it might be argued that s. 132 must be read subject to s. 92 of the Act. The answer in this case is that thus to interpret the Act would deprive s. 132 of all value and render legislation in Canada for treaty purposes of extreme uncertainty. The second point is whether under the treaty of peace the real obligation is not to bring the convention before the authority which can consent to ratify, and this authority is the Parliament of Canada. This is ingenious,

[1] Cf. the procedure as to the convention with the United States as to the disposal of real and personal property of 1899, finally accepted by a convention of 21 Oct. 1921, Cmd. 1728.

[2] 11 & 12 Geo. V, c. 46.

[3] *The King* v. *Stuart*, [1925] 1 D. L. R. 12.

[4] Rogers, 4 *Can. Bar Review*, 42 ff.; [1925] S. C. R. 505.

but it is not the natural interpretation of the treaty of peace provisions, which in point of fact were deliberately inserted to meet the case of federal states where the central authority has normally not a general power to deal with issues such as concern the Labour organization under the treaty of peace. No doubt if Canada should ratify by executive action, then the Dominion could legislate, but, despite the legality of such a course, it would normally be unconstitutional.

§ 9. *The Entry of New Provinces.*

S. 147 of the Act provided for the admission as provinces of Newfoundland, Prince Edward Island and British Columbia on addresses from the Parliament and the Legislature, and of Rupert's Land and the North-western Territory on an address from Parliament, on such terms as might be embodied in the addresses and approved by the Queen. The form of admission was to be by Order in Council to have the force of an Imperial Act. Prince Edward Island was to have four Senators, two each at the expense of Nova Scotia and New Brunswick, and Newfoundland four additional Senators, while British Columbia was ignored. Somewhat confused action followed; the creation of Manitoba as a province was not carried out in the due form of an address specifying conditions, and the power of Canada to legislate for the rest of the Hudson's Bay Company's territories was far from certain. The proceedings, therefore, were validated by an Imperial Act of 1871[1] which confirmed the Dominion Act of 1870[2] regarding Manitoba, and safeguarded the constitution of that, and any other provinces which the Dominion was empowered to create out of lands included in the Dominion, by providing that they could not be altered by the Dominion Parliament save to the extent of increasing, diminishing, or altering the territory with the consent of the Legislature of the province, and making changes consequential on such action. The Act further authorized the Dominion to legislate for any territory not included in a province. It permitted also the representation of the newly created provinces in the Parliament, and this permission was in 1886[3] extended to allow of

[1] 34 & 35 Vict. c. 28; *Prov. Leg.*, 1867–95, pp. 8–11.

[2] See 33 Vict. c. 3 and 32 & 33 Vict. c. 3; *Sess. Pap.*, 1871, No. 20.

[3] 49 & 50 Vict. c. 35, confirming the Canadian Act, 49 Vict. c. 24.

the representation of the territories. British Columbia was provided with Senators under the inclusion of the provision of them in the addresses presented to the Crown in 1871. The powers to create new provinces were duly exercised in respect of Saskatchewan and Alberta in 1905.[1] These provinces were refused control of their public lands, and a system of denominational privileges in favour of the Roman Catholic Church was forced upon them, to the great indignation of some of the Government's supporters as well as of the Opposition, Mr. Sifton resigning office on this score, while the intrigues of the Catholic hierarchy aroused widespread indignation,[2] renewed in 1926, when Mr. Mackenzie King's dependence on Quebec forced him to seek to fetter the province of Alberta as a condition of granting it its lands.

§ 10. *The Territories.*

The power of the Dominion over its territories rests on the Act of 1871,[3] while, to remove all doubts, in 1880 Canada was given the whole of British territory in North America save Newfoundland and her dependencies. The extent of this territory remains to be finally determined, as investigation goes on and islands are formally taken possession of in the name of the Crown, the Governor-General having authority to annex any territory to the north of the Dominion. The attempt to extend this claim to Wrangel Island was never seriously countenanced by the Imperial Government and is now definitely renounced.[4] Despite discussion as to the attitude of the United States, nothing seems definitely to have been done to question the Canadian claim. Moreover, Hudson Bay is claimed as territorial waters by the Dominion,[5] and in 1925 the North-West Territories Act was amended to assert the necessity of permission being obtained by would-be explorers of the area in which lie the islands claimed by the Dominion. It is clear as regards the

[1] 4 & 5 Edw. VII, cc. 42 and 43.

[2] For a lame defence see Skelton, *Sir Wilfrid Laurier*, ii. 224 ff. The evil that men do lives after them.

[3] See *Riel* v. *Reg.* (1885), 10 App. Cas. 675.

[4] V. Stefannson, *Wrangel Island*. On 12 May 1922 Mr. Mackenzie King still claimed the island for Canada; *Canadian Annual Review*, 1922, p. 263; see ibid., 1909, pp. 204 f.; Bernier, *Voyage of the Arctic*, pp. 194 ff., 320 ff.

[5] *Rev. Stat.*, 1906, c. 45.

Bay that Charles II treated it as territorial waters over which sovereignty could be exercised; such sovereignty has repeatedly been asserted and not rebutted, and the fisheries treaty with the United States of 1818 has been adduced as presumptive evidence of American acquiescence in the doctrine, which may also be presumed from the absence of protest against the repeated declarations of Canada as to her rights.

The constitutional history of the North-West Territories [1] is simple: there was first a Lieutenant-Governor with a nominee Council appointed by the Governor in Council; as contemplated in 1875, partial election was introduced in 1881; in 1886 representation in Parliament was conceded; in 1888 (c. 19) an important advance was made, there being created an elective Legislature of 22 members, the three judges being given powers to debate but not to vote, with an advisory financial council, which held office at pleasure; in 1891 (c. 22) fresh powers were conceded to the Legislature; in 1897 (c. 28) a responsible executive was created; and in 1898 (c. 5) and 1900 (c. 44) further concessions were made, resulting in the creation of a Lieutenant-Governor with a responsible executive and a Legislature of 31 elected members, with manhood suffrage and extended powers of legislation. The plan as to the division of powers was simple; the Dominion never relaxed the right of legislation, but normally it was content to allow the Governor in Council to authorize the territories to legislate on such topics, taken out of the provincial list in s. 92, as seemed to it judicious; from 1891 on, the list was, as prescribed by Parliament, a generous one, but not amounting to full provincial autonomy. The creation of the new provinces of Saskatchewan and Alberta in 1905 immensely reduced the importance of the territories, from which the Yukon had already been detached in 1898.

The rest of the territories under c. 62 of the *Revised Statutes*, 1906, was placed under a Commissioner aided by a Council of not more than four members, appointed by the Governor in Council. This body has power to legislate on any of the topics which were within the power of the former Legislature on

[1] Cf. *O'Brien* v. *Allen* (1900), 30 S. C. R. 340; *North Cypress* v. *C. P. R. Co.*, 35 S. C. R. 550; *Dinner* v. *Humberstone*, 26 S. C. R. 252; *Conger* v. *Kennedy*, ibid., 397; *Commons Deb.*, 1897, p. 4115; Canada *Sess. Pap.*, 1877, No. 121; *Canadian Annual Review*, pp. 48 ff.

31 August 1905, which may be put within its sphere of authority by the Governor in Council. Ordinances may also be made as to education, but must permit of a minority having separate schools for which alone they may be rated. Dominion Acts apply, unless otherwise expressed, and the Governor in Council may apply to the territories laws not otherwise applicable. Further special powers as to legislation respecting liquor, arms and ammunition, and judicial matters are conferred on the Governor in Council. The area of the territories was enormously decreased by the decision to add to Ontario, Quebec, and Manitoba the bulk of the lands still included in the territories by Acts of 1912.[1] These reserve to the Dominion control of Indians and their lands, and in the case of Manitoba also the public lands. Moreover, the provinces are bound to recognize Indian rights, as did the Dominion, and to obtain surrender of them from time to time in the same mode as adopted by the Dominion, each surrender to be approved by the Dominion Government. Fresh subsidies were accorded to Manitoba, and, while the population of the new area added to Quebec was not to be included in reckoning the population of Canada for purposes of proportionate representation of the provinces and redistribution of seats, representation was to be accorded to it according to the terms of s. 51 of the Act of 1867.

From 1898 [1] to 1909 the Yukon, which was accorded a distinct Government of its own as a mining area of special remoteness and requiring careful management, was governed by a Commissioner with a Council not exceeding eleven members, five elective and the rest nominated by the Governor-General under his Privy Seal. In 1908 an Act (c. 76) provided for an elective Council of ten members with a three years' duration, subject to the Commissioner's powers of dissolution and annual sessions. The number has since been altered to three. The Executive Government is in the hands of the Commissioner under the control of the Governor in Council, though due regard is to be paid to the views of the Legislature. The powers of that body [2] extend to the appointment, tenure, &c., of territorial

[1] 61 Vict. c. 6; 62 and 63 Vict. c. 11. See also *Canadian Annual Review*, 1907, pp. 614–16; 1909, pp. 594 f.

[2] *Rev. Stat.*, 1906, c. 63; 2 Edw. VII, c. 34; the power to enact retroactive legislation is questioned; *Prov. Leg.*, 1899–1900, p. 155.

officers; the provision of prisons; municipal institutions; shop, saloon, tavern, auctioneer and other licences to raise territorial or municipal revenue; incorporation of companies with territorial objects other than steamship, railway, canal, telegraph, and irrigation companies; solemnization of marriage; property and civil rights; the administration of justice, but not including the appointment of officers, organization of criminal courts, or criminal procedure, but extending to the definition of the duties of sheriffs and clerks of court, and conferring jurisdiction to grant alimony on territorial courts; imposing penalties by fine or imprisonment for breaches of territorial laws; regulating the expenditure of local revenue or sums granted by Parliament; and all matters of a merely local or private nature. In all these matters the Legislature may not exercise powers in excess of those of the provinces, and, while laws may be passed as to education,[1] these must authorize separate schools for minorities and payment of rates by them in respect of these alone. Electoral matters may be regulated by ordinance, and male adult suffrage has been established. Every ordinance may be disallowed, as in the case of the territories, within two years. Dominion Acts apply, unless otherwise expressed, to the Yukon, and the Governor in Council may extend Acts not otherwise applicable. He may also enact temporary ordinances, which must be published for four weeks, and do not extend beyond the end of the next Parliamentary session unless approved by Parliament; he may not impose taxes save in connexion with gold or silver mining, customs or excise, or appropriate public lands.

§ 11. *Boundaries.*

The Act of 1867 declared the boundaries of Ontario and Quebec to be those of the old provinces of Upper and Lower Canada, and confirmed the existing boundaries of Nova Scotia and New Brunswick. Manitoba, as originally created, was of modest dimensions, say 13,500 square miles (49°–50° 30′ N.; 96°–99° W.), but by the Dominion Act 44 Vict. c. 14 it was greatly extended (to 73,956 square miles) by the change of the

[1] Cf. Ordinance No. 27 of 1902; *Prov. Leg.*, 1901–3, p. 122; as to liquor, ibid., p. 123. The difficulty of supply (by reason of United States objections to transport) were only overcome by treaty of 1924.

boundaries to 49°–53° N. and to 90°–101° W. A dispute, however, arose between the Dominion and Ontario, which affected Manitoba, as to the area of Ontario. An arbitral award was agreed on in 1878,[1] the Chief Justice acting for Ontario, Sir F. Hincks for Canada, and Sir E. Thornton, British Minister at Washington, being the third. Their award was accepted by Ontario in 1879,[2] but Canada did nothing. It was agreed in 1884 to refer to the Privy Council, but Canada withdrew, leaving the provinces to proceed. The Council held that the line proposed in arbitration was a fair boundary for Ontario and Manitoba, and advised Imperial legislation,[3] which was ultimately passed in 1889 [4] on an address from the Dominion. The boundary of Quebec was defined by concurrent Acts of the province and the Dominion in 1898,[5] in virtue of the powers given by the Imperial Act of 1871; there remains, however, in doubt the question of the relative rights of Quebec and Newfoundland over Labrador, which Newfoundland was willing to settle in 1925 by the purchase of their claims by Quebec with a reservation on the shore for Newfoundland. These terms, however, Quebec and the Dominion refused, and the matter, therefore, was left over for settlement in 1926 by the Privy Council,[6] to which it had been already agreed to refer the issue. The boundaries of Saskatchewan and Alberta were expressed in the Acts constituting the provinces.

There remained the boundaries of Quebec, Ontario, and Manitoba to the north, and these were regulated by concurrent Acts of 1912, after the Dominion had long been delayed by the disputes between Ontario and Manitoba as to the nature of the extensions to be accorded either, especially as regards Hudson Bay.

§ 12. *The Alteration of the Constitution.*

As has been mentioned,[7] it was most expressly recognized in 1907 by the Imperial Government that the federal constitution

[1] Canada *Annual Register*, 1878, pp. 189–94. [2] 42 Vict. c. 2.

[3] Biggar, *Sir Oliver Mowat*, i. 369–423; *Commons Deb.*, 1885, pp. 17 f., 23.

[4] 52 & 53 Vict. c. 28; *Commons Deb.*, 1889, pp. 1654–8.

[5] Canada 61 Vict. c. 3; Quebec, c. 6; see 34 & 35 Vict. c. 28. For New Brunswick see 14 & 15 Vict. c. 63; 20 & 21 Vict. c. 34.

[6] See *The Times*, Nov. 1926 and 43 T. L. R. 289.

[7] British Columbia *Sess. Pap.*, 1908, C. 1.

is a compact which cannot be altered save with the assent both of the Dominion and the provinces. This recognition, of course, is subject to reasonable interpretation ; that one province, say Prince Edward Island, could block a change desired by the rest of Canada would be absurd, but nothing save some real and very pressing necessity would justify overriding the western provinces or the maritime provinces, and it is difficult to conceive any case in which Ontario or Quebec could be overridden, assuming, of course, that the majority in the province against change was real and substantial. It is this fact which enables Quebec to sterilize every effort for the improvement of the constitution as in the shape of improving the Senate.

On the other hand, the Central Government was created by the foresight of the framers of confederation, who had just witnessed the effort to break up the United States, sufficiently strong to exercise all vital functions of government, as was seen strikingly in 1907 when Canada showed her power [1] to protect Asiatics on the west coast at a time when the Federal Government of the United States was being more or less completely defied by California. Moreover, there are considerable powers of amendment of detail, though only minor detail ; thus representation in the Commons, electoral matters including the franchise, now regulated by Dominion legislation of 1920, and the constitution of the non-provincial area are all within its powers. But even as regards electoral matters there is one limitation of importance ; [2] Quebec must have sixty-five members, and at each decennial census proportional increases must be made in the representation of the other provinces, whose population, as in the case of the west, has grown more rapidly in proportion to that of Quebec, while decreases are also authorized, subject to the rule that no diminution shall be made unless the population of the province has diminished in proportion to that of the Dominion as a whole to the extent of a twentieth. The Parliament may increase the quota for Quebec with proportionate increases for the other provinces. In adding territory to Quebec, however, this was not done, but

[1] *Canadian Annual Review*, 1907, pp. 384–9.

[2] In addition to ss. 50, 51 of the Act, see Orders in Council 16 May 1871 (British Columbia); 26 June 1873 (Prince Edward Island); 33 Vict. c. 3, s. 4; 4 & 5 Edw. VII, c. 3, s. 6 ; C. 42, s. 6 ; 5 & 6 Geo. V, c. 45.

representation promised to the added territory in accordance with population.

On the other hand, fundamentals are reserved; the Parliament cannot vary the provisions as to executive power in ss. 9–11, 13–15; nor change the seat of government, a power reserved for the Crown. Not a provision regarding the Senate save the quorum is alterable. As regards the House of Commons, save in the electoral matters above mentioned, it is helpless; it required an Imperial Act to validate its desire to appoint a deputy speaker;[1] it cannot change its quorum nor deprive the Speaker of his casting vote or give him an ordinary vote. It cannot alter the rule that appropriations must be recommended by the Governor-General, and that money Bills must originate in the Commons. It cannot vary the relations between the two Houses by restricting the power of the Senate or increasing it. It cannot alter the rules as to assent to or reservation of Bills. Most important of all, it cannot vary in any way the constitutions of the provinces or alter the distribution of subjects between the federation and the provinces. It cannot by legislation give any binding interpretation of the many obscure provisions of the constitution, which must be interpreted by the Courts alone and amended if at all by the Imperial Parliament. Even so minor a matter as alteration of the duration of Parliament is beyond its powers, and, though an alteration was arranged in 1916 in the shape of prolongation for a year, a proposal to this effect in 1917 was defeated by the obvious impossibility of obtaining agreement for the proposal. It is, however, given one power of change, but merely in consultation with the provinces and their assent, for it can alter boundaries and make consequential provisions as in the case of Ontario, Quebec, and Manitoba in 1912. Under this provision, no doubt, was passed the proposal to accord representation in the Commons to the new territory added to Quebec.

The provinces, as has been seen, are more fortunate in that, save as regards the office of Lieutenant-Governor, they can freely amend the constitution of the Legislatures and the Executive Governments; the Act of 1867 imposes, it is true, a restriction on the alteration of what were then English-speak-

[1] 59 Vict. c. 3; Canada 57 & 58 Vict. c. 11; *Prov. Leg.*, 1867–95, pp. 1314–23.

ing constituencies in the province of Quebec, unless the second and third readings of any Bill to this effect are passed by a majority of their representatives. The districts have long since ceased in the main to be British as opposed to French, and the provision itself might perhaps be abolished under the general power of constitutional change given in s. 92 (1). The abolition of the Upper Houses of Manitoba, New Brunswick, and, on merger in the Lower House, in Prince Edward Island illustrate the wide character of this power, which indeed when exercised excited some misgivings.

The true federal character of the constitution, despite its tendency to centralization, was mainly secured by the energy of Sir O. Mowat [1] on behalf of Ontario. It was he who secured the recognition of the provincial rights as representing the Crown to escheats ; [2] of the power of the Legislatures to define their privileges ; [3] of the power of the Lieutenant-Governors to receive authority to pardon ; [4] of the declaration of the provincial title to the freehold of the lands occupied by the Indians ; [5] of their right to regulate the liquor trade ; [6] and of the impropriety of the employment of the power of disallowance of provincial Acts not clearly unconstitutional. Sir J. Thompson, it is fair to say, as Minister of Justice, furthered his efforts by refusing, despite his desire to help the Dominion Government, to seek to override the federal spirit of the *British North America Act*, which Sir J. Macdonald had disliked and tried to diminish. The strength of this spirit is seen in the growing tendency of the provinces to exercise pressure on the Dominion, and in the refusal of Quebec to accommodate her policy as regards pulp wood to the wishes of the Dominion in connexion with relations with the United States. The same difficulty has arisen regarding electric power, for the provinces are not willing to agree to the desire of the Dominion for export to the United States.

The one real derogation from the federal system, the disallowance of provincial Acts, remains unsolved. The Inter-Provincial Conference of 1887 demanded its abolition of the power, but of course in vain. The possibility of arbitration or judicial

[1] See Biggar, *Sir Oliver Mowat.*
[2] Above, pp. 514, 531 f.
[3] Above, p. 370.
[4] Above, p. 516.
[5] Above, p. 534.
[6] Above, pp. 526 f.

decision of disputes between provinces and the federation or one province and other—for such disputes are quite possible—seems worth exploring.

§ 13. *The Unity of Canada.*

The federal union is clearly indissoluble save through the intervention of the Imperial Parliament, a most improbable contingency. It is impossible to assert that the federation has yet secured unity, and in 1925–6 the demands of both the west and the east were pressed with some heat. The eastern provinces have seen the hopes on which they reluctantly entered federation largely defeated; nothing in their view has been done to fulfil their destiny as the proper ports of export of Canadian produce, for, while Halifax and St. John remain open during the period of the closure of the St. Lawrence, the port of Portland, Maine, the terminus of the Canadian National Railways, serves as a preferable mode of export. Further, the fact that, by reason of the increase in the population of the west and the relative decline in that of the east, each census sees the voting power of the eastern provinces diminished, contrary to the expectation on the creation of federation, causes annoyance, though under the Imperial Act of 1915 assurance is now accorded that the number of members for each province in the House of Commons shall not fall below that of the number of Senators, that is, ten each for Nova Scotia and New Brunswick, and four for Prince Edward Island, in regard to which the rule has already become operative. Moreover, the eastern provinces have resented the proposed surrender to the western provinces of their natural resources, which delayed by disagreement is still inevitable, holding that they should receive compensation for their limited areas and resources in the shape of higher subsidies. But the really serious injury done to Nova Scotia and New Brunswick, especially the former, rests on the inclusion in a tariff system which benefits industry at the expense of a province which wishes to export its forest, farm, and fishery products to the outer world in place of sending them by costly railway transit to western markets. No compensating establishment of Canadian industries has taken place to provide work for the people, and many manufacturing, banking, and merchant houses have either gone out of business or been absorbed by

Ontario and Quebec concerns, whose centres of interest lie outside the maritime provinces. The movement for secession is strongest in Nova Scotia, where the decision to federate was carried by Sir C. Tupper through the Legislature without regard to the will of the people, but it is recognized that this is not practical politics, as the dominant partners would never consent to separation, and the chief hope is that the usual dole of increased subsidies may be conceded, valueless as this really is, and ineffective as it must be to remedy fundamental difficulties. The tariff barrier, opposed by the United States, remains a grave drawback to the fishing industry, and Canadian action in 1923 in withdrawing from United States shipping vessels privileges of purchasing supplies and bait, transhipping cargoes, and engaging crews, was motived in part by the desire to elicit some concession.[1]

The western provinces have a grievance of their own in the shape of the tariff policy of Ontario and Quebec, and the use of railway rates as a means of compelling the use of Montreal as the channel for exportation of grain to the detriment either of the Vancouver route or the Hudson Bay line. The latter project, favoured at one time generally, has been more or less successfully hampered by the jealousy of Montreal. Moreover, the question of the use of Vancouver was complicated by the rights of the prairie provinces under the Crow's Nest Pass Agreement of 1897 to specially low rates on produce east bound and on certain articles west bound. This agreement,[2] suspended in 1918 by war legislation, would normally have come to an end in 1924, and its termination appealed both to the maritime provinces and to British Columbia, on the score that it prejudiced their interests, in the former case by unfair competition with their natural products, in the latter by diverting railway traffic from Vancouver. But it was resisted by the prairie provinces, and after a complex series of decisions and hearings by the Railway Commission, the Cabinet, and the Supreme Court, the Government in 1925 came out in favour of maintaining low charges for east-bound freight, but also granting them for freight

[1] From 1918–21 reciprocal privileges were given by the United States, but then withdrawn. Under the treaty of 1818 American vessels may enter only for wood, water, shelter, and repair; this was extended voluntarily by Canada in 1888, but from 31 Dec. 1923 the treaty position was revived.

[2] *Canadian Annual Review*, 1924–5, pp. 95 ff., 378 f.; 1925–6, pp. 193 f.

to Vancouver. The feeling against the selfishness of the manufacturers of Ontario and Quebec has expressed itself in the growth of the farmers' movement in the west, whence for a time it advanced to secure power in the provincial Government of Ontario. The general election of 1925, however, showed a serious decline in federal politics, the party having done nothing in the preceding Parliament save weaken the Liberals, and the achievement of the party in 1926 equally showed lack of resource or clear thinking, Mr. Mackenzie King being denied support, and then Mr. Meighen in turn being misled as to their attitude towards him. The fact, however, remains that, if talk of secession in the west also has little solid meaning, it none the less points to the fundamental selfishness of Ontario manufacturers and their confrères in Quebec who still look on the west as a means of exploitation, and have no idea of a Canadian outlook, a defect doubtless also to be seen in the attitude of the west towards the fears of ruin from too low a tariff freely expressed in the old manufacturing centres of Canada.

The Dominion Government met the demands of the eastern provinces in April 1926 by the favourite device of a Royal Commission. Specific recommendations to ease the situation emanated from a conference of commercial interests in the provinces at Charlottetown.[1] These included an energetic immigration policy, pursued for at least ten years; reductions in freight rates both for transport to the rest of Canada and for export; the equipment on an elaborate scale of maritime ports; the grant of encouragement to the fisheries; the appointment of a much increased number of trade commissioners; the establishment of coking plant at central points with a view to diminish the importation of American anthracite, and the development of the coal exports of Nova Scotia, New Brunswick, and also Alberta; and the improvement of communications with Prince Edward Island. None of these proposals raises any very serious constitutional difficulty, and the matter, therefore, is one of policy. It is different as regards the claim of the western provinces to the enjoyment of their national resources, and in 1926 a serious political difficulty appeared.[2] The agree-

[1] *Canadian Annual Review*, 1925–6, p. 398 (4–5 Nov. 1925).

[2] Ibid., 1925–6, pp. 61, 495 f. The change would, of course, be completed by an Imperial Act.

ment arrived at in 1925 provided for the transfer of Crown lands mines, minerals, and royalties, and of fisheries, from the federation to Alberta, with a continuance for three years of the existing subsidy of 562,500 dollars. Indian reserves were to remain under federal control, the province to set aside any additional lands requisite in order to enable the Dominion to carry out its treaty obligations. The school lands were also to be transferred. Unfortunately, under the influence of Quebec the Federal Government in its legislation to implement the agreement of 1925 included a provision that the school lands fund and the school lands to be transferred to the province should be set aside and administered 'for the support of schools organized and carried on therein in accordance with s. 17 of the Alberta Act'. The province very justly protested that this change was not in accordance with the agreement, and was wholly beside the mark. It denied that the issue was one of the validity of s. 17 of the Act, which imposes on Alberta restrictions as to educational privileges of minorities, asserting that it simply did not agree that the issues of natural resources and of education should be combined. As the two Governments would not agree, the legislation necessary failed to pass, the Alberta Act being objected to by the Dominion as throwing doubt on the validity of s. 17 of the Alberta Act. Indignation in Alberta at the attitude of the Dominion Government undoubtedly played a part in the defection of the governmental majority at the end of June.

More serious,[1] in one sense, is the vital distinction between the French and the British of the Dominion, but it is plain that talk of secession on the part of Quebec is meaningless, and that the interests of Ontario and Quebec are too essentially commingled to be capable of solution. Quebec secures from her position in the federation as it stands security for her language, for her religion, and for her distinctive nationality, which is vitally different from that of modern France, and combines the free social life and love of amusement of modern America with a devotion to religion and submission to clerical domination which are unknown to western Europe. It is held generally

[1] Cf. Lord de Villiers' judgement (Walker, p. 434): 'the result has been to establish a distinctly French province without any prospect of its being ever emerged into a Canadian as distinguished from a purely French nation'.

in Quebec that membership of the United States would menace the securities now enjoyed, and likewise any idea of change of the basis of federation deeply agitates public feeling. Hence the paradox that local autonomy, and a detestation of any possibility of engagement in foreign wars wholly foreign to the gallant courage of France, render the people of Quebec completely and inalterably anti-Imperialist, while, on the other hand, they regard with equal fear any change in the *status quo* in the direction of greater autonomy for Canada as a whole, and beyond all the possibility of the alteration of the constitution by a majority of the people of Canada. These facts, it will be seen, have had, and must long continue to have, a dominant effect on Canadian orientation in Imperial affairs, apart altogether from the steady effect of the proximity of the United States on the outlook of all Canadians irrespective of their national origin.[1]

[1] In 1927 the chief demands of the maritime provinces were conceded by Parliament, while signs appeared of loss of popularity in Quebec of the appeal to the Privy Council as a result of the adverse decision on the Labrador boundary.